

## **Free Exercise, Religious Conscience, and the Common Good**

**Christopher Wolfe**  
**Co-Director, Ralph McInerny Center for Thomistic Studies**

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The questions presented to me for discussion were: “when should the civil law grant religious believers exemptions from civil laws?” and “How should such occasions be understood: as concessions to the opaque demands of religious practice/belief, or as a right not to be conscripted into committing injustices?”

Examples of such issues include: requirements of military service, requirements to be photographed for security purposes, medical treatment of children of religious believers, the scope of parental education rights (e.g., "conscientious objection" to secularized and/or debased public schools), the freedom of religious communities to make distinctions that would otherwise violate secular antidiscrimination laws regarding women and homosexuals; and the rights of religious medical providers (hospitals, pharmacists, etc).

In the first part of this paper, I will begin with a brief review of the development of free exercise law in the U.S. and then suggest what I think is the proper constitutional approach should be. In the second part, I will turn to the question of principles for accommodating religious conscience.

### **U.S. Free Exercise Constitutional Law**

For the first 150 years of U.S. constitutional law, the governing principle of free exercise jurisprudence was the “secular regulation rule.” Belief was fully protected, and religiously-based action was protected against restrictions based on religious differences. At the

same time, it was recognized that religiously-based action could not be absolutely free. The obvious example is human sacrifice. The rule was that valid secular regulations could not be overridden by claims of religious conscience. For instance, a secular interest in the institution of marriage as the foundation of society would override the religious claim to practice polygamy.

In the middle of the twentieth century, there was growing dissatisfaction with the secular regulation rule, for at least two reasons (both of which focus on a sense that the rule excessively curtails protection of individual liberty). First, the rule did not give any consideration to the relative weight of secular and religious claims. It meant that even secular regulations of quite limited importance took precedence to very strong, sincere religious claims. Second, the rule made it possible to use secular regulations as legitimate nominal reasons – excuses – to restrict religious minorities, even when the underlying motive of the regulation was religious hostility.

An example of both reasons may be found in the flag-salute cases of the early 1940s.<sup>1</sup> Jehovah's Witnesses children were punished for their refusal to salute the flag in public schools – a refusal based on an undeniably sincere belief that they would thereby violate Deuteronomy's injunction against worshiping graven idols and earn damnation. Even granting the importance of school ceremonies promoting patriotism (as Justice Frankfurter emphasized in his Court opinion in *Gobitis*), it is hard to see why they should be applied to punish a small minority that objected to them on grounds of religious belief. Moreover, once the Supreme Court upheld the flag salute requirement in the first case, it appears that some school districts passed flag salute

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<sup>1</sup> Cites for *Gobitis v. Minersville School District* and *West Virginia v. Barnette*. I want to make it clear that I am not arguing that the two cases analyzed the issue as I have, in terms of free exercise. In fact, the Court did not take that approach (relying on free speech grounds in *Barnette*). While I speculate that dissatisfaction with the secular regulation rule for being inadequate in its protection of liberty may have been a background factor in the decision, I cite

requirements with a view to persecuting the Jehovah's Witnesses, whose proselytizing methods made them a distinctly unpopular religious minority.<sup>2</sup>

The dissatisfaction with the secular regulation rule was broached in *Braunfield v. Brown* (1961) and the dissenters there finally succeeded in displacing it with a new approach in *Sherbert v. Verner* (1963). Justice Brennan argued that free exercise was such an important right that only a compelling state interest would justify impinging upon it. Employing this standard, the Court struck down South Carolina's refusal to give unemployment compensation to Mrs. Sherbert, a Seventh Day Adventist who quit her job when her employer required her to work on Saturday (her Sabbath). The state interest in protecting its unemployment compensation fund from those unwilling to work on Saturday for religious reasons was far inferior, the Court felt, to the interest in Mrs. Sherbert's sincere belief and conscientious refusal to act contrary to it.

The *Sherbert* compelling state interest standard was the general free exercise standard from 1963 until 1990, when the Court decided *Employment Division, Department of Human Resources of the State of Oregon v. Smith*. Justice Scalia denied this forcefully in *Smith*, maintaining that the Court had never – outside the area of “hybrid rights” implicating other constitutional guarantees (such as First Amendment parental ) and the area of unemployment

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these cases here only to exemplify the two concerns about the secular regulation rule

<sup>2</sup> David Manwaring *Render Unto Caesar: The Flag-Salute Controversy* (University of Chicago Press, 1962).

<sup>3</sup> “The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.

compensation, which lent itself to case-by-case determinations – rejected the notion that a neutral, generally applicable law had to give way before a sincere claim of religious conscience. If this assertion was not particularly compelling to constitutional commentators and lawyers, who had universally assumed that *Sherbert* was the general controlling standard for 27 years (despite various exceptions Scalia could cite), his broader argument against the *Sherbert* standard was powerful.

Scalia framed the question very clearly:

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

Aware of the fact that religious practices may sometimes be prohibited for motives that are not, in fact, secular, Scalia conceded that practices of religious minorities may be at risk under the secular regulation rule. But the alternatives are worse, he argued. Either religious conscience is a law unto itself, which is unthinkable (human sacrifice again), or judges will have to engage in acts that exceed their legitimate authority, namely, weighing the importance of secular laws against the centrality of religious beliefs. Legislatures were free to grant religious believers exemptions from secular laws, but judges could not mandate them.<sup>4</sup>

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<sup>4</sup> For reasons I discuss elsewhere, I think that *Smith* is an unusual example of a decision in which

In a subsequent case, the Court made it clear that the *Smith* standard did not declare open season on religious minorities. Where a law clearly targeted a particular religious minority, and was not based on neutral secular criteria, as in *Church of Lukumi Babalu Aye v. City of Hialeah* (1993),<sup>5</sup> the Court would strike down the law.

But when Congress tried to reverse *Smith* by the Religious Freedom Restoration Act in 1993 – with an overwhelming vote based on a very broad coalition of conservatives and liberals – the Court maintained its position and overturned the act, at least as it applied to state governments.<sup>6</sup>

### **A Significant Amendment to the Smith Approach**

I believe that Justice Scalia is correct in upholding the secular regulation rule in *Smith*. I also believe, however, that the assumption that this decision – correct as regards the scope of judicial review – ends the constitutional discussion is an unfortunate feature of modern attitudes toward constitutional law.

While there has been some change in recent years, the prevailing assumption in our society still seems to be that constitutional issues are the preserve of the judiciary. Once the Supreme Court has made a decision, that ends the constitutional debate, and subsequent

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the modern Court returned to more traditional notions of judicial review (that is, to what is generally referred to as the “original understanding” of the Constitution). It is ironic, however, that the necessary fifth vote for *Smith* came from Justice Stevens (based on his radical separationism), despite his general deep opposition to an original intent approach.

<sup>5</sup> 508 U.S. 520.

<sup>6</sup> RFRA still applies to the federal government, since Congress is free to adopt a higher standard of religious free exercise for itself than the Constitution mandates, as the Court unanimously confirmed in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* 546 U.S. 418 (2006).

discussion is a matter of policy debate, within the constitutional confines established by the Court. This is a profoundly mistaken understanding, I believe.

The judiciary does have a special role in enforcing the Constitution, where the commands of the Constitution are clear. In the absence of a clear command, however, where the meaning of the Constitution, even after assiduous efforts to ascertain its meaning, remains uncertain, the judges lack a key element that justifies their power to strike down laws passed by democratic majorities (or executive acts to carry out these laws). What harmonizes judicial review with democratic principles is the capacity of the judges to show that they are enforcing not their own wills, but the will of the people embodied in the constitution.<sup>7</sup> When the meaning of the Constitution is not clear, judges cannot claim to be enforcing its will. At best, they can claim to be enforcing their preferred reading of the document, with their preferences being determined by something other than the Constitution itself.

There is a wide range of issues, moreover, where the Constitution is unclear, due to its generality. One thinks, for example, of a phrase like “the privileges and immunities of citizens of the United States.” But to say that a provision is very “general” is not to say that it has no meaning. It is to say that the meaning is general, that there is a need to specify its content, and that the text does not entirely determine the specification, but only sets certain limits on it, within which some element of choice is exercised – something beyond “interpretation” in the strict

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<sup>7</sup> Of course, the “will of the people” in “constitutional” acts is a distinctive form of “popular will”: it requires an extraordinary majority and it may also be inconsistent with current (ordinary) majority preferences. The requirement of an extraordinary majority may frustrate current majorities, and, from a Jeffersonian perspective, the difference between older constitutional majorities and current majorities gives rise to the possibility of “the dead ruling the living.” To the extent that this situation may be considered undemocratic, however, that is not because of judicial review, but because of constitutionalism.

sense of that term.

To say that a provision of the Constitution is not clear enough to justify judicial review, however, is not to say that it is not a constitutional provision, or that it has no binding force. It is to say that it needs to be specified, but by someone other than judges. The most appropriate institution in our government to perform this function is the political branches: the legislature, through legislation, in which the executive has a role to play.

The objection to a form of judicial enforcement of the free exercise clause that takes into account the relative weight of the state interest and the religious claim – namely, that it requires judges to make policy decisions they are not authorized by their office to make – does not apply to the political branches. If judges are confined in their enforcement of the free exercise clause by limits of their judicial office, the same cannot be said of the political branches. The *Sherbert* standard was at least right about this: that judgments about the scope of free exercise often require some kind of “balancing” of competing considerations, with a presumption in favor of free exercise. It was wrong in thinking that judges should be the ones to engage in this balancing process.

Some people refer to legislative exemptions granted religious believers pursuant to a concern for free exercise as actions of “legislative grace.” The legislature has the discretion to allow exemptions, according to this notion, and it can choose to permit them or not.

I would like to suggest that legislative free exercise exemptions are often not a matter of legislative grace in the sense that they are simply within the discretion of the legislature to grant or withhold. Sometimes, I argue, legislatures have a constitutional duty to grant free exercise exemptions. The argument is simple. The Constitution says the Congress shall pass no law

prohibiting the free exercise of religion. (Let us assume that, as a matter of long-established precedent, this limitation applies to state legislatures as well.) Let us suppose that a state legislature passes a secular law that turns out to impinge significantly on the religious practice or conscientious beliefs of a particular religious group. The law is either a) useful, but by no means essential or necessary for the common good, or b) important, but could easily allow for a small number of exceptions, and there is good reason to think that, in this case, exemptions will be invoked by only a small number of people. That is, exemptions could be granted without any significant harm to the common good. Since the law does, in fact, even if inadvertently and unintentionally, curtail the free exercise of religion, on what reasonable ground, consistent with its constitutional duties, could the legislature refuse to grant the exemption?

The answer “simply because they choose to” – a flat assertion of will – is not an acceptable answer. This answer may be tempting to anti-judicial activists, caught up in the debate about the scope of judicial power, because it vindicates decisively the legislative prerogative to make such judgments, contrary to judicial pretensions to make them. But the discussion should not end simply because we have answered the question “who shall make the decision?”. It must continue through to the question “according to what principles should they make it?”. That is, it must include the question of what rational principles ought to guide the decision-maker. Those rational principles will recognize the important difference between constitutional norms and public policy judgments, with the former having a higher level of authority. Accordingly, public officials and citizens should acknowledge that they have a duty to achieve the ends toward which those principles, including free exercise, are ordained.

Now the conditions in the example I just gave will sometimes (perhaps even often) be

inapplicable to cases in which exemptions are requested. The state interest may, indeed, be compelling. Or the degree of impingement on religious conscience may be relatively minor. Or there may be reasonable grounds to worry that granting a given exemption will swell unacceptably the ranks of those claiming the exemption. In such cases, the legislature will have no constitutional duty to provide exemptions, because in those cases exemptions will be inconsistent with the common good. But where the legislature can provide an exemption without significant harm to the common good, vindication of the principle of free exercise is the right and necessary thing to do, for the very purposes implicit in the free exercise clause.

The sort of “constitutional standard” I am describing is one that is unfamiliar to us, since we tend to think of constitutional standards for legislators and other public officials, at least in principle, as commands issued and enforced by an external source (a separate institution), according to the language of a legal document. The approach I am proposing suggests that, in some cases, abiding by constitutional standards requires legislators to internalize constitutional principles and integrate them into their prudential judgments about proposed laws (and exemptions from law). The fact that these judgments require prudence, and that reasonable people will disagree about where exactly to draw the line, does not mean that the law is nothing more than unprincipled ad hoc judgments.

### **Principles for Free Exercise**

When legislators, and the citizens who elect them, evaluate how far the scope of free exercise extends, they should begin by keeping in mind the reasons for protecting free exercise of religion. There are two primary reasons for doing so. First, in some cases, the protection of

free exercise facilitates the free religious submission and worship that is due to God. Second, in other cases, it vindicates the principle of personal integrity, making it possible for people to live in accordance with the demands of their consciences.

### ***Religious Liberty and the Facilitation of Worship Pleasing to God***

That God – the Creator and Provident Deity – exists can be known by reason. That human beings should offer homage to God can likewise be known, and is one of the common precepts of the natural law (at the core of, but not coextensive with, the First Commandment). It is easy to lose sight of these facts in a culture that has what St. Thomas would call “corrupt customs” that often obscure this knowledge, but this has not always been so; they were widely recognized, for example, at the time of the American Founding. In his “Memorial and Remonstrance,” James Madison offered the following as the first reason to protest religious assessments:

Because we hold it for a fundamental and undeniable truth, "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." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right

towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.<sup>8</sup>

Madison is explicit about rooting the right to free exercise in the duty men have to worship God, the virtue of religion. But true worship must be done according to “reason and conviction”, “conscience and conviction,” each man having an obligation to offer God the worship that he thinks God finds acceptable. That worship has consequences for life: it involves not only a free interior disposition – as fundamental as that is – but also exterior acts demanded by that religious belief. Hence, the political community should generally protect not only belief, but also the action based on it.

It is less clear that Madison is right when he says of Civil Society that “religion is wholly

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<sup>8</sup> [http://www.milestonedocuments.com/document\\_detail.php?id=122&more=fulltext](http://www.milestonedocuments.com/document_detail.php?id=122&more=fulltext)

exempt from its cognizance.” The very fact that Madison gives the reason quoted above – man has a duty to worship God – as a reason for civil society to follow a certain policy (not imposing assessments to support religion) suggests that civil society does, in some measure, “take cognizance” of religion. It at least takes cognizance of religion this much: that it facilitates the free exercise of men’s conscientious beliefs regarding religion by refusing to impose religiously-grounded limits on it.

It is true, of course, that the worship men think God finds acceptable may not actually be what God finds acceptable. Given the diversity of religions, that is, indeed, inevitable. Even the view that “God finds acceptable whatever people sincerely offer him” is not a neutral, or all-encompassing position, since that claim is itself inconsistent with the claims of certain religions. Moreover, it would lead to the conclusion that God finds pleasing some pretty horrendous practices.

Still, we can recognize that even if there is a particular faith that embodies fully the way that God wants to be worshiped, laws protecting religious freedom and free exercise can facilitate imperfect forms of worship that, assuming invincible ignorance of the full truth, is pleasing to him. Rather than viewing all religions other than the true religion as simply false, we can recognize that different religions have partial recognition of the truth about God, in varying measures.<sup>9</sup> These imperfect forms of worship, and the conscientious acts based on them, fall short of what God desires from and for men, but they are nonetheless acts of the virtue of religion, and so public facilitation of them still accomplishes a good.

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<sup>9</sup> Cite, as an example of Catholic teaching on this matter, the Second Vatican Council (*Nostra*

### *Religious Liberty and Integrity*

In addition to the good of facilitating acts of the virtue of religion, religious liberty and free exercise protect the good of integrity, the moral good of men acting in accord with their consciences. Men have an obligation to follow their consciences. This is true when their consciences are rightly formed, as for example, when they refuse to participate in abortions in any way; or when they refuse to participate in an unjust war. It is also true even when their beliefs are false and lead them to act in an objectively wrong way; e.g., when pacifists refuse to perform, in a just war, their objective duty to assist in the defense of their country; when citizens participate in unjust wars that they mistakenly consider to be just; when parents refuse to authorize life-saving treatment for their children on the grounds that, for example, blood transfusions or other legitimate medical acts are opposed to divine law; when a Sabbatarian collects unemployment insurance, after refusing to work on Saturday, even when such a job is the only one available; and, arguably (but controversially), when a community and its citizens choose not to recognize God and the true religion (whatever that may be). In cases where conscientious people act on an erroneous conscience, their acts are materially wrong, but formally good.

There are, of course, some complexities in these matters. One has an obligation to form

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*Aetate* #2, *Lumen Gentium* #16).

<sup>10</sup> Cf. the “Declaration on Religious Liberty” of the Second Vatican Council, which left “untouched traditional Catholic doctrine on the moral duty of men *and societies* toward the true religion and toward the one Church of Christ.” (Emphasis added)

one's conscience well, and the human capacity for rationalization is such that moral error may lie at the root of what may appear to be a sincere conscience. Only God knows the human heart and so He alone judges such matters.

Even when a political community protects the right of a person to act according to his erroneous conscience, then, it is accomplishing a good, which is the integrity or consistency between a person's conscience and his actions.

### **How Should Situations Involving Free Exercise Claims Be Understood?**

As a preliminary point, let's deal with one question that has been asked about situations in which religious believers claim a right to exemption from a secular law, namely, "how should such occasions be understood: as concessions to the opaque demands of religious practice/belief, or as a right not to be conscripted into committing injustices?"

In addressing this question, we have to ask: from what perspective are we viewing this situation: from an Archimedean point that transcends the law – from the standpoint of morally objective truth, from God's view – or from the perspective of the political actors who must make this decision within the framework of their laws? From the Archimedean or external perspective, we would say that, in those cases where prudence does command that public officials grant an exemption, the balancing process should protect a right not to be conscripted into committing an evil act (namely, acting contrary to one's conscience) or a right not to be punished or burdened in some way for refusing to act contrary to one's conscience. In some of these cases – that is, when the conscience is well-formed – there is the additional important good of preventing a person from being conscripted into performing an unjust act or punished for not

performing one. In cases where prudence commands public officials to refuse exemptions, the balancing process protects the common good against acts of individuals or groups based on erroneous consciences.

From the internal perspective of those public officials making decisions about exemptions according to law, it seems inevitable that, qua public officials, they will make such decisions assuming that the laws from which the exemptions are sought are just, and that the demands for exemptions are based on erroneous consciences. In these cases, the granting of exemptions (where that is done) might appear to be “concessions to the opaque demands of religious practice/belief.” “The law” (the legal system) itself cannot be expected to be schizophrenic: assuming that a particular law is just and at the same time considering that requests for (conscientious) exemptions from it are just.

## **Factors in Prudential Evaluations of the Scope of Free Exercise**

### *Some Preliminary Considerations*

Before outlining some principles to guide the “balancing” of free exercise and the need to limit free exercise to achieve important elements of the common good, I want to make some preliminary points regarding sincerity, judgments by public officials regarding the form and magnitude of imposition on religious consciences, and varying levels of demands of conscience.

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<sup>11</sup> We are talking here about conscientious objections, not claims for exemptions based, for example, on inability to perform a task that has been commanded (should the law have failed to anticipate and provide for such a case).

More complex would be the case where the conscientious objector does not maintain that the law is unjust, but only that *his* participation in the legal action would be wrong. For example, a priest might recognize that there is a general duty of citizens to defend their country, in the form of military service when necessary, but might assert that his own trans-political

In considering demands for exemptions alleged to be on the basis of religious conscience, one unavoidable issue is the sincerity of the religious belief. As difficult as it is to offer proof of insincerity in some cases, there are at least certain cases where the insincerity seems transparent. (My favorite is the couple arrested in Los Angeles, where the “chief priestess” of the “Church of the Most High Goddess” offered an ancient rite of absolution through sexual activity to male visitors [2,000 of them], who then left an “donations” for the “church.”) A concern for free exercise, however, would suggest starting with a (rebuttable) presumption of sincerity.

Another question is whether public officials must simply accept the judgment of religious believers about what constitutes a violation of their consciences, and the magnitude of that violation. It seems plausible to think that public officials cannot make judgments about such matters – that it must be left up to the person (or group) claiming the exemption to make such judgments, since only they can provide an accurate assessment of what their own conscientious beliefs demand, by way of refusal to act in accord with secular laws. To allow otherwise would open the door for officials to argue, for example, that saluting a flag is not plausibly a violation of the injunction against worshiping graven images in Deuteronomy. Or one can imagine prosecutors finding Catholic theologians to testify that Catholicism doesn’t really demand “discriminating against women” by confining priestly ordination to men. This question tends to blend in, ultimately, with the question of sincerity, because a sincere religious belief about what a person’s belief demands (and the importance of that demand) itself constitutes a conscientious belief that deserves serious respect.

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vocation morally exempts him from such service and should exempt him legally as well.

<sup>12</sup> <http://www.subgenius.com/subg-digest/v0/0082.html>

However, from a viewpoint transcending the subjective conscience of the believer, perhaps public officials can make some distinctions among different claims of conscience, considering different levels of commands of conscience. First, the clearest and sharpest conflict is when a person is ordered by law or public officials to do something he judges to be intrinsically evil. Second, a strong case of conflict exists when a person is prohibited from doing something he considers a positive obligation that does not admit of exception. The example I think of is Antigone and the burial of her brother. (But what are other examples of positive duties that are absolute – not conditioned by countervailing considerations?) Third, there is certainly significant conflict, but perhaps a less sharp form, in the case when a person believes that he has a positive obligation to do something, but that obligation is conditioned by what is reasonably possible, given social conditions (including laws prohibiting the action). Some examples of duties limited by countervailing considerations are: 1) there is a general obligation to support one's parents, but this can be overridden in some cases by factors such as scarce resources and prior obligations (e.g., to one's spouse and children); 2) there is a general obligation to prevent lethal acts against innocents, but this can be overridden when attempts to do so would be futile, and also punished. Where conscientious obligations are conditioned by other obligations and by questions of practicability, public officials might think that the demands of conscience are not as compelling as those regarding exceptionless norms. Fourth, least compelling are cases in which one person's religious conscience demands that another person or institution perform or not perform a certain act.

***Principles Guiding the Balancing of Free Exercise and Requirements of the Common Good***

The following are some principles that might guide the judgment of public officials regarding the question of religious exemption from secular laws:

1 - The religious beliefs of some people cannot be the ground to impose duties on others, including the government. [Indian beliefs about the sacredness of certain places cannot trump government decisions regarding use of those places, though government should try to accommodate such sincere belief to the extent possible, consistent with important public goods]

2 - Religiously-motivated action that poses serious threats to public order can be prohibited. Some factors in considering whether an exemption would be such a threat:

a - in cases where the law prohibits an act: if the exemption would endanger the life or substantial well-being of third parties, it can be denied. [medical treatment of children, contrary to parents' religious beliefs, where withholding the treatment would result in a threat to life or a substantial threat to health; internal religious community practices such as honor killings or maiming individuals]

b - in cases where the law imposes an affirmative duty:

(1) if the exemption, granted to all similarly situated persons who are likely to invoke it, will endanger the securing of an important public interest, it can be denied.

[unqualified selective conscientious objection]

(2) - if the exemption can be combined with alternative and equivalent forms of service to the community, it should be granted. [selective conscientious objection, with willingness to perform "alternative service," if it is available]

3 - in cases regarding secular prohibitions of unjust discrimination that bear upon religiously-motivated actions

a - religiously-motivated actions that concern the internal operation of a church or its institutions (schools, hospitals, social service agencies) should be exempted (though government has no obligation to fund such activities)

b - discrimination by religious groups or individuals in the context of activities that do not implicate religious beliefs may be forbidden (e.g., church-run commercial activities unrelated to religious beliefs); but this should be a narrow exception, qualified by a presumption in favor of the person or group claiming an exemption as to whether their activities implicate religious belief

4 - in a pluralistic society that accords equal status to various religions, decisions about exemptions ought to consider the fairness of granting or denying particular exemptions; [if such a society prohibits various commercial activities on a particular day of the week, to achieve secular goals of rest, time with family, and relief from relentless commercial activity, and where the day chosen by the society is the majority's sabbath, then permission to engage in activities prohibited on the day of rest ought to be given, as a matter of fairness, to minorities that have a different sabbath day, at least as far as that is compatible with the overall secular goal, e.g., permission for those minorities to engage in commercial activities among themselves]

### **Minimizing Free Exercise Conflicts**

My last point is that, in societies that embrace the principle of free exercise, efforts should be made to minimize conflict by embracing a principle of “forbearance.” I do not often invoke Mark Tushnet to support arguments I make, but this is one of those times. He suggests that,

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<sup>13</sup> It is not clear to me to what extent Tushnet and I mean the same thing by “forbearance.” Tushnet argues in his book *Red, White, and Blue* that civic republicanism suggests “mutual forbearance” (instead of the Constitution) as the basis for resolving issues such as public school

with respect to religious matters, and especially differences between religious majorities and minorities, accommodations could be reached in many cases by a spirit of accommodation. Regarding establishment clause issues, this spirit of forbearance might lead more liberals to recognize that education and religion are inevitably intertwined, and to allow for public support of religiously-affiliated schools. It would also lead more conservatives to tone down their insistence on public displays of religion, especially sectarian religion (America as a “Christian nation”), and especially in a public school context that invariably includes children of non-Christians and nonbelievers.

In the free exercise area, this spirit of forbearance would counsel a sensitivity to the different beliefs and practices of religious minorities (who are typically most in need of exemptions) and to the norm of fairness (“how would I feel if I were in the minority and had similar restrictions imposed upon me?”). This sensitivity would make public officials (and citizens in general) more likely to try to accommodate religious beliefs, except in cases involving very important obligations of the community.

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prayer. In a culture of mutual forbearance groups might forbear actions that generate intense hostility (seeing that they are unlikely to advance the public good) or they might pursue actions to promote intensely held values (and others groups might forego challenging them out of forbearance). Tushnet points out that such a culture might result in a pattern of public actions that superficially resemble the current [Court’s constitutional principle of the] marginality of religion in public life, but marginality would not be a principle – it would be a characteristic that the citizens decide, on balance, to give their public life.

Tushnet might also have pointed out, however, that it might result in a pattern of public actions that make religion more central or at least more easily tolerated in public life. If Christians exercised forbearance in foregoing daily public school prayer, for example, perhaps non-believers might exercise forbearance in foregoing objections to graduation prayers.