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> Therefore, whosoever heareth these sayings of mine, and doeth them, I will liken him unto a wise man, which built his house upon a rock:
>
> And the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell not: for it was founded upon a rock.
>
> And everyone that heareth these sayings of mine, and doeth them not, shall be likened unto a foolish man, which built his house upon the sand:
>
> And the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell: and great was the fall of it.
>
> *Matthew* 7:24-27 (King James).

"Better is half a loaf than no bread."

John Heywood (1497-1530)

I. INTRODUCTION: THE QUESTION WITHOUT AN ANSWER

Consider the following hypotheticals:

A church and a secular nonprofit organization both want to operate a homeless shelter in violation of local zoning regulations. What would be the justification for granting the church an exemption from the regulations, but not the secular nonprofit?

A pro-life Roman Catholic attorney is assigned by a court to represent an indigent pregnant teen seeking an abortion without parental notification in a state with a judicial bypass procedure. An African American attorney is assigned to represent a group of indigent white supremacists who have been denied a permit to demonstrate in a city park. Assuming that the state's ethical rules do not permit either attorney to decline the representation, and assuming further that both attorneys prefer to decline the representation for the obvious reasons, what would be the justification for granting a constitutional exemption from the rule to the Roman Catholic, but not to the African American?

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> A Sabbatarian refuses to work on Saturday for religious reasons. An agnostic refuses to work on Saturday because he is a noncustodial parent, and Saturday is the only day his children are available to visit him. What would be the justification for constitutionally excusing the Sabbatarian from the obligation to make herself available for work as a condition to receiving unemployment benefits, but not the noncustodial parent?

A variety of justifications for religious exemptions have long been offered under the Free Exercise Clause. Some have argued that such exemptions are necessary to implement the First Amendment's textual guarantee of free exercise of religion,[1] or that exemptions form part of the original understanding of this guarantee.[2] Others have argued that the pain suffered by believers when forced to obey laws that violate their faith is greater or different than that suffered by nonbelievers who are forced to violate secular moral convictions.[3] Still others have offered policy justifications for exemptions, arguing that they are necessary to keep the peace or to eliminate religious persecution,[4] or to encourage and protect an inherently good activity.[5] My thesis is that these various justifications are no longer plausible, and thus can no longer account for religious exemptions. In the face of increasing scrutiny and growing criticism,[6] these justifications no longer persuasively explain why religious people are constitutionally entitled to exemptions from laws that burden their religious practices, but non-religious people are not entitled to exemptions from laws that burden personal moral commitments as serious as religion, such as eliminating poverty, opposing racism, or caring for one's children.

I will begin by surveying these various justifications for religious exemptions and explaining why I believe they no longer possess explanatory power.[7] If this part of the thesis is correct, then the most obvious response is to develop a new justification for religious exemptions, one that does its proper

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1. *See infra* Part II-A.
2. *See infra* Part II-B.
3. *See infra* Part II-C.
4. *See infra* Part II-D.
5. *See infra* Part II-E.
6. *See, e.g.*, Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) [hereinafter Marshall, *Free Exercise Revisionism*]; William P. Marshall, *The Case against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990) [hereinafter Marshall, *Constitutionally Compelled Exemption*]; Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123 (1992); Mark V. Tushnet, *The Rhetoric of Free Exercise*, 1993 BYU L. REV. 117 (1993); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).
7. *See infra* Part II.

explanatory work in contemporary legal culture. In the second part of this essay, I suggest that the commitment of contemporary legal culture (and, indeed, of American society) to equality will likely prevent the success of any such effort.[8] I will close with the suggestion that we abandon the effort to defend religious exemptions and look elsewhere for doctrine to protect the free exercise of religion.[9]

I come to this conclusion reluctantly. Although I was skeptical of the usefulness of exemptions in the past, I became convinced that they provided a significant increment of protection for religious practice against government interference. As one who values religious liberty as an independent good, I was not pleased either with *Employment Division v. Smith's*[10] abandonment of the exemption doctrine, or with *City of Boerne v. Flores's*[11] invalidation of the Religious Freedom Restoration Act.[12] Consequently, I emphasize that I am not urging the abandonment of exemptions on the basis of a normative argument, but rather for the pragmatic reason that they can no longer be justified with the theoretical resources available in late 20th century legal culture.

II. JUSTIFICATIONS THAT NO LONGER JUSTIFY

Many of the justifications for religious exemptions have a belated quality. Consider, for example, *Zorach v. Clawson*,[13] a decision from the early 1950s in which Justice Douglas concluded that so-called "released time" programs of religious instruction do not violate the Establishment Clause.[14] These programs excuse religious students in public schools from mandatory attendance requirements several times a week so that they might attend religious instruction taking place elsewhere, off of the public school campus; those not attending the off-campus instruction must remain in school. (My elementary school in New Jersey had such a program. Every Wednesday afternoon, most of my classmates left for "church school," leaving behind the Jews, the Quakers, and me.)

In defending released-time programs against the Establishment Clause challenge, Justice Douglas argued, "We are a religious people whose

8. *See infra* Part III.
9. *See infra* Part IV.
10. 496 U.S. 913 (1990).
11. 117 S. Ct. 2157 (1997).
12. I was a co-author of the amicus brief filed by the Church of Jesus Christ of Latter-day Saints in *Boerne* in support of RFRA. This essay does not reflect my reconsideration of the arguments set forth in the brief, but my judgment that they are not likely to prevail in the current judicial and political climate.
13. 343 U.S. 306 (1952).
14. *See id.*

institutions presuppose a Supreme Being."[15] Now, however persuasive a starting point this may have been in 1952, I suggest that this is not a good foundation for a defense of released-time programs in 1998. Justice Douglas's statement presupposes a society that is not only religiously (if nondenominationally) pious, but which sees no constitutional problems in government's adjusting its programs and functions to encourage such piety.[16] This normative conception of church and state is no longer widely held by the judges, lawyers, academics, and other professionals who make up the legal community in the United States. While contemporary Americans remain a religious people, this fact has little cash value in the economy of church-state relations regulated by American legal culture.[17] Consequently, opinions like *Zorach* have an anachronistic flavor, failing to persuade as they once did, because history has undermined the acceptability of their premises. This is my point. An examination of various justifications for religious exemptions reveals that these justifications no longer account for the unique benefit accorded to believers by religious exemptions.

A. Text

One of the most frequently invoked justifications for religious exemptions is the enumeration of the free exercise of religion in the First Amendment: "Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof." Citing the text in this manner is a bit like answering a preschooler's unrelenting question, "Why?," with, "Because I said so." Like the exasperated parent who has been asked the same question too many times, free exercise textualists account for religious exemptions by

15. *Id.* at 313-14.

16. I have elsewhere labeled this view of church/state relations "religious communitarianism," and suggested that it was the dominant ideological paradigm for such relations in late nineteenth and early twentieth century America. *See* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 11-18 (1995).

17. Professor Berg properly criticizes me for having suggested in the oral presentation of this essay that Justice Douglas's language lacks cash value in American society generally. *See* Thomas C. Berg, *The Constitutional Future of Religious Freedom Litigation*, 20 U. ARK. LITTLE ROCK L.J. 715 (1998). That was an exaggeration, though perhaps not so large a one as he assumes. It is far from clear that the religious devotion that many Americans exhibit in their private lives invariably leads to support for religious exemptions. *See, e.g.*, Jay Alan Sekulow & John Tuskey, City of Boerne v. Flores: *The Justices Know Best*, 2 NEXUS 51, 52-53 (Fall 1997) (arguing that the significance of *Boerne* "is not its effect on religious liberty," but the Court's endorsement of "judicial supremacy at the expense of congressional prerogative."); Phillip E. Johnson, *Afterword*, 2 NEXUS 169, 173 (Fall 1997) (observing that many conservative Christians were reluctant to defend RFRA "at the cost of establishing a principle that federal judges have a power to exempt an open-ended category of 'religious activities' from nondiscriminatory regulations which other citizens must obey.").

insisting that the First Amendment singles out religious exercise for special protection. Professor Laycock, for example, argues that

> [f]or whatever reason, the Constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor. 'Because the Constitution says so, and because all our liberties depend on maintaining the authority of the Constitution's guarantees,' should be sufficient reason to vigorously protect religious liberty.[18]

This begs the question. It does not follow from the enumeration of religious exercise among the rights protected by the First Amendment that religious exemptions are constitutionally required. There are plenty of individual rights and interests specified in the text of the Constitution to which the Supreme Court gives little meaningful protection. This may be because the Court views these rights as judicially unenforceable,[19] or because it has traditionally construed the scope of the right in accordance with the narrowest possible reading of the text,[20] or because the Court believes that, notwithstanding textual enumeration of the rights, deference is owed to actions by the majoritarian political branches that burden these rights.[21] The mere fact that a

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18. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996) [hereinafter Laycock, *Religious Liberty*]. *See also* Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 717 (1992) [hereinafter McConnell, *Accommodation of Religion*] (The kind of "favoritism toward religion" that protects "religious freedom more than the freedom to conduct oneself in accordance with nonreligious norms" is "inherent in the very text of the First Amendment."); Stephen Pepper, *Conflicting Paradigms of Religious Liberty*, 1993 BYU L. REV. 7, 12 ("On its face, the [text of the free exercise clause] grants a unique advantage to religious conduct, protecting it from government imposition.").

19. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (guarantee clause of Article IV); Luther v. Borden, 48 U.S. (7. How.) 1 (1849). *Compare* Roe v. Wade, 410 U.S. 113, 210 (1973) (Douglas, J., concurring) (arguing that the Ninth Amendment does not protect federally enforceable rights) *with* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (arguing that Ninth Amendment protects unenumerated rights such as the right to marital privacy).

20. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (privileges and immunities clause of Fourteenth Amendment).

21. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). *See generally* LEARNED HAND, THE BILL OF RIGHTS (1958); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Judicial Review*, 7 HARV. L. REV. 129 (1893). Professor Lupu suggests that the demise of the exemption doctrine may have been the result of the tension between the activist judicial philosophy implied by the exemption doctrine and the more restrained judicial philosophy of the mostly conservative judges appointed by Presidents Reagan and Bush. *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 754 (1992) [hereinafter Lupu, *The Trouble with Accommodation*].

free exercise right is enumerated in the constitutional text does not mean that holders of the right are constitutionally entitled to be excused from complying with government action that incidentally burdens the right.

The textualist argument for religious exemptions is particularly problematic. The appearance of "prohibit" in the Free Exercise Clause suggests as much the anti-discrimination meaning given the clause by *Employment Division v. Smith*[22] as it does the exemption doctrine imposed by *Sherbert v. Verner*[23] and *Wisconsin v. Yoder*.[24] As Professor Marshall has pointed out, the framers' explicit reference to religion in the First Amendment "reflects the fact that religious groups had often been persecuted and therefore needed special protection. The text, in short, is consistent with protecting religion from discrimination; it does not compel discrimination in favor of religion."[25] At best, the text of the Free Exercise Clause is ambiguous with respect to exemptions,[26] meaning that the justification for religious exemptions must lie elsewhere.

B. History

Closely related to the textual argument is the historical one, that those who lived at the time of the ratification of the First Amendment in 1791 or the Fourteenth Amendment in 1868 understood the Free Exercise Clause to mandate exemptions. With respect to the framers of the First Amendment, evidence for this hypothesis is scarce, and many scholars have rejected it.[27] After an exhaustive review of colonial history, even so strong a supporter of exemptions as Professor McConnell was able to conclude only that exemptions were not unknown to the people of that time, and thus is not inconsistent an original understanding of the free exercise clause that encompassed exemp-

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22. 494 U.S. 872 (1990).
23. 374 U.S. 398 (1963).
24. 406 U.S. 205 (1972).
25. Marshall, *Free Exercise Revisionism*, *supra* note 6, at 325.

> It is not enough . . . to say that the Constitution gives religion special protection. No one is contesting that point . . . . 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.

West, *supra* note 6, at 621-22.

26. *See* McConnell, *Accommodation of Religion*, *supra* note 18, at 690.
27. *See, e.g.*, MICHAEL J. MALBIN, RELIGION AND POLITICS (1978); STEVEN D. SMITH, FOREORDAINED FAILURE chs. 2-4 (1995); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 261-306 (1991); Phillip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); West, *supra* note 6, at 623-33.

tions.[28] Justice Scalia was right to count this as evidence *against* the historical validity of exemptions.[29]

The originalist case for exemptions in connection with the ratification of the Fourteenth Amendment and the application of the Bill of Rights against the states is stronger. Professor Lash has argued that some members of the Reconstruction Congress intended the Privileges or Immunities Clause of section one to impose upon the states an understanding of the Free Exercise Clause that encompassed exemptions.[30] One scholar has questioned Lash's conclusions,[31] however, and the fact remains that barely ten years after the Fourteenth Amendment was ratified, *Reynolds v. United States*[32] decisively rejected the argument that the Free Exercise Clause requires exemptions.[33]

In fact, the constitutional history of the Free Exercise Clause is almost completely against religious exemptions. Every appellate court that had occasion to interpret the Free Exercise Clause in the decades following the ratification of the First Amendment concluded that it did not mandate exemptions.[34] In the late 19th century *Reynolds* and the other Mormon polygamy cases repeatedly emphasized that the clause did not excuse religious practitioners from complying with otherwise legitimate laws, even when those laws prevented them from practicing their faith.[35] This remained the rule well into the twentieth century.[36] Mark Galanter once reported that in a survey of court decisions prior to 1940, he was unable to find a single one in which a violation of the criminal law was excused because of the defendant's religious

28. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414-15 (1990). Even this modest conclusion was sharply attacked as methodologically unsound by Mark Tushnet. *See* Tushnet, *supra* note 6, at 124-27.

29. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172-73 (1997) (Scalia, J., concurring).

30. *See* Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994). Lash concurs with those scholars who argue that mandatory exemptions formed no part of the 1791 understanding of the Free Exercise Clause. *See id.* at 1110-18.

31. *See* SMITH, *supra* note 27, at 50-54.

32. 98 U.S. 145 (1878).

33. *See id.* at 164, 166-67. Because *Reynolds* involved a prosecution of polygamy in Utah Territory, however, questions about the original meaning of the Fourteenth Amendment and the significance of incorporation of the Free Exercise Clause against the states did not arise.

34. *See* Tushnet, *supra* note 6, at 125.

35. *See* Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885); *Reynolds*, 98 U.S. at 164, 166-67.

36. *See* Braunfeld v. Brown, 366 U.S. 599, 601-01 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

motivation.[37] From the standpoint of history, then, the aberrations are *Sherbert* and *Yoder*, not *Smith*.

C. Transcendent Consequences

Some have argued that religious exemptions are justified by certain unique consequences of believing in God. Disobeying God subjects believers to divine punishment in the life hereafter; nonbelievers do not fear such punishments because they do not believe in an extra-temporal existence beyond this life.[38] When government action forces believers to disobey the commands of their God, they suffer a psychological harm to which nonbelievers are not subject.[39] Exemptions eliminate for believers a "conflict of loyalties" not faced by nonbelievers.[40]

This justification is substantially over- and under-inclusive. Many of those who profess belief in God deny the reality of extra-temporal punishment for disobeying his commands.[41] On the other hand, as Professor Marshall has observed, "[t]he violation of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet, even if the latter is believed to have extra-temporal consequences."[42] Certainly it is conceivable that an African American who is forced to represent a racist feels a psychological or emotional distress similar to that felt by an orthodox Roman Catholic who is forced to represent a teenager seeking an abortion.[43] Likewise, the injustice and bitterness that might be experienced by

37. *See* Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 216, 234.

38. *See* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 286-87 (1996) [hereinafter Garvey, *An Anti-Liberal Argument*].

39. *See id.* at 288.

40. *See* Michael W. McConnell, *Religious Freedom at A Crossroads*, 59 U. CHI. L. REV. 115, 125 (1992) [hereinafter McConnell, *Religious Freedom*]. *See also* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 359 (1996) [hereinafter Lupu, *A General Theory*] ("To be insensitive to the pain of those forced to choose between religious faith and the norms of the wider community is cruel.").

41. *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1085-87 (1996) [hereinafter Laycock, *Continuity and Change*] (summarizing poll data). *See also* West, *supra* note 6, at 615 ("[T]here are many religious persons whose behavior is not influenced by a belief in the after life or by concern with punishments of any sort.").

42. Marshall, *Free Exercise Revisionism*, *supra* note 6, at 321. Elsewhere Professor Marshall has suggested that the fear of extra-temporal punishment makes believers especially prone to extremism and violence, and thus justifies more stringent regulation of religion, rather than its special protection. *See* William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L. REV. 843 (1993).

43. *Cf.* Marshall, *Free Exercise Exemption*, *supra* note 6, at 384 ("A person has a secular

one who is denied unemployment benefits when she leaves a job rather than violate her Sabbath do not seem different in kind or intensity from those that might be suffered by a noncustodial parent who is denied benefits when he leaves a job so as to be free to visit his children.[44]

In the end, the contemporary liberal commitment to individual autonomy makes it unlikely that government interference with religious conscience will be understood as a serious harm distinct from interference with secular conscience. The commitment to autonomy protects individual choice for its own sake; the value is in the freedom to choose, not in the object of choice.[45] As a result, the constitutional harm that results when government interferes with autonomy is less the substantive harm that follows from the choice imposed upon the individual than the procedural harm of denying the individual the opportunity to choose. This leaves the liberal theory unable to distinguish between religious practices and *any* secular lifestyle choice,[46] including a choice motivated by personal commitment to a secular morality.[47] Without this distinction, however, it is difficult to argue that the transcendent or extra-temporal consequences of religious belief entitle believers to exemption from morally burdensome laws when nonbelievers are left subject to them.

D. Preventing Violence and Persecution

The Supreme Court has long interpreted the Constitution in terms of the Court's own views about good social policy, regardless of the teachings of text and history. Accordingly, religious exemptions might be justified because they lead to socially desirable results. One such argument proceeds from the premise that conflicts over religious belief are particularly violent and

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moral objection to killing in war and a religious objection to working on the Sabbath might well suffer greater psychic harm in being forced to kill than in being forced to work.").

44. *Cf.* Marshall, *Free Exercise Exemption*, *supra* note 6, at 383 (noting that the same unemployment compensation appeals board that denied benefits to a religious pacifist who refused to work in an armaments factory also denied benefits to a person who was unavailable for work due to strong convictions about parental obligations).

45. *See* Garvey, *An Anti-Liberal Argument*, *supra* note 38, at 276.

46. *See, e.g.*, Garvey, *An Anti-Liberal Argument*, *supra* note 38, at 278 (describing the autonomy justification for religious freedom as placing "religious choices . . . on a par with promiscuous sex, cigarette smoking, and the practice of optometry").

47. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 344 (1970) (statute exempting religious pacifists from military service held to cover "those whose consciences, by deeply held moral, ethical or religious beliefs, would give them no rest if they allowed themselves to become part of an instrument of war"); United States v. Seeger, 380 U.S. 163, 166 (1965) (statute exempting those with anti-war convictions motivated by "belief in a relation to a Supreme Being" held to cover those whose moral or philosophical convictions occupy a place in their lives comparable to that occupied by God in the lives of believers).

disruptive of social order, and that giving religion special protection avoids this violence and disruption.[48]

One major difficulty with this argument is that it provides no justification for protecting marginal religious groups which government could easily suppress without any threat to social order.[49] Peace and order are only seriously threatened when government seeks to suppress a large or influential religious minority. The broad, even radical, pluralism that now characterizes religious belief and practice in the United States suggests the improbability of this kind of socially disruptive persecution. This is not to minimize or ignore what Professor Laycock has called three of the worst religious persecutions in American history—those against Mormons, Roman Catholics, and Jehovah's Witnesses.[50] But as vicious and wrong as these and other religious persecutions were in the United States, they did not disrupt the social fabric of the country. They caused tremendous difficulty for their victims, but they did not at any time threaten the destructive and violent anarchy that characterized Reformation Europe.

Ironically, the most socially disruptive period in recent American history, the 1960s, was situated in the middle of the heyday of the exemption doctrine. That the upheavals of the 1960s had little to do with religion and were hardly ameliorated by the exemption doctrine tells us, I think, why this justification no longer works: There is nothing about religious belief and practice in contemporary America that is uniquely disruptive of the social order.[51]

Still, what about persecution of religious minorities in the United States that continues to occur? Though its victims are not sufficiently numerous to threaten social order when they resist, is this nonetheless an independent justification for religious exemptions?[52] It is indisputable that intentional

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48. *See, e.g.*, Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992). *See also* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" under the Religion Clauses*, 1995 SUP. CT. REV. 323, 341 ("In general, religious beliefs and practices place demands on people that are more intense, less subject to reasons that regulate civil society, more likely to generate conflicts with the state if not accommodated, than do nonreligious beliefs and practices."); Lupu, *A General Theory*, *supra* note 40, at 360-61, 363-64 (arguing that religious belief creates unusual risks of political faction). Professor Laycock rejects this justification, arguing that the evil of the Reformations Wars was not disruption of the social order by religion, but state imposition of religious beliefs and practices on dissenters. *See* Laycock, *Continuity and Change*, *supra* note 41, at 1091-93.

49. *See* Garvey, *An Anti-Liberal Argument*, *supra* note 38, at 281-82.

50. *See* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 222-24.

51. For an argument that religion has not been especially violent in Western history relative to secular ideologies and movements, see FREDERICK MARK GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE ch. 9 (1991).

52. *See, e.g.*, Laycock, *Continuity and Change*, *supra* note 41, at 1089-91, 1094-95. *See*

disadvantaging of religious people on the basis of their faith continues to occur in the United States, although these days it usually takes the form of nonviolent discrimination or hostile indifference.[53] The burden of justifying religious exemptions, however, is not discharged by identifying instances of religious persecution that exemptions might alleviate. A justification for exemptions must establish not only that exemptions provide protection from religious discrimination, but also that religious people are entitled to extraordinary protection against discrimination when victims of comparable discrimination are not.

For example, proof of the disproportionate racial impact of government action does not by itself establish a violation of the equal protection clause.[54] In order to prove such a violation, the plaintiff must show that the disproportionate impact was intended, that the action which disproportionately burdens racial minorities was taken *because of*, rather than *in spite of*, this burden.[55] As Professor Marshall has pointed out, "[n]ormally . . . concerns of disproportionate impact do not support constitutional claims unless there is also an improper intent."[56] What would be the justification for excusing religious plaintiffs from proving that discriminatory intent lies behind religiously disproportionate government action, while African Americans—whose enslaved ancestors are the principal reason we have an equal protection clause at all—must prove such intent in case of government action that disproportionately burdens their interests?

It now appears that even so-called "benign" racial classifications, those with which a political majority chooses to burden itself in order to mitigate the effects of centuries of chattel slavery and racial discrimination against African Americans, are nevertheless subject to strict scrutiny.[57] Is there a justification for subjecting religious exemptions, a kind of religious affirmative action, to

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also McConnell, *Accommodation of Religion*, *supra* note 18, at 691 ("Just as the Establishment Clause is more than a ban on a compulsory official church, the Free Exercise Clause is more than a ban on the Inquisition.").

53. *See, e.g.*, Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Lyng v. Northwest Indian Cem. Ass'n, 485 U.S. 439 (1988); Larson v. Valente, 456 U.S. 228 (1982); McDaniel v. Paty, 435 U.S. 618 (1978). *See also* McConnell, *Religious Freedom*, *supra* note 40, at 134 ("The Religion Clause jurisprudence of the Warren and Burger era was . . . characterized by a hostility or indifference to religion, manifested in a weak application of free exercise doctrine and an aggressive application of an establishment doctrine systematically weighted in favor of the secular and against genuine religious pluralism.").

54. *See* Washington v. Davis, 426 U.S. 229, 239-42 (1976).

55. *See* Village of Arlington Heights v. Metropolitan Housing Develop. Corp., 429 U.S. 252, 265-70 (1977).

56. Marshall, *Free Exercise Revisionism*, *supra* note 6, at 318.

57. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.); *Id.* at 520 (Scalia, J., concurring).

a lesser level of scrutiny?[58] I submit that as bad as things have been for many religious groups in the United States, none can claim to have had a worse experience with persecution and discrimination than African Americans. It will be difficult to justify religious exemptions after the Court has rejected the legitimacy of comparable legislative actions designed to provide redress to African Americans and other racial minorities for the adverse consequences of government action that was every bit as serious as religious persecution.

E. "God is Good"

Professor Garvey maintains that religion is a unique contributor to social good in the United States with which government should not interfere. From this premise, Garvey argues that the establishment clause should permit government to remove general disincentives to religious activity by funding it neutrally with secular activities, and that the free exercise clause should require government to remove direct obstacles to religious activity imposed by laws which burden such activity, by exempting believers from the obligation to comply with such laws.[59]

A great virtue of Garvey's position is that it *does* provide an answer to the question why we grant religion strong protections that we do not grant to other kinds of comparable, morally serious behavior. We do so, Garvey argues, because religion is a uniquely valuable human activity: "The First Amendment is not part of an integrated system for promoting human autonomy. It protects certain kinds of activities because those are especially good things to do."[60] Garvey points out,

> [L]iberal theory has a hard time explaining why we should exempt people who were making religious choices, but not people who were pursuing other kinds of personal interests. Since all choices are equal in the eyes of the law, we should not show special consideration to one set. My theory does not face this conflict. It argues that the point of the First Amendment is to promote the good of religion . . . .[61]

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58. *Cf.* Abner S. Greene, *Kiryas Joel and Two Mistakes about Equality*, 96 COLUM. L. REV. 1, 63-70 (1996); David E. Steinberg; *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991). *See also* Lupu, *A General Theory, supra* note 40, at 367 ("[S]ect specific accommodation bears a strong resemblance to the race-conscious affirmative action programs that the Court has viewed with increasing disfavor.").

59. *See* John H. Garvey, *All Things Being Equal . . .*, 1996 BYU L. REV. 587, 604-09 [hereinafter Garvey, *All Things*]; Garvey, *An Anti-Liberal Argument, supra* note 38, at 288.

60. *See* Garvey, *All Things*, *supra* note 59, at 604.

61. Garvey, *All Things*, *supra* note 59, at 609.

> [T]he religious justification is the only convincing explanation for the split-level character of free exercise law. Sometimes religious believers and nonbelievers are

I confess that part of me finds Garvey's argument very appealing. His is the work of someone who believes deeply in the value of religion, who understands what it is like to try to live a religious life in a hostile or indifferent secular world. The most positive influence for good in my own life has been my faith, and I want to believe that this good is something that is only worked by religion.

But I can't quite believe this. In preparing this paper, I read a recent essay by Professor Laycock. At the end of his essay, Laycock discloses that he is an agnostic who once held unflattering opinions about believers.[62] He then makes a remarkable and moving statement: "I went through my period of hostility to theistic religion, went through my period of stick figure caricatures of believers, and I learned better," writes Laycock.[63] As a result of his frequent contact with believers in the course of his work on behalf of free exercise claimants, he confesses,

> I learned that highly intelligent and accomplished people are devout believers—indeed, they believe that they have personally experienced the presence of God. I learned that believers reason just as well as nonbelievers on average, and that most believers do not see the conflict between faith and reason . . . . I learned that religious faith is a powerful force for good in the lives of many believers. I learned that the great religious traditions often embody accumulated wisdom, whatever its sources and whatever the accumulated baggage of positions that seem to me mistaken.[64]

I have found that this same softening of the heart occurs from the other direction. Religious people are often too quick to demonize atheists, agnostics, humanists and others with secular moral commitments. As Laycock changed his views of believers, my time in this area has changed my views of nonbelievers. I have seen many of my friends and colleagues whose faith in God is tenuous or nonexistent exhibit qualities of morality, integrity, caring, and friendship that are as deep and as genuine as these qualities are in those who are motivated by faith. Though I find Garvey's argument personally appealing, my experience does not permit me to believe that religion and religious people hold the monopoly on moral conduct that would justify the extraordinary protection bestowed by religious exemptions. As good as I believe God is, I

> treated alike, but sometimes the law protects only religious believers. This is not something that we can explain by appeals to consent and fairness. It violates the canon of reciprocity. The only convincing explanation for such a rule is that the law thinks that religion is a good thing.

Garvey, *An Anti-Liberal Argument*, *supra* note 38, at 291.

62. *See* Laycock, *Religious Liberty*, *supra* note 18, at 353-54.

63. Laycock, *Religious Liberty*, *supra* note 18, at 354.

64. Laycock, *Religious Liberty*, *supra* note 18, at 354-55.

do not believe that this argument can work as a persuasive justification for differential protection of religious practice and secular moral action in a morally pluralistic society like the contemporary United States.

III. THE IMPROBABILITY OF A DEFENSIBLE JUSTIFICATION: THE RHETORICAL POWER OF EQUALITY

The likelihood of developing a persuasive account of religious exemptions depends to a large extent on whether free exercise and establishment clause rights are classified as liberty rights or equality rights. Equality rights generally prevent government from imposing a burden on one person unless it imposes the burden on everyone. Liberty rights generally prevent the state from imposing the burden at all, even if it imposes it on everyone. What follows are sketches of various doctrinal combinations of free exercise and establishment interests, alternately conceived as liberty rights and equality rights.

A. Separationism: Establishment and Free Exercise as Liberty Rights.

Under this doctrinal type, the establishment clause protects a freedom from noncoercive government influence to adhere to a particular sect or to support religion generally. The free exercise clause as liberty protects freedom from coercive government action that prevents a person from acting in accordance with her faith, or which directly and affirmatively forces a person to adhere to a faith.

Separationism was characteristic of the religion clause jurisprudence of the 1960s and 1970s. Under the establishment clause, most government action that helped or encouraged religion, such as religious teaching and voluntary prayer in public schools[65] and financial aid to religious elementary and secondary schools,[66] was declared unconstitutional. Under the free exercise clause, the exemption doctrine insulated religious practice burdened by government action.[67] Some commentators even argued a quid pro quo: The special disabilities imposed on religion under the establishment clause justified the special protections granted religion under the free exercise clause.[68]

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65. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 599 (1962). *See also* Epperson v. Arkansas, 393 U.S. 97 (1968); McCollum v. Board of Educ., 333 U.S. 203 (1948).

66. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). *But see* Board of Educ. v. Allen, 392 U.S. 236 (1968).

67. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). *See also* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

68. *See* Abner Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611

B. Benevolent Neutrality: Establishment as an Equality Right, Free Exercise as a Liberty Right.

When understood as an equality right, the Establishment Clause demands government neutrality with respect to religion: Religion is not to be denied access to government benefits that are otherwise freely available to all, nor is it to shoulder government burdens that are not otherwise imposed on all. When combined with a liberty conception of the Free Exercise Clause, Benevolent Neutrality yields a government stance with respect to religion that does not directly or overtly encourage it, but that at the same time is not so strictly neutral that it impedes the ability of religion to grow and flourish in American society. This was the doctrine of the 1980s, when the Supreme Court began to permit close identification of religion and government,[69] as well as aid to religion pursuant to programs of general government assistance,[70] while leaving the exemption doctrine at least formally in effect.[71] After upholding a wide-ranging religion-specific exemption in 1987, however, the Court retreated from religious exemptions in 1989.[72] Benevolent Neutrality is the doctrinal combination to which we would return if religious exemptions were reinstituted without substantial change in establishment clause doctrine.

C. Formal Neutrality: Establishment and Free Exercise as Equality Rights.

Understood as an equality right, the free exercise of religion protects against government discrimination on the basis of religion, but does not protect against burdens imposed on religious practice as the incidental effect of facially neutral government action. This is the doctrine of the 1990s, beginning with

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(1993). *See also* Lupu, *A General Theory*, *supra* note 40, at 362 ("Religion is entitled to unique constitutional respect, but it must suffer unique constitutional disability.").

69. *See* County of Allegheny v. ACLU, 492 U.S. 581 (1989); Lynch v. Donelly, 465 U.S. 665 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Widmar v. Vincent, 454 U.S. 263 (1981). *But see* Wallace v. Jaffree, 472 U.S. 38 (1985).

70. *See* Bowen v. Kendrick, 487 U.S. 589 (1988); Witters v. Department for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). *But see* Aguilar v. Felton, 473 U.S. 402 (1985) (overruled by Agostini v. Felton, 117 S. Ct. 1997 (1997)); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (overruled by Agostini v. Felton, 117 S. Ct. 1997 (1997)).

71. *See* Frazee v. Department of Empl. Sec., 429 U.S. 929 (1989); Hobbie v. Unemployment Comp. Appeals Comm'n., 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981). *But see* Tony & Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290 (1985).

72. *Compare* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) *with* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). *See also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

Smith under the Free Exercise clause,[73] and continuing the further development of establishment clause equality.[74]

It should be immediately apparent that of these three doctrinal paradigms, Benevolent Neutrality is the most problematic, because it exhibits a rhetorical imbalance. It seems intuitively appropriate that religion might be granted special protection under the Free Exercise Clause as compensation for special disabilities imposed under the establishment clause, as under Separationism. Formal Neutrality is similarly plausible: When no special disabilities are imposed on religion under the establishment clause, it receives no special protection under the free exercise clause.[75] From the standpoint of nonbelievers, however, Benevolent Neutrality's combination of establishment equality and free exercise liberty has a "heads I win, tails you lose" bias in favor of religious practice: The Establishment Clause does not require that religious individuals and organizations be uniquely deprived of public benefits otherwise

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73. *See* 494 U.S. 872 (1990). *See also* Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

74. *See* Agostini v. Felton, 117 S. Ct. 1997 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985) & Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985)); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Capitol Square Rev. & Adv. Comm. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); Board of Educ. v. Mergens, 496 U.S. 226 (1990).

> The principle of 'no content discrimination' fits well with the equal treatment approach to the Religion Clauses, and both reflect the modern emphasis on equality in constitutional adjudication. . . .
>
> *Employment Division v. Smith* and the abandonment of *Lemon* represent, in part, a movement away from robust interpretations of the two Religion Clauses, under which religion must be treated as special (either in receiving exemptions or in not receiving aid), and toward principles of equal treatment and legislative discretion.

Greenawalt, *supra* note 48, at 390.

A fourth logically possible combination would be establishment clause liberty and free exercise equality, which implies a general governmental hostility toward religion in all its interactions with government. This combination has never had much influence in the United States.

75. Professor Berg is correct that even the weakest interpretation of the establishment clause would prevent government from expressly favoring one religious denomination over another, whereas government is free to favor one secular philosophy over another. Berg, *supra* note 17, at pt. I. In other words, government may expressly endorse capitalism or environmentalism, but not Catholicism or Mormonism. However, this would justify only the very narrow range of free exercise exemptions necessary to give religious institutions the freedom to promote their unique spiritual perspectives, as a kind of ideological compensation for the fact that they are constitutionally prohibited from competing for government endorsement in the way that secular philosophies may. *See* Ira C. Lupu, *Why Congress Was Wrong and the Court Was Right—Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 789, 805 (forthcoming 1998); *cf.* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1983).

generally available to all, yet the Free Exercise Clause requires that religious individuals and organizations be uniquely relieved of legal burdens otherwise generally imposed upon all.[76]

While it may make intuitive sense for the religion clauses to protect either religious liberty or religious equality, that intuition begins to fade when it is urged that the clauses sometimes protect religious equality, and sometimes protect religious liberty, and it disappears altogether when it is argued that the clauses protect equality in case of religious benefits, and liberty in case of religious burdens. In short, a society committed to individual equality cannot explain why believers should be deprived of benefits or relieved of burdens which are equally distributed and fully justified on secular grounds.[77]

The rhetorical power of equality is evident in contemporary constitutional scholarship.[78] One sees the pull of the egalitarian norm even in the work of those who support exemptions. Professor Lupu, for example, advocates a narrow doctrine of exemptions in his work in the religion clauses, but he would extend his exemptions for religion to comparable secular interests.[79] Professor Laycock makes a similar theoretical move, arguing in favor of an exemption doctrine that is formally available only to protect actions motivated by religious belief, but which in practice protects actions motivated by secular beliefs, through an expansive definition of "religion" which includes agnostic and atheistic beliefs.[80] Dean Smith argues for a notion of "conscience" which would similarly expand the protection of exemptions beyond traditional religious practices.[81] Even Michael McConnell, perhaps the most prominent current defender of Benevolent Neutrality, concedes that released time

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76. *See, e.g.*, Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1104 (1996) ("The state has a compelling interest in eradicating discrimination. What, then, is so special about religious freedoms that religious employers are permitted to exceed the limits of tolerance set for all others?").

77. I develop this thesis in detail in GEDICKS, *supra* note 16, ch. 6; Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233 (1997).

78. *See* Rutherford, *supra* note 76, at 1060-76 (arguing that equality has long been the most fundamental constitutional value). *See also* Lupu, *A General Theory, supra* note 40, at 362 ("'[E]quality' or 'nondiscrimination'" resonates with "the constitutional ethos of the late twentieth century.").

79. *See* Lupu, *The Trouble with Accommodation*, *supra* note 21, at 778-79; Lupu, *A General Theory*, *supra* note 40, at 384.

80. Professor Laycock defends his expansive definition by maintaining that the current conflict between religious believers and nonbelievers is merely the contemporary version of the Reformation conflict between Protestants and Catholics, and thus still falls within the historic purposes of the religion clauses. *See* Laycock, *Religious Liberty*, *supra* note 18, at 326-37, 338-39; Laycock, *Continuity and Change*, *supra* note 41, at 1069-89.

81. *See* Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little Conscience*, 1996 BYU L. REV. 645, 662-75.

programs that permit religious instruction during the public school day are more easily defended under the Establishment Clause if they allow children to be released for nonreligious as well as religious purposes.[82] While these scholars maintain a doctrinal commitment to exemptions, they implicitly admit the force of the egalitarian objection by expanding the scope of exemptions far beyond traditional understandings of religious practice.

IV. CONCLUSION: PROTECTION WITHOUT EXEMPTIONS?

As I was finishing this essay, there arrived on my desk a law journal symposium issue ominously entitled, "Does Religious Freedom Have a Future?: The First Amendment after *Boerne*."[83] The tone of this question is indistinguishable from that of most scholarly commentary in the immediate aftermath of *Smith* itself.[84] The assumption is that religious freedom and religious exemptions are tied together in a binary relationship: Exemptions = religious freedom; no exemptions = no religious freedom.

For too long debates about free exercise doctrine have been framed by this all-or-nothing proposition that meaningful religious freedom is only possible with exemptions. The myopic focus on restoration of the exemption doctrine has obscured other possible readings of *Smith* that, given the current doctrinal and political climate, may have far greater potential for the protection of religious freedom than the quixotic effort to restore the exemption doctrine. There has been virtually no effort at developing an intermediate position between the emphatically rejected exemption doctrine and the rubber-stamp rational basis review which this rejection seems to have left in its place.[85]

This is not because alternative readings of *Smith* are not possible. For example, while the Court correctly maintains that the exemption doctrine was a constitutional aberration, its suggestion that rejection of the exemption doctrine restored doctrinal normality is demonstrably untrue.[86] The *Smith* doctrine does not resemble the structure of either liberty rights under the speech clause of the First Amendment or equality rights under the equal protection clause of the Fourteenth Amendment.[87] Whereas *Smith* merely requires that laws which incidentally burden religious conduct have a rational basis,[88]

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82. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 36.

83. 2 NEXUS 1 (Fall 1997).

84. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

85. *See* Lupu, *The Trouble with Accommodation, supra* note 21, at 758 ("[M]ost free exercise claims will be summarily rejected with citation to and brief discussion of *Smith*.").

86. *See Smith*, 494 U.S. at 886. *See also Boerne*, 107 S. Ct. at 2161.

87. I develop this thesis in detail in Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities* (forthcoming Apr. 9, 1998).

88. *See* 494 U.S. at 885 (holding that incidental burdens on religious practice are not

Speech Clause doctrine generally requires that laws which burden expression as an incident to otherwise legitimate regulation of conduct satisfy a higher level of scrutiny.[89] In case of content-neutral government regulation of the time, place and manner of expression in public forums, Speech Clause doctrine additionally requires a close relationship between means and end, and adequate alternative channels of communication.[90]

All the attention on the restoration of exemptions, however, has relieved the Court of the need to defend rational basis review of incidental burdens on religion, and diverted attention from the opportunity to develop alternative standards of review within the nonexemption framework set out by *Smith*. Obviously, even the modestly heightened scrutiny of incidental burdens represented by the *O'Brien* standard would be better than the deferential rational basis review apparently left by *Smith*: a requirement analogous to the test applied to time, place, and manner regulation in public forums—say, that incidental burdens on religious practice must leave open ample alternative means and places such practice—would be a substantial improvement.[91]

A similar argument can be made under the Equal Protection Clause of the Fourteenth Amendment. Although most applications of heightened scrutiny under the Equal Protection Clause are the result of government classification on suspicious grounds like race or gender,[92] one branch of equal protection applies heightened scrutiny to nonsuspect classifications which nevertheless prevent or burden the exercise of fundamental rights explicitly or implicitly guaranteed by the Constitution.[93] It can be argued that a law that contains one

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subject to heightened judicial scrutiny). *See also id.* at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid* as applied to the religious objector every regulation of conduct that does not protect an interest of the highest order.") (emphasis in original).

89. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (government regulation of conduct that incidentally burdens freedom of expression is constitutionally valid if it furthers an "important or substantial governmental interest," is "unrelated to the suppression of free expression," and is "no greater than is essential to the furtherance of that interest").

90. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 654-55 (1981).

91. *Cf.* Lupu, *A General Theory*, *supra* note 40, at 378 (noting that in most instances alternatives to religious practice prohibited by generally applicable law do not exist); McConnell, *Accommodation of Religion*, *supra* note 18, at 692 (same).

92. *See* Plyler v. Doe, 457 U.S. 202, 216-17 (1982); United States v. Carolene Prods., Inc., 304 U.S. 144, 152 n.4 (1938).

93. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (distinction between owners and nonowners of real property in determining eligibility to vote held unconstitutional burden on fundamental right to vote in state elections); Shapiro v. Thompson, 394 U.S. 618 (1969) (distinction drawn between longtime residents and new residents for purposes of determining eligibility for welfare benefits held unconstitutional burden on fundamental right to travel) (overruled in part by Edelman v. Jordan, 415 U.S. 651 (1974));

or more secular exemptions but no religious exemptions should trigger this "fundamental rights/equal protection analysis," because the effect of the secular exemptions is to classify individuals in such a way that some of them are deprived of the fundamental right to the free exercise of religion.

"Fundamental rights/equal protection" analysis was highly controversial because it gave to the Court the unconstrained power to recognize and enforce unenumerated constitutional rights.[94] Its application to protect an enumerated right like the free exercise of religion, however, would be less problematic.[95]

In my view, the historical moment for exemptions has come and gone. There no longer exists a plausible explanation of why religious believers—and *only* believers—are constitutionally entitled to be excused from complying with otherwise legitimate laws that burden practices motivated by moral belief. Without such an explanation, exemptions face a doubtful future in the Supreme Court. I suggest that those who value religious liberty make a virtue of necessity by abandoning the effort to restore exemptions and looking elsewhere for more fruitful means of protecting religious freedom. Some protection of religious free exercise is better than none at all.

Harper v. Virginia Bd. of Elects., 383 U.S. 663 (1966) (wealth distinction drawn by state poll tax held unconstitutional burden on fundamental right to vote in state elections); Skinner v. Oklahoma, 316 U.S. 535 (1942) (distinction between violent and nonviolent felonies for purpose of determining criminals to be sterilized held unconstitutional burden on fundamental right of procreation).

94. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 72-73, 90-91 (1990).

95. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (limiting fundamental rights/equal protection analysis to classifications that prevent or burden the exercise of rights "explicitly or implicitly guaranteed by the Constitution"). It is clear from the decisions cited as authority that the *San Antonio* majority believes the right to travel, the right to vote in state elections, and the right to privacy to be the only implied fundamental rights guaranteed by the Constitution. *See id.* at 34 nn.73-76, 35 n.78.