

## *Scopes of Religious Exemption: A Normative Map*

Perry Dane<sup>1</sup>

### I. Introduction

#### A.

The first part of wisdom in thinking rigorously about religion-based exemptions might be to appreciate their diversity.<sup>2</sup> One sign of that diversity is the wide range of laws from which exemptions have been sought, from insurance mandates<sup>3</sup> to drug bans<sup>4</sup> to compulsory education laws<sup>5</sup> to humane slaughter laws<sup>6</sup> to definitions of death<sup>7</sup> to military uniform rules<sup>8</sup> to grooming

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<sup>1</sup> Professor of Law, Rutgers School of Law – Camden.

<sup>2</sup> As I complete this paper, that simple observation is suddenly taking more than merely analytic significance as the political debate over Indiana’s passage of a state Religious Freedom Restoration Act has focused entirely and misleadingly on the statute’s speculative and mostly moot implications for the right of businesses to discriminate on the basis of sexual orientation. For a balanced commentary, see Stephen Prothero, “Indiana needs to balance gay, religious rights,” USA TODAY, March 30, 2015, *available at* <http://www.usatoday.com/story/opinion/2015/03/29/indiana-religious-freedom-prothero/70632870/>.

<sup>3</sup> See *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_\_ (2014) (claim under the Religious Freedom Restoration Act (RFRA) to exemption from contraceptive coverage mandate issued under the Patient Protection and Affordable Care Act).

<sup>4</sup> See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990) (claim to exemption under the Free Exercise Clause from rule denying unemployment benefits to persons fired for violating state prohibitions on the use of peyote); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (claim under RFRA to exemption from federal customs and drug laws banning a sacramental tea listed as a Schedule I substance).

<sup>5</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>6</sup> See Humane Slaughter Act, 7 U.S.C.A. § 1902 (defining “slaughtering in accordance with the ritual requirements of the Islamic and Jewish faith” and similar procedures prescribed by other faiths as “humane” notwithstanding the general rule that humane slaughter of livestock requires that the animals be stunned before “being shackled, hoisted, thrown, cast, or cut.”).

requirements for police officers<sup>9</sup> and prison inmates<sup>10</sup> to photograph requirements for drivers' licenses<sup>11</sup> to standard doctrines of bankruptcy law,<sup>12</sup> tort law,<sup>13</sup> and tax law<sup>14</sup> to civil rights statutes.<sup>15</sup> But this multiformity of religious claims is conceptually significant mainly because it illustrates how religious belief can encompass any aspect of human life and religious commitments can potentially conflict with any law at all, however ordinary and benign it might

<sup>7</sup> See New Jersey Declaration of Death Act, N.J.S. 26:6A-1 to -8 (generally recognizing both cardio-respiratory and neurological criteria for death, but requiring that the “death of an individual shall not be declared upon the basis of neurological criteria . . . when the licensed physician authorized to declare death, has reason to believe . . . that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria. . . .”)

<sup>8</sup> Compare *Goldman v. Weinberger*, 450 U.S. 707(1986) (denying observant Jewish officer exemption under the Free Exercise Clause from requirement that he remove all headgear indoors) with 10 U.S.C. § 774 (authorizing members of the armed forces, subject to certain conditions, to “wear an item of religious apparel while wearing the uniform of the member’s armed force.”)

<sup>9</sup> *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

<sup>10</sup> *Holt v. Hobbs*, 574 U.S. \_\_\_\_ (2015).

<sup>11</sup> See, e.g., *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff’d by divided court*, 472 U.S. 478 (1985); *Johnson v. Motor Vehicles Dep’t*, 197 Colo. 455 (Colo. 1979); *Freeman v. Dep’t of Highway Safety and Motor Vehicles*, 924 So.2d 48, 55 (Fla. Dist. Ct. App. 2006); see also Oregon Code, Section 735-062; North Carolina Code, Section 20-7.

<sup>12</sup> See, e.g., 11 U.S.C. § 1325(b)(2)(A) (amended by Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 1011 U.S.C. § 1325(b)(2)(A)5-183 (1998)) (legislatively overruling cases not allowing debtors to include tithing and other charitable contributions to be treated as “reasonable expenses” for the purpose of Chapter 13 bankruptcy plans).

<sup>13</sup> See, e.g., *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) (plaintiff seeking to avoid application of avoidable consequences doctrine when death of plaintiff’s deceased was arguably attributable to her adherence to her faith’s rejection of blood transfusions).

<sup>14</sup> See, e.g., I.R.C. § 107 (2012) (parsonage exemption).

<sup>15</sup> See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 (Admin. Ct. Colo., Dec. 6, 2013); *Thomas v. Anchorage Equal Rights Comm’n*, 102 P.3d 937 (Alaska 2004).

seem to persons of other faiths or no faith. That is a deep and important point to which I will return.<sup>16</sup>

The diversity of religious exemptions is also apparent in the various forms that legal regimes recognizing such exemptions can take – from entirely general rules – whether constitutional<sup>17</sup> or statutory<sup>18</sup> – to subject-specific<sup>19</sup> and even religion-specific<sup>20</sup> enactments. This spectrum of approaches raises important questions about relative legislative and judicial competencies and the craft of statutory design. For my purposes here, however, its main interest is that it points, if indirectly, to more fundamental differences among religion-based exemptions.

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<sup>16</sup> See *infra* at \_\_\_\_\_.

<sup>17</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963)

<sup>18</sup> See, e.g., Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. 2000bb, 2000bb-1 to 2000bb-4 (2000)), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997); Ariz. Rev. Stat. Ann. 41-1493.01 (1999) (state religious freedom statute); Conn Gen. Stat. Ann. 52-571b (2001) (same).

<sup>19</sup> See, e.g., Wis. Stat. § 102.28(3) (allowing employees religiously opposed to participating in state-mandated unemployment compensation insurance system to waive such benefits if “the religious sect to which the employee belongs . . . has a long-standing history of providing its members who become dependent on the support of the religious sect as a result of work-related injuries” and their dependents with a reasonable standard of living).

<sup>20</sup> See, e.g., Va. Code Ann. § 18.2-314 (providing that “any parent or other person having custody of a minor child that is being furnished Christian Science treatment by a duly accredited Christian Science practitioner shall not, for that reason alone, be considered in violation” of statutory duty of parents under certain circumstances to secure medical attention for children suffering from physical injuries inflicted by a member of the family).

This paper focuses on those more fundamental differences. Its goal is to construct a typology of the various logical structures and normative underpinnings that can explain, justify, and describe religion-based exemptions. These categories are ideal types. They overlap, and many actual cases can rest comfortably in more than one box. But they are also distinct.

I offer this typology partly for its own sake, to help make sense of what might otherwise seem to be mysterious discontinuities and inconsistencies. But I will also suggest how the various categories occupy distinct locations on the normative map, but also how they can illuminate each other and how they and how surveying the sequence as a whole might say something about the encounter of religion and state and the power of the legal imagination. The payoff or punch line is that the first, most obvious and straightforward, category of religion-based exemptions is also the most radical, that some of the other categories are tamer precisely to the extent that they introduce a wider and more complex range of values, but that the excursion in the end will necessarily come full circle to where it started.

## B.

Lurking in the background of this paper, however, is another vital part of wisdom in thinking about religion-based exemptions, which even those of us who support a vigorous recognition of such exemptions need to admit: They are not normatively straightforward. Exemption regimes can be justified, but not always in the usual way that we justify other rights. So another of my goals here is to suggest how each of the ideal types I describe responds in its

own distinctive way to the normative challenges that any account of religious exemptions must confront.

1.

The first normative difficulty that faces (not all, as we shall see in more detail, but many) claims for exemptions is conceptual. I have argued this point elsewhere<sup>21</sup> and will only recapitulate it briefly here.<sup>22</sup>

Justice Scalia correctly identified the gist of the problem when, in *Employment Division v. Smith*, he argued that that a constitutionally guaranteed “private right to ignore generally applicable laws” would be (with some exceptions) not a “constitutional norm[]” but a “constitutional anomaly.”<sup>23</sup> Religion-based exemptions can be anomalous, at least as constitutional rights, in at least two important respects. First, while judicial review (including most as-applied judicial review) ordinarily identifies something inherently suspicious or defective in a statute or legal rule, the basic fact that religious commitments can take any form whatsoever suggests that *any* statute or legal rule, however generally reasonable and innocuous, could give rise to a claim for exemption. Second, the assertion of constitutional rights does not

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<sup>21</sup> See, e.g., Perry Dane, “*Omalous*” *Autonomy*, 2004 BRIGHAM YOUNG U. L. REV. 1715; Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming).

<sup>22</sup> Some of the language in this subsection is also freely borrowed from my earlier work.

<sup>23</sup> *Employment Div. v. Smith*, 494 U.S. 872, 886 (1990).

generally depend on the motivations or beliefs of the claimant.<sup>24</sup> But claims to religion-based exemptions turn at the outset entirely on the sincere commitments of religious dissenters and the direct conflict between those commitments and a given statute or legal rule.<sup>25</sup> In sum, as the Court put it many years earlier in *Reynolds v. United States*, a constitutional right to religion-based exemptions risks making “the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>26</sup>

Of course, to admit that a right or doctrine is constitutionally “anomalous” is not to concede that it is impossible or wrong. Our constitutional structure is entitled to include anomalies. But it does suggest that supporters of religion-based exemptions have a special burden to justify and make sense of such a right or doctrine.

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<sup>24</sup> In most contexts, the assertion of constitutional rights, including free speech rights, does not even depend on the sincerity of the claimant. The free speech clause, that is to say, protects, “devil’s advocates” as much as zealous partisans. Cf. John M. Kang, *The Irrelevance of Sincerity: Deliberative Democracy in the Supreme Court*, 48 ST. LOUIS L.J. 305 (2004). One exception might be found in libel law, in which a finding of “actual malice” might depend on a lack of “honest belief” in the allegedly libelous statement.

<sup>25</sup> I have in other work also emphasized a third important difference: in most contexts, the strength of whatever governmental interest is asserted in defense of a challenge law is measured *in toto*, while in the religious exemptions context, it is only measured *at the margin*, as it applies to the persons seeking an exemption.

<sup>26</sup> 98 U.S. 145, 166–67 (1879).

It might be said, of course, that only constitutionally-grounded rights to exemptions from general laws are “anomalous” in the sense described here. Statutory exemptions, in this view, would be acts of legislative grace.<sup>27</sup> Even here, however, a bit of paradox emerges.

General exemption regimes such as the Religious Freedom Restoration Act and its state equivalents are not constitutional rules as such but they have about them the aura of quasi-constitutional enactments.<sup>28</sup> That is to say, as much as constitutional doctrines, they arguably lock in an “anomalous” right by allowing “every citizen to become a law unto himself.”

Specific exemptions from specific laws thus stand on a different footing from a general exemptions regime from general laws. But a collection of specific exemptions is inherently discriminatory and indeed cannot avoid being discriminatory. Because *any* law might give rise

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<sup>27</sup> Cf. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990):

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. 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.

<sup>28</sup> The federal Religious Freedom Restoration Act was explicitly enacted to “restore” the doctrine of religion-based exemptions in effect before *Smith*, which is why it originally applied to the States as well as the federal government itself. See 42 USC 2000bb-2. And it was precisely as a rebuke to that quasi-constitutional ambition that the Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down that application of the statute.

to *somebody's* claim for an exemption, even the most well-meaning, far-seeing, and generous legislature could not – even in principle – systematically decide which exemption claims are worthy of its grace and which are not.

This paradox suggests that all exemption regimes – constitutional and statutory, general and specific – run into apparent difficulties. So part of what I need to do as I work through my suggested typology is to smooth out the rough edges of these normative roadblocks.

## 2.

There is another set of normative objections that can apply directly to at least many exemption claims, whether constitutionally-grounded or not. These objections involve the potential prejudice to third parties.

Third parties can be affected by religion-based exemptions in two distinct ways. First, they might bear some of the secular costs of an assertion of religious rights. Thus, some of the controversy over cases such as *Hobby Lobby* focused on the claim that allowing exemptions to employers who objected to the contraception mandate would directly deprive their employees of coverage to which they would otherwise be entitled.<sup>29</sup> But the problem is broader, and extends even to some historically-entrenched exemptions. For example, every conscientious objector exempted from a military draft arguably shifts the burden of fighting to some other young person

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<sup>29</sup> See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356-71 (2014).



whose service would otherwise not have been necessary.<sup>30</sup> More broadly yet, one might argue that everyone contributing to an unemployment insurance fund bears the burden of exemptions such as those granted in *Sherbert v. Verner*<sup>31</sup> and *Thomas v. Review Board*.<sup>32</sup>

Another, conceptually distinct, sort of third-party effect occurs when persons without the same convictions are denied the secular benefit of exemptions granted to religious objectors. Consider the secular libertarian employer who also objects to a government mandate that she provide insurance coverage for her employees. Or the worker who seeks unemployment benefits despite his unwillingness to work on Saturdays, when his unwillingness is based on a purely secular but urgent need to see his beloved son's college football games.

My own view is that both of these objections are overblown. As others have argued,<sup>33</sup> many constitutional rights impose costs on third parties. And as my list of examples demonstrates, it is difficult to draw a clear analytic line between moderate and severe – or acceptable and unacceptable – third-party costs. In addition, any consideration of “costs” requires some consideration of baselines; for example, even the most unqualified exemption

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<sup>30</sup> See Doug Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409, 432 (1986). *But cf.* 1 Kent Greenawalt, *Religion and the Constitution* 53 (2009) (“The extent to which those who are drafted suffer because others are exempted turns out to be debatable. In a symbolic sense, a burden is shifted from those who avoid conscription to those who submit. The practical effect is more doubtful.”)

<sup>31</sup> 374 U.S. 398 (1963).

<sup>32</sup> 450 U.S. 707 (1981).

<sup>33</sup> See, e.g., Marc O. Degirolami, *The Deeper Meaning in Hobby Lobby*, Library of Law & Liberty, July 1, 2014

from the contraception mandate would only return employees to the position they had before the mandate was imposed in the first place.<sup>34</sup> I am also not convinced that the Establishment Clause changes the equation, at least outside its own ordinary domain.

The claim of unfairness to persons whose claims to exemptions are not religious depends essentially on the premise that religion is not “special.”<sup>35</sup> And while that is an important question, to which I will need to return here, it is not a question without possible answers.<sup>36</sup>

Nevertheless, even if the problems they pose are exaggerated, these two types of third-party effects do cast a sort of normative shadow over religion-based exemptions. Or at least over many religion-based exemptions. The shadow might not, for example, reach the case of Mary Stinemetz, a Kansas Jehovah’s Witness who sought Medicaid coverage for a bloodless liver transplant procedure that was only available out of state.<sup>37</sup> The state’s Medicaid agency refused to bend its usual rule that it would only reimburse for in-state medical care and the Kansas Court of Appeals interpreted the state constitution to require an exemption.<sup>38</sup> The exemption did not give Ms. Stinemetz anything that the rest of us would reasonably consider to be a “secular

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<sup>34</sup> Cf. Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015).

<sup>35</sup> See Micah Schwartzman, *What if Religion is Not Special*, 79 U. CHI. L. REV. 1351 (2012).

<sup>36</sup> See *infra* at \_\_\_\_.

<sup>37</sup> I am thankful to Christopher Lund for highlighting this case. See Christopher Lund, *RFRA, State RFRA, and Religious Minorities*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming).

<sup>38</sup> *Stinemetz v. Kansas Health Policy Auth.*, 252 P.3d 141 (Kan. App. 2011). Lund reports that the court’s help unfortunately came too late for Steinemetz, who died because of the delay in obtaining a transplant.

benefit.” Nor did it impose any secular cost on either other individuals or the State; as the court pointed out, the bloodless transplant procedure was actually less expensive than a standard transplant.<sup>39</sup> It thus appears to present what might be among the easiest and certainly among the most poignant claims to a religion-based exemption.

Yet an exemptions regime limited to such cases would be weak indeed. Moreover, in an odd sort of way, such cases – precisely because the religious belief in question and the religious burden being claimed seem so difficult to process in conventional secular terms – in some ways illustrate most acutely the “anomalous” character of claims to religion-based exemptions. The conflict between religious commitment and secular law only arises in these contexts because of the sheer accidental collision, which no legal system could reasonably be expected to anticipate, between a singular religious belief and a general law.

### C

The typological exercise that is the primary goal of this paper is analytic and normative. It seeks to identify both core categories and more peripheral ones, and also show their sometimes dialectical relationship to each other. It also tries to situate in the larger catalog of exemptions regimes some doctrines that, in their own right, are rightly not thought of as exemptions at all. More generally, it tries to make sense of the distinct if overlapping justifications for exemptions, the distinct if overlapping values and paradigms that come into play in various types of

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<sup>39</sup> *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 161 (Kan. Ct. App. 2011).

exemptions, and the distinct if overlapping ways that categories of exemptions might respond to the normative objections just discussed. My account here surveys both claims under general regimes such as the free exercise clause (particularly before *Smith*) and RFRA and specific legislatively-crafted exemptions.

In the following sections, I discuss and illustrate eight distinct ideal types of exemptions and claims to exemptions. They fall into three larger broad categories that I call Recognition, Modesty, and Neutrality. For the reader's convenience, here is a chart:

Article Section		Type of Exemption	
II. Recognition	A	1	The Core Case – Sovereignty and Encounter
	B	2	Religious Institutional Autonomy
III. Modesty	A	3	Instrumental Modesty
	B	4	Empirical Modesty
	C	5	Normative Modesty
IV. Neutrality	A	6	Analogy of Dignity
	B	7	Quasi-Establishment
	C	8	“Most Favored Nation”

## II. Recognition

### A. (1) The Core Case – Sovereignty and Encounter

The first ideal type is the most obvious – indeed paradigmatic. It arises when the dilemma for both the state and the religious believer is most poignant and also most innocent. On the state's side is a law or rule whose purpose and general operation is undoubtedly non-

discriminatory and even neutral, and which is grounded in instrumental, empirical, and normative premises to which the state is fully and tenaciously committed (whether or not they are “compelling”<sup>40</sup>). On the believer’s side is a religious norm that just happens to conflict with the state’s law so that the state ends up directing the believer to do something that the believer’s religion forbids or forbids the believer from doing something that the believer’s religion requires.

These cases present, without the possibility of evasion or minimization, a direct clash between two normative worlds. And any account that hopes to make sense of them must face up to that clash.

In other work, I argue that the central idea animating the entire range of legal questions defining the relation of religion and law – including both questions of “Establishment” and questions of “Free Exercise” – is that “that religion is a sovereign realm distinct from the state, its government, and its claims.”<sup>41</sup> Indeed, I have argued that “the relationship between government and religion should be understood as an ‘existential encounter,’ in which each side tries to make sense of, and decide whether or how to make room, for the other.”<sup>42</sup> I even suggest that this encounter has about it, in a fundamental sense, something of the feel of the I-Thou relationship

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<sup>40</sup> I return to that point at the end of this paper, at *infra* \_\_\_\_\_.

<sup>41</sup> See Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_\_ (forthcoming). See also, e.g., Perry Dane, *Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991).

<sup>42</sup> *Id.* (quoting **Error! Main Document Only.** *The Varieties of Religious Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 117 (Gerhard Robbers, ed., Peter Lang Publishers 2001)).

described by Martin Buber.<sup>43</sup> That is to say, as with Buber’s famous discussion of an I-It relationship between a human being and a tree (or a cat or a work of art), the point is to emphasize the pre-analytic, pre-instrumental, pre-purposive, character of the encounter. Such an I-Thou encounter might be fleeting, and might indeed give way to a more detached I-It analysis, but its impact and its importance remains nevertheless.

As a general principle in the legal relation of the state and religion, this jurisdictional/sovereignty/encounter metaphor necessarily gets mediated, refracted, and even eclipsed in any number of complex ways.<sup>44</sup> But I do want to suggest more specifically that only something close to this jurisdictional notion can explain and justify the sort of core claims to religion-based exemptions I have just described.<sup>45</sup> In particular, only the jurisdictional idea can make sense of the “anomalous” character of these core claims to religion-based exemptions by emphasizing that such exemptions do not, as suggested in *Reynolds v. United States*, simply “permit every citizen to become a law unto himself,”<sup>46</sup> but rather recognize the competing hold of religious authority on the believer. Indeed, understood as an instance of something like a conflict of laws, the most “anomalous” aspects of religion-based exemptions – that they can arise in the

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<sup>43</sup> *Id.* See MARTIN BUBER, I AND THOU (Ronald Gregor Smith, trans., 1958). I discuss the relevance of Buber at greater length in another work-in-progress, “Martin Buber and the Existential Encounter of State and Religious Authority.”

<sup>44</sup> I refer to some of that process of mediation and refraction as “double coding.”

<sup>45</sup> See also Perry Dane, **Error! Main Document Only**.Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L. J. 350 (1980).

<sup>46</sup> *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

context of any law whatsoever, however otherwise unremarkable, and that they depend on the personal characteristics of the claimant – actually seem quite ordinary.<sup>47</sup>

The jurisdictional/sovereignty/encounter metaphor can also say something regarding the normative claims of “third parties.” With respect to the argument that extending exemptions only to religious claimants is “unfair,” the simple answer is that it is no more unfair than recognizing the distinct legal status of Canadians or Finns.<sup>48</sup> With respect to the argument that religious exemptions can directly hurt third parties, the jurisdictional principle suggests something quite different – that concern for third party effects is not a normative principle external to the logic of exemptions, but is actually, properly understood, internal to that logic. “After all, to recognize religious normative systems as possessing sovereign dignity does not exclude admitting the sovereign dignity of government. The challenge is to draw appropriate

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<sup>47</sup> See Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L. J. 350 (1980).

<sup>48</sup> This argument depends, of course, on a fairly robust legal pluralism, the sort of legal pluralism that can answer the question “Is religion special?” with its own question:

What makes the state ‘special’? For only by asking that question can we overcome the assumption that religion must be fit neatly into an account of the liberal polity that already has the state as its Archimedean referee, or, to use a different images, overcome the assumption that religion must find its place, if any, as a character in a drama whose author is liberal political theory and whose director is the state. To be sure, answering a question with a question does not settle anything, as such. . . . But allowing both questions to sit side by side, without privileging either, does create the opening for genuine dialogical encounter and the possible normative and conceptual fruits of that encounter.

Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming).

boundaries between the two.”<sup>49</sup> That, though, is a difficult challenge. In cases such as *Hobby Lobby*, for example, there is a genuine puzzle as to whether employees of religiously-affiliated nonprofit enterprises and even religiously-committed for-profit firms are best understood as “insiders” or “outsiders” to jurisdictional reach of the religious nomos, whether or not they are members of the religious community itself.<sup>50</sup> The proper test, as in other jurisdictional contexts, is not consent (actual or implied<sup>51</sup>) but a more subtle and difficult metric of community, affiliation, and authority.

#### B. (2) Religious Institutional Autonomy

The second ideal type, which might actually not belong in this paper at all, is religious institutional autonomy. Institutional autonomy is the recognized right of collectively organized religious groups to govern themselves and determine their own affairs with respect to issues such

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<sup>49</sup> Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming). In my own student note, which was my first foray into suggesting a “conflict of laws” metaphor for religious exemptions, I insisted that a state might justifiably apply its own law to protect “third parties not subject to the religious authority who would be directly affected by the granting of an exemption.” Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L. J. 350, 368 (1980).

<sup>50</sup> See Perry Dane, “Doctrine and Deep Structure in the Contraceptive Mandate Debate” (2013), <http://ssrn.com/abstract=2296635> For an interesting related discussion of the inherent malleability of notions such as “privacy” and “the market” in discussions of the *Hobby Lobby* and similar conundrums, see Nathan Oman, “Markets, Religion, and the Limits of Privacy,” Center for Law and Religion Forum Blog, <http://clrforum.org/2015/04/07/markets-religion-and-the-limits-of-privacy/>

<sup>51</sup> *But cf.* Michael Helfand, *Religious Institutionalism, Implied Consent and the Value of Voluntarism*, 88 SO. CAL. L. REV. \_\_\_\_ (forthcoming 2015).



as ecclesiastical organization,<sup>52</sup> property disputes among factions of the church,<sup>53</sup> and the sort of personnel decisions encompassed by the “ministerial exception” recently reaffirmed in the Supreme Court’s *Hosanna-Tabor* decision.<sup>54</sup>

Religious institutional autonomy is important. What is less clear is whether it should properly be thought of as a set of “exemptions.” Elsewhere,<sup>55</sup> I have suggested the following metaphor for the pieces of the law governing the relation of religion and the state: The basic church-state dispensation, as captured, for example, by the Establishment Clause of the First Amendment to the United States Constitution, reflects the “wholesale” dimension of the relationship between religion and state, establishing general boundaries of competency and jurisdiction. Religious liberty doctrines, on the other hand, particularly with respect to their consideration of religion-based exemptions, reflect the “retail” adjustments that take into account the particular and often radically differing commitments of specific religious normative systems. Meanwhile, religious institutional autonomy is in some sense both wholesale and retain. It draws

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<sup>52</sup> See, e.g.,

<sup>53</sup> The classic case was *Watson v. Jones*, 80 U.S. 679 (1872).

For a discussion of how the so-called “neutral principles of law” approach, as approved by the Supreme Court, can be understood as serving rather than denying underlying principles of institutional autonomy, see Perry Dane, “*Omalous*” *Autonomy*, 2004 BRIGHAM YOUNG U. L. REV. 1715.

<sup>54</sup> *Hosanna-Tabor Evangelical Lutheran Church v. EECO*, 132 S. Ct. 694 (2012).

<sup>55</sup> Most recently in Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming), from which much of the language in this paragraph is drawn. See also Perry Dane, *Constitutional Law and Religion*, in *A Companion to the Philosophy of Law and Legal Theory* 119-131 (2d ed., Dennis Patterson, ed., 2010).

*general* lines that recognize the self-governing right of all religious groups, regardless of their specific religious commitments.

I include the institutional autonomy here, though, for two reasons. First, the rights recognized by religious institutional autonomy *are*, at least arguably, exemptions of a sort, albeit general ones that apply regardless of specific religious commitments.<sup>56</sup> More to the point, though, institutional autonomy fills a specific if deeply ironic niche in the normative map I am trying to draw here.

On the one hand, institutional autonomy avoids the normative obstacles I identified earlier. In particular, as I have also argued elsewhere, institutional autonomy does is not an “anomalous” doctrine. It does not open up the entire gamut of state laws to potential challenge. And its application does not depend on the specific beliefs of the institutions that seek its protection. In addition, institutional autonomy has few “third party” effects, at least if one is willing to take at face value the proposition that it only extends to the “internal” affairs of churches.<sup>57</sup> For that matter, institutional autonomy even manages to avoid at least some of the brunt of the claim that religious rights are “unfair” to their non-religious counterparts: To be sure, as the Court emphasized in *Hosanna-Tabor*, institutional autonomy is more expansive and

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<sup>56</sup> Cf. Christopher Lund, *Free Exercise Reconceived*, 108 NW. U. L. REV. 1183 (2014).

<sup>57</sup> To be sure, this claim is contestable. See, e.g., Leslie C. Griffin, *Smith and Women’s Equality*, 32 Cardozo L. Rev. 1831, 1843 (2011) (describing ministerial exception as a “a constitutional theory that protects churches’ liberty to harm their employees and other third parties.”)

uncompromising than the rights of self-governance accorded to other expressive voluntary associations, but it is at least in the same ballpark.<sup>58</sup> All this helps explain, if only in part,<sup>59</sup> why acceptance of institutional autonomy has fared better, both legally and politically, than what I have called the core instances of religion-based exemptions.<sup>60</sup>

On the other hand, institutional autonomy as a legally-recognized set of doctrines is remarkable for the degree to which it has often directly articulated the jurisdictional principle at its very surface.<sup>61</sup> It is in that sense as close as the law is willing to come to what a full-fledged embrace of the jurisdictional principle might be or could be.<sup>62</sup>

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<sup>58</sup> Thus, some commentators could argue, credibly if not convincingly, that churches could get all the protection they needed by way of the ordinary doctrines of freedom of association and freedom of conscience that are applied to other, non-religious, groups. See, e.g., Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 Va. L. Rev. 917 (2013). Cf. Brief for the Federal Respondent, *Hosanna-Tabor Evangelical Lutheran Church v. EECO*, 132 S. Ct. 694 (2012), available at [http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other\\_Brief\\_Updates/10-553\\_federalrespondents.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-553_federalrespondents.authcheckdam.pdf).

<sup>59</sup> Cf. Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming).

<sup>60</sup> Compare *Employment Div. v. Smith*, 494 U.S. 872, 886 (1990) (rejecting, by a closely-divided Court, even a prima facie constitutional claim in most cases to a religion-based exemption from a neutral and generally applicable law) with *Hosanna-Tabor Evangelical Lutheran Church v. EECO*, 132 S. Ct. 694 (2012) (unanimously reaffirming the ministerial exception from generally applicable employment legislation).

<sup>61</sup> See, e.g., *Watson v. Jones*, 80 U.S. 679, 727 (1871) ("questions of discipline, or of faith, or ecclesiastical rule, custom, or law [that] have been decided by the highest of .. church judicatories ... must [be] accepted ... as final"); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (affirming authority of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v Milivojevich*, 426 U.S. 696 (1976) ("civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical

### III. Modesty

The jurisdictional model of the relation between religion and the state is powerful. It is also radical and conceptually frightening, particularly given the inevitable solipsism of every legal and normative system, particularly that of the modern state. It was at the heart of James Madison’s argument that before “any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And . . . every man who becomes a member of any particular Civil Society, . . . [does so] with a saving of his allegiance to the Universal Sovereign.”<sup>63</sup> But that bold idea has long been domesticated if not suppressed by

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rule, custom, or law.”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (describing religious institutional autonomy as a “century-old affirmation of a church's sovereignty over its own affairs. “); *Shannon v. Frost*, 42 Ky. 253, 258 (1842){“This Court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.”); *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87 (1843) (“It belongs not to the civil power to enter into or review the proceedings of a spiritual court.”)

To be sure, the Court in *Hosanna-Tabor* did hold that the ministerial exception was not a “jurisdictional” doctrine as such, *Hosanna-Tabor Evangelical Lutheran Church v. EECO*, 132 S. Ct. 694, \_\_\_ n. 4 (2012), but there were technical reasons having to do with the Court’s recent jurisprudence of jurisdiction for that holding, and it does not alter the essentially jurisdictional feel of the doctrine and the ways in which it has been articulated. *Cf. Conlon v. InterVarsity Christian Fellowship*, \_\_\_ F.3d \_\_\_ (6<sup>th</sup> Cir. , Feb. 5, 2015) (ministerial exception defense not waivable).

<sup>62</sup> It does bear emphasis, though, that the “jurisdictional” character of religious institutional autonomy does not necessarily require full-fledged civil abstention from hearing intra-religious disputes, particularly since “autonomy” itself is a concept with different and potentially contradictory meanings and implications. See Perry Dane, *The Varieties of Religious Autonomy*, in *CHURCH AUTONOMY: A COMPARATIVE SURVEY* 117 (Gerhard Robbers, ed., Peter Lang Publishers 2001)

<sup>63</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *JAMES*

legal and political arguments. It also, as just noted, emerges explicitly in the conversation about religious institutional autonomy, but that is the exception that puts the rule into relief.

The radical power of the jurisdictional idea can still peek through under the guise of less threatening rhetoric and legal doctrines by way of what I have, borrowing a term from postmodern discourse, called “double coding.”<sup>64</sup> In this paper, though, I want to suggest a different dynamic with respect to the specific problem of religion-based exemptions. Simply put, even if only the jurisdictional/sovereignty/encounter principle can adequately make sense of the most general idea of religion-based exemptions and their paradigmatic ideal type, not all exceptions need to be described or justified, nor their scope be assessed, according to that most radical and unsettling idea. The rest of the ideal types surveyed here are, in effect, the more tame and manageable variations on the theme.

In this part, I want to relax the assumption in the paradigm case that the law from which an exemption is sought “is grounded in normative and factual premises to which the state is fully and tenaciously committed.” In many cases, the state is, or can and should be, more modest in its commitment to its own laws. In such instances, even the solipsistic state might make room for religious claims to exemptions. And, not coincidentally, rights to such exemptions – which

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MADISON: WRITINGS 29 (Jack N. Rakove ed., Lib. Am. 1999).

<sup>64</sup> See Perry Dane, *Master Metaphors and Double Coding*, 52 SAN DIEGO L. REV. \_\_\_\_ (forthcoming).

only pertain to those laws about which the state can or should be modest – more easily avoid the charge of being normatively “anomalous.”

In this section, I survey three forms of modesty. They form something of a progression, from the least to the most potentially fraught. These categories are also particularly permeable, however, and, with respect to at least some of my examples, my account here should not be read to be particularly invested in whether they belong in one ideal type or another.

#### A. (3) Instrumental Modesty

Laws have means as well as ends. And sometimes particular means are not actually necessary to achieve the law’s ends. Thus, in *Hobby Lobby*, the Supreme Court held that the ends of the contraceptive mandate – assuring appropriate coverage for workers – could be achieved in other ways even if religious objectors were excused from the requirement to enter into a specific insurance contract or even to complete and file a particular legal certification declaring their unwillingness to enter into such a contract.<sup>65</sup>

Such cases are often categorized under the rubric of the “least restrictive means” test applied when laws challenged by claims for exemptions are subject to some type of strict scrutiny. For my purposes, however, I want to understand the idea at work, not as the second step in a doctrinal test, but as the first rung in a ladder of governmental modesty.

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<sup>65</sup> *Hobby Lobby*

This description under the heading of “instrumental modesty” also brings into the basket of such exemptions not only claims to exemptions litigated under very general “tests,” as in *Hobby Lobby*, but also specific, often minutely-detailed, legislatively-crafted compromises. For example, the Supreme Court in *United States v. Lee*, applying the compelling interest test mandated by cases such as *Sherbert* and *Yoder* refused to consider a constitutional claim to a religious exemption from an employer’s liability to pay social security taxes.<sup>66</sup> Indeed, the language in *Lee* denying the claim is about as uncategorical as one could imagine. Yet, as the Court recognized, Congress itself created a limited religious exemption from social security taxes for certain self-employed workers.<sup>67</sup> Similarly, a claim to a religious exemption from a state workers’ compensation scheme might well, for good reason, not succeed under either a pre-*Smith* constitutional free exercise standard or a general statute such as RFRA. Not only would the interest underlying such a scheme likely be found “compelling,” but the particular means used to further that interest – an insurance plan paid for by mandatory contributions from employers – would probably be found to survive a least restrictive means test. But state legislatures are well-positioned to craft detailed rules that can further the state’s interest while

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<sup>66</sup> 455 U.S. 252 (1982).

<sup>67</sup> 26 U.S.C. § 1402(g).

still accommodating the scruples of religious communities that, in effect, self-insure their members against workplace injuries and other losses.<sup>68</sup>

#### B. (4) Empirical Modesty

Just a tad higher up the ladder of modesty than instrumental modesty is what I'll call empirical modesty. Consider, for example, the federal Humane Slaughter Act, which reads as follows:

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the

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<sup>68</sup> See, e.g., Wis. Stat. § 102.28(3) (“provision of alternative benefits”). See also, e.g., 625 ILCS 5/7-609 (creating limited exemption from automobile liability insurance requirements).



carotid arteries with a sharp instrument and handling in connection with such slaughtering.<sup>69</sup>

The purpose of this legislation, obviously, is to accommodate the forms of ritual slaughter required for meat to be Kosher for Jews and Halal for Muslims. The language of the statute, however, is particularly intriguing: It is framed, not as an exemption, but – in accord with what is likely true – as a “finding” that a certain sort of ritual slaughter of conscious animals is likely to be as painless (and therefore humane) as slaughter of a stunned and therefore unconscious animal. And while the law might not choose to allow any sort of slaughter of conscious animals outside the religious ritual context, it is modest enough about its empirical convictions to allow the regulatory space within which believers can practice their faith.

Or consider the New Jersey Declaration of Death Act.<sup>70</sup> The primary provisions of the Act set out two alternative grounds for a declaration of death: either “traditional cardio-respiratory criteria” or “modern neurological criteria.” That is to say, a person is to be declared dead if he or she has *either* “sustained irreversible cessation of all circulatory and respiratory functions, as determined in accordance with currently accepted medical standards”<sup>71</sup> *or*, for someone “whose circulatory and respiratory functions can be maintained solely by artificial

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<sup>69</sup> 7 U.S.C. § 1902.

<sup>70</sup> 26 N.J.S. § 26:6A-1 to -5.

<sup>71</sup> 26 N.J.S. § 26:6A-2.

means,” if he or she “has sustained irreversible cessation of all functions of the entire brain.”<sup>72</sup>

But the statute also contains this provision:

The death of an individual shall not be declared upon the basis of neurological criteria . . . when the licensed physician authorized to declare death, has reason to believe . . . that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria. . . .<sup>73</sup>

Notice that this statute does not allow *any* sundry religious belief to trump the standard definition of death, nor could it. Rather, it reflects, it seems to me, some genuine empirical modesty about the contingency of the “modern” neurological criteria the state is now adopting. Indeed, the exemption provision would make little sense if it were not grounded in at least some empirical modesty. After all, how otherwise could a *really* dead person be accorded a “*right*” not to be declared dead.<sup>74</sup>

Empirical modesty in the case of the Humane Slaughter Act is grounded, or at least those of us who keep Kosher would like to believe, in genuine empirical reservations. The modesty at work in the New Jersey Declaration of Death Act is of a different sort, however. It is not

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<sup>72</sup> 26 N.J.S. § 26:6A-3.

<sup>73</sup> 26 N.J.S. § 26:6A-5.

<sup>74</sup> Importantly, the statute does not seek to protect the religious convictions of the patient’s family, but of the patient himself or herself, although information provided by the family can be relevant to a doctor’s findings about the beliefs of the patient. *Id.*

grounded in strong doubts. Those of us whose faith does not reject “neurological criteria” as the standard for death need not fear that we will be discarded while still alive.<sup>75</sup> Rather, the State is demonstrating some sensitivity to the temporal situatedness of its own, however legitimate, claims to knowledge. It is, that is to say, allowing religious dissenters to live by (or die by) the “traditional” criteria that all of us assumed were correct and sufficient until not all that long ago.

More legitimately controversial are various sorts of provisions in both federal and state law treating Christian Science prayer as the legal equivalent of medical care.<sup>76</sup> Such provisions have often been enacted after strenuous lobbying based on the presentation of alleged proofs of the healing efficacy of Christian Science practice.<sup>77</sup> But the point of granting the exemptions is not to take such testimonies entirely at face value but rather to suspend judgment, to a point, in the face of the faith and practice of a religious group that has at least demonstrated that its members are not dying in droves. To be less flippant about it, the modesty here might reflect in

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<sup>75</sup> At the risk of treating a serious topic far too lightly, it might be worth quoting here from one of the number in the musical *Spamalot* sung by a plague victim after a collector of the dead has unceremoniously dumped him in a cart:

I am not dead yet  
 I can dance and I can sing  
 I am not dead yet  
 I can do the highland fling  
 I am not dead yet  
 No need to go to bed  
 No need to call the doctor  
 'Cos I'm not yet dead.

<sup>76</sup> See, e.g.,

<sup>77</sup> See

part the fact that many persons, while they do not pray as Christian Scientists do in lieu of medical care, do pray and do believe in the potential efficacy of such prayer. They allow at least that much mystery into their attitude to illness and healing. And that itself might give them, and the government that represents them, some reason to understand, even if it does not embrace, the Christian Science effort to harness that mystery and put it at the center of their faith.

### C. (5) Normative Modesty

More difficult but in many ways more interesting questions arise when the state is or should be modest, not about the means it employs or the facts it assumes, but about the values that undergird some of its laws.

Sometimes, normative modesty is prompted by the existence of a distinct other value in the calculus. That might indeed be the best account for what Justice Scalia in *Smith* notoriously called “hybrid situations” in which religious claims are raised “in conjunction with other constitutional protections.”<sup>78</sup> Thus, Justice Scalia explained *Wisconsin v. Yoder*, in which the Court recognized an exemption from certain compulsory education laws for Amish parents, as implicating both free exercise rights and the separate substantive due process right of the parents to “direct the education of their children.”<sup>79</sup> On the surface, Justice Scalia’s notion of hybrid rights seems odd and arbitrary. If Amish parents would not have, separately considered, either a

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<sup>78</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>79</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

separate substantive due process right or a free exercise right to pull their children out of school after eighth grade, why should the conjunction of those two rights give them a winning claim? After all, zero plus zero still equals zero. But another way to understand the problem is simply to notice that the existence of a colorable even if losing parental rights claim at least takes the compulsory education law out of the inherently limitless class of reasonable and innocuous legislation a general right to exemption from which would be “anomalous.” Put another way, it is precisely when a law might at least be suspicious on other grounds that the law, whether through constitutional doctrine or otherwise, might find it appropriate to be normatively modest about imposing the full effect of the law on religious dissenters.

In other contexts, however, the considerations explaining or justifying normative modesty might be more internal to the conversation surrounding the challenged law itself. Kent Greenawalt, for example, convincingly argues that one explanation for the long-established practice of exempting conscientious objectors from the draft is that the consciences

of pacifists are informed by values that are respected in American culture, not by perspectives that are evil or corrupt. Most Americans have ambivalent feelings about war, as sometimes necessary, but always horrible and often unjust. Those who witness by their objection to the abhorrence of killing in war reinforce a crucial strand in our sentiments.<sup>80</sup>

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<sup>80</sup> KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 53

Similarly, “conscience clauses” and other exemptions that allow health care providers not to perform or facilitate abortions arguably reflect a degree of normative modesty if not outright ambivalence even among the staunchest of abortion-rights supporters.<sup>81</sup>

Of course, how much normative modesty might be appropriate with respect to particular morally controversial laws can itself be a morally freighted question. This helps explain, I think, at least some of the tumult surrounding religion-based exemptions in the context of same-sex marriage. Thus, some of us who support same-sex marriage also support at least limited religion-based exemptions at least in part because we believe that the marriage question is genuinely difficult and “might therefore merit” a degree of “tolerance of diversity and conscientious objection” that we would not think appropriate in other contexts.<sup>82</sup> Others might support exemptions on the basis of a sort of qualified Burkean conservatism, believing that, although same-sex couples deserve the right to marry, society should allow some continued space

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(2006).

<sup>81</sup> See, e.g., Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 *FORDHAM URB. L.J.* 783, 801 (2004); Mark L. Rienzi, *The Constitutional Right Not To Kill*, 62 *EMORY L.J.* 121 (2012).

For a complementary but very different arguments, that exemptions with respect to abortion actually helped smooth the way for wider acceptance of abortion rights and even the wider availability of abortion services, see Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 *U.C. DAVIS L. REV.* 703 (2014).

<sup>82</sup> See Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 *BUFFALO L. REV.* 291, 366 (2014). See *id.*, at 362-63 (discussing some of the differences, which cut both ways, between limitations on same-sex marriage and bans on interracial marriage).

in the market and the public sphere for the contrary view that, after all, has been both traditional and taken for granted for millennia across wide swaths of human civilizations. In that sense, exemptions in the same-sex marriage context resemble, at least in formal terms, the sort of accommodation granted by the New Jersey Definition of Death Act.

But it is precisely these sorts of arguments that might understandably rankle those supporters of same-sex marriage who believe that the underlying question is easy and that opponents of same-sex marriage are necessarily bigots. For that reason, the debate over exemptions will inevitably reflect at least some of the tone and substance of the debate over same-sex marriage itself. To be sure, it bears repeating here that modesty – whether instrumental, empirical, or normative – is not the same thing as, and does not depend on, uncertainty or ambivalence. It simply requires a modicum of understanding. But even that might be out of bounds in today’s hyper-polarized political and legal climate.

#### IV. Neutrality

The previous three ideal types, classed under the broader rubric of “modesty,” relaxed the assumption in the core case that the law from which an exemption is sought is “grounded in instrumental, empirical, and normative premises to which the state is fully and tenaciously committed.” In this section of the paper, I discuss a final set of three ideal types that relax the assumption that the law from which an exemption is sought is “undoubtedly non-discriminatory and even neutral.” I am not interested here in laws that forthrightly discriminate against religion,

religious believer, or religious practices,<sup>83</sup> which do not raise the problem of exemptions and which are therefore outside the scope of this paper. Nor do I want to invoke the argument that exemption claims in general can be recharacterized as please for “normative” rather than merely “formal” neutrality.<sup>84</sup> Rather, I want to describe some very specific classes of situations in which more subtle and even roundabout considerations of neutrality or equality can come into play.

#### A. (6) Analogy of Dignity

In other work, I have discussed the instinct of our legal culture’s “powerful, if often only intermittent, impulse to avoid treating religious groups and traditions differently based on theological differences among them, even when it might be perfectly sensible to do so.”<sup>85</sup> I treat this as one instance, along with others having nothing to do with religion, of a discursive move I call “analogy of dignity,” in which a legal rule or institution is extended “horizontally” to new contexts, not because the logic of the rule requires it, but rather out of consideration for the status or worth of the person or entity for whose benefit the rule or institution is being extended.<sup>86</sup>

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<sup>83</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down municipal ordinance banning “ritual” “sacrifice” of animals while allowing other forms of killing and slaughter of animals).

<sup>84</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Souter, J., concurring); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

<sup>85</sup> Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO L. REV. 291, 341 (2014).

<sup>86</sup> Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO L. REV. 291, 334



In the religious context, the original rule is sometimes itself a religion-based exemption designed to accommodate a specific faith commitment. That limited exemption, however, proves to be normatively unstable, and the instinct for “analogy of dignity” ends up extending it to other or all religious faiths. A good example is the clergy-penitent privilege.

The first cases recognizing the privilege sought to protect Catholic priests, as an accommodation to their very specific sacramental understanding of the seal of confession. Indeed, some early authority explicitly held that the privilege only applied to Catholic priests. Soon, though, legislatures extended the privilege to all clergy, often even if their own theological understandings or religious principles did not require it.<sup>87</sup>

The more interesting cases for present purposes, though, are those in which the original rule is *not* itself an exemption but rather a perfectly ordinary application of a “neutral and generally applicable law.” Consider, for example, the federal tax code’s “parsonage exemption.”<sup>88</sup>

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(2014).

<sup>87</sup> Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO L. REV. 291, 344 (2014).

More generally, one might think of a doctrine such as the ministerial exception, already discussed separately above, as at least arguably an example of analogy of dignity, at least to the extent that the protective rule ends up applying regardless of the specific religious convictions of the church in question. I hesitate here, though, because I am not sure that in the ministerial exception and other religious institutional autonomy contexts it is useful or correct to distinguish between an “original” exemption and its extensions.

<sup>88</sup> I.R.C. § 107 (2012). See Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO L. REV. 291, 345-46 (2014); Perry Dane, *The Parsonage Exemption and Constitutional Glare*,

It turns out that, under ordinary principles of tax law, employees living in employer-provided housing as a requirement of their employment and for the benefit of their employer, are entitled to exclude the value of that housing from their taxable income. Examples include resident building managers and the President of the United States. Under these principles, *some* working clergypersons – such as Catholic priests living in rectories – would be entitled to exclude the value of their housing. But others would not. The statutory parsonage exemption, however, essentially extends that right, subject to certain technical limitations, to all clergy.<sup>89</sup>

As I argue in my prior article, the parsonage exemption poses a particularly completed to challenge to arguments about fairness and equality in the exemption context. On the one hand, it might seem unfair to give clergypersons a tax privilege to which they would otherwise not be entitled and which is not available to others.<sup>90</sup> But considerations of analogy of dignity suggest that it would be unfair – not illogical or even unreasonable, but unfair – to treat different clergypersons differently on the basis of the accident of their churches' ecclesiastical structures and theological conceptions. The parsonage exemption is thus a response to “an intractable

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CENTER FOR L. & RELIGION F., (Nov. 27, 2013), <http://clrforum.org/2013/11/27/parsonageexemption/>.

<sup>89</sup> *See id.*

<sup>90</sup> *Cf.* Freedom from Religion Found., Inc. v. Lew, No. 11-cv-626-bbc, 2013 U.S. Dist. LEXIS 166076, \*2-3, \*62 (W.D. Wis. Nov. 21, 2013) (holding that the parsonage exemption violates the Establishment Clause because it “provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise”), *vacated with instructions to dismiss for lack of standing*, 773 F.3d 815 (7<sup>th</sup> Cir. 2014). For my reaction to the district court opinion, see Perry Dane, *The Parsonage Exemption and Constitutional Glare*, CENTER FOR L. & RELIGION F., (Nov. 27, 2013), <http://clrforum.org/2013/11/27/parsonageexemption/>.

problem—either the law treats priests and rabbis the same, as under current law, or it treats rabbis and their next-door neighbors the same.”<sup>91</sup>

#### B. (7) Quasi-Establishment

Another ideal type emerges out of cases in which the law from which a religious exemption is sought is itself the product of perhaps attenuated religious commitments. The problem arises in part because of an accident of legal doctrine. When a law or practice is challenged on Establishment Clause grounds, the usual remedy is simply to strike down the law or practice. But if the law survives even a credible challenge, the courts have tended to treat that as a complete exoneration. Thus, for example, in the early 1960’s, the Supreme Court upheld Sunday Closing laws against an Establishment Clause challenge, admitting that Sunday was the day of rest of most Christian traditions but holding that the perpetuation of Sunday closing could now be justified on secular grounds.<sup>92</sup> It then faced the case of *Braunfeld v. Brown*, in which an Jewish shopkeeper sought an exemption from a Sunday closing law, complaining of the “substantial economic loss” he suffered because of the combined effect of needing to close on Saturday (for religious reasons) *and* on Sunday (to comply with the statute).<sup>93</sup> In rejecting Braunfeld’s free exercise argument (because the burden on his exercise of religion was merely

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<sup>91</sup> See Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO L. REV. 291, 347 (2014); Perry Dane, *The Parsonage Exemption and Constitutional Glare*, CENTER FOR L. & RELIGION F., (Nov. 27, 2013), <http://clrforum.org/2013/11/27/parsonageexemption/>.

<sup>92</sup> See *McGowan v. Maryland*, 366 U.S. 420 (1960).

<sup>93</sup> *Braunfeld v. Brown*, 366 U.S. 599 (1961).

“indirect”), the Court, however, treated the Sunday Closing law as it would any other neutral and generally applicable law and essentially ignored the vital fact that the difference between the majority’s day of rest and Braunfeld’s was not coincidental, but was instead the product of a long and very specific religious history, at least some of it involving the dynamics of relations between Christians and Jews.<sup>94</sup> Had the Court applied a little more doctrinal imagination, it could have, however, held that although Sunday Closing Laws were not so clearly a violation of the Establishment Clause as to justify striking down them, the establishment problem was sufficiently present to justify a partial remedy such as an exemption for Mr. Braunfeld.<sup>95</sup>

The Court ever so slightly made up for that lost opportunity in *Sherbert v. Verner* two years later. *Sherbert* recognized a Seventh Day Adventist’s constitutional right to a religion-based exemption from a state rule that would have deprived her of unemployment compensation because she could not, for religious reasons, take employment that would require her to work on Saturdays. In *Sherbert*, the Court at least noted that the State “expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the

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<sup>95</sup> For a similar argument, to different ends and with a different partial remedy, see Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 Yale L.J. 1196 (1982). For a similar discussion of the limitations of purely binary, all-or-nothing, legal reasoning a very different context, see David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135; Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L. J. 1 (2011).

Sabbatarian’s religious liberty”<sup>96</sup> and held that the “the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina’s general statutory scheme necessarily effects.”<sup>97</sup> With these words, the Court recognized, if only incidentally, what I will call the problem of “quasi-Establishment,”<sup>98</sup> when a civic ritual practice with religious roots comes into non-coincidental conflict with the ritual practice of a minority religious tradition whose history is intertwined with that of the majority.

This sort of principle of “quasi-Establishment” has not had much of a sweep. But, if taken seriously, it might have helped illuminate other, less obvious, cases. For example, in *Goldman v. Weinberger*, the Court denied an observant Jewish air force officer who regularly wore a yarmulke an exemption from a military dress regulation requiring service members to remove their headgear indoors.<sup>99</sup> In all the Court’s discussion of military “uniformity,” however, there was no account of the long, culturally specific, histories – at least partially influenced by religion – of both general Western and specifically Jewish headgear practices.<sup>100</sup>

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<sup>96</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>97</sup> *Id.*

<sup>98</sup> This class of cases could also be considered under the rubric of one of Justice Scalia’s “hybrid situations” in *Smith*, in which the two constitutional provisions in the “hybrid” are the Free Exercise Clause and the Establishment Clause.

<sup>99</sup> 450 U.S. 707(1986). The next year, Congress partially reversed this result by statute. See Pub. L. 100-180, Div. A, Title V, § 508(a)(2), Dec. 4, 1987, 101 Stat. 1086, *codified at* 10 U.S.C. § 774.

<sup>100</sup> *See*

### C. (8) “Most Favored Nation”

The two forms of neutrality arguments just canvassed involved comparisons among religious groups or traditions. An even more evocative set of cases, though, arises when the comparator is not religious. Consider, for example, *Fraternal Order of Police v. City of Newark*, in which a federal Court of Appeals, in an opinion written by then-Judge Alito, held that a Muslim police officer had a constitutional right to be exempted from his department’s no-beard policy, particularly because the department already allowed exemptions for officers who could not shave off their beards for medical reasons.<sup>101</sup>

Some scholars have argued that cases such as these reflect what they call a “most favored nation” principle.<sup>102</sup> If the state’s interests in a particular law or rule can still give way to allow exceptions for non-religious reasons, they are *a fortiori* not strong enough to deny exemptions for religious reasons. For my purposes, however, I want to employ that very resonant label in a way that is both narrower and broader than others have. On the one hand, it cannot be that *any* exemption on non-religious grounds should trigger the right to a religion-based exemption. Some secular exemptions, after all, just reflect enforcement priorities or structural limitations on a legal regime. On the other hand, the “most favored nation” principle might well apply, not

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<sup>101</sup> 170 F.3d 359 (3d Cir. 1999).

<sup>102</sup> See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49. Cf. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) (discussing principle of “equal liberty”).

only with respect to “exceptions” on non-religious grounds, but also with respect to more fundamental, underlying, classifications within legal regimes themselves. I have in mind, for example, the question in personal bankruptcy reorganizations, once litigated in the courts and now clarified by legislation, whether religious tithing should be treated as a “reasonable expense” in the debtor’s proposed budget.<sup>103</sup> Recall also the old chestnut in tort law whether a tort victim’s failure to consent to certain forms of medical treatment should reduce the damages owed by the tortfeasor under the doctrine of avoidable consequences (sometimes described as the failure to mitigate damages) or whether, to the contrary, the tortfeasor should, as in the paradigmatic “eggshell skull” doctrine, be held responsible even for injuries flowing from even unforeseeable personal characteristics of the victim.<sup>104</sup>

As these cases illustrate, the relevant question is not merely the state’s “interest” in this or that exception or legal doctrine, but whether a particular comparison works. Is a religious obligation not to share in some sense equivalent to a medical condition that counsels against shaving? Is a religious obligation to tithe equivalent to other financial obligations such as contracts? Is a religious principle whose consequence might be to exacerbate an injury equivalent to a pre-existing physical disorder? If the answers in these cases are “yes,” that not only suggests the justice of providing a religious “exemption,” it also disposes of some of the

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<sup>103</sup> See 11 U.S.C. § 1325(b)(2)(A) (amended by Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 1011 U.S.C. § 1325(b)(2)(A)5-183 (1998)).

<sup>104</sup> See, e.g., *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991).

fairness concerns, particularly regarding third-party effects, that might otherwise stand in the way of such exemptions.

But this is where the discussion here comes full circle. For it seems to me that, at the end of the day, it is only by way of an essentially existential encounter – a sort of direct sympathetic act of perception – that a legal system could *see* an obligation to tithe as the same as a debt or *see* a religious prohibition on receiving a blood transfusion as being just like an eggshell skull. Or, to put it another way, the law operates through analytic categories. It engages with its subject-matter through what Buber might consider a quintessential I-It relationship. But that I-It relationship can be informed by, and help motivate, an I-Thou relationship that stands beyond all such analytic categories. So even the most mundane questions with respect to religion-based exemptions cannot avoid the ultimate existential questions arising out of sheer dialogical encounter.

## V. Conclusion

This last observation prompts a more general question. The list of ideal types surveyed in this paper began with what I called the “core” or “paradigmatic” case. But many of the classic examples of actual religion-based exemptions ended up falling under one or another of the seven categories outside that “core.” For example, *Sherbert* and *Yoder*, the two great constitutional cases that, until *Smith*, established a *prima facie* free exercise right to exemptions (subject to a compelling interest test) turn out to be justifiable as responses to, respectively, a “quasi-



establishment” and “normative modesty.” So what is left of the “core,” particularly with respect to exemptions that an actual legal system might really be willing to grant?

More specifically, if the “core” ideal type involves a direct and unavoidable clash between a religious norm and a law “grounded in instrumental, empirical, and normative premises to which the state is fully and tenaciously committed,” why would any actual legal system even consider an exemption? That is to say, despite my proviso, isn’t a law “grounded in instrumental, empirical, and normative premises to which the state is fully and tenaciously committed” exactly the same as a law justified by a “compelling” state interest?

I want to offer two responses. To begin with, it is possible that a state “fully and tenaciously committed” to a legal rule would still, by way of general or specific norms, still be willing to carve out some room in which that rule is suspended – an island of immunity in which the competing religious *nomos* can operate. Indeed, *that* is precisely the challenge and the potential of what I have called “existential encounter.” And even on a purely doctrinal level, it is entirely possible that a state interest might indeed be compelling *in toto* but not compelling in the particular case of a religious claimant.<sup>105</sup>

The more general answer, though, is a little different. Even if the core case did end up being – at least insofar as actually-recognized exemptions are concerned – a null set, it still reverberates through all the other ideal types. It is still that underlying existential encounter –

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<sup>105</sup> Cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory education).

the willingness, whether explicit or not, to understand religion in jurisdictional terms – that helps the law demonstrate some “modesty” about its own instrumental, empirical, and even normative convictions, and also allows it to “see” comparisons among religions or between religious and non-religious phenomena that might otherwise be invisible.

One purpose of this typology has been to demonstrate how principles more mundane than the radical metaphors of jurisdiction, sovereignty, dialogue, and encounter, can explain or justify religion-based exemptions. I believe it has done that. But it has also suggested that, somewhere beneath the apparently tamer alternatives, however camouflaged it might be, the radical core still rests, like a beating heart.