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Volume 106 | Issue 4 Article 4

2018

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Recommended Citation

Segall, Eric J. (2018) "Putting the "Exercise" Back in Free Exercise," *Kentucky Law Journal*: Vol. 106 : Iss. 4 , Article 4.
Available at: https://uknowledge.uky.edu/klj/vol106/iss4/4

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Putting the "Exercise" Back in Free Exercise

Eric J. Segall[1]

"[T]he government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause." - Justice Ruth Bader Ginsburg[2]

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[1] Kathy and Lawrence Ashe Professor of Law, Georgia State University College of Law. I would like to thank Professor Josh Douglas and the students of the KENTUCKY LAW JOURNAL for hosting the wonderful symposium where I presented this paper. I also want to thank the participants of a free exercise workshop at the Southeastern Association of Law Schools who heard and commented on this thesis, especially Professor Christopher Lund who moderated that workshop.

[2] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2802 n.25 (2014) (Ginsburg, J., dissenting).

INTRODUCTION

For centuries, scholars, judges, and lawmakers have reasonably disagreed over whether people of faith should receive religious exemptions from generally applicable laws, and if so, whether there are occasions when the Constitution requires such exemptions. Prominent law professors and historians have not reached a consensus over how the Founding Fathers viewed these questions.[3] The Constitution's relevant text, that "Congress shall make no law respecting an establishment of religion[] or prohibiting the free exercise thereof[,]" is unhelpful.[4]

From 1791-1963, the Supreme Court consistently held that the First Amendment does not require religious exemptions from generally applicable laws.[5] Starting in 1963, the Court held that exemptions were required unless the government could meet strict scrutiny (it had a compelling interest and used the least restrictive means to further that interest), though in practice the test was far less rigorous than normal strict scrutiny.[6] In 1990, the Court changed direction and ruled that no one is entitled as a constitutional matter to religious exemptions from generally applicable laws as long as the statute was not enacted or implemented for discriminatory purposes.[7] Since 1990, however, both the Federal Government and numerous states have passed Religious Freedom Restoration Acts ("RFRAs"), providing legislative exemptions for people of faith from generally applicable laws unless the statute furthers a compelling government interest and narrowly furthers that interest.[8]

In the wake of Supreme Court decisions holding that gays and lesbians have a constitutional right to marry,[9] and the strong religious opposition to those holdings, as well as the Court's decision in *Hobby Lobby* that the federal RFRA applies to for-profit corporations,[10] cultural clashes have broken out around the country as people with religious objections to same-sex marriage have refused to provide their services to gays and lesbians.[11] In light of *Smith*, most of these claims are being

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[3] *Compare* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 915–32 (1992), *with* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 841–46 (1998).

[4] U.S. CONST. amend. I.

[5] *See* Michael P. Farris & Jordan W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 67–68 (1995).

[6] *See id.* at 68–69.

[7] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884–85 (1990); *see also* Farris & Lorence, *supra* note 5, at 65–67 (discussing the shock that ensued following *Employment Division v. Smith*).

[8] *See* Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST: FIX (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/?utm_term=.ec2c21345d95 [https://perma.cc/XCF8-AE4L].

[9] Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); United States v. Windsor, 133 S. Ct. 2675, 2696 (2013);

[10] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014).

[11] *See, e.g.*, Order Affirmed at 1–2, Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351 (Colo. App. Aug. 13, 2015); State v. Arlene's Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017).

brought by plaintiffs under state RFRAs.[12] Although these state statutes are not identical, most employ the strict scrutiny standard articulated (if not applied) by the Supreme Court prior to *Smith* and incorporated by Congress into the national RFRA.[13]

This Essay suggests that when the exemption claim, whether legislatively or judicially created, is one of pure conscience, not religious exercise, serious establishment clause values are implicated and perhaps even violated unless the exemption is also extended to non-religious moral objectors. This distinction between religious exercise and religious conscience has been overlooked and undervalued in our traditional debates over the propriety of religious exemptions from generally applicable laws. There is a substantial difference between the government impairing a religious exercise, action, or activity, and the government requiring a secular act that violates a person's religious sensibilities.

Part I discusses the difference between religious exercise and religious conscience. Part II explains why establishment clause and other constitutional values are significantly implicated by pure religious conscience-based exemptions and why legislatures and courts rarely, if ever, should grant such exemptions unless non-faith based moral objectors are also allowed to opt out of such laws. Part III argues that if the Court adopted that principle, it is unlikely that states would carve out religious exemptions to non-discrimination laws because such exemptions would have to apply to non-religious objectors as well.

I. RELIGIOUS CONSCIENCE V. RELIGIOUS EXERCISE

The First Amendment uses the term "exercise" of religion, not religious conscience.[14] There are many aspects of religious exercise that should be beyond governmental power to regulate. People should have the right to *believe* in anything they wish and *worship* any deity or deities, or none at all, without governmental interference. The government should not target particular religions for discriminatory treatment or enact laws the purpose of which are to harm religion, at least absent a compelling governmental interest. Where serious disagreements begin is whether people of faith must comply with secular laws that have the incidental effect of substantially burdening religion.

Our most prominent legal scholars and Supreme Court Justices strongly disagree over whether the founding fathers believed that the Constitution requires religious exemptions from generally applicable laws. One can read every word of the seminal articles by Professors Michael McConnell and Phillip Hamburger on this issue and likely come away believing there is no persuasive answer to the historical question.[15]

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[12] *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 163–71 (2016).

[13] *See id.* at 164 ("The compelling-interest test discarded by *Smith* now again applies to the federal government and more than half the states.").

[14] *See* U.S. CONST. amend. I.

[15] *See generally* Hamburger, *supra* note 3; McConnell, *supra* note 3.

In addition, Justices Scalia and O'Connor argued over the historical question as well, leading to yet another stalemate.[16] This Essay will not make originalist arguments given these reasonable debates among folks who, in good faith, have studied the question. What Justice Jackson said about difficult executive powers problems applies equally to trying to discern what the Founding Fathers thought about religious exemptions: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[17]

There are significant distinctions between laws affecting religious exercise and laws affecting religious conscience. Laws prohibiting the use of items used by people of faith during religious ceremonies directly interfere with religious exercise. Whether the practice is wine used by Catholics during communion or peyote used by Native Americans during religious ceremonies, laws that criminalize objects, food, or drugs that people use to practice their religious rituals implicate substantial free exercise concerns.[18] Also, laws that burden the ability of a person to engage in religious exercise during her Sabbath, such as the workers' compensation statute at issue in *Sherbert v. Verner*,[19] directly interfere with religious exercise. Moreover, statutes that prohibit the wearing of religious clothing in certain places, such as yarmulkes on government property,[20] or regulations preventing people of faith from the personal grooming required by their religion, such as beard or hair length in schools, prisons, and the military,[21] also impact religious exercise in a way that might justify exemptions from generally applicable laws. The common element in all these examples is the government's material interference with a person's religious activities, habits, rituals, or practices.

Objections based on religious conscience, however, often take quite different forms. Bakers who refuse to sell wedding cakes to gays and lesbians for use in same-sex weddings,[22] florists who refuse to provide flowers for such weddings,[23] and photographers and other vendors who wish to deny their services or products for use in such weddings,[24] are stating a different type of religious objection. In the face of religiously neutral non-discrimination laws requiring that vendors treat all people equally regardless of sexual orientation, the religious objectors noted above are arguing that their religious consciences or values are offended by their complicity in

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[16] *See* City of Boerne v. Flores, 521 U.S. 507, 537–65 (1997) (Scalia, J., concurring) (O'Connor, J., dissenting).

[17] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[18] *See, e.g.*, Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874–78 (1990); *see also id.* at 913 n.6 (Blackmun, J., dissenting).

[19] 374 U.S. 398, 399–401, 408–09 (1963).

[20] Goldman v. Weinberger, 475 U.S. 503, 504–05, 509–10 (1986).

[21] *See* Holt v. Hobbs, 135 S. Ct. 853, 859–61, 867 (2015) (granting a Muslim an exemption under RIULPA to wear a beard in prison longer than regulations allowed).

[22] *See, e.g.*, Order Affirmed, *supra* note 11, at 1–2.

[23] State v. Arlene's Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017), *petition for cert. filed*, No. 17-108, 2017 WL 3126218 (U.S. July 14, 2017).

[24] Elane Photography, LLC v. Willock, 309 P.3d 53, 59–60 (N.M. 2013).

acts they feel violate their religious precepts.[25] The same is true for doctors and nurses who for religious reasons do not want to assist in abortions,[26] or pharmacists who believe selling contraceptive devices makes them complicit in sexual behavior that offends their religious consciences.[27] In these cases, the government is not placing any obstacle between a person and his religious activities, rituals or ceremonies. Instead, the government is requiring a secular act that offends a person's sincere religious conscience.

When a baker sells cakes for a living, he is doing his job, not exercising religion.[28] When a doctor or nurse provides medical care, she is not exercising religion but taking care of people's health needs, usually to earn a living. When a pharmacist sells prescription medicine, he is not engaged in religious activity. When for-profit employers make decisions about their employees' health insurance, they are not exercising religion.

Of course, the baker's religious conscience might be offended if the government forces him to sell his products to a couple whose marriage he believes violates his religious tenets. Similarly, a doctor with religious objections to abortion may feel it violates his religious principles to assist with an abortion, and the same applies to a pharmacist forced by state law to sell the morning after pill. But, the protection for religion in both the Constitution, and in most RFRA's, is for the "exercise" of religion, not religious conscience.[29]

Is it possible to have a civil society where people possess a religious cloak of conscience protection that allows them to violate secular laws regardless of whether the objected-to-law interferes with religious activity, ceremony, ritual, or exercise? It is one thing for the government to deter people through force of law from engaging in religious exercise, but quite another to allow people to violate secular laws because their religious sensibilities are offended.

The devout will argue in good faith that they "exercise" their religion twenty-four hours a day, seven days a week, and when forced to comply with laws that offend their religious conscience, they cannot "exercise" their religion.[30] This argument may be sound as a theological matter (I do not judge), but should be quite troubling as a legal matter.[31] The right to the free exercise of religion assumes the actor is engaging in a religious act, ritual, or ceremony.[32] The definition of "exercise" presupposes some

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[25] *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2562–63 (2015).

[26] *See id.* at 2533–42 (showing examples of state and federal laws allowing medical personnel exemptions from general laws in cases of abortion and contraception).

[27] Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172, 1181 (W.D. Wash. 2012).

[28] *See* Eric Segall, *Common Sense, Legal Doctrine and Wedding Cakes*, DORF ON LAW (Aug. 2, 2017, 2:30 PM), http://www.dorfonlaw.org/2017/08/common-sense-legal-doctrine-and-wedding.html [https://perma.cc/E866-BN9Q].

[29] *See* U.S. CONST. amend. I; *see also, e.g.*, IND. CODE ANN. § 34-13-9-8 (LexisNexis 2018); VA. CODE ANN. § 57-2.02 (published by LexisNexis 2018).

[30] Segall, *supra* note 28.

[31] *Id.*

[32] *Id.*

action, movement, or exertion, and in the exemption context, some religious action, movement or exertion.[33] Selling a product for profit to the public *is not a religious action, movement, or exertion*, even if being forced to do so bothers a person's religious conscience.[34]

Most of the time, especially recently, the request for an exemption based solely on conscience comes in the form of a person not wanting to be complicit in a third-party's alleged sin.[35] This kind of claim often has material negative effects or consequences for that third-party. Scholars have written a great deal about this third-party harm idea.[36] The employer refusing to provide contraception to its employees, the doctor not willing to assist with an abortion, and the baker not willing to provide his products to a same-sex wedding, are all depriving third-parties of a benefit the law normally requires to be supplied and denigrating the activity the third-party wishes to engage in, which also stigmatizes that party.

There are rare instances when a claim for a conscience exemption based solely on refusal to perform a completely secular act does not harm third-parties. For example, the religious dissenter in *Thomas v. Review Board*, who did not want to make military weapons and after being fired, was denied unemployment benefits, made a pure conscience exemption to a secular act.[37] But, his request neither harmed nor stigmatized third-parties. The Court required that accommodation in the pre-*Smith* regime.[38] Although there may be strong Establishment Clause arguments that a non-religious moral dissenter to making weapons should receive the same treatment, at least no third-party was harmed by the exemption the Court required.

This difference between exemptions that cause third-party harm and exemptions that do not, while relevant to all exemption cases, takes on a special importance when the request to comply with a generally applicable law is based on refusal to perform a secular act, such as baking a cake or providing contraception, as opposed to a claim alleging the government is interfering with a person's ability to actually engage in a religious act or exercise.

In their important article discussing religious exemptions based on claims of complicity with third-parties, Professors Douglas Nejaime and Reva Siegel explained why these kinds of claims should be viewed by courts and legislatures differently than traditional religious exemption claims.[39] Nejaime and Siegel did not expressly distinguish between exercise and conscience, but their complicity analysis proceeds along similar lines.

When people of faith seek exemptions from generally applicable laws based solely on their objections to performing secular acts for other people as required by law,

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[33] *Id.*; *see also Exercise*, BLACK'S LAW DICTIONARY (8th ed. 2004); *Exercise*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

[34] Segall, *supra* note 28.

[35] See, for example, *supra* notes 22–27 and accompanying text.

[36] *See, e.g.*, Christopher C. Lund, *Religious Exemptions, Third Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375 (2016).

[37] Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 709–10, 720 (1981).

[38] *See* Farris & Lorence, *supra* note 5, at 68–69.

[39] *See generally* Nejaime & Siegel, *supra* note 25.

government accommodations "will have social meaning and material consequences for the law-abiding persons who the claimants say are sinning."[40] The baker refusing his services to a gay couple is asking that couple "to bear the costs of another's religious exercise."[41] These costs can come in three forms.

First, in communities where the third-party is a distinct minority, she may have difficulty obtaining the benefit the law provides. As Nejaime and Siegel document, where Catholic hospitals provide most of the medical services in rural areas and doctors and nurses can exempt themselves from laws generally requiring the provision of medical services but not abortion, women may be severely burdened in their ability to secure safe and necessary medical services.[42] There also may be wide geographical regions where gays and lesbians have a difficult time obtaining wedding services and other products if those providers are given exemptions from general non-discrimination laws.

But even if scarcity is not an issue, the refusal to provide one's services to a potential customer, client, or patient often denigrates and insults the person seeking the services. For example, David Mullins, one of the two partners in the gay couple denied a wedding cake by Masterpiece Cakeshop, described in an interview the experience as follows:

> Mullins said the three [Craig's mother was with them] went in "really excited" and Craig came in with a binder of ideas, but "it all went wrong immediately" after they sat down with Phillips.
>
> "He immediately asked us who the cake was for and we said it was for us, and he told us he would not make a cake for a same-sex wedding," Mullins said. "And what followed was a horrible pregnant pause. We were just mortified and embarrassed and quickly we just got up and we left."
>
> When the couple entered the parking lot, Mullins said they became emotional and broke down in tears — a moment they said was all the more "painful and profoundly embarrassing" because Craig's mother was present.[43]

Professors Nejaime and Siegel compared the dignitary harm suffered by gays and lesbians when they are refused services to the pain and suffering African-Americans encountered when they were excluded from all white establishments before Congress passed the Civil Rights Act of 1964.[44] In fact, Congress took this kind of exclusionary offense into account when passing that historic law.[45] Nejaime and Siegel observe

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[40] *Id.* at 2520.

[41] *Id.* at 2588.

[42] *See id.* at 2554–58.

[43] Chris Johnson, *Meet the Gay Couple at the Center of* Masterpiece Cakeshop *Case*, WASH. BLADE (Nov. 21, 2017, 3:35 PM), http://www.washingtonblade.com/2017/11/21/meet-the-gay-couple-at-the-center-of-the-masterpiece-cakeshop-case/ [https://perma.cc/Z8WS-QQME].

[44] *See* Nejaime & Siegel, *supra* note 25, at 2574–75.

[45] *Id.* at 2575.

that courts and legislators should take the same considerations into account when deciding "whether and how to grant persons religious exemptions from laws of general application."[46]

The third type of harm caused by granting religious exemptions to people for pure conscience claims is more diffused, yet still quite important. When laws of general applicability, such as non-discrimination statutes protecting gays and lesbians are enacted, the democratic process, for better or worse, has made a judgment about the importance of the interest at stake. It is one thing for those laws to be repealed through traditional political means. But, as Nejaime and Siegel point out, the normal results of the democratic process can be skewed by people using their religious conscience as a work around for the law in question.[47] Nejaime and Siegel state:

> When defenders of traditional marriage can no longer persuade by appeal to shared beliefs about the wrongs of same-sex relationships, they may instead appeal to beliefs about the importance of protecting religious pluralism, revising the secular rationale for the claim in a way that gives more direct and uninhibited expression to its religious logic.[48]

In an amicus brief filed in *Hobby Lobby*, religion law expert, Professor Marci Hamilton, made a similar argument about the federal RFRA:

> RFRA invites the believer into the judicial system to trump the duly enacted public policy. After having fought in the political process, the objecting taxpayers must then expend their own funds in federal litigation to protect the law that was passed, assuming they can intervene or obtain taxpayer standing, and they must do so under a standard that places a heavy thumb on the side of the balance of the religious believer. In short, religious believers are getting two bites at the public policy apple.[49]

The accommodation of these claims for special treatment because of religious conscience will more than likely lead to more societal conflict and more religious divisiveness.[50] Although this potential for religious conflict is true for all claims of exemptions from generally applicable laws, when the claimant's request causes harm to third-parties and is based solely on conscience, not exercise, the balance of equities shifts dramatically away from granting the exemption.[51] Moreover, as the next section argues, when only conscience is at issue, the granting, by a court or a

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[46] *Id.*

[47] *Id.* at 2553.

[48] *Id.*

[49] *See* Brief of The Freedom from Religion Foundation et al. as Amici Curiae Supporting Petitioner at 33, Sebelius v. Hobby Lobby Stores, Inc., 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), https://cardozo.yu.edu/sites/default/files/FFRF_HAMILTON_HobbyLobby_Amicus_FINAL_1.pdf [https://perma.cc/66GH-9T8H].

[50] *See* Nejaime & Siegel, *supra* note 25, at 2553.

[51] *See id.* at 2528–29.

legislature, of a religious exemption but not a secular, morals-based exemption raises serious Establishment Clause concerns.

II. THE NEED FOR EQUAL TREATMENT OF RELIGION AND NON-RELIGION

The First Amendment provides that "Congress shall make no law respecting an establishment of religion."[52] The Supreme Court's cases interpreting the clause are notorious for their inconsistency and lack of principle.[53] Whatever "pockets of coherence that periodically appear in establishment clause doctrine are . . . [little] more than way stations on a road to nowhere."[54] The Court's decisions on parochial school aid, legislative prayers, religious symbols on government property, and who has standing to bring Establishment Clause claims in the first instance, have been roundly criticized by most commentators regardless of which positions they hold on how to best interpret the clause. Professor Cynthia Ward summed up this sorry state of affairs by remarking that "[f]ew areas of . . . Supreme Court interpretation have attracted such strong and universal criticism as the Court's Establishment Clause jurisprudence."[55]

The Court has applied many different "tests" over the years in Establishment Clause cases. The most infamous is the *Lemon* test which, as originally conceived in *Lemon v. Kurtzman*, asks whether the government program or law at issue has a secular purpose, whether its principal or primary effect advances or inhibits religion, and whether the law fosters an excessive government entanglement with religion.[56] This approach, though never formally overruled by five Justices in the same case, has been much maligned over the years by judges and scholars alike.[57] Justice Scalia once said the following about the *Lemon* test, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."[58]

Justice O'Connor advocated for, and the Court at times adopted, an endorsement test asking whether the law in dispute would cause a reasonable observer to conclude that the government "endorses religion," thus sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the

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[52] U.S. CONST. amend. I.

[53] *See, e.g.*, Frederick Mark Gedicks, *Indeterminacy and the Establishment Clause*, 25 CONST. COMMENT. 279, 279 (2008).

[54] *Id.*

[55] Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1623 (2006).

[56] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[57] *See, e.g.*, Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 515–31 (1990) (discussing the evolution of the *Lemon* test).

[58] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

political community."[59] This standard, if one can call it that, is so vacuous that one scholar once wrote that the only way to distinguish constitutional symbols from unconstitutional symbols on government property was to "page" Justice O'Connor to see what she thought.[60]

At the other end of the spectrum, Justice Scalia consistently advocated for a "coercion" test to evaluate Establishment Clause challenges.[61] According to Scalia, the Establishment Clause allows the government to favor religion over non-religion in a symbolic manner and simply forbids the state from punishing, forbidding, or coercing religious practices.[62] So interpreted, the Establishment Clause prevents little or nothing already forbidden by the Free Exercise Clause and would allow the United States government and the states to fund religious organizations and/or schools with little or no restraint.

This Essay is not the place to defend a grand theory of interpretation for the Establishment Clause. But, considering core, mutually shared principles, as well as Free Speech and Equal Protection Clause values, most judges and scholars would likely agree on the following limitation on governmental authority that is sufficient to discuss the question at hand: the government cannot favor one religious group over another, nor should it favor religion over non-religion in a material way that places the government's official, coercive power behind religion.[63]

Judges and scholars have universally shared the first principle. For example, even Justice Rehnquist, who took an extremely narrow view of Establishment Clause limitations, wrote that the Establishment Clause was "designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment . . . States are prohibited as well from establishing a religion or discriminating between sects."[64] As to the second principle, it is well-recognized for free speech purposes that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[65]

The government is simply not allowed to pass laws or otherwise act coercively in ways that places its power behind one religion over another or religion over non-religion.[66] Transporting this fundamental idea into the religious exemption

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[59] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).
[60] Gedicks, *supra* note 53, at 281.
[61] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 632–38 (1992) (Scalia, J., dissenting).
[62] *Id.*
[63] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).
[64] *Id.*
[65] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[66] *Lee*, 505 U.S. at 587.

context demonstrates why the difference between exercise and conscience is far more important than the attention it has received so far from legal scholars.

When a person of faith needs to wear religious garb or use illegal drugs in the face of a generally applicable law prohibiting the garb or the drug, there is no substantial secular interest equivalent to the religious interest. An inmate might wish to groom himself as he pleases, or people may want to use drugs recreationally, but what is at stake for those objectors is not nearly of the same character as the person of faith who cannot exercise his religion. Although granting an exemption in these kinds of circumstances arguably favors religion over non-religion, the 'play in the joints' between the Establishment and Free Exercise Clauses allows the government to accommodate religion when that choice neither harms nor disparages anyone else's beliefs.[67]

A good way to illustrate this idea is to look at the facts of *Sherbert v. Verner*.[68] The plaintiff was denied unemployment benefits after she was fired for refusing to work on her Sabbath (Saturday).[69] The Court said the state's decision unconstitutionally burdened her free exercise rights.[70] The decision may be right or may be wrong, but it should not raise Establishment Clause concerns unless someone else similarly situated would not be entitled to the exemption. But it is hard to imagine who that person would be. A devoted little league coach or girl scout leader who needs to attend games or meetings on Saturday mornings could argue that they also want the exemption, but the Constitution does not specially protect those activities as it does with free exercise. Absent a similarly situated plaintiff, or a strong governmental interest, or harm to third-parties, granting the plaintiff in *Sherbert* the requested exemption so she can work on her Sabbath does not implicate other core constitutional values.[71]

The same is true with the jail inmate who seeks an exemption for religiously required personal grooming.[72] It is difficult to imagine why granting the inmate an exemption would place the government's coercive power behind religion in a way materially affecting other constitutional values. Theoretically, if another inmate could also make a compelling argument that a method of grooming has always been a core component of his communicative self-expression in a way protected by the First Amendment, he too might be constitutionally entitled to the exemption, but such an argument is unlikely to be strong or common.

An excellent example of a situation where other constitutional values are implicated by granting exemptions to people objecting to the required performance of a secular act involves conscientious objectors to military service (back when there was a draft). If the government allows people to escape war time duty because of their pacifist views grounded in religion, both the Establishment Clause, and likely the

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[67] Locke v. Davey, 540 U.S. 712, 718–19 (2004).
[68] 374 U.S. 398 (1963).
[69] *Id.* at 399.
[70] *Id.* at 410.
[71] *Id.* at 409.
[72] *See* Holt v. Hobbs, 135 S. Ct. 853, 860–61 (2015).

Equal Protection Clause, should require the same treatment for people whose objections to war are based on strong and consistent moral, non-religious views.[73] When the government allows the Quaker to avoid conscription, it is not because he is exercising religion when fighting a war, but because we as a society have decided that people with sincere religious objections to wars do not have to fight.[74] If the Quaker were granted the exemption but not the secular objector who holds a similar and consistent moral belief, the coercive power of the government would be used to favor religion over non-religion in a way that violates the basic principles set forth above.[75]

The Supreme Court has faced this issue in several cases and through fractured decisions reached similar conclusions. In *Welsh v. United States*, the Court had to interpret the conscientious objector statute relevant at the time, which provided that:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[76]

This text strongly suggests that objection to military service must be religious in nature and related to a belief in a "Supreme Being." Nevertheless, the Court's plurality opinion reaffirmed a previous case,[77] and held that a person holding a conscientious objection to all war is "religious" within the meaning of the law even if his opposition is based on moral or ethical beliefs about what is right and wrong, as long as he holds those beliefs with the strength of traditional religious convictions.[78] The opinion's rationale is murky, as was the reasoning of the prior case it relied on,[79] but the point for our purposes is that the Constitution should not allow the government to grant an exemption to people with religious objections to war but deny the exemption to those with life-long and consistent moral objections to war. A dedicated pacifist whose beliefs are generated by ethics and a dedicated pacifist whose beliefs are based in religious faith simply cannot be treated differently by the government when that difference causes the non-religious objector material harm (such as being drafted against one's will). The Free Exercise Clause, the Free Speech

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[73] Segall, *supra* note 28.

[74] *Id.*

[75] *See id.* ("[F]ighting in a war on behalf of the United States is simply not a religious exercise even if the government decides as a matter of grace to allow those who object *or religious grounds alone* to be exempt.").

[76] Welsh v. United States, 398 U.S. 333, 336 (1970).

[77] *See* United States v. Seeger, 380 U.S. 163 (1965).

[78] *Welsh*, 398 U.S. at 338–43.

[79] *See id.*

Clause, and the Equal Protection Clause all would be violated by the government taking such a stand.

The difference between the conscientious objector to war and the person of faith who wants to wear religious garb while in the military demonstrates the substance of the conscience/exercise distinction. In *Goldman v. Weinberger*, the Court denied a free exercise exemption to a doctor in the military who, against regulations, wanted to wear a yarmulke while on his base in California.[80] After the decision, Congress eventually amended the law to allow military personnel to wear religious apparel in certain circumstances and recently liberalized the rules allowing accommodations for "'individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) of service members' unless it might affect military readiness or unit cohesion . . . ."[81]

The desire to wear a piece of religious apparel central to one's religious identity is the exercise of religion in a sense that is different than wanting to forego a purely secular act such as fighting a war. Moreover, although a life-long Kentucky basketball fan might want to wear his UK hat while on the military base just as passionately as a person of the Jewish faith who wants to wear a yarmulke, the interests are obviously different. It is hard to imagine a non-religious request to wear a piece of clothing that when denied would put the government's coercive power behind a material preference for religion over non-religion, even though in theory the regulations now allow a person to make that case.

The final example of the conscience/exercise distinction, before we turn to non-discrimination laws, might be the hardest one even if somewhat unrealistic. Imagine a municipal or state law requiring Jewish butchers to serve pork in violation of their religious beliefs. Serving pork for a profit is not a religious exercise, yet somehow it feels as if the distinction between exercise and conscience breaks down here.

There are two answers. First, few legal rules are immune from creative hypotheticals that expose grey areas. In most circumstances, the line between pure conscience claims and free exercise claims will be clear. Second, when a person's religion requires them to forego a course of conduct, and they have done so consistently as part of their religious observance, it is unlikely there will be secular claims of equivalent status. Few butchers take principled stands regarding what they sell based on deeply held moral beliefs. A vegan seller of food, however, who for life has politically opposed the killing of animals, must have the same right to refuse to sell pork as the kosher butcher. Otherwise, the government would be using its coercive powers to support religion over non-religion (as opposed to simple symbolic gestures). That coercion violates fundamental constitutional principles limiting how the government treats religion and non-religion.

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[80] Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

[81] David Alexander, *Pentagon Relaxes Rules on Religious Clothing and Appearance in Military Uniforms Allowing Turbans, Head Scarfs, and Yarmulkes*, HUFFPOST (Jan. 23, 2014, 9:08 AM), https://www.huffingtonpost.com/2014/01/23/pentagon-religious-clothing_n_4651050.html [https://perma.cc/GH79-R4ZD].

III. NON-DISCRIMINATION LAWS

Imagine a state with both a RFRA and a state non-discrimination statute covering gays and lesbians. Alternatively, assume that that the Supreme Court reverses the *Smith* decision, something many academics favor, and brings back into play the Free Exercise Clause as a source of religious exemptions to generally applicable laws. A same-sex couple seeks a cake or flowers from a vendor who refuses, claiming that selling her wares to the couple violates her religious beliefs. How should a court evaluate this request for an exemption under the first part of the exemption analysis, i.e., has the person's exercise of religion been substantially burdened by the non-discrimination law?

Despite the holding of the *Hobby Lobby* decision,[82] selling goods to the public for a profit is not a *religious* exercise.[83] A person certainly may sincerely believe that her religious beliefs are violated if she must perform a secular act in a certain way, but that is not the same thing as exercising religion.[84] For example, some faiths might have rules about appropriate attire for adherents swimming in public pools, and those people might be bothered by the bathing suit choices others make when swimming at a public pool.[85] But when that person of faith swims in the pool, he is not exercising religion.[86] A florist selling flowers for profit is in the same position.

Yet, a state might wish to accommodate people who do not want to perform secular acts that burden their religious consciences, or the Supreme Court could decide the combination of the Free Exercise and Free Speech Clauses of the First Amendment require such an accommodation depending on the strength of the government interest at stake and the means used to achieve that interest. But if one person's religious conscience is offended by the required performance of a secular act and another person's non-religious moral conscience is equally offended, the government must treat both parties equally under the general principles derived from numerous constitutional provisions which prevent the government from materially favoring religion over non-religion.

In the context of the current culture wars over same-sex marriage, a wedding cake baker who refuses on religious grounds to sell a cake to a same-sex couple must be treated by courts and legislatures the same way as a baker who makes the decision based on a deeply held moral conviction that same-sex marriages are harmful in secular ways. Otherwise, the government is allowing the religious baker an important, material privilege that it is denying to a similarly situated non-religious baker in violation of the rule that the government cannot coercively favor religion over non-religion.

The same analysis would not necessarily apply when the government seeks to accommodate actual religious exercises. A person who wants to use a restricted drug

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[82] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
[83] Segall, *supra* note 28.
[84] *Id.*
[85] *Id.*
[86] *Id.*

for recreational purposes and a person who wants to do so for religious activity purposes are similarly situated in the sense that the government is granting a privilege to one person and not the other based on religion. But the First Amendment explicitly refers to the free exercise of religion, and more importantly, it is rational, given this country's history and traditions to grant some heightened protection to religious activity. Selling goods for profit to the public, as opposed to smoking peyote during a religious ritual as an important and long-standing component of that ritual, is not a religious activity in any material sense.

If courts require states to allow secular objectors to opt out of non-discrimination laws on the same basis as religious objectors, it is likely that many states would choose either to not pass such laws repeal them, or deny the religious objectors the exemptions in the first place (the choice preferred by this writer). That is exactly the choice states ought to make because the government must not treat religion better than non-religion in any but the most symbolic of ways.

In the context of non-discrimination laws, the vendor's choice to deny third-parties the treatment required by law, along with the dignity harms that come along with such decision, as well as the cultural clashes such decisions cause,[87] all suggest that deeply held non-religious moral and ethical views must be treated the same way by the government as traditional religious views. The added benefit of this approach is that it demonstrates that when it comes to non-religious activities, such as selling goods for profit, discrimination rooted in faith and discrimination rooted in other secular justifications are extremely hard, if not impossible, to distinguish for legal purposes. That statement is not true when it comes to the desire to use drugs, wear clothes, or engage in other necessary components of a person's actual religious exercise.

CONCLUSION

In *Employment Division v. Smith*, Justice Scalia quoted Justice Felix Frankfurter for the following proposition:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[88]

When the government allows someone's religious "scruples" or someone's "religious convictions" to relieve him or her of the obligation to comply with generally applicable laws, the government is accommodating something that is markedly

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[87] *See supra* Part I.

[88] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting Minersville Sch. Dist. v. Gobitis, 310 U. S. 586, 594–95 (1940)).

different from the free exercise of religion. Laws that do no more than burden religious conscience should not be treated the same way by courts or legislatures as statutes that burden religious exercise, activities, and rituals. The government should not be allowed, absent the most compelling of circumstances, to treat religious conscience materially differently than other kinds of conscience. Therefore, if the government decides to grant exemptions from generally applicable laws to people of faith when only their conscience is at issue, it must provide the same accommodation to all moral objectors. It is well past time to put the "exercise" back into the Free Exercise Clause.