8 Scopes of Religious Exemption
A NORMATIVE MAP
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8.1. Introduction

A. Diversity

The first part of wisdom in thinking rigorously about religion-based exemptions is to appreciate their diversity. One sign of that diversity is the wide range of laws from which exemptions have been sought, from insurance mandates to drug bans to compulsory education laws to humane slaughter laws to definitions of death to military uniform

That simple observation is all too easily forgotten whenever the general question of exemptions is seen through the lens of one or another specific highly polarized debate, as in the recent furious battles over religious exemption claims by opponents of same-sex marriage, contraceptive mandates, and the like.


5 See Humane Slaughter Act, 7 U.S.C.A. § 1901 (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.”).

6 See New Jersey Declaration of Death Act, N.J.S. 26:6A-1 to -8 (1991) (generally recognizing both cardiorespiratory 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 cardiorespiratory criteria . . .”).
regulations to grooming rules for police officers and prison inmates to photograph requirements for drivers' licenses to doctrines of bankruptcy law, tort law, and tax law, to civil rights statutes. 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 seem to persons of other faiths or no faith. That is a deep point to which I will return.

The diversity of religious exemptions is also apparent, though, in the various forms that legal regimes recognizing such exemptions can take, from entirely general rules—whether constitutional or statutory—to subject-specific and even religion-specific enactments. This spectrum raises

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7 Compare Goldman v. Weinberger, 475 U.S. 503 (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(a)-(b) (2012) (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").

8 Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999).


12 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).


15 See text accompanying notes 26-27, 49.


18 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).

19 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).

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important questions about relative legislative and judicial competencies and the craft of statutory design.\textsuperscript{20} For my purposes here, however, its main interest is that it points, if indirectly, to more fundamental differences among types of religion-based exemptions.

This essay 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 claims for exemption can rest comfortably in more than one box. But they are also distinct.

I offer this typology partly for its own sake, in the spirit of the hackneyed fox "who knows many things."\textsuperscript{21} I identify eight ideal types, grouped into three larger rubrics, representing a series of different analytic and justificatory structures, to help make sense of what might otherwise seem to be mysterious discontinuities and inconsistencies. But I also want to be a bit of a hedgehog, who "knows one big thing."\textsuperscript{22} I will suggest how the various types can illuminate each other 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.

\section*{B. Normative Challenges}

Lurking in the background of this essay, however, is another vital part of wisdom in thinking about religion-based exemptions, which even those of us who support 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.

\subsection*{1. Anomalousness}

The first normative difficulty that faces many claims for exemptions is conceptual. I have argued this point elsewhere\textsuperscript{23} and will only recapitulate it briefly here.\textsuperscript{24}

\begin{itemize}
  \item[20] See text accompanying note 102.
  \item[22] Ibid.
  \item[24] Much of the language in this subsection is also freely borrowed from my earlier work.
\end{itemize}
Justice Scalia correctly identified the gist of the problem in Employment Division v. Smith when, in drastically narrowing the right to religion-based exemptions recognized in prior cases, 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.” Religion-based exemptions can be anomalous, at least as constitutional rights, in at least three 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 generally depend on the motivations or beliefs of the claimant. 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. And third, as a corollary to the first two, the government interests that are brought to bear in exemption claims are typically measured, not in toto, but at the margin, as they apply to the persons seeking an exemption. 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.”
Of course, to admit that a right or doctrine is constitutionally "anomalous" is not to concede that it is impossible or wrong. 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.

It might be said 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. Even here, however, a bit of a paradox emerges.

General exemption regimes such as the Religious Freedom Restoration Act (RFRA) and its state equivalents are not constitutional rules as such but they have about them the aura of quasi-constitutional enactments. 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 cannot avoid being discriminatory. Because any law might give rise 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 hurdles.

2. Prejudice to Third Parties

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.

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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.

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.
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* or *Zubik* focused on the claim that allowing exemptions to employers who objected to the contraception mandate would deprive their employees of coverage to which they would otherwise be entitled. 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 whose service would otherwise not have been necessary. More broadly, one might argue that everyone contributing to an unemployment insurance fund bears the burden of exemptions such as those granted in *Sherbert v. Verner* and *Thomas v. Review Board*.

Another, conceptually distinct sort of third-party effect occurs when persons without the same religious 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 because of his purely secular but urgent need to see his beloved son’s college football games.

To be sure, the problem of third party effects is tricky. Many constitutional rights impose costs on third parties. It is also hard to draw a clear line between moderate (or acceptable) and severe (or unacceptable) third-party costs. Any consideration of “costs” also requires some measure of baselines; for example, even unqualified exemption from the contraception mandate would only return employees to the position they had before the mandate was imposed in the first place. And the claim of unfairness to nonreligious persons depends on the debatable premise, to which I will need to return that religion is not

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37 See note 50 and accompanying text.
"special." Nevertheless, even if the problems they pose are exaggerated, these two types of third-party effects do cast a sort of normative shadow over at least many religion-based exemptions.

That normative shadow has its own bounds. It might not reach, for example, 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. 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. The exemption would not give Ms. Stinemetz anything that could reasonably be considered a “secular benefit.” Nor would it impose any secular cost on either other individuals or the state; as the court pointed out, the bloodless transplant procedure was less expensive than a standard transplant. 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 way, such cases—precisely because the asserted religious burden is so difficult to process in conventional secular terms—actually 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. A Typology

The typological exercise that is the primary goal of this essay is analytic and normative. It seeks to identify both core categories and more peripheral ones, and show their sometimes dialectical relationship to each other. More generally, it tries to make sense of the distinct if overlapping justifications for exemptions, the values and paradigms that come into play in various types of exemptions, and the 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.

41 Ibid., at 161.
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 Jurisdiction/Recognition, Modesty, and Neutrality and Analogy.

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8.2. Jurisdiction/Recognition

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

The first ideal type is the most obvious—indeed quintessential. It arises when the dilemma for both the state and the religious believer is most poignant but 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”). 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.”

Indeed, I have argued that “the relationship between government and religion should be understood as an ‘existential encounter,’ in which each side tries

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42 I return to that point at the end of this paper. See text accompanying notes 116–117.
to make sense of, and decide whether or how to make room, for the other."44

I even suggest that this encounter has about it, in a fundamental sense, something of the feel of the I-Thou relationship described by Martin Buber.45 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.46 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.47 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,”48 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 context of any law whatsoever, however otherwise unremarkable, and that they depend on the personal characteristics of the claimant—seem quite ordinary.49

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.50 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

46 I refer to some of that process of mediation and refraction as “double coding.” See Dane, Double Coding, note 23.
49 See Dane, note 47.
50 This argument depends, of course, on the sort of robust legal pluralism that can answer the question “Is religion special?” with its own question:
possessing sovereign dignity does not exclude admitting the sovereign dignity of government. The challenge is to draw appropriate boundaries between the two.51 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.52 The proper test, as in other jurisdictional contexts, is not consent (actual or implied53) but a more subtle and difficult metric of community, affiliation, and authority.

B. Religious Institutional Autonomy (#2)

The second ideal type, which might not actually belong in this essay 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 as ecclesiastical organization,54 property disputes among factions of the church,55 and the sort of personnel decisions encompassed by the "ministerial exception" reaffirmed most recently in the Supreme Court's Hosanna-Tabor decision.56

Dane, Double Coding, note 23, at 57–58.
51 Dane, Double-Coding, note 23. 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." Dane, note 47, at 368.
54 See, e.g., Katz v. Singerman, 241 La. 103 (1961) (refusing to interfere in the decision of the board of a synagogue defined in its charter as Orthodox to allow mixed or family seating in apparent contravention of Orthodox Jewish religious norms).
55 The classic case was Watson v. Jones, 8Q U.S. 679 (1872).
56 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 Dane, Omalous Autonomy, note 23.
Religious institutional autonomy is important. What is less clear is whether it should properly be thought of as a set of "exemptions."57

I include 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.58 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. As I have also argued elsewhere, institutional autonomy is not an "anomalous" doctrine. It does not open 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.59 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 nonreligious counterparts: Admittedly, as the Court emphasized in Hosanna-Tabor, institutional autonomy is more expansive and uncompromising than the rights of self-governance accorded to other expressive voluntary associations. But it is at least in the same ballpark.60 All this helps explain, if only in

57 I have elsewhere suggested the following metaphor for the pieces of the law governing the relation of religion and the state in American law:

[The] establishment clause largely reflects the "wholesale" part of the relationship. It constructs, from the state's constitutional perspective, the general map delineating the competencies and appropriate jurisdictional domains of the state and religion. The free exercise clause—particularly in its consideration of religion-based exemptions—is then the retail piece of the puzzle. It considers adjusting the wholesale map to take into account the particular and often radically differing and even apparently idiosyncratic commitments of particular religious normative systems. Meanwhile, religious institutional autonomy is in some sense both wholesale and retail. . . . It seems to straddle the free exercise and establishment clauses and, if the truth be told, should really be treated as a third, distinct if unwritten, religion clause.


59 To be sure, this claim is contestable. See, e.g., Leslie C. Griffin, "Smith and Women's Equality," Cardozo Law Review 32 (2011): 1831, 1843 (describing ministerial exception as "a constitutional theory that protects churches' liberty to harm their employees and other third parties").

60 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 and Micah Schwartzman, "Against Religious Institutionalism," Virginia Law Review 99 (2013): 917, and 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.
why acceptance of institutional autonomy has fared better, both legally and politically, than what I have called the core instances of religion-based exemptions.

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. It is in that sense as close as our law is willing to come to what a full-fledged embrace of the jurisdictional principle might look like.

8.3. 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, especially 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.”

But that bold idea has long been domesticated if not suppressed by 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.” In this essay, 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 exemptions from 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 three categories are especially permeable, however, and, with respect to at least some of my examples, my account here should not be read to be deeply invested in whether they belong in one ideal type or another.

A. Instrumental Modesty (#3)

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

66 See Dane, Double-Coding, note 23.
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.\(^67\) And more recently, in its brief per curiam order in *Zubik* *v.* *Burwell*, the Court remanded a set of deeply contentious cases involving the contraceptive mandate to see if the parties could “arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage.”\(^68\)

Such cases are usually 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.

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 cases litigated under RFRA, 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.\(^69\) Indeed, the language in *Lee* denying the claim is about as adamant and unqualified 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.\(^70\) 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 specific 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 still accommodating the scruples of religious communities that, in effect, self-insure their members against workplace injuries and other losses.\(^71\)

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\(^68\) *Zubik* *v.* *Burwell*, 136 S. Ct. 1557 (2016) (internal quotation marks omitted).

\(^69\) *United States* *v.* *Lee*, 455 U.S. 252 (1982).

\(^70\) 26 U.S.C. § 1402(g).

\(^71\) See, e.g., Wis. Stat. § 102.28(3) (“provision of alternative benefits”). See also 625 ILCS 5/7-609 (creating limited exemption from automobile liability insurance requirements).
B. Empirical Modesty (#4)

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 regarding 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 carotid arteries with a sharp instrument and handling in connection with such slaughtering.72

The obvious purpose of this legislation 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 intriguing: It is framed, not as an exception, 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 does 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.73 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.” 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”74 or, for someone “whose circulatory and respiratory functions can be maintained solely by artificial means,” if he or she “has sustained irreversible

73 26 N.J.S. § 26:6A-1 to -5.
cessation of all functions of the entire brain." 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 ... .

Notice that this statute does not allow any sundry religious belief to trump the standard definition of death, nor could it. Rather, it reflects the precise contingency of the specific "modern" neurological criteria the state has adopted.

The empirical modesty apparent in the Humane Slaughter Act is relatively straightforward. As many of us who keep kosher would like to believe, a quick cut of the jugular vein can produce a quick, painless, death. The issues surrounding the New Jersey Declaration of Death Act are more multilayered, however. The exemption statute must be based at one level on genuine doubts about the adequacy of "brain death" as a definition of death. After all, how otherwise could a really dead person be accorded a "right" not to be declared dead? Those doubts are partly factual. "Brain death" is still a contested idea even in the discourse of secular medical ethics. But the full range of uncertainties is more profound. "Interwoven into this debate [on the definition of death] are deep philosophical issues on realism, the normative/descriptive

77 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.

At the risk of treating a serious topic far too lightly, it might be worth quoting here from a 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
Cause I'm not yet dead.


distinction, the relation of thought and language to the world, the mind–body problem, personhood, moral status, and the ethics of killing."79

Even apart from all those real empirical and meta-empirical worries, however, the New Jersey statute might also reflect the state's sensitivity to the sheer temporal situatedness of its own, however legitimate, claims to knowledge. It is 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 or similar religious practices as the legal equivalent of medical care for certain purposes.80 Such provisions have often been enacted after strenuous lobbying based in part on the presentation of alleged proofs of the healing efficacy of Christian Science practice.81 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 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. Normative Modesty (#5)

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.

80 See, e.g., Ark. Code § 21-4-207(a)(2)(B) (providing that a "certificate from a Christian Science practitioner listed in The Christian Science Journal may be submitted in lieu of a physician's certificate" for the purpose of authorizing sick leave for state employees); Wis. Stat. § 102.42 (workers' compensation provision requiring employers to provide a range of medical and other conventional treatments and supplies "or, at the option of the employee, Christian Science treatment in lieu of medical treatment, medicines, and medical supplies").
Sometimes, normative modesty is prompted by the existence of a distinct other value in the normative 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.” 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.”

On the surface, Justice Scalia’s notion of hybrid rights seems odd and arbitrary. If Amish parents would not have, separately considered, either a 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 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.” That is to say, it is precisely when a challenged rule might at least be suspicious on other grounds that the legal system, whether through constitutional doctrine or otherwise, might find it appropriate to be normatively modest about imposing the full effect of the rule 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.

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.
How much normative modesty might be appropriate with respect to any given set of 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. 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 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. As I have emphasized, 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.

8.4. Neutrality and Analogy

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 essay, I discuss a final set of three ideal types that relax the assumption that the law from which an exemption is sought is “undoubtedly nondiscriminatory and even neutral.” I am not interested here in laws that forthrightly discriminate

For a complementary but very different argument, 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,” U.C. Davis Law Review 48, no. 2 (2014): 703.

against religion, religious believer, or religious practices, which do not raise the problem of exemptions and which are therefore outside the scope of this essay. Nor do I want to invoke the argument that exemption claims in general can be recharacterized as pleas for “substantive” rather than merely “formal” neutrality. Rather, I want to describe some very specific classes of situations in which subtler and even roundabout considerations of neutrality—grounded as often in analogy as in the acid logic of equality—can come into play.

A. Quasi-Establishment (#6)

One ideal type emerges when religious claimants seek exemptions from laws embodying civic practices that are themselves grounded in religious practices or traditions. Of course, some laws of that sort will be held to violate the Establishment Clause on that ground and struck down in their entirety. But I want to consider a class of laws that almost but not quite cross the line. The binary and stepwise logic of legal reasoning has tended to treat the refusal to strike down such laws in toto as a complete exoneration even as against a more partial remedy such as an exemption for religious minorities. But that cannot be quite right.

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. It then faced Braunfeld v. Brown, a Free Exercise case in which a 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. In rejecting Braunfeld’s argument (for reasons not relevant here), the Court, however, treated the Sunday closing statute as if it were unproblematically neutral and essentially ignored the vital fact that the difference between the majority culture’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

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88 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).
90 Cf. Dane, note 87.
some of it involving the dynamics of relations between Christians and Jews, and between different understandings of Christianity itself. Had the Court applied a little more doctrinal imagination, it could have split the difference, holding that although Sunday Closing Laws were not so clearly a violation of the Establishment Clause as to justify striking down them in toto, the establishment problem was sufficiently present to justify a partial remedy such as an exemption for Mr. Braunfeld.

The Court only slightly made up for that lost opportunity in Sherbert v. Verner two years later. Sherbert—the very case that began the line of decisions that was ultimately pruned back in Smith—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 noted in passing that the State "expressly saves the Sunday worshipper from having to make the kind of..."
choice which we here hold infringes the Sabbatarian’s religious liberty”\textsuperscript{96} 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.”\textsuperscript{97} Thus it recognized, if only incidentally, what might be called the problem of “quasi-Establishment,” when a civic ritual practice with religious roots comes into noncoincidental conflict with the ritual practice of a minority religious tradition whose history is intertwined with that of the majority.

“Quasi-Establishments” also crop up in other, less obvious, disputes. For example, in \textit{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.\textsuperscript{98} 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.\textsuperscript{99}

The assumptions of doctrinal logic have kept courts from even seeing the normative challenge of “quasi-Establishments.”\textsuperscript{100} But legislatures, operating under legitimately different forms of reasoning, need not be so hampered.\textsuperscript{101} Thus it might be no coincidence that many states, even in the heyday of Sunday closing laws, did provide statutory exemptions for Sabbatarians. And it might similarly be no coincidence that Congress within a year partially reversed the result in \textit{Goldman} with a statute of its own.\textsuperscript{102}

\textsuperscript{97} Ibid.
\textsuperscript{98} 475 U.S. 503 (1986).
\textsuperscript{99} The history of headgear traditions among both Christians and Jews is complex, inconsistent, and often obscure. Suffice it to say that Christians, influenced in part by Saint Paul’s admonition in 1 Corinthians 11:3–5, have come to regard it as a sign of piety, respect, and deference for men to remove their hats in church and by extension in other indoor places or in the presence of superiors. And Jews, influenced in part by a variety of rabbinic sources and evolving practices, have come to regard it as a sign of piety, respect, and deference, as well as religious identity, for men to wear hats or kippas both in and out of doors. For one review of the history (whose prescriptive conclusion can safely be ignored), see Harry Steinhauer, “Yarmulke, ‘Holy Headgear’,” \textit{The Antioch Review} 48, no. 1 (1990): 4. For an account of an earlier significant religious clash over hat-wearing practices, see Penelope J. Corfield, “Dress for Deference and Dissent: Hats and the Decline of Hat Honour,” \textit{Costume} 23, no. 1 (1989): 64 (discussing 17th century English religious dissenters who refused, contrary to well-established norms, to doff hats to authority or to remove them in church).
\textsuperscript{100} Interestingly, Justice Scalia’s discussion of “hybrid rights” in \textit{Smith} pokes at binary legal reasoning in other contexts. See text accompanying notes 82–84. But outside the doctrine of religious institutional autonomy, see, e.g., \textit{EEOC v. Catholic University of America}, 83 F.3d 455, 467 (D.C. Cir. 1996), which is actually more of a straddle than a hybrid—see Dane, \textit{Double-Coding}, note 23, at 58—courts have not to my knowledge taken up the invitation to combine Establishment and Free Exercise concerns to produce a right to religion-based exemptions.
B. Analogy of Dignity (#7)

A distinct category arises out 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." I have in other work treated 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 or any abstract value of equality 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.

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.

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." 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.

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103 Dane, note 87, at 341.
104 Ibid., 334.
105 Dane, note 87, at 344.
107 Ibid.
As I argue in my prior article, the parsonage exemption poses an especially complicated 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. But considerations of analogy of dignity suggest that it might also be at least as unfair—not illogical or even unreasonable, but unfair—to treat different clergypersons differently based on the accident of their churches’ ecclesiastical structures and theological conceptions. The parsonage exemption is thus a response to “an intractable 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.”

C. “Most Favored Nation” (#8)

The two forms of argument just canvassed involved comparisons among religious groups or practices. 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 Appeals 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.

The reasoning by which Judge Alito reconciled the court’s holding and its use of a compelling interest test with Smith was a mite convoluted. Be that as it may, some scholars have argued that cases such as these reflect what they call a “most favored nation” principle. If the state’s interests in a given

108 Cf. Gaylor v. Mnuchin, 2017 U.S. Dist. LEXIS 165957, *58 (W.D. Wis. October 6, 2017) (holding that the parsonage exemption violates the Establishment Clause because its “purpose and effect ... is to provide financial assistance to one group of religious employees without any consideration to the secular employees who are similarly situated to ministers.”) For my reaction to an earlier, subsequently vacated, opinion along the same lines by the same federal district judge, see Dane, note 106.


110 170 F.3d 359 (3d Cir. 1999).

111 The Supreme Court in Smith backtracked on several decades of precedent by denying religious claimants even a prima facie right to exemption from most “neutral” and “generally applicable” laws; see Employment Div. v. Smith, 494 U.S. 872, 879, 885–886 (1990). The Court did not formally overrule its prior cases, however, distinguishing some of them because they allowed for “individualized governmental assessment” or “individualized exemptions” for nonreligious reasons. Ibid., at 884. But Judge Alito, in common with some academic commentators, concluded that the same principle applied whether the nonreligious exemption was “individual” or “categorical.” See also, for example, Frederick Mark Gedicks, “The Normalized Free Exercise Clause: Three Abnormalities,” Indiana Law Journal 75, no. 1 (2000): 77. For a different view, see, e.g., Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

112 See, e.g., Douglas Laycock, “The Remnants of Free Exercise,” Supreme Court Review (1990): 1, at 49. See also Christopher L. Eisgruber and Lawrence G. Sager, Religious Freedom and the
law or rule can still leave room for exceptions for nonreligious reasons, then those interests are *a fortiori* not strong enough to deny exemptions for religious reasons. I want to employ that very resonant label in a way that is both narrower and broader than other accounts, however. On the one hand, it cannot be that *any* exemption on nonreligious 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 should reasonably apply, not only to "exceptions" justified on nonreligious grounds, but also to more fundamental "inclusions" within legal regimes.\(^\text{113}\) 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.\(^\text{114}\) 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 unforeseeable personal characteristics of the victim.\(^\text{115}\)

As these examples illustrate, the relevant question is not merely the state's "interest" in this or that exception or legal doctrine, but whether a given comparison or analogy *works*. Is a religious obligation not to shave 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 preexisting 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 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 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

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\(^\text{112}\) I do not want to suggest that the line between "exemptions" and "inclusions" is easy or for that matter particularly interesting.


\(^\text{114}\) See, e.g., *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991).
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 regarding religion-based exemptions cannot avoid the ultimate existential questions arising out of sheer dialogical encounter.

8.5. Conclusion

Unvarnished religion-based exemptions are “anomalous.” The jurisdictional, pluralist, dialogical perspective claims only to transcend that simple fact, not to deny it. The various other ideal types canvassed in this essay do, however, represent more domesticated, less anomalous, forms of justification. In the “modesty” cases, the state is responding to its own uncertainties and hesitations. And in the “neutrality/analogy” cases, the exemptions at play are at least arguably more like than unlike other, conventional, legal rights and entitlements.

Much the same might be said about the problem of third-party effects. Indeed, at least some of the ideal types discussed here put in doubt the normative baseline according to which an affected third party might claim to be aggrieved in the first place. If, for example, tithing really is understood as a legally cognizable form of financial obligation, that would blunt what might otherwise be the legitimate grievance of a creditor whose interests are sacrificed to those of a debtor allowed to claim tithes as a reasonable expense in a personal bankruptcy reorganization.

Were I so inclined, I might even take this argument one step further and ask whether the “core” or “paradigmatic” cases, which are the most jurisprudentially “anomalous” and challenging, are actually not as important as they seem in the light of all the other types of exemptions. After all, if the “core” ideal type posits 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? Isn’t a law “grounded in instrumental, empirical, and normative premises to which the state is fully and tenaciously committed” the same as a law supported by a “compelling” state interest?

The simple analytic answer is not necessarily. Remember Mary Stinemetz.\(^{116}\) And even in harder cases, a state “fully and tenaciously committed” to a legal rule might still not find that rule so “compelling” as to preclude a religious exemption. It might, that is to say, be willing to carve out some room in which its 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.”\(^{117}\)

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\(^{116}\) See text accompanying notes 39–41.

\(^{117}\) It is also possible, as I noted earlier, that a state interest might indeed be compelling in toto but not compelling in the particular case of a religious claimant. See text accompanying note 27.
Nevertheless, as a practical matter, it is striking how many of the classic examples of actual religion-based exemptions fall under one or another of the categories outside the “core.” For example, *Sherbert* and *Yoder*, the two great constitutional cases that, until *Smith* came along, had established a prima facie free exercise right to exemptions (subject to a compelling interest test) turn out to be justifiable more narrowly on their own facts as responses to, respectively, a “quasi-establishment” and “normative modesty.” Similarly, the recent contraceptive mandate cases have turned on arguments about instrumental modesty. And conscientious exemption—one of the oldest forms of deference to religious convictions—reflects normative modesty, and for that matter a deep strain in the majority culture’s own normative patrimony. So if the “core” is not, conceptually or practically, exactly a null set, it might still be a very small one, at least with respect to exemptions that an actual legal system might really be willing to grant.

But the matter is not so simple. One purpose of this paper’s typological exercise 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. But I have also suggested that it is the underlying existential encounter—the willingness, whether explicit or not, to understand religion in jurisdictional terms—that helps the law demonstrate some “modesty” about its own convictions and allows it to “see” analogies that might otherwise be invisible. So somewhere beneath the apparently tamer alternatives I have so insistently identified still rests a radical if camouflaged core, like a beating heart.