

**THE PROPRIETY OF RELIGIOUS EXEMPTIONS:  
A RESPONSE TO SAGER**

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It is a sincere pleasure to be here to respond to Professor Lawrence Sager. I began thinking about these things fifteen years ago as a student in his church-state class. Professor Sager and I are close together on these issues. We think religious freedom is important. We think gay rights are important. And we think the American political, legal, and constitutional traditions are all properly concerned with protecting both—and, in a sense, protecting both equally. The goal is to enable people to live their lives in accord with their true identities, as much as possible. All people should be able to pursue their deep commitments—to be who they really are, LGBT people, religious people, all people. Though—and this is going to be a theme of mine—the variety of kinds of commitments may require an equal variety in the manners in which different commitments are accommodated.

Professor Sager and I agree on many things related to church and state. But to make it interesting, I'm going to focus most on where we disagree. Because I think our disagreements are actually somewhat helpful. Disagreements are unproductive when people start too far apart. But Professor Sager and I start very close together yet end up going somewhat different directions. So I want to talk about two things where we part company a little, which will correspond to certain parts of his Childress Lecture. First, I want to say something about the historical part of his lecture—the history of religious exemptions. Second, I want to talk about need for religious exemptions.



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\* Associate Professor of Law, Wayne State University Law School. This essay is a footnoted and lightly edited version of oral remarks presented at Saint Louis University School of Law in response to the 2015 Childress Lecture delivered by Lawrence Sager. Some of the things discussed briefly here—especially the latter half of these remarks—will be elaborated more fully in Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. (forthcoming 2017). Thanks to the *Saint Louis University Law Journal* and its editors for inviting me; to Chad Flanders, for all his thoughtful advice; and especially to Lawrence Sager, a true scholar, generous mentor, and (most importantly) kind and caring human being.

Let me start with a few comments about history. The way that Professor Sager tells it, American history lines up against religious exemptions. *Reynolds* back in the nineteenth century rejected exemptions for polygamy.<sup>1</sup> *Smith* in the twentieth century rejected exemptions for peyote use.<sup>2</sup> In between, there was *Yoder* and a few other cases.<sup>3</sup> But those cases were exceptional, against the dominant trust of the jurisprudence. *Smith* brought us back to the truth, back to *Reynolds*. And this isn't just Professor Sager's view. This is the stance Justice Scalia takes back in *Smith*.<sup>4</sup>

But there's more to this story, I think. Our history with religious exemptions is more complicated than *Smith* let on. Take *Reynolds*, for one thing. Does *Reynolds* say no exemptions, ever?<sup>5</sup> Or no exemptions in a case like this?<sup>6</sup> The latter, of course, could easily sound like the compelling-interest test. America in the nineteenth and twentieth centuries regulated peoples' sexual lives much more than it does today.<sup>7</sup> No matter the test, it's impossible to imagine the Supreme Court in 1878 giving constitutional protection to polygamy. Frankly, I doubt the Court is much inclined to do that today.

I wonder if the fairest reading of *Reynolds* is simply that the Court was against that kind of religious exemption with all other questions being pushed off to the future. And when that future arrived, in cases like *Sherbert* and *Yoder*, the Court adopted religious exemptions as a way of protecting America's burgeoning religious pluralism. The Court said that if the government wanted to burden religious exercise, it had to have a very good reason.<sup>8</sup> To be sure, exemptions were largely jettisoned as a constitutional matter in *Smith*. But *Smith* too is only part of the story. *Smith* has been, in

1. *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

2. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

3. The most important cases were *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). But there were a few others as well: *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

4. *Smith*, 494 U.S. at 878–82 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . We first had occasion to assert that principle in *Reynolds* . . . [and] the rule to which we have adhered ever since *Reynolds* plainly controls [this case].”).

5. *See, e.g., Reynolds*, 98 U.S. at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

6. *See, e.g., id.* at 164 (“Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which *were in violation of social duties or subversive of good order*. Polygamy has always been odious among the northern and western nations of Europe . . . .”) (emphasis added).

7. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973).

8. *Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 214.

significant part though certainly not entirely, superseded by legislative developments.<sup>9</sup>

Here's a simple and undisguisable truth. Religious exemptions are the law now, in most places. The federal government and more than half the states have the compelling-interest test.<sup>10</sup> Religious exemptions are thus a matter of right in a majority of United States jurisdictions. With the federal government, exemptions have now been the rule for more than fifty years, with just a short three-year interregnum. And many of the states, like my home state of Michigan, have had the compelling-interest test for the full fifty years.<sup>11</sup>

Now there has, as Professor Sager said, been some difficulty at defining "religion."<sup>12</sup> But I don't think that this has been a big problem. The Court has kept its definition properly broad. And the remaining boundary questions, though fascinating, rarely come up in real life. Every year I have to counsel students against adopting this as a topic for seminar papers. Similarly, *Smith's* fears of anarchy seem a little overwrought now.<sup>13</sup> The federal government and most states have the compelling-interest test now and have had it for decades.<sup>14</sup> If the compelling-interest test caused anarchy, we would know it by now.

I don't want to press all this too hard on you. I'm not trying to convince you of the opposite of Professor Sager's view. I'm not arguing that all the history lines up in favor of religious exemptions. That's not true either. What I'm saying is that our tradition is profoundly mixed on the issue of exemptions. At some times and in some places, we've given exemptions and had rules requiring exemptions. And at some times and in some places, we've denied exemptions and had rules denying exemptions. Our history is indelibly mixed.

There is, in fact, an article out there waiting for someone to write about all this. I'll even give you the title: "The History of the History of the Free Exercise Clause." Before *Smith*, I would have said that our constitutional

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9. See Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012). See also Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010) (discussing state RFRAs and state constitutional provisions providing *Sherbert/Yoder*-style protection).

10. Lund, *supra* note 9, at 466–67.

11. *E.g.*, *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998) (explaining that "religious freedom [claims] under art 1, § 4 of the Michigan Constitution [are analyzed] . . . under the compelling state interest test . . ."); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995) ("Michigan courts have always applied a strict scrutiny test to state regulation of religious freedom.").

12. Lawrence Sager, Keynote Address at the Saint Louis University School of Law Childress Lecture: Religious Freedom, Social Justice and Public Policy (Nov. 13, 2015), <http://law.slu.edu/event/childresslecture2015> [<http://perma.cc/3LEA-3TLB>].

13. *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990) ("Any society adopting such a system [the compelling-interest test] would be courting anarchy . . .").

14. Lund, *supra* note 9, at 466–67.

tradition tilted somewhat in favor of religious exemptions—after all, *Sherbert* and *Yoder* were governing law. *Smith* changed that, of course. But *Smith* did not just change the law; it tried to change the history too. *Smith* said the truth was that we had *never* given exemptions: Note the importance of the words “never” and “ever since” in one of *Smith*’s key passages:

We have *never* held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . . We first had occasion to assert that principle in *Reynolds* . . . . [and] the rule to which we have adhered *ever since Reynolds* plainly controls [this case].<sup>15</sup>

But, curiously enough, the history now has been changed back—apparently without Justice Scalia noticing. The idea that the no-exemptions position has always been our law—a core claim of *Smith*—has been quietly abandoned. In *Holt v. Hobbs*, for example, a unanimous Court treated *Smith* not as continuous with earlier precedent but as a fundamental departure from it:

*Smith* largely repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder* . . . and *Sherbert v. Verner* . . . . In those cases, we employed a balancing test that considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest.<sup>16</sup>

Everyone knows about the Court’s ability to make and remake the law. But here it has had an amazing ability to make and remake the history, too. I guess this is a call for skepticism. Don’t believe everything that people tell you.



Let me now say something about the propriety of exemptions. The reason why our system keeps coming back to religious exemptions is, I think, fairly simple. It is impossible to maintain genuine religious pluralism without religious exemptions. Think of the Native Americans in *Smith*, the peyote case.<sup>17</sup> The law forbids peyote; Native Americans use peyote in their religious rituals; those religious rituals cannot survive without religious exemptions.

The history of exemptions goes way back—back before the Founding. Groups like the Quakers demanded religious exemptions. And they demanded exemptions not only from religious requirements (like church taxes and religious oaths), but also from secular ones (like the draft). Massachusetts, for instance, exempted Quakers from serving in the militia all the way back in

15. *Smith*, 494 U.S. at 878–82 (emphasis added).

16. *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015).

17. *Smith*, 494 U.S. at 874.

1757.<sup>18</sup> What has changed in the centuries since the Founding is the scope of the problem. The kinds of religious claims have grown; there are more religious groups now, greater variety between religious groups, and greater variety in religious practices. And the kinds of legal obligations have also grown. Government regulates a lot more now; the modern twenty-first century regulatory state bears almost no resemblance to America in 1787. *Smith* used the word “anarchy” because it saw there being so many possible conflicts between religious practice and legal obligation. But it cuts the other way too. Precisely because there are so many conflicts, many religious practices (and faiths) won’t survive without exemptions.

Professor Sager knows this to be the case. And in his writings, he’s often quite warm to religious exemptions in particular cases. He wants to protect the peyote use in *Smith*.<sup>19</sup> He wants to protect the hoasca use in *Gonzales*.<sup>20</sup> I haven’t asked him this, but I feel pretty confident he would want to protect the Muslim prisoner in *Holt v. Hobbs*.<sup>21</sup> Yet the results in those cases were reached under statutes like RFRA, under the compelling-interest test. And I don’t know if they would have been reached otherwise.

So why is this? Why is Professor Sager attracted to religious exemptions in these particular cases, but against religious exemptions in general? It’s for one fundamental reason. Professor Sager worries that religious exemptions privilege religious commitments over other kinds of commitments.<sup>22</sup> And I understand this concern. In a way, I share it. But I think he’s trying to solve it the wrong way.

There’s a single sentence in one of his articles that I think captures both his view and where I differ with him. Here’s the sentence: “An important theme of this essay is that religion does not exhaust the commitments and passions that move human beings in deep and valuable ways.”<sup>23</sup> I’ve always been struck by this sentence. It’s not that I think Sager is wrong. It’s that I think Sager is so plainly right. *Of course*, religious commitments are not the only kinds of

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18. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 410 (2011).

19. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 93 (2007).

20. *Id.* at 265–66. *See also* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429–30 (2006).

21. *See* *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

22. EISGRUBER & SAGER, *supra* note 19, at 82 (calling RFRA an “entitle[ment] to disregard laws that get in the way of their religious convictions.”); *Id.* (referring to a “get-out-of-jail-free privilege”); *Id.* at 262 (stating RFRA “give[s] religiously motivated persons a presumptive right to disobey laws that [get] in their way.”).

23. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1245 n.dd (1994).

commitments that should be protected. *Of course*, religion doesn't exhaust the commitments and passions that move people in deep and valuable ways. Many other things are important to human beings. But religion nevertheless remains one of those things—it remains one of the things most important to human beings. And so instead of removing the protections we give to religion, we should be interested in protecting other kinds of deep concerns, too. If there's a problem here, that's the way to go about fixing it.

So, for example, we should protect secular conscience. I think the Court did a good job of that in cases like *Seeger* and *Welsh*.<sup>24</sup> We should protect speech and assembly, sexual liberties, contract and property. We should protect race and gender, sexual orientation and disability. The law should strive to protect all kinds of deep commitments. But that's not a reason to take away the protection given specifically to religious commitments. It's a call to broaden protections. To add categories that we think capture the other varieties of deep human commitment. "Religion" is not a perfect category. But no category is perfect. All categories are over and under inclusive. All categories involve cases at the margins and people who are just slightly beyond the margins. That's inevitable with categories.

The problem here is one of administration. In the framework of a written Constitution, it's impossible to protect the category of "deep and valuable commitments." It's not administrable. In the context of a written Constitution, the way to protect "deep and valuable commitments" is by naming certain specific deep and valuable commitments. We start with the ones we know. We keep an open mind about the rest. Religion is not the only thing in that category, to be sure. But religion is in that category.

To be sure, religion is somewhat unique in that it involves "exemptions" from generally applicable laws. But other rights involve exemptions too. Free speech sometimes involves exemptions from generally applicable laws.<sup>25</sup> Abortion rights sometimes involve exemptions from generally applicable laws.<sup>26</sup> Free exercise isn't entirely unique this way.

Even so, it is certainly true that religious liberty is different from those rights—with free exercise, the focus always seems to be exemptions. But that's just because religion is slightly different than other things. I'm not saying that religion is categorically more important than those other things—though of course some people will feel that way. It's simply that religious liberty is sufficiently different in structure that accommodation of it looks different than the accommodation of other human needs. It's the old Latin phrase, *mutatis*

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24. See *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

25. See Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1201 (2014) (making this point and providing citations).

26. See *id.* at 1201–02 (making this point and providing citations).

*mutandis*. Whenever one translates a principle—whether the principle be justice or fairness or toleration or what have you—from one domain to another, one has to make changes in the practical operation of the principle.

Religion is not the only deep and valuable human commitment. But it is a deep and valuable human commitment. And religious exemptions are what it looks like when society treats religion as a deep and valuable human commitment.

