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The Priority of Law: A Response to Michael Stokes Paulsen

Eugene Volokh*

Professor Paulsen's *Priority of God*¹ is an interesting and provocative contribution. Let me offer, though, a few critical thoughts.

First, an observation, which perhaps Professor Paulsen might not disagree with, but which other friends of religious freedom might find troubling: Under the *Priority of God* theory of religious freedom, a mostly irreligious country—like some European countries today, and like America might perhaps one day be—*shouldn't* provide such freedom.²

After all, the *Priority of God* view is that “religious liberty provisions make no sense except on the supposition that God exists—that such a thing as religious truth exists and that the commands of true religious faith are *real* and *superior* to the commands of civil society.”³ If most citizens doubt that God commands us to do anything, then they can't well act based on the supposed priority of God's commands. Under Professor Paulsen's view, religious liberty makes no sense in a mostly irreligious country.⁴

Second, *Priority of God* argues for a legal system that would require the government to judge quintessentially theological questions. The article proposes a strikingly broad vision of religious exemptions, but naturally it can't endorse exemptions from all laws, including murder laws and the like. So it cabins this vision by asserting that “surely there are some claims individuals make about God's commands that are simply intolerably and irredeemably false.”⁵ Courts applying the Free Exercise Clause would therefore grant exemptions only for a practice that “has any plausible claim

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1. Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013).

2. *See id.* at 1185–87.

3. *See id.* at 1161.

4. *Id.* at 1185–88.

5. *Id.* at 1161.

to religious truth—that is, as long as the claimed religious right is not contrary to the clear, universal moral command of God, resulting in serious harms outside the truly consenting, sincerely confessing community of faith.”⁶

Would it really advance religious freedom in a multidenominational society for courts to decide which practices have “plausible claim[s] to religious truth,” and what the “clear, universal moral command of God” might be? I don’t think so. The Court has rightly refused to get into the business of judging religious truth,⁷ or interpreting religious doctrine.⁸ Both religious believers and the Justices, I think, are better off that way.

Confirmation hearings are bad enough as they are. Do we want them to also turn into forums to discuss what the nominee thinks is the scope of the “clear, universal moral command of God”?⁹ Likewise, Religion Clauses cases even today yield a good deal of religious discord among Americans. Do we want to add to that the discord that would likely happen when there’s a 5-4 opinion about what constitutes the “clear, universal moral command of God”? My guess is no.

Finally, how could a nonreligious judge make decisions under such a system? How can someone who doesn’t believe in God figure out what the “clear, universal moral command of God” would be, if there were a God?

To be sure, judges sometimes have to deal with counterfactuals, and operate based on hypothetical assumptions. But nonreligious people are likely to find it very hard to operate based on a hypothetical that is so foreign to their worldview. And even religious people who lack much training or inclination for comparative theology might have a hard time reasoning about the “clear, universal moral command of God” that goes beyond their own understanding of God.

Third, it seems to me that *Priority of God* doesn’t sufficiently address the key question of religious exemption law: Why should *my* belief in what God commands me to do allow me to take something away from *you*, when you don’t share this belief?

Say that I believe I should trespass on your property (for instance, to worship at a visitation of the Virgin Mary that I think happened on your property). Say that I believe I should breach my contract, for instance because I’ve had a religious experience that tells me that I should no longer do what I promised to do. Say that I believe I should make loud calls to prayer in the early morning, though that might constitute a nuisance. Say

6. *Id.* at 1162.

7. See *United States v. Ballard*, 322 U.S. 78, 87–88 (1871).

8. See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

9. Paulsen, *supra* note 1, at 1162.

that I believe I should spread the word of God to everyone by distributing millions of copies of the holy books, but those books happen to be works to which you own the copyright.

These cases do not involve “very serious threats or injury to life, liberty, or even property of another” (the test *Priority of God* seems to urge), at least if “very serious” is to have much meaning.¹⁰ But all involve my claiming a constitutional right to do something that violates what the legal system views as your rights—and my claimed right is based on nothing more than my assertion that God told me to do this, even though your view of God is entirely different. I don’t think our legal system ought to endorse such a constitutional right.

Fourth, *Priority of God* seems to take the view that the Constitution enshrines a particular set of private rights, which we might enjoy without having others infringe them for religious reasons, but that the legal system may not recognize any new private rights that would have the same force.¹¹ Religious exemptions, the article says, should be denied when they harm others—but the courts shouldn’t count “purported harms to third parties that are either relatively minor or that involve injuries to new, non-common law, non-natural ‘rights’ (for example, statutory rights creating affirmative benefits or broad freedom from others’ actions extending beyond traditional baseline conceptions of private rights).”¹²

But does the Constitution really constitutionalize a “natural rights” theory of private rights, or for that matter constitutionalize the common law, where religious claims are involved? Nondiscrimination rights, employee rights, environmental law rights, copyright (outside the narrow scope of common-law copyright), and more might not be “common law” rights or “traditional” rights. Yet rightly or wrongly our society has embraced them, perhaps because its views of right and wrong are not the same as those of the judges who made the common law in centuries past.

I can imagine an originalist argument that suggests that the Free Exercise Clause was indeed understood as constitutionalizing a common-law baseline in such matters. But *Priority of God* does not make such an argument, and I doubt such an argument would be historically accurate. And if one isn’t speaking of originalist evidence and is instead making a normative claim about what would constitute a wise Free Exercise Clause jurisprudence, I see little basis for constitutionally enshrining the set of value

10. *Id.* at 1208.

11. *Id.* at 1208–09.

12. *Id.*

judgments embodied in traditional common law above the set of value judgments embodied in modern statutes.

Indeed, as I argued in an earlier article, *A Common-Law Model for Religious Exemptions*,¹³ a constitutional religious exemption regime of the *Sherbert/Yoder* variety would make much the same mistake as what is often called the *Lochner* regime did in its day—though likely even to a greater degree.¹⁴ *Lochner v. New York*¹⁵ constitutionalized some liberty claims (limited by traditional, common-law restraints), subject to a sort of moderate intermediate scrutiny.¹⁶ *Priority of God* would constitutionalize a vast range of liberty claims (limited by traditional, common-law restraints), subject to a standard *beyond* strict scrutiny.

To be sure, the liberty claims constitutionalized under the *Priority of God* model would be limited to claims based on religious belief. But the article's scheme would provide an incentive for broad claims of religious belief, both insincere and sincere.¹⁷ Many people, after all, have comprehensive religious visions that affect many aspects of their lives, and may conflict with a vast range of laws (especially once one considers that people might make religious claims based not just on scriptural laws but also on felt individual commands from God¹⁸).

As I argued in *A Common-Law Model for Religious Exemptions*, all the debates that the Court has largely avoided through its narrowing of substantive due process law would come back in front of the courts.¹⁹ *Washington v. Glucksberg*,²⁰ for instance, left questions about assisted suicide to the political branches, partly because such questions involve moral and practical questions that, the Court reasoned, should not be for unelected Supreme Court Justices to decide.²¹ But under the *Priority of God* model, anyone who has a religious objection to assisted suicide law (perhaps because he interprets the parable of the Good Samaritan as requiring him to offer help to others who are in agony) would have a solid religious

13. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

14. *See id.* at 1495–99.

15. 198 U.S. 45 (1905).

16. *See id.* at 60.

17. *See* Paulsen, *supra* note 1, at 1182–89, 1213–16.

18. *See, e.g.,* *Marvin v. Giles*, 463 N.E.2d 81 (Ohio Ct. App. 1983) (involving a religious exemption claim—brought in the context of an unemployment compensation scheme—based on a claimant's assertion that he “had a religious experience and was told by God to return to his home in Alabama within two years to help raise his deceased sister's six children”).

19. *See* Volokh, *A Common-Law Model for Religious Exemptions*, *supra* note 13, at 1529–36.

20. 521 U.S. 702 (1997).

21. *Id.* at 702–04, 735; *see also* Volokh, *A Common-Law Model for Religious Exemptions*, *supra* note 13, at 1528–29.

exemption claim, to be judged under strict scrutiny or perhaps super-strict scrutiny.²²

The same would go for any businessperson who has religious objections to antidiscrimination laws,²³ to minimum wage laws,²⁴ or a wide range of other laws. Anyone who feels a religious objection to testifying against a family member,²⁵ or against a coreligionist,²⁶ would presumptively get an exemption. Each legal obligation would survive only if courts conclude that the moral judgments behind the law are compelling enough, and the practical superiority of the law to other alternatives is clear enough. That is *Lochner* plus.

What, then, is the alternative? I wouldn't give up so quickly on the "modern" model that *Priority of God* rejects.²⁷

Under that model, religious exemptions are valuable to society because they are valuable to many members of society.²⁸ Some generally applicable laws impose very modest burdens on others, but impose a grave burden on religious groups, a burden that the lawmakers often didn't anticipate; consider, for instance, no-headgear rules in various forms of government

22. See Paulsen, *supra* note 1, at Parts III–IV.

23. See Volokh, *A Common-Law Model for Religious Exemptions*, *supra* note 13, at 1499.

24. See *id.* at 1524.

25. See Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 604 n.20 (1999); compare *In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (holding that RFRA does not allow a religiously motivated refusal to testify against a family member, at least in this case), and *In re Doe*, 842 F.2d 244, 245–48 (10th Cir. 1988) (same, under Free Exercise Clause), with *In re Greenberg*, 11 Fed. R. Evid. Serv. 579 (D. Conn. 1982) (holding the opposite, under Free Exercise Clause), and *In re Grand Jury Empaneling*, 171 F.3d at 837 (McKee, J., dissenting) (same, under RFRA). Cf. *Grossberg's Parents Ask to Keep Talks Confidential*, NEWARK STAR-LEDGER, Nov. 26, 1997, at 43:

The parents of Amy Grossberg, the college student accused of killing her newborn in Delaware . . . argued in court papers that talks with their daughter should be kept secret and that it is a violation of their right to the free exercise of religion [for prosecutors] to force them to divulge information. Rabbi Joel Roth, a legal expert at the Jewish Theological Seminary in New York City, confirmed yesterday he wrote an affidavit for the Grossbergs, stating that "under Jewish law, a mother and/or a father are not allowed to give testimony against their child in any legal proceeding."

Id.

26. See, e.g., Eugene Volokh, *Rabbi Jailed for Refusing to Testify Against Co-Religionists*, THE VOLOKH CONSPIRACY (Mar. 19, 2012, 10:48 PM), <http://volokh.com/2012/03/19/rabbi-jailed-for-refusing-to-testify-against-co-religionists/>; Benjamin Weiser, *Theological Discussion on Testifying Emerges in Terrorism Case*, N.Y. TIMES, Aug. 8, 1999, at 33 (discussing a witness who refused to testify on the grounds that in his view the Koran taught Muslims to do nothing that "will cause harm to innocents," and that testifying in this case would be seen by his community as "a major sin" and "a betrayal of our beliefs as Muslims").

27. See Paulsen, *supra* note 1, at Part II.C.

28. See *id.* at 1171.

employment, or motorcycle helmet laws that make it impossible for observant Sikhs to lawfully ride a motorcycle.²⁹ It therefore makes sense to implement some religious exemptions, in cases where they benefit the religious observers without much harming others.

Who then is to decide which exemptions really can be granted without much harming others? Legislatures sometimes can, by carving out statute-by-statute exemptions. But often legislatures won't think about it in advance, and it can be hard for religious minorities to get a place on the legislative agenda when the problem arises.³⁰

So it makes sense to have courts decide, in the first instance, whether an exemption would really unduly interfere with other people's rights and interests (whether directly or indirectly, for instance by costing taxpayers too much). That, after all, is what courts have long done when developing common-law rules and the exceptions to those rules, and indeed legislatures have sometimes delegated courts this authority in carving out exceptions even to statutory rules.³¹ Consider, for instance, the Federal Rules of Evidence, which delegate to courts the development of evidentiary privileges, or the Copyright Act of 1976, which delegates to courts the continued development of fair use law.³²

But, as with common-law rules and the statutory delegations, the legislatures should have the power to conclude that, for moral or practical reasons, some exemptions should be denied. And this power to reject court-made religious exemptions is what avoids the *Lochner* problem.

As it happens, I think this is pretty much the legal framework that we have after *Employment Division v. Smith*³³ in those jurisdictions that have adopted RFRAs. There are no *constitutionally mandated* exemptions (outside narrow zones, such as the power of religious institutions to select their clergy). But there are *statute-by-statute* exemptions, for example the conscientious objector exemption from draft law and the clergy-penitent privilege as an exemption from the duty to testify.³⁴

What is more, the RFRAs provide what I call a *common-law* exemption model, in which courts can recognize exemptions but subject to trumping by legislatures. Say, for instance, that a court applying a state RFRA concludes

29. See Volokh, *A Common-Law Model*, *supra* note 13, at 1477–78; see also *Buhl v. Hannigan*, 20 Cal. Rptr. 2d 740, 747–48 (Ct. App. 1993) (analyzing whether the mandatory motorcycle helmet law infringed upon a Sikh's freedom of religion); *State v. Miller*, 538 N.W.2d 573, 579 (Wis. Ct. App. 1995) (creating a religious exemption for bright signs on slow moving vehicles).

30. Volokh, *A Common-Law Model for Religious Exemptions*, *supra* note 13, at 1533–35.

31. See *id.* at 1476–80.

32. FED. R. EVID. 501; Copyright Act of 1976, 17 U.S.C. § 107 (2006); see also Volokh, *A Common Law Model for Religious Exemptions*, *supra* note 13, at 1476.

33. 494 U.S. 872 (1990).

34. See Volokh, *A Common-Law Model for Religious Exemptions*, *supra* note 13, at 1478–49.

that there ought to be a religious exemption from housing discrimination law for landlords who have a religious objection to lending to unmarried couples (or just to same-sex couples).³⁵ Then, if the legislature takes a different view of the importance of equal treatment in housing, the elected representatives of the people can have the final word.

Even religious people, I think, should be reluctant to have the “priority of God” enshrined as the basis of a principle to be applied *by secular courts*. Such a principle would require those courts to make judgments about what God might want and about what God cannot possibly want. And it would mean that, as a constitutional matter, my view of what God demands can undermine your rights, even though your view of God is very different from mine. Priority of law—with both statute-by-statute exemptions and RFRA exemptions providing a democratically supported basis for accommodating many (though not all) religious objections—is a better approach.

35. *See id.* at 1475–76, 1556–58 & n.191; *see also* *State v. French*, 460 N.W.2d 2, 9–11 (Minn. 1990) (accepting such a claim under the Minnesota Constitution, using the same strict scrutiny analysis that is mandated by state RFRA).
