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Religious Exemptions and the Common Good: A Reply to Professor Carmella

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RELIGIOUS EXEMPTIONS AND THE COMMON GOOD: A REPLY TO PROFESSOR CARMELLA

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I. INTRODUCTION

Exemptions for religious exercise from secular laws have always occupied an uneasy place in American constitutional jurisprudence. On the one hand, such exemptions arguably vindicate the implicit textual command of the First Amendment that religion enjoys a privileged status in its collision with the secular legal order.[1] On the other hand, religious exemptions violate foundational democratic principles of the equal treatment of citizens[2] and the idea that laws enacted by the people must govern.

In her article, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*,[3] Professor Angela Carmella tackles the justificational difficulties that religious exemptions involve. Although an avowed proponent of such exemptions, she maintains that one cannot simply rely upon the assertion that religion (as exercised) is textually privileged and that religious exemptions, therefore, follow.[4] There are, in fact, many mod-

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1 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). *See generally* Laura S. Underkuffler, *Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society*, 27 OXFORD REV. EDUC. 577, 583-88 (2001) [hereinafter *Public Funding for Religious Schools*]; Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. DET. MERCY L. REV. 463, 476-77 (2001).

2 *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448-49 (1994); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

3 *See* Angela C. Carmella, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007).

4 *Id.* at 405-06.

els of religious protection that would not reach as far as the idea of exemptions for religious individuals and institutions from secular laws.[5] Rather, Professor Carmella argues that for the idea of religious exemptions to be convincing, there must be substantive reasons for the exemption of religious individuals and institutions from otherwise valid societal norms.[6]

The core idea that Professor Carmella advances is that a principled case for religious exemptions can be grounded in the positive societal role that religion plays in public life. Focusing particularly on religious institutions, she argues that exemptions make sense because religious institutions, first, "function responsibly in the 'space' created by the exemption by filling that space with their own ethical-legal norms," and, second, "promote the common good (or at least do not thwart it) by the conduct [that] the exemption allows."[7] Religious institutions, she argues, do not function in a manner that is contrary to broader social objectives; rather, they "function according to their own ethical-legal systems, [and] are . . . capable of advancing the common good."[8] Because of these functions, exemptions for religious institutions "are designed not for the exclusive protection of religious freedom but for the protection of both religious freedom *and* the socio-political community that provides the conditions for the meaningful exercise of that freedom."[9]

This is an interesting argument, which is subject to various challenges as described below. However, I believe that the true value of Professor Carmella's thesis lies not in its truth or falsity but in what it suggests about our approach to this difficult area of First Amendment jurisprudence. Her thesis, I shall argue, represents a fundamental shift in our way of thinking about religious exemptions and their merit. In particular, by arguing that religious exemptions are justified by the common good that they advance, Professor Carmella implicitly—and at times explicitly—*assumes that the outcomes of religious exemptions must be evaluated against substantive, societal norms.* This is a bold move which challenges a fundamental premise of the dominant model of religion/state relations. It also carries a very important message for those who value both religious freedom and the maintenance of democratic principles.

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5 *Id.* at 420. For instance, it has been argued that the constitutional guarantee does not require that religion be privileged, but "that government [must] treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally." Eisgruber & Sager, *supra* note 2, at 1283.

6 Carmella, *supra* note 3, at 407.

7 *Id.* at 405-06.

8 *Id.* at 406.

9 *Id.*

II. THE CASE FOR RELIGIOUS INSTITUTIONAL EXEMPTIONS: A SUBSTANTIVE PROPOSAL AND CRITIQUE

In the opening sections of her article, Professor Carmella sets forth what can be seen as a variation on traditional arguments in favor of religious exemptions for religious institutions. Her argument is straight-forward:

> 1. Churches (and other religious institutions) operate with their own sets of ethical-legal norms.
>
> 2. In contrast to the model of "competing" religious and secular interests, which is so commonly assumed in First Amendment jurisprudence, the ethical-legal norms of religious institutions are often congruent with, and reinforcing of, societal notions of the common good.
>
> 3. Religious institutional exemptions, therefore, may serve a dual purpose. Not only do they promote the value of religious freedom, but they also promote the positive, substantive values on which society rests.[10]

The "common good" that provides the lynchpin for this argument is something that transcends traditional notions of the "state's interest" or "general welfare." Rather, it "captures the rich sense of the [broader] socio-political community."[11] Professor Carmella observes that "in its fullest sense, the common good describes social conditions designed to enable the 'total human development' of the person, such as human rights for individuals, social health and development of the community, and a just, stable, and secure order."[12] Her claim, thus, is "that churches, along with other institutions in society, are capable of providing some of those social goods that help create the conditions for human flourishing, and should enjoy exemptions that enable them to do so."[13]

The idea that religious institutions may perform positive societal functions is, of course, not new. As Professor Carmella discusses, the positive societal functions performed by religious institutions are reflected in the status of religious institutions as the purveyors of vital social services and in other positive societal roles which they have historically fulfilled. What is different about Professor Carmella's thesis is its advancement of these roles *as a reason* for the existence of religious institutional exemptions. In her view, we protect religious

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10 *See id.* 406-09.

11 *Id.* at 407.

12 *Id.*

13 *Id.* at 408.

institutions not only to protect religious believers but also to protect the interests of the secular society of which the religious institutions are a part.[14]

The idea that religious institutions are justified because they advance *secular* goals is interesting and provocative. However, its persuasiveness depends upon additional critical inquiry. For instance, how is the "common good" that Professor Carmella describes determined? What is the substantive content of this ideal?

The "common good" that Professor Carmella describes seems to be identified by the process that determines it. The common good, she writes, is one that "emerges from a broad consensus, achieved through deliberation and prudential argument."[15] It is "not necessarily the same as 'majoritarian determination' and it may be, on some matters, of necessity plural rather than universal."[16] Beyond these process guidelines, the content of the "common good" to which she refers is opaque. Perhaps this understanding of the common good is necessary in a divided, highly diverse society; but it makes the assertion that religious institutions further this societal vision very difficult to evaluate. Does this boil down to an assertion that religious institutions "further" the common good simply because they are actors in the process of societal "deliberation and prudential argument"? One surmises from her article that she intends something far more substantive than this. But if we have no specified content for this ideal, the idea that religious institutions further it is virtually impossible to assess.

Even if we ignore this issue, and assume that some collective determination of the "common good" can be imagined, the idea that advancement of this good justifies the constitutional principle of religious institutional exemptions can be challenged on several grounds. First, the idea that religious institutions advance the common good seems, on its face, to be little more than an assumption in which we might indulge. What evidence is there that this is true? If we assume a benign model of religion and religious institutions ("benign," that is, in societal terms) then this assumption might be true. However, human history is replete with persecution in the name of religious objectives. Religions, like all human institutions, can be the expositors of positive values, or they can be the expositors of bigotry, hatred, and oppression of those who hold opposing views.[17] Indeed, the cases in which religious groups seek freedom from secular laws—such as those involving the enforcement of employment standards, civil rights laws, drug prohibitions, and others—are often those that involve bitter disputes and fundamental conflict between religious ideas and so-

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14 *Id.*

15 *Id.* at 407.

16 *Id* at 407-08 (quoting Kyle Duncan, *Subsidiary and Establishments in the United States Constitution,* 52 VILL. L. REV. 67, 87-88 (2007)).

17 *See, e.g.,* Underkuffler, *Public Funding for Religious Schools*, *supra* note 1, at 584-85 (discussing studies of religious intolerance in the United States).

cietal norms.[18] One could argue that in cases where religious exemptions are necessary, it is *precisely because* there is conflict between religious assertions and broader notions of the "common good." It is difficult to see how we can possibly assume congruence between religious values and the "common good" in such cases.

Furthermore, even if it is true (as a factual matter) that religious institutions "are capable of providing some of those social goods that help create the conditions for human flourishing,"[19] it does not necessarily follow, as a matter of logic, that they "should enjoy exemptions that enable them to do so."[20] Even if religious institutions can perform positive social functions, they are presumably no more worthy (for this reason) than secular institutions that likewise perform them. Just because an institution—religious or secular—provides useful societal goods does not, of itself, make the case for that institution's claim to exemption from secular norms and secular laws. There must be other reasons that support this special and privileged status.

In summary, the idea that religious exemptions may be justified because of their advancement of the common good usefully challenges the largely unquestioned assumption of religion/state antagonism and points out that the substantive values advanced by both may be supportive and reinforcing. However, beyond this important insight, it is difficult to see how this model can be used to justify the general notion of religious institutional exemptions from secular laws.

The significance of Professor Carmella's work does not, however, end with these threshold questions. And it is its further implications that I find particularly penetrating and courageous.

To explore these deeper issues, let us return to the idea of the "common good" that Professor Carmella employs. The idea of the "common good" that she endorses, as outlined above, is understood in broad, societal terms. It refers to "the totality of goods that create the conditions in which persons flourish."[21] It "describes social conditions designed to enable the 'total human development' of the person."[22] It "emerges from a broad consensus, achieved through [social] deliberation and prudential argument."[23]

It is apparent from this discussion that the "common good" on which Professor Carmella's argument rests is societally, not religiously, derived. Although religions may contribute to this process, secular individuals and institu-

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18 *See* Laura S. Underkuffler, *Thoughts on* Smith *and Religious-Group Autonomy*, 2004 BYU L. REV. 1773, 1783-88 (2004).

19 Carmella, *supra* note 3, at 408.

20 *Id.*

21 *Id.* at 407 (quoting Angela C. Carmella, *A Catholic View of Law and Justice, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 255, 266 (Michael W. McConnell et al. eds., 2001)).

22 *Id.*

23 *Id.*

tions maintain equal if not greater roles. As a result, her argument for religious exemptions is anchored in the idea of the positive *congruence* of religious norms with those that are generated by secular societal processes.

This orientation raises an important question. How can the possible congruence of religious norms and secular (state) norms be critical to the idea of religious exemptions? If the ultimate constitutional concern is the protection of free religious exercise, or religious expression, or religious autonomy, why should we care whether religious norms are in harmony with secular ones, or not?

The obvious answer is that we should not care. If protection of religious freedom or autonomy is our goal, concern about the congruence of religious norms with secular ones has no place. Indeed, insulation of religious norms and practices from secular demands has always been the working assumption of religious-exemption jurisprudence. Religion is protected, under this doctrine, because it is something whose values cannot be questioned and whose conclusions from those values are therefore placed beyond the reach of the secular state and its laws.[24]

By arguing that advancement of the common good is the justificatory reason for religious institutional exemptions, Professor Carmella breaks with this fundamental tenet of religious-exemption jurisprudence. Implicitly, in her scheme, religious values and secular notions of the common good do not exist in separate spheres, as the traditional approach would tell us. Rather, the common good, as defined by societal or secular norms, must be used to evaluate the permissibility of claimed religious institutional values and activities.

How radical is this notion? The idea that secular, societal norms have always played some residual role in the legal treatment of claimed religious exemptions is, of course, undeniable. From the time of the Founding Era, legal protection of claimed religious activity has always had, as its outer boundary, the "'peace,' 'safety' and . . . reciprocal rights of others."[25] For instance, as James Madison famously stated, religious exercise cannot be protected "if the

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[24] For instance, the Supreme Court has repeatedly expressed the view that the religious beliefs protected by the First Amendment are necessarily subjective, understood and defined by the individual adherent alone. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86-87 (1944) ("Men may believe what they cannot prove . . . . [T]he fact that [religious experiences] . . . may be beyond the ken of mortals does not mean that they can be made suspect before the law."); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of [the] courts to say . . . what is a religious practice or activity . . . ."); Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (inquiring into the sincerity of an individual's religious beliefs might well "run afoul of the spirit of constitutionally protected religious guarantees").

[25] Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 923 (1995) (discussing the historical record).

preservation of equal liberty or the existence of the State is manifestly endangered."[26]

However, Professor Carmella is saying something far more than this. She is postulating that there must be some substantive scrutiny of whether the "common good," as secularly derived, will be achieved in any individual case of claimed religious exemption. As she explains, "the common good argument is an attempt to work out a methodology for '*responsible*' religious freedom in the exemption context."[27] For example, she endorses the Supreme Court's decision in the *Bob Jones* case,[28] which denied a religiously affiliated college the right to retain its tax-exempt status and engage in racially discriminatory policies.[29] That decision, Professor Carmella writes, is an example of the principle that when religious institutions are granted special, protected status, "social benefit, not harm, is expected."[30] As she forthrightly acknowledges, "there are constitutional limits to the operation of . . . trust [that religious organizations further the common good] when it comes to the teachings of worship communities."[31]

This is a substantial departure from the rhetoric and spirit of First Amendment free-exercise jurisprudence. Under prevailing assumptions, a particular religious exercise or institution is protected *precisely because* the state is not competent to be its judge.[32] Religion is exempt from secular laws *precisely because* we (the state) cannot, and should not, evaluate it against prevailing societal norms.

Professor Carmella is keenly aware of the profound theoretical departure that her approach requires. At one point she acknowledges that "[t]he reader may be uncomfortable with an approach that involves the 'judgment' of religion . . . ."[33] However, she stands her ground. In her view,

> [J]udgment regarding the social impact of an exemption is inevitable when a court or legislature is trying to determine whether the goals of a law or the needs of society will be undermined if the law is not uniformly applied. Courts and legislatures are always evaluating, even if implicitly and indirectly, the compatibility of exemptions with the common good and the

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26 James Madison, *Amendments to the Declaration of Rights*, I THE PAPERS OF JAMES MADISON 174, 175 (William T. Hutchinson & William M.E. Kachal eds., 1962).

27 Carmella, *supra* note 3, at 407 (emphasis added).

28 Bob Jones Univ. v. U.S., 461 U.S. 574 (1983).

29 Carmella, *supra* note 3, at 419.

30 *Id.*

31 *Id.* at 420.

32 *Id.* at 413.

33 *Id.* at 408.

> congruence of alternative ethical-legal systems with broader societal norms.[34]

Further, she claims that is far better to "mak[e] the evaluation comprehensive and explicit"[35] than to pretend that it is not done.[36]

For those who prize religious freedom, Professor Carmella's positions may seem paradoxical at best and dangerous at worst. How can one support the idea of religious autonomy, through religious exemptions, and yet undermine that idea by subjecting religious values to the dictates of general societal norms? One could suppose that it will be of little solace to religious-institutional actors that their actions are seen as providing positive societal benefits if they are, at the same time, to be held accountable to secular ideas of "the common good."

These objections undoubtedly have some truth. However, advocates of religious freedom should pause before rejecting Professor Carmella's position so completely. One could argue persuasively that in the United States, the assumed model of religion as separate and autonomous has persisted precisely because, to date, the conflicts between religion's values and society's values have been so limited. We have constructed our models on the basis of what has been—essentially—a society of homogeneous religious values. As a result, genuine challenges to the social order by major religious groups have been few and far between. This is not true in many areas of the world today, including countries in Europe with which we have been culturally allied.[37] Throughout the world, deep differences, rooted in different religious and cultural identities, threaten the values of tolerance and the ability of societies to respond positively and peacefully to deep and enduring change. As religious diversity increases in this country, the question of the divergence of religious and societal norms will become more pressing. No longer will an implicit assumption of congruence between religious and secular values be adequate to address these issues. No longer will a simple model of religious separatism suffice.

As these new challenges arise, religious and secular advocates will be forced to consider their relations in deeper and more complex terms. In particular, advocates of religious freedom will be forced to develop new ways to identify and protect their legitimate interests, while acknowledging increased tensions and secular demands. It is here that Professor Carmella's message is so trenchant. With increased societal awareness of the costs of religious freedom, religious-freedom advocates will face a choice. Either they can insist upon a model of religious separation and autonomy—a model that will become increasing untenable—or they can engage the process of redefinition that will occur.

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34 *Id.* at 409.

35 *Id.*

36 *Id.*

37 *See, e.g.*, Harry Judge, *Faith-Based Schools and State Funding: A Partial Argument*, 27 OXFORD REV. EDUC. 463, 472-73 (2001) (discussing recent religious tensions and intolerance in the U.K.).

To put the matter in Professor Carmella's terms, rather than resisting these tensions with a rigid model of separation and autonomy, it would behoove those who wish to preserve religious freedom to acknowledge that religion is indeed a part of the larger social fabric and to work toward a more nuanced and inclusive idea of the common good.

III. CODA

Two decades ago, the idea of value neutrality as the foundational democratic principle was at its height in the American legal academy. The overriding goal of democracy, as envisioned by many theorists at the time, was to honor the diverse needs of pluralism. Democracy, it was believed, should not attempt to impose particular values on its citizens beyond those that are required by the democratic process.

In more recent years, the idea of value neutrality as the dominant concern of democratic governance has been seriously challenged. As attempts have been made to establish democratic regimes in countries with totalitarian histories, the need for shared, basic, underlying societal values has become glaringly apparent.[38]

Religion-Clause jurisprudence, it could be argued, is the one area of American constitutional theory where the mythology of value-neutrality as the basic, operative principle is still alive and well. By accepting the idea that religion is generally beyond civil cognizance, we have boxed ourselves into a doctrinal corner in which religion is, formally at least, exempt from any evaluation in terms of the foundational values on which the society must rest. Professor Carmella's idea of the substantive review of religion's congruence with the "common good" might seem to be a radical and disturbing departure from the historic model of the exemption of religion from the scrutiny of secular norms. But I would argue that she is simply courageous in forcing us to face what, of necessity, our democracy demands.

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[38] Consider, for instance, the remarks of Raul Alfonsin, elected to Argentina's presidency after years of totalitarian rule:

> [I]n order to fulfill the mandate given us by society, the main goal of our government is to consolidate the democratic system as a peaceful procedure for the solution of conflicts and to establish the rule of law . . . . But neither democracy nor the rule of law can be . . . secured in a society, if that society does not deeply internalize the norms of public morality that serve as the basis of living in harmony and tolerance . . . .

Raul Alfonsin, President of Argentina, Speech at Yale Law School (November 18, 1986).