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PERMEABLE SOVEREIGNTY AND RELIGIOUS LIBERTY

Paul Horwitz *

ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 2012. Pp. 333. Hardcover, \$49.95.

INTRODUCTION

With *Against Obligation*,¹ Abner Greene² has accomplished a valuable task: he has written a book that is both timeless and timely. It is timeless insofar as the main questions asked by his book—whether citizens have a general moral duty to obey the law, and whether legal interpreters “have a duty to follow prior or higher sources of constitutional meaning”³—are perennial, and perennially fresh, questions in legal and constitutional theory.⁴ It is timely because one of the main contributions of the book—its focus on what Greene calls “permeable sovereignty,” and particularly its application of that concept to questions of law’s treatment of religious obligations—is a central part of contemporary developments in church-state law and scholarship.⁵

* Gordon Rosen Professor, University of Alabama School of Law. Thanks to Abner Greene for reading and commenting on an earlier draft, and to Matthew Bailey for research assistance.

1. ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012) [hereinafter GREENE, *AGAINST OBLIGATION*].

2. Leonard F. Manning Professor of Law, Fordham University School of Law.

3. See, e.g., GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 1-2.

4. I would be remiss if I did not note another recent and excellent book that focuses on roughly the same questions: LAURENCE CLAUS, *LAW’S EVOLUTION AND HUMAN UNDERSTANDING* (2012).

5. In church-state law, Greene’s discussion of permeable sovereignty is highly relevant to recent cases involving the ministerial exception, see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), and the “contraceptive mandate.” See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dept. of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). In church-state scholarship, Greene’s book is relevant to recent discussions of institutional religious freedom and/or “freedom of the church.” See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013) [hereinafter HORWITZ, *FIRST AMENDMENT INSTITUTIONS*]; Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 *MERCER L. REV.* 405 (2013); Jed Glickstein, Note, *Should the Ministerial Exception Apply to Functions, Not Persons?*, 122 *YALE L.J.* 1964 (2013); Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 *MINN. L. REV.* 1891 (2013); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 *VA. L. REV.* 1049 (2013) [hereinafter Horwitz, *Defending (Religious) Institutionalism*]; Paul Horwitz, *Rethinking the Law, Not Abandoning It: A Comment on “Overlapping Jurisdictions,”* 4 *FAULKNER L. REV.* 351 (2013) [hereinafter Horwitz, *Rethinking the Law*]; John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 *CARDOZO L. REV.* 1693 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 *VA. L. REV.* 917 (2013); Symposium, *Freedom of the Church in the Modern Age*, *J. CONTEMP. LEGAL ISSUES* (forthcoming). Those are just a few examples, from the past year alone, of the explosion in this area of church-state scholarship. To this very incomplete list I would add, at a

The combination of timeless and timely topics is not always seamlessly achieved.⁶ Even if Greene himself sees the book as a unity, readers and reviews may end up focusing more on one aspect of Greene's book than on others. That is an occupational hazard for one who writes, as Greene has done, such a sweeping book, using the general concept of obligation to cover a wide range of issues, from the fundamental jurisprudential question whether there is a general duty of political obedience,⁷ to the problems with history⁸ and precedent⁹ as authoritative interpretive sources. The scope of his achievement deserves to be recognized and praised.

Nevertheless, I too will focus on just a sliver of his book: chapter two of *Against Obligation*, which focuses on the relationship between "permeable sovereignty" and church-state law.¹⁰ Greene is kind enough to give those of us with a narrower focus an out, writing that one may accept his account of permeable sovereignty even if one rejects his foundational chapter against legal obligation.¹¹ I am not so sure that the two are wholly separable.¹² But the challenge is great enough, and Greene's discussion rich enough, even given this limited focus.

Greene's discussion of permeable sovereignty, and his treatment in chapter two of its application to religious exemptions from generally applicable law, comes at a useful time. Religion Clause litigation, in a very real if crude sense, and law and religion scholarship, in a deep if vague way, have focused with increasing intensity on the contest between state authority and other authorities, especially religious ones.¹³ This moment represents a return—perhaps a recurring return¹⁴—of a broader debate over precisely how pluralist and how authoritative our legal order is. Do the state and its laws set the entire terms of engagement, accommodating other obligations (if at all) only as a matter of grace or forbearance?¹⁵ Or are there other authorities out there, other obligations that *must* and not *may* be given real weight, other "groups" with a "real existence that the state recognizes but does not

minimum, older and newer pieces by scholars such as Richard Garnett, Steven D. Smith, Zoe Robinson, James Nelson, Jessie Hill, Caroline Mala Corbin, Kathleen Brady, Michael McConnell, Douglas Laycock, Leslie Griffin, and others.

6. See, e.g., Louis Michael Seidman, *Political and Constitutional Obligation*, 93 B.U. L. REV. 1257, 1258 (2013) ("Greene is not as clear as he might be about the relationship between these two claims.").

7. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at ch. 1.

8. *Id.* at ch. 3.

9. *Id.* at ch. 4.

10. For a review with a similar focus, albeit from a very different perspective, see Linda C. McClain, *Against Agnosticism: Why the Liberal State Isn't Just One (Authority) Among Many*, 93 B.U. L. REV. 1319 (2013). It may help underscore the difference in our perspectives that my recent book on law and religion focuses on agnosticism, see THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION (2011) [hereinafter HORWITZ, THE AGNOSTIC AGE], and that one working title for the book was *Constitutional Agnosticism*. For another, no doubt better, recent book emphasizing agnosticism in its own way, see ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

11. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 33-34.

12. See generally Micah Schwartzman, *Obligation, Anarchy, and Exemption*, 29 CONST. COMMENT. 93 (2013) (reviewing GREENE, *AGAINST OBLIGATION*, *supra* note 1).

13. See *supra* note 5 and accompanying text.

14. See Horwitz, *Defending (Religious) Institutionalism*, *supra* note 5, at 1049-50.

15. See, e.g., Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160 (2013) (describing a "state-conferred-dispensation view," which asserts "the priority and supremacy of the state" and grants religious freedom as a matter of "beneficence," and charging that it "is the dominant view today.").

create?”¹⁶ If so, how do we set the just terms of engagement and co-existence between them—and just who is the “we” that will do so?

The reasons for the return and heightened intensity of this debate are varied and interesting. As its recurring nature suggests, some of the debate has to do with a broader and perhaps endless movement back and forth of the pendulum. On this view, first public and then private ordering dominate the conversation; as each side dominates in turn, it gives birth to renewed resistance and a revival of interest in the opposing position. Some of it may have to do with the phenomenon of polarization and culture wars,¹⁷ in which each side seeks mastery of the levers of power and worries that the other side is gaining an undue advantage.¹⁸ And some of it has a *faute de mieux* quality. *Employment Division v. Smith*¹⁹ is still the law of the land. Many strong supporters of Free Exercise rights (although not Greene himself)²⁰ have become increasingly reconciled to it.²¹ Despite the existence of statutory exceptions to that regime,²² and the potential ease with which judges can get around it,²³ *Smith* continues to cast a long shadow over free exercise law and theory, forcing those who champion broad religious liberty rights to find other avenues of circumscribing state authority over religion. These and other factors have combined to put the enduring contest between state and religious authority at the top of the judicial and scholarly agenda in this area.

Greene’s discussion of permeable sovereignty, and his attempt to cash out that

16. Jacob T. Levy, *From Liberal Constitutionalism to Pluralism*, in MODERN PLURALISM: ANGLO-AMERICAN DEBATES SINCE 1880, at 33 (Mark Bevir ed., 2012). See also Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953):

The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.

17. See, e.g., HORWITZ, THE AGNOSTIC AGE, *supra* note 10, at 136-42; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011).

18. Thus, one side sees the state as having expanded its regulatory reach so much that there is little room left for a rich sphere of private conduct, conscience, and obligation. Exemptions or resistance thus become ever more necessary. See, e.g., *Thomas v. Rev. Bd.*, 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 24 (2013); Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 521 (2006-2007); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 23-24 (1985). The other side worries that claims for legislative or judicial exemptions from law have become an ever more powerful and dangerous vehicle which “elevates religious entities to a far higher ground than everyone else.” Marsha B. Freeman, *What’s Religion Got to Do With It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption*, 16 U. PA. J.L. & SOC. CHANGE 133, 147 (2013); see also Dahlia Lithwick, *Conscience Creep: What’s So Wrong with Conscience Clauses?*, SLATE (Oct. 3, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/is_there_a_principled_way_to_respond_to_the_proliferation_of_conscience.html (describing conscience clauses in legislation as a potential “vehicle by which we are going to end-run the most fundamental aspects of the social welfare state.”).

19. *Emp’t Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that neutral, generally applicable laws give rise to no serious claim to a judicial mandated exemption under the Free Exercise Clause).

20. GREENE, AGAINST OBLIGATION, *supra* note 1, at 116. Nor me. See HORWITZ, THE AGNOSTIC AGE, *supra* note 10, at 184-90.

21. See, e.g., Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815 (2011).

22. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1993); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1 (2000).

23. See, e.g., Nelson Tebbe, *Smith in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2056 (2011) (“[M]any judges find they have all the room they need to carve out needed exemptions for religious practitioners despite the principal rule of *Smith*.”).

concept in church-state law, is a valuable contribution to this discussion. As it stands, that discussion suffers from one major shortcoming, one that is admittedly chronic in much constitutional scholarship. Some of the scholarship is beautifully theorized; but the theory is not always brought to the level of doctrine. Some of it is doctrinally sophisticated, but sufficiently lacking in theory that it is difficult to determine what all the doctrine-chopping is for, let alone to identify a metric by which it can be evaluated. It is to Greene's great credit that he makes a serious effort to do both things, and does them well. Theorists and doctrinalists alike will have to reckon with this book.

That said, one may wonder if Greene succeeds fully at either task—or, just as important, at linking the two enterprises. A popular metaphor in Religion Clause jurisprudence is that of the “play in the joints.”²⁴ It refers to the interplay between the Religion Clauses. But the metaphor, slightly adapted, applies as well to the connection between the theory of religious freedom and the jurisprudence of the Religion Clauses. A good deal of stress is borne by the linkage or joint between the two, and more often than not this is the most vulnerable point.²⁵

In the case of Greene's admirable book, the weakness strikes me as afflicting two “joints” or linkages: 1) the linkage between his general discussion of permeable sovereignty and his broad argument with respect to the shape of religious liberty; and 2) the linkage between his approach to religious liberty and specific cases. I worry in both cases that Greene has offered a fairly attractive theory, and a fairly attractive (if problematic) jurisprudential approach, but has not adequately tied the two together.

Other writers have taken on the religious liberty aspects of Greene's work at the broader level of theory,²⁶ and at least one writer has quarreled with the kinds of outcomes that his approach to religious liberty entails.²⁷ If I have something to add here, it is that I come as a friend. I am broadly sympathetic to his account of permeable sovereignty, and his argument that it has important implications for Religion Clause jurisprudence.²⁸ Although I quarrel with some of his jurisprudential approach—particularly his insistence that the Establishment Clause “invalidat[es] legislation based in express, predominant religious justification”²⁹—I have every rea-

24. It originates in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). For more recent usages, see, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005); *Locke v. Davey*, 540 U.S. 712, 718-19 (2004).

25. I do not exempt myself. Whatever virtues *The Agnostic Age* may have, I agree with those critics who have said that it is most vulnerable to uncertainty or attack at the point of implementation of its general theory or approach in specific cases. See, e.g., Robert K. Vischer, *We Hold Which Truths?*, COMMONWEAL 29, Sept. 23, 2011. That this problem is widespread and may be inevitable in church-state law and theory is cold comfort. See, e.g., HORWITZ, *THE AGNOSTIC AGE*, *supra* note 10, at ch. 8; MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013) (describing the law and theory of religious freedom as suffering from the problem of tragic choices). And, although they are justly subject to criticism, there are examples of writers in this field who have done a careful and detailed job of both articulating a theory and applying it to a body of cases. Two commendable examples are CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007), and KOPPELMAN, *supra* note 10.

26. See, e.g., Schwartzman, *supra* note 12; Seidman, *supra* note 6.

27. See McClain, *supra* note 10 (worrying, in particular, about how Greene's argument for a broad freedom for nomic communities will affect children). Seidman, *supra* note 6, also questions some details of Greene's religious liberty approach.

28. See, e.g., HORWITZ, *FIRST AMENDMENT INSTITUTIONS*, *supra* note 5; Horwitz, *Defending (Religious) Institutionalism*, *supra* note 5; Horwitz, *Rethinking the Law*, *supra* note 5.

29. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 155.

son to want his project to succeed. In this case, it may be that friendship entails stabbing Greene in the front and not the back, so to speak.

I have few answers. I will not present a competing theory or implementing approach here; indeed, as I said, in many respects I sympathize with Greene's approach. Nevertheless, I have a *lot* of questions. Some are broad; some are narrow and may come close to nit-picking. But nit-picking may be a genuine contribution here, if I am right about the gap between high-level theory and on-the-ground doctrinal practice that afflicts most unified theories of Religion Clause jurisprudence, including Greene's. After laying the ground by summarizing Greene's key arguments, I offer a volley of questions, which involve both his theory of permeable sovereignty and his specific approach to Religion Clause cases, as well as the joints between the two.

I close with a broader question. I wonder whether Greene does not err in describing his doctrinal application of the permeable sovereignty approach as a matter of "releasing people from the grip of the law."³⁰ Putting things in those terms may cede too much ground to those who see state sovereignty as plenary, and give them the rhetorical high ground from which to insist that exemptions are a way of putting religious claimants "above" or "outside" the law.³¹ Whether from within the permeable sovereignty perspective or otherwise, we might better view these conflicts as a matter of renegotiating the law to include some recognition of permeable sovereignty and religious commitments, rather than as a demand by religious and other nomic groups to stand outside the law altogether.³²

I. GREENE'S PERMEABLE SOVEREIGNTY APPROACH TO RELIGIOUS LIBERTY

A. *Permeable Sovereignty*

The modern liberal state, Greene writes, claims a status of plenary sovereignty. "It claims the legitimate power to demand general legal compliance. It might recognize exceptions for various reasons, but it is within the state's discretion to so recognize."³³ This view is summed up dramatically in a statement by Emile Combes, a turn-of-the-century French prime minister: "There are, there can be no rights except the right of the State, and there [is], and there can be no other authority than the authority of the Republic."³⁴ It is rarely so bluntly stated, but the view that all

30. *Id.* at 149. In correspondence with me, Professor Greene has suggested that I may elide two points here. In his description, any accommodations of religious obligations would themselves be "within the law," while the religious norms themselves would fall outside "the norms of the state's law." Email from Abner Greene to Paul Horwitz, Oct. 18, 2013 (on file with author). I think the clarification is a useful one and thank him for providing it, although I think my broader point here expressing concern about being too quick to cede the language of "the law" to one side of the argument still has some value.

31. See, e.g., Caroline Mala Corbin, *Above the Law?: The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965 (2007); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 *IND. L.J.* 981, 984 (2013) ("[T]he numerous justifications for the [ministerial] exception are all a restatement of one foundational and fundamentally mistaken argument: that religious groups are entitled to disobey the law."); Horwitz, *Rethinking the Law*, *supra* note 5, at 353 (quoting a draft paper by John Witte describing advocates of Shari'a law as "hav[ing] given up on the state and its capacity to reform its laws of sexuality, marriage, and family life" and "want[ing] to become a law unto themselves.").

32. See generally Horwitz, *Rethinking the Law*, *supra* note 5.

33. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 20.

34. J.N. Figgis, *The Great Leviathan*, in *THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF*

power lies within the boundaries of the sovereign state, and that any constraints on that power—whether constitutionally mandated or provided as a matter of political grace—depend wholly on the structure of state power is common enough.

In Greene's view, "viewing state sovereignty as plenary is a wish, a hope, an illusion, and we should dispense with it."³⁵ Instead, we should view our social and legal order as one of "permeable sovereignty." "Many of us adhere to norms other than the state's laws."³⁶ Those sources of norms include "religion, philosophy, family, ethnic and cultural groups, and more," although Greene's primary focus is on religion.³⁷ We should not view those norms as subordinate to the state's own vision, or their authority as subordinate to that of the state. Rather, "we should see sovereignty as permeable through to our plural sources of obligation, rather than as absolute in the state and its laws."³⁸

Greene's account of permeable sovereignty is both descriptive and normative. Descriptively, it is consistent with the "complex set of sources of normative authority to which many people turn" as a matter of actual practice.³⁹ It also comports on a local level with the American constitutional structure, at the heart of which lies a "core commitment to multiple repositories of power."⁴⁰ On this view, the state should be understood as just one of many potential sources of authority, and "the state's law [should] be understood as just one source of the norms that properly govern people's lives."⁴¹ We should thus "see the state's sovereignty as permeable—full of holes, rather than full."⁴²

Normatively, Greene argues that permeable sovereignty offers an attractive understanding of our political structure. It draws on a substantial literature of pluralism and multiculturalism.⁴³ It advances a suitably humble, anti-foundationalist "agnosticism of value that helps explain much of our constitutional order."⁴⁴ And by recognizing the multiple sources of authority that compete for our attention and allegiance, and the interpretive and political responsibilities that reside in each individual citizen, rather than in any single sovereign entity, "we increase our chances of being active, rather than passive, citizens."⁴⁵ We prevent the alienation of power "from its true source—the people, as citizens."⁴⁶

Taking permeable sovereignty as "a baseline,"⁴⁷ as a reminder "that authority

G.D.H. COLE, J.N. FIGGIS, AND H.J. LASKI 112 (Paul Q. Hirst ed., 1989) (quoting French Prime Minister, Emile Combes). See also Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 *DRAKE L. REV.* 901, 902 (2009); Horwitz, *Defending (Religious) Institutionalism*, *supra* note 5, at 1049.

35. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 115.

36. *Id.* at 2.

37. *Id.* at 20.

38. *Id.* at 2-3.

39. *Id.* at 20.

40. *Id.* at 4.

41. *Id.*

42. *Id.* at 20.

43. *Id.* at 21-22.

44. *Id.* at 23.

45. *Id.* at 3.

46. *Id.*

47. *Id.* at 20.

ultimately rests elsewhere than in the state,"⁴⁸ has many implications for Greene, most of which are beyond the scope of this review. It helps ground his central argument, in the first part of his book, that "there is no successful general case for a presumptive . . . moral duty to obey the law," although such an obligation may attach in particular cases.⁴⁹ It supports his argument against an "interpretive obligation to prior sources of constitutional meaning," such as "original understanding or meaning or the teachings of precedent," insofar as interpretive authority, like sovereignty, is "permeable rather than plenary, permeable through to different interpreters (other than the [Supreme] Court) and sources of interpretation (other than the past)."⁵⁰ It also directs, or purports to direct, his account of religious liberty, to which I now turn.

B. *Religious Liberty*

Speaking very roughly, the modern American legal regime of religious liberty can be viewed as falling into two major periods. The first period began in 1963, when the Supreme Court issued its decision in *Sherbert v. Verner*.⁵¹ During that period, the legal rule was that the Free Exercise Clause requires a presumptive right to an exemption or accommodation from laws that burden religious liberty, whether those laws are aimed at religion or not.⁵²

The second period commenced in 1990 with the issuance of the Supreme Court's decision in *Smith*.⁵³ In *Smith*, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."⁵⁴ In other words, mere incidental burdens on religion do not give rise to a presumptive, judicially granted exemption from general laws. In practice, both because of legislation⁵⁵ and case law,⁵⁶ *Smith's* impact is not as broad as its early critics feared it would be. In theory, however, the two tests are strikingly different with respect to their starting points and default rules, even if the two regimes were not always radically different in application.

Put simply, Greene would enlist permeable sovereignty to take us back to the first period, the *Sherbert* era—or what he believes that period should have been. Government, he writes, "should seek to assist those who find themselves in a dilemma of competing claims of sovereignty, from state and other sources."⁵⁷ Those living under competing claims in a system of permeable sovereignty ought to have

48. *Id.* at 24.

49. *Id.* at 2; *see generally id.* at 35-113.

50. *Id.* at 162-63; *see generally id.* at 161-251.

51. *Sherbert v. Verner*, 374 U.S. 398 (1963).

52. The rule was, however, applied very weakly. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127-28 (1992).

53. *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

54. *Id.* at 879 (quotations and citation omitted).

55. *See e.g.*, Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act, *supra* note 22. Many states have similar legislation.

56. *See, e.g.*, Tebbe, *supra* note 23; Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 8 U. PA. J. CONST. L. 850 (2001).

57. GREENE, AGAINST OBLIGATION, *supra* note 1, at 114.

some partial “exit options” to help them avoid “the clutches of the state.”⁵⁸ Judges and legislators should therefore provide “exemptions for the free exercise of religion . . . as a matter of constitutional right.”⁵⁹

Such a right, he makes clear, “is prima facie only, subject to override by a compelling state interest.”⁶⁰ That is what *Sherbert* required. But Greene would make the application of that test more demanding. Given the weakness of the state’s claim to legitimacy and the importance of other claims of authority, when addressing such claims, “[g]overnment has to earn its stripes, law by law or case by case.”⁶¹ He is highly skeptical of governmental claims that uniformity is a compelling state interest, and argues that we should hesitate before accepting “paternalistic justifications for the application of law to religious and other deeply held, normative views.”⁶²

This is a strong rule, and Greene cabins it in other ways. In particular, and against the current of the cases, he argues that courts could inquire into whether a claim for an exemption involves “a central religious or other practice.”⁶³ He makes clear, as I noted, that the right is still only prima facie, and allows for “case-by-case judicial balancing.”⁶⁴ And he recognizes the difficult choices involved in dealing with arguments for exemptions by illiberal groups, which may present strong competing equality claims.⁶⁵ But this is still a very strong default rule in favor of religious exemptions⁶⁶—rightly so, in Greene’s view, given the weakness of the state’s claim of plenary sovereignty and of a concomitant general duty to obey the law.

This approach is both strengthened and necessitated, according to Greene, by a special feature of the Religion Clauses: the balance they strike between disabling and protecting religion in the political process.⁶⁷ The Religion Clauses, he writes, “should be understood as striking a political balance, offsetting a gag rule with ex-

58. *Id.* at 115-16.

59. *Id.* at 116.

60. *Id.* at 123.

61. *Id.* at 124.

62. *Id.* at 118. For present purposes, I deal only with “religious” exemptions, leaving aside questions of whether other strongly held beliefs or sources of authority should be entitled to equal treatment. Much of Greene’s argument is limited to religion, although he acknowledges the broader question and sketches some arguments in favor of extending exemption rights across all manner of claims. *Id.* at 116. Jay Wexler addresses this point more directly elsewhere. Jay Wexler, *Some Thoughts on the First Amendment’s Religion Clause and Abner Greene’s Against Obligation, with Reference to Patton Oswalt’s Character “Paul From Staten Island” in the Film Big Fan*, 93 B.U. L. REV. 1363 (2013). This has been an important question in law and religion scholarship of late. See, especially, Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

63. GREENE, AGAINST OBLIGATION, *supra* note 1, at 130; see, e.g., *Emp’t Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) (rejecting a centrality test); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457-58 (1988) (pre-*Smith* case rejecting centrality inquiry); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 958-59 (1989) (enumerating problems with centrality).

64. GREENE, AGAINST OBLIGATION, *supra* note 1, at 131, 156.

65. *Id.* at 157-60.

66. With respect to illiberal groups in particular, although he recognizes that some of their exemption claims should fail, his approach is “deferential to (even illiberal) persons/groups desiring to depart from law and live by their own lights.” *Id.* at 157. I generally share Greene’s perspective here. For criticisms of this approach for failing to give appropriate weight to equality concerns and neglecting to give full consideration to the case of children, see McClain, *supra* note 10.

67. See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993). In *Against Obligation*, Greene argues that the political balance argument for exemptions “fits with my theme but could be considered a stand-alone argument.” GREENE, AGAINST OBLIGATION, *supra* note 1, at 149.

emptions.”⁶⁸

The Establishment Clause’s “gag rule” requires the invalidation of any law that is “based in express, predominant religious justification.”⁶⁹ Put more positively, “For a law to be upheld against an Establishment Clause challenge, the law’s predominant express purpose must be secular, and any expressly religious purpose for the law must be ancillary and not itself predominant.”⁷⁰ Legislators and voters are entitled to rely on their religious beliefs “when they form political positions or decide how to vote.”⁷¹ But an argument in favor of a law that is stated in predominantly religious terms “effectively excludes those who don’t share the relevant religious faith from meaningful participation in the political process.”⁷² “Reference to human experience can be seen as the common denominator for political debate.”⁷³ Conversely, “[w]hen religious believers enact laws for the express purpose of advancing norms dictated by their religion, they exclude nonbelievers from meaningful participation in political discourse and from meaningful access to the source of normative authority predicating law.”⁷⁴

Free Exercise exemptions are a corollary to the Establishment Clause gag rule. “[D]enial of a right of political participation is sufficient to undermine political obligation and to strip the state of its claim of legitimacy.”⁷⁵ Exemptions are thus required, “to compensate religious people for the obstacle [the gag rule] poses to their participation in the democratic process.”⁷⁶ Religious faith is simultaneously a forbidden ground for lawmaking and “a ground for avoiding the obligations of law.”⁷⁷

II. QUESTIONS POSED BY GREENE’S APPROACH

Despite, or perhaps because of, my general sympathy for Greene’s permeable sovereignty approach to religious liberty, I am left with a number of questions about both its justification and its implementation.

A. *Questions of Connection Between Theory and Practice*

I find much to appreciate in the broad picture Greene draws of permeable sovereignty. Anyone who has written with admiration of both pluralism and agnosticism,⁷⁸ and advocated an understanding of our social and legal order in which non-state institutions play a key role,⁷⁹ is bound to find something attractive about a theory that “is based in keeping front and center agnosticism of value and its man-

68. GREENE, AGAINST OBLIGATION, *supra* note 1, at 150.

69. *Id.* at 155.

70. *Id.* at 152.

71. *Id.* at 151.

72. *Id.* at 150.

73. *Id.*

74. *Id.* at 151.

75. *Id.* at 155.

76. *Id.*

77. *Id.*

78. See, e.g., HORWITZ, THE AGNOSTIC AGE, *supra* note 10; Horwitz, *Defending (Religious) Institutionalism*, *supra* note 5; Paul Horwitz, *Churches as First Amendment Institutions: Of Spheres and Sovereignty*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

79. See generally HORWITZ, FIRST AMENDMENT INSTITUTIONS, *supra* note 5.

ifestation in the political setting, permeable sovereignty”; that rejects a vision of state power as plenary and conceives of the Constitution as “anti-foundationalist” and focused on “multiple repositories of power;” that gives pride of place to “doubt” and “the centrifugal”; and that “start[s] from the outside in, rather than from the inside out, and begin[s] with a presumption that various comprehensive views, not just our own, might be correct.”⁸⁰ This approach is not entirely reassuring for a lawyer. It may drive the rule-bound to distraction. There is a good deal of virtue in settlement. But there is also reason to reject “the lure of rule-ness,”⁸¹ and to appreciate a constitutional vision that cabins power by diffusing it rather than attempting, with uncertain success at best, to enthrone the state (let alone the court) and expect it to lay down clear rules for its exercise of power.

That said, it is sometimes unclear how Greene’s broader vision of permeable sovereignty relates to on-the-ground implementation. Greene assures us that “one could adopt [his] argument for permeable sovereignty” even if one rejects his argument that “the state’s political legitimacy” is correlative with “a citizen’s moral duty to obey the law.”⁸² His discussion of religious liberty acknowledges that permeable sovereignty might, as his language in the book generally suggests, require “a constitutional right to judicial exemptions for nonreligious norms,” with all the questions that entails,⁸³ but sets that issue to one side.⁸⁴ He argues that his account of the symbiotic nature of the Religion Clauses, with Establishment Clause gag rules balanced by Free Exercise exemptions, is consistent with his larger vision of permeable sovereignty, but “could be considered a stand-alone argument: one could reject it and accept the foregoing case for state recognition of permeable sovereignty; conversely, one could accept it while rejecting all or pieces of the foregoing.”⁸⁵

Greene presents all this as a feature of *Against Obligation*, which allows us to accept or reject particular pieces of his argument without worrying about the rest. Readers might view it as a bug. In the piece of the book we are concerned with here, dealing with religious liberty, it becomes difficult to tell what independent work permeable sovereignty does in requiring or guiding his prescriptions for the Religion Clauses. That matters, I think, because it affects the weight of the arguments in favor of (or against) adopting the balancing approach Greene recommends. If that approach is not required by permeable sovereignty, then why not opt for clear (albeit imperfect) rules, laid down authoritatively by the Court, over judicial balancing, with all the “[h]ard[] cases” that will require resolution under that uncertain standard?⁸⁶ Conversely, Greene argues that one could accept the principle of permeable

80. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 20, 22, 121, 126. On the latter point, see HORWITZ, *FIRST AMENDMENT INSTITUTIONS*, *supra* note 5, at 16, 72-74 (arguing that law should be understood in a bottom-up fashion in which a variety of spheres and institutions participate, along with lawmakers, in building legal rules and norms).

81. Abner S. Greene, *What is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1249 (2013).

82. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 5, 33.

83. See Wexler, *supra* note 62.

84. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 116, 149.

85. *Id.* at 149.

86. *Id.* at 158. The indeterminacy of that test is nicely captured by Greene in one description (one that I agree with in broad terms, incidentally): “[W]e can seek a nuanced approach to relaxing the demands of the state, to allowing religious and philosophical and other sources of normative authority to govern the lives of the state’s subjects to the fullest extent compatible with the stable operation of government and the liberty of other

sovereignty while rejecting his approach to the Religion Clauses.⁸⁷ If that is the case, then again we must ask where and how strong the linkage is between his theory and his recommended practice.

In some places, the linkage seems especially weak. Recall, for example, that in order to avoid the concerns about endless exemptions that produced the rule in *Smith*, Greene suggests that courts could ask whether particular religious burdens are “obligatory or central” to those claimants’ faiths.⁸⁸ Greene anticipates the objection that questions such as centrality will entangle courts in religious questions they ought not decide. His answer to this concern is that “if parties don’t want such judicial questioning, then they don’t have to ask for an exemption. Waiver here seems a sensible posture.”⁸⁹ His answer may be sensible. But it’s hard to see how such an answer, which treats fundamental religious claims and questions as easily defeasible, follows from or is even consistent with permeable sovereignty.⁹⁰

In short, Greene may make an attractive case for permeable sovereignty, and he may make an attractive case for his particular vision of religious liberty. But I am not convinced that he makes as strong a case for a relationship between the two. As I noted earlier, this seems to be a common problem in law and religion scholarship, which is often most vulnerable at the point where theory becomes practice. But it is a problem for Greene as well.

B. Questions of Implementation

Every theory of religious liberty is bound to face difficult questions of implementation, at least if its author is forthright enough to attempt to provide practical guidance.⁹¹ Greene does an admirable job of detailing the practice of religious liberty under his approach. But his discussion raises many questions. I approach them primarily first through the structure of the balancing test Greene proposes, and then add some questions on top of that, roughly following the order of his chapter. I ask these questions; for better or worse, I do not answer them.

Begin with one of the threshold requirements of Greene’s exemption-friendly balancing approach. Under that approach, “the citizen should first make her case for how she is burdened. . . . This makes sense because we want to screen out citizen claims based on either insubstantial hits to serious interests or any kind of hit to an

persons.” *Id.* at 115. A world of uncertainty occupies the last seventeen words of that sentence.

87. *Id.* at 149.

88. *Id.* at 131.

89. *Id.* at 132.

90. Nor, for that matter, am I entirely convinced that his entire “political balance” argument, which as far as I know predated his writings on permeable sovereignty, has much to do with permeable sovereignty in the final analysis. I relegate this point to a footnote for two reasons. First, I may be biased here: I share his interest in permeable sovereignty but have always resisted his argument for an Establishment Clause gag rule. Second, there is at least a plausible connection in the book between his account of permeable sovereignty and his gag rule argument. But the connection still seems fragile to me. It is true that Free Exercise exemptions might “ameliorate the legitimacy/obligation problem caused by the gag rule.” *Id.* at 157. But I am not convinced that the gag rule itself is a necessary consequence of permeable sovereignty.

91. Some writers attempt to avoid these problems by focusing on doctrine while bracketing or ignoring questions of theory. The attempt fails. Church-state doctrinalism without any theory either begs all the questions of theory it seeks to avoid, or accepts as a given whatever theory can be said to animate the jurisprudence. In either case, it cannot escape questions of theory, and the failure to engage those questions leaves it without any resources to answer them.

interest not part of one's deeper set of values."⁹² Again, this sounds sensible enough. But how do we distinguish between substantial and insubstantial "hits?" As I noted earlier,⁹³ this distinction appears to be intended to ward off the concerns about endless exemptions that ended up ushering in *Smith*.⁹⁴ But *Smith* happened for a reason. Drawing these sorts of distinctions is indeed difficult.

Consider another key aspect of Greene's test: "Government has to earn its stripes, law by law or case by case."⁹⁵ This appears to relate to both his underlying argument for permeable sovereignty, and his desire to ensure that government does not simply win every case by claiming an interest in uniform application of the law.⁹⁶ But what does it mean to say that government must prove itself "law by law or case by case?" Won't government (and courts) learn from experience? As it learns, won't case-by-case balancing end up ushering in more categorical rules?⁹⁷ And given the cost-sharing and risk-spreading nature of many modern social welfare regimes, is Greene right to say that "a mere desire for uniformity [should] (almost) never suffice as a compelling state interest"?⁹⁸

More generally, Greene argues that "we should not be troubled by case-by-case judicial balancing" because it is "a familiar task" for common-law-oriented constitutional courts, and he cites as an example the free speech cases involving time, place, and manner.⁹⁹ This seems too sunny a view. It is not as clear to me that courts actually do time, place, and manner tests well, or that they do not end up substantially favoring the state or the majority.¹⁰⁰ Similarly, he praises Martha

92. GREENE, AGAINST OBLIGATION, *supra* note 1, at 118-19.

93. See *supra* note 22 and accompanying text.

94. Another reason to doubt this will succeed is that even if courts stem the flood by evaluating substantiality and centrality up front, we are still left with the ruling in *Thomas v. Review Board*, 450 U.S. 707 (1981), which treats highly idiosyncratic individual religious claimants' as sincere, and thus allows a proliferation of valid claims of centrality and substantiality based on individual religious views. Shoring up the dike at one point will not prevent it from collapsing at others.

95. GREENE, AGAINST OBLIGATION, *supra* note 1, at 124.

96. *Id.* at 118. It also relates to a standard question in the case law: whether the compelling interest test should be applied only with narrow reference to the specific case before the court, or whether it should weigh in the balance all the possible exemptions to the challenged law that might arise. Compare *Gonzalez v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-32 (2006) (holding that RFRA requires a "focused inquiry" in which government must show that its compelling interest requires "application of the challenged law 'to . . . the particular claimant whose sincere exercise of religion is being substantially burdened'"), with *United States v. Lee*, 455 U.S. 252, 259-60 (1982) (rejecting an exemption under the Free Exercise Clause because "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

97. See generally Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2005).

98. GREENE, AGAINST OBLIGATION, *supra* note 1, at 118. For example, Greene questions the result in *United States v. Lee*, 455 U.S. 252 (1982), which refused to grant an exemption to the Social Security tax payment system for an Amish employer of Amish workers, arguing that it presented "less than compelling state interests." GREENE, AGAINST OBLIGATION, *supra* note 1, at 123. But a court informed by experience, and by knowledge of the Social Security system, might well have concluded that some benefits regimes—an increasing number of them, in fact—depend on uniformity to work. How broadly *Lee* applies will likely be a major issue in the Supreme Court's treatment of the contraceptive mandate cases, which it is about to hear as of the time of this writing.

99. GREENE, AGAINST OBLIGATION, *supra* note 1, at 131-32.

100. For a mixed review, see Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007). See also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 604-05 (1993) (arguing that time, place, and manner doctrine ends up favoring majoritarian preferences).

Nussbaum for seeking to guard against “the slippery nature of public order and safety claims” made by the state by emphasizing that “the threat to stability [posed by a religious liberty] must be extremely evident, in terms of a manifest breach of *civil* peace, if there is to be any legitimacy to state infringement.”¹⁰¹ That sounds a lot like the free speech cases dealing with incitement of lawless activity. Those cases erect a strong bulwark against prosecution.¹⁰² But they are not wholly indicative of the main body of free speech law, which is full of categorical distinctions, regularly accused of incoherence, and in some areas has ended up by ushering in a *Smith*-like approach that favors rules of general applicability.¹⁰³

In short, the “stepped-up judicial scrutiny” Greene recommends raises a lot of practical questions.¹⁰⁴ If this approach, whatever its problems, is compelled by the argument from permeable sovereignty, then so be it; but, as I have said, it’s not clear how strong the linkage between the two is. In any event, but especially if it is treated independently of permeable sovereignty, Greene’s approach leaves open questions about how it will be implemented and whether that implementation will succeed.¹⁰⁵ Indeed, it is precisely these questions of implementation that arguably led us to *Smith*.

I have similar questions about Greene’s advocacy of a political balancing approach to the Religion Clauses, and specifically his argument for an Establishment Clause gag rule. Space limitations prevent me from going into them in great detail, and in any event they have been raised elsewhere.¹⁰⁶ I agree with those critics who argue that expressly religious arguments are neither as inaccessible to others as Greene claims, nor are they any more inaccessible than other arguments, even ostensibly “secular” ones.¹⁰⁷ That seems especially true to me in the current age, a “secular age”¹⁰⁸ or “agnostic age”¹⁰⁹ in which many people live cheek by jowl with others who hold different religious beliefs or non-beliefs, and in which both non-belief and many forms of religious belief are at least imaginable to many of us.¹¹⁰ I

101. GREENE, AGAINST OBLIGATION, *supra* note 1, at 125 (quoting MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 63 (2008)).

102. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

103. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

104. GREENE, AGAINST OBLIGATION, *supra* note 1, at 143.

105. The best evidence that it will not, of course, is the *Sherbert* era itself, which did not usher in the results Greene seeks. *Id.* at 123-24.

106. For criticisms, see, e.g., Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993); Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene’s Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337; Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL’Y 1 (2002); Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should be Excluded From Democratic Deliberation*, 1999 UTAH L. REV. 639 (addressing the sorts of arguments made by Greene); Steven S. Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631 (1999). For a reply to one critic, see Abner S. Greene, *Is Religion Special?: A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535. *See also* HORWITZ, THE AGNOSTIC AGE, *supra* note 10, at 258-60, 266-71 (arguing for a broadly permissive rule for religion in public discourse); Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEMPHIS L. REV. 973 (2009).

107. *See, e.g.*, McConnell, *supra* note 106, at 651-54; Shiffrin, *supra* note 106, at 1638-39; Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 769-70, 774-75 (1993).

108. CHARLES TAYLOR, A SECULAR AGE (2007).

109. HORWITZ, THE AGNOSTIC AGE, *supra* note 10.

110. *See id.* at 112-21. Of course, my own description may be too sunny. If so, however, Greene shares some of my optimism, since he concedes that “the nonreligious can debate religious arguments” and that many religious arguments are “based in human reason and experience.” GREENE, AGAINST OBLIGATION, *supra* note 1, at

would just add a few other points.

First and most important, I think Greene is mistaken as a matter of the best reading of the Establishment Clause to focus on the deliberative process of lawmaking rather than the result—on the inputs rather than the outputs of lawmaking.¹¹¹ The Establishment Clause, on this view, bars certain legislative outcomes that effectively require the state to announce conclusions on questions of religious truth. But it does not bar legislative outcomes that merely *depend* on lawmakers' views of religious truth, no matter how explicitly they relied on those views. I agree with Greene in favoring an exemption regime under the Free Exercise Clause, but I do not share his Establishment Clause-based reasons for favoring such a regime.

Second, I doubt the problem is great enough to warrant such a gag rule. Given both the state of American religious pluralism and the background legal rule that accommodations and other laws cannot improperly favor particular denominations,¹¹² there are plenty of reasons (apart from their own inclinations to do so, which will generally suffice) for lawmakers to voluntarily offer a suite of both religious and non-religious arguments for laws. Third, on a related point, Greene's argument for a gag rule is, he says, "nation- and practice-specific."¹¹³ And our culture is religiously and politically pluralistic. For that and other reasons, most lawmakers rely on a mixture of religious *and* non-religious reasons in support of the laws they seek to pass. Given those factors, I do not think our experience justifies Greene's gag rule, at least as long as the Establishment Clause is treated as maintaining a limitation on particular legislative outputs.

Finally, Greene argues that his rule is acceptable because, while some laws will pass and others won't, his approach "will eliminate the Establishment Clause injury of excluding nonbelievers from meaningful participation in the political process."¹¹⁴ Maybe so. But it may result in the opposite problem: the injury of excluding some *believers* from meaningful participation in the political process. Moreover, that burden will fall unequally. Most mainstream believers already make both "secular" and "religious" arguments in public debate as a matter of course. The citizens most greatly affected by Greene's gag rule will be those with comprehensive, fiercely held religious beliefs.

That should concern anyone, like Greene, who is convinced of the value of pluralism and the importance of multiple sovereigns, but still hopes for some level of coexistence in our social order. Greene already acknowledges the strain that illiberal groups put on his or any other legal and social regime.¹¹⁵ He might consider the risk that an up-front gag rule will drive more individuals and groups into the arms of illiberalism, and an outright rejection of peaceful coexistence.¹¹⁶ As long as we

154.

111. See, e.g., HORWITZ, *THE AGNOSTIC AGE*, *supra* note 10, at 258-62, 270. Andrew Koppelman takes a similar view. See KOPPELMAN, *supra* note 10, at 94; Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002).

112. See *Larson v. Valente*, 456 U.S. 228 (1982).

113. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 155.

114. *Id.* at 152.

115. *Id.* at 157.

116. See LUCAS SWAINE, *THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM* (2008); see also HORWITZ, *THE AGNOSTIC AGE*, *supra* note 10, at 205-08.

have certain Establishment Clause limitations on legislative outputs, it is better, in my view, to keep such individuals as part of the conversation, however difficult that conversation may be, than to risk driving them further away.

CONCLUSION: A QUESTION ABOUT “LAW”

The questions I have asked so far are critical and skeptical. They are not, I noted, unique to Greene’s approach; they can be asked of just about any legal implementation of a theory of religious liberty. But they are important in evaluating Greene’s work too. That these questions remain is hardly a fatal criticism. *Against Obligation* is an important, provocative, and timely book.

Let me close with a question that is unlikely to occur to most of Greene’s critics, who are likely to be skeptical about permeable sovereignty and loyal to the liberal state. The question is whether Greene does not, in one respect, cede *too much* ground to his critics and their worldview.

Greene’s permeable sovereignty approach, we have seen, treats “all of our sources of value, of how to live, as at least presumptively on par with each other, as equal.”¹¹⁷ “The state’s law,” on this view, “should . . . be understood as just one source of the norms that properly govern people’s lives.”¹¹⁸ Despite this, Greene’s language ends up stacking the deck in favor of the state, or at least of a particular view of law, by treating other nomic communities and sources of norms as not being part of “the law.” Thus, he speaks in terms of judicial exemptions for religious claimants as “releasing [them] from the grip of the law,” frames the case for exemptions as an “exit” remedy, and talks about exemptions as “providing a balm against the otherwise scorching demands of the law.”¹¹⁹

All this is understandable enough, and perhaps not too much hangs on the language here. But I wonder whether it does not give away too much ground. Arguments for permeable sovereignty, or institutional autonomy, or the importance of nomic authority, or simply for accommodation of individual claimants under the Free Exercise Clause, are not just arguments for “exceptions” from “the law.” They are, in large measure, arguments about what “the law” *itself* requires, and about what it encompasses.

As I have written elsewhere, “In thinking about ‘what the law is,’ we need not—and perhaps ought not—think solely in terms of the positive law of the state.”¹²⁰ Religious and other nomic communities are indeed independent sources of authority. But they are also a part of “[o]ur constitutional order,” which embraces “multiple repositories of power.”¹²¹ When we defer to agency interpretations of statutes,¹²² we do not speak in terms of those agencies being “outside the law.” Rather, we treat them as *part of* the law, as partners in developing its unfolding meaning. I worry that treating Free Exercise exemptions as an “exit” or “escape” from

117. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 2 (emphasis added).

118. *Id.* at 4.

119. *Id.* at 10, 115, 149.

120. Horwitz, *Rethinking the Law*, *supra* note 5, at 363 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

121. GREENE, *AGAINST OBLIGATION*, *supra* note 1, at 3.

122. *See Chevron U.A.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

“the law” constitutes a pre-emptive surrender of rhetorical ground to those who insist that legal uniformity itself is a clear, powerful, and sufficient value. Rather, we might think and speak of permeable sovereignty as involving an insistence that religious and other nomic communities, with the substantial authority they enjoy within their proper sphere, form an essential part of our social order—of our “law,” properly understood and interpreted. Through the Religion Clauses, that includes our positive law. They are inside the law as well as outside it.