

## **Four Objections to Religious Liberty (and some Possible Answers)**

Michael Stokes Paulsen  
*University Chair & Professor of Law  
The University of St. Thomas*

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### **Introduction**

Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 *Pepperdine L. Rev.* 1519 (2013)

#### **I. “The Law Should Be the Same For Everyone” (There Shouldn’t Be Any Religious Exemptions)**

- Strong Intuitive Appeal: “Equality” and “Fairness” (and Relativism)
- A Driving Force Behind Justice Scalia’s Opinion in *Employment Division v. Smith*
- Is Religion Really “Like” Other Things?
- Overcoming Intuition with Constitutional *Text* (and a different intuition)

#### **II. “Religion Isn’t a Real Thing” (“Why Tolerate Religion?” Mere Nonsense; Shouldn’t Protect)**

- If honest, the true motivation (of many)
- The Inadequacy of “Liberal” Arguments for Religious Liberty
- The text is still the text (The “Embarrassing” Free Exercise Clause)
- The Rationality of Religious Faith

Paulsen, *Is Religious Freedom Irrational?* 112 *Mich. L. Rev.* 1043 (2014)  
(reviewing Brian Leiter, *Why Tolerate Religion?* (2013)).

### **III. “People Will Abuse It”**

*(Spurious Claims, Insincerity, Incentives)*

- The reality of bogus claims, insincere assertions of religion, perverse incentives
- Trumped-up claims; exaggerated claims of harm or burden on religion (same problem)
- Slippery slope – plus analogous secular claims?

*The Draft Exemption Cases: Welsh, Seeger, Gillette*

- Difficulty, almost impossibility, of sifting sincere from spurious (administrative burden)
- Another driver of *Employment Division v. Smith*
- Does the Objection Defeat the Rule? (*Babies and bathwater*)

### **IV. “Religious Liberty is Harmful to Others”**

*(The Problems of Ordinary and Extraordinary External Effects)*

- What *kinds* of “harms” count? (And *how much* should they count?)
- The True Problem of *Exceptional Harm*
- Reconciling Text and Third-Party Injury

## **Conclusion**