Four Objections to Religious Liberty
(and some Possible Answers)

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Introduction


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

(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