

# Religion Ain't Sacrosanct

## How to Fight Obsolete Accounts of Religious Freedom

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### 1 Introduction

At first sight, Jean Cohen's paper seems to fit in the larger literature on religious exemptions currently *en vogue* in liberal and multicultural political theory. A closer look, however, makes clear that she focuses on a specific though philosophically highly interesting sub-discussion. It does not concern the protection of religious minorities against disproportional burdensome majority law. Instead, it concerns claims by well-established and majority groups to have their religious autonomy protected. Moreover, the claims are not grounded in comparative arguments of equal respect and concern but, instead, in a presumed higher-order pre-legal claim of immunity towards state interference. This special privilege is supposedly based on ancient entitlements and founded in the 'two-worlds' theory dividing distinct jurisdictional domains of organized religion and the State.

As someone tasked with commenting on Cohen's paper, I am embarrassed by the extent to which I agree with her central argument. What follows is an endorsement and largely a further elaboration of her central thesis, rather than a negation of it. I agree with Cohen's critical discussion of the two ominous court cases and the conceptual overstretch of religious freedom they embody. I am, however, less surprised than Cohen that the old tropes of religious freedom as immunity are still so prevalent in current legal and political debates. Cohen's paper ends in disbelief – why would the Supreme Court come to these judgments that are so far removed from central ideas within the US constitutional tradition?

Whatever their historical genesis, neither religious freedom, nor the separation of church and state, nor the idea of a civil polity, nor justifiable legislative accommodations, need rest on the Christian two-worlds theory. If traces of it underpin some laws or court decisions, these anachronisms should be dropped.<sup>1</sup>

In this paper, I argue that the anachronisms cannot be dropped as easily as Cohen would want because the ideas underpinning them – i.e., the extended interpretation of religious freedom – is less alien to the liberal tradition than Cohen seems to believe. My main thesis is that the root of this dispute can be traced back to a fault line *within* liberalism between a more tolerance-leaning and a more equality-

1 Jean L. Cohen, 'Freedom of Religion Inc.: Whose Sovereignty?' *Netherlands Journal of Legal Philosophy* 44(3) (2015): 206.

leaning tradition. Although they are both part and parcel of the liberal tradition, they arrive at quite different – even incompatible – conclusions on the justification and implications of religious freedom in the liberal political order. Cohen's position fits within the latter tradition, while the 'ominous' Court cases presuppose the former interpretation of religious freedom – albeit, as I will argue, in an overstretched form. Analyzing Cohen's discussion in the key of this fault line might enable us to get a better grasp of what is at stake in this discussion and might provide clues on how the anachronisms Cohen mentions could be fought.

## 2 Two traditions within liberalism

A historical analysis makes clear that liberalism harbours two contradictory accounts of religious freedom that are separated by a fundamental fault line *within* liberalism: a more *tolerance-leaning* and a more *equality-leaning* tradition. These traditions coincide with two more or less distinct liberal strands of thought: (Lockean) classic-liberalism and (Rawlsian) egalitarian-liberalism.<sup>2</sup>

Seen from a chronological perspective, the role of religion in the public order was established long before religious freedom and the liberal state that protected it. The latter two only emerged after the outbreak of the Reformation in a time in which undivided state sovereignty, as we know it today, was not yet settled. Jean Cohen refers to a description of this time as one in which the state was just one association among several, none of which had an ultimate claim to supremacy.<sup>3</sup> Authority was allocated over various jurisdictions: the earthly realm was subject to state supervision, while the divine realm was subject to regulation by organized religion. Any attempt by the king to regulate divine issues was considered to be an 'invasion of God's prerogative'.<sup>4</sup>

The Reformation forced Christians to confront the internal divisions separating Christians themselves.<sup>5</sup> The *tolerance-leaning* strand of liberalism emerged in the post-Reformation context. It is a liberalism of prudence, focusing on the way the state should be organized in order to encourage a stable coexistence in multi-faith environments. Toleration was not conceptualized in terms of individual rights, but merely presented as a *modus vivendi* approach, a *pax politica* in the face of (possibly disruptive) moral and religious disagreement between Catholics and Protestants. The liberal state and the concept of religious freedom emerged in the contingent historical constellation of the religious strife of the sixteenth and seventeenth century in Europe. After the outbreak of the Reformation, the liberal state built upon the pre-Reformation political order that was intimately interwoven with Christianity. European states accommodated the emerging religious

2 I deliberately employ the term 'traditions' to indicate that I do not see these strands of thought as mutually exclusive.

3 Cohen, 'Freedom of Religion Inc.', 189-193.

4 *Ibid.*, 189.

5 Jeffrey R. Collins, 'Redeeming the Enlightenment: New Histories of Religious Toleration', *The Journal of Modern History* 81(3) (2009): 607-36 at 611.

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diversity through the model of *cuius regio, eius religio* – each state harboured one established (state) religion while simultaneously practicing a form of tolerance towards others. This practice is nicely exemplified by the so-called ‘schuilkerken’, clandestine churches that emerged all over Europe, but especially in the Netherlands.<sup>6</sup> These were semi-hidden, semi-clandestine houses of worship used by religious minorities. It was not necessary for minority religions to be completely invisible; still, they should not be too prominent, appear too self-confident, or challenge the hegemony of majority religion. Their communal worship was tolerated in practice, but *not* recognized in terms of individual or collective rights. The praxis of religious freedom emphasized the principle of non-interference as the foundational value for governing plural societies.

A genealogical analysis makes clear that religious freedom was originally seen as the basic and distinctive ‘first freedom’ in the liberal political order. It was primarily considered to be a freedom *sui generis*, a pre-institutional freedom that must be protected against state infringement.<sup>7</sup> The liberal state slowly gained power by monopolizing sovereignty at the expense of organized religion. However, it could only do so under the condition that the religious freedoms of the factions involved in the Reformation remained unchallenged. Originally, this freedom of religion was quite limited: the freedom from persecution and the right to practice religion in private – *live and let live* – and was not yet conceptualized in terms of individual rights.

The second, *equality-leaning* tradition emerged much later in the context of the Enlightenment and widened the concept of religious toleration from a *pax politica* to an endorsement of personal freedoms of religion, thought and expression. Enlightenment thinkers like Spinoza ‘cleared a much wider space for liberty and human rights than Locke, and (...) cut an historically more direct, and arguably more important path toward modern western individualism’.<sup>8</sup> It moved beyond religious tolerance as a *modus vivendi* practice and emphasized a specific conception of the person – of what it is to be a moral agent – and what this conception requires from the state for persons to equally achieve that status. Equality-leaning liberalism takes the ideal of *equal respect and concern* as its first principle and argues that religious pluralism can and should be governed within a framework of state neutrality, secular law, non-discrimination, and the rule of law. This line of thought is currently firmly embedded in liberal thought through John Rawls’ *A Theory of Justice*.

6 B. Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Cambridge: Harvard University Press, 2007), 183-84.

7 C. Eisgruber and L. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007), 203.

8 Jonathan I. Israel, *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man, 1670–1752* (Oxford: Oxford University Press, 2006), 161.

### 3 Two freedoms of religion and the fault line of liberalism

The tolerance-leaning tradition in liberalism shows, on the one hand, the *tight* historical relation between the liberal political order and Christianity. Since it initially emerged as a means to curtail inter-Christian conflict, it is very much informed by the post-Reformation *modus vivendi* approach. Since it emerged to pacify inter-Christian strife, its norms towards religious diversity are very much informed by inter-Christian disputes.<sup>9</sup> As such, it might present an under-inclusive defence of religious freedom – especially seen from the perspective of current plural societies – being primarily geared towards Christian denominations in its normative analysis and apparatus.

The equality-leaning tradition shows, on the other hand, the *strained* character of the relationship between the liberal political order and Christianity. In its abstract and a-historical approach, it is less appreciative of the specific constellation in which the western concept of religious freedom emerged: the long and difficult political struggles in the context of the Reformation. Of course, theorists like Rawls are very much aware of the historic roots of liberalism.<sup>10</sup> Nevertheless, these roots do not play an explicit role in the architecture of his *justice as fairness*, in which principles of justice are chosen behind the veil of ignorance. This social-contract approach makes equality-leaning liberalism less receptive to the socially salient fact of the immense impact of Christianity on western liberalism and Western nation building.

In one sense, a continuity between the two traditions can be construed. Equality-leaning liberalism radicalizes the egalitarian seeds that were already planted in tolerance-leaning liberalism. Over time, the idea of toleration and religious freedom was broadened from its original inter-Christian basis, as it emerged from the Reformation, towards an inter-theistic ideal and ending with an ideal of neutrality that treats free religious exercise as part of a broader notion of 'equal liberty of conscience' that extends to both moral and religious claims.<sup>11</sup>

In another sense, this development indicates a radical trend reversal after the Reformation. Tolerance lost its narrow inter-Christian focus. Equality-leaning liberals argue that the state should protect a citizen's ability to form and pursue a comprehensive conception of the good and should not limit these comprehensive conceptions to religious ones.<sup>12</sup> Current equality-leaning liberalism starts from a social-contract approach, providing a basic structure-perspective and defending a fair scheme of equal liberties for all citizens, regardless of their particular (religious or secular) beliefs and values that should be guaranteed through the institu-

9 J. Spinner-Halev, 'Hinduism, Christianity, and Liberal Religious Toleration', *Political Theory* 33(1) (2005): 28-57; Jeremy Waldron, 'Theoretical foundations of liberalism', *The Philosophical Quarterly* 37(147) (1987): 127-50.

10 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), xxiv, 10.

11 *Ibid.*, 206.

12 *Ibid.*, 29.

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tions of the liberal-democratic state. As Cécile Laborde aptly summarizes this tradition:

Egalitarian theorists of religious freedom concede that religion may be paradigmatic of beliefs, identifications, and practices that people have a particular interest in pursuing in their own way, individually or collectively. But they insist that while religion is a paradigm of those valuable concerns, it does not uniquely capture them.<sup>13</sup>

These developments led to a more inclusive approach of religious freedom and smoked out its sectarian origins. Moreover, freedom of religion lost its unique status of first liberal freedom, because over time other liberal values and principles gained equal status, including state neutrality, non-discrimination, the separation of church and state, the rule of law and, over time, welfare state provisions.

#### 4 The neo-reformation reinvention of religious freedom as immunity

Many contemporary defenders of liberal tolerance have taken central Enlightenment elements on board in their analysis. For example, Dobbernack and Modood still see toleration as one of the 'enduring values of European liberalism' but they acknowledge that 'the limits of liberal tolerance are set where actions harm those interests of others which are so important that they should be protected by rights'.<sup>14</sup> Other tolerance-leaning thinkers reject the emerging penetration of Enlightenment values in liberalism and hold on to the pre-modern, sectarian interpretation of religious freedom. McConnell argues that religious freedom cannot be analogized with or reduced to other freedoms, as it serves to protect a uniquely special human good through the protection of an autonomous sphere of conscience, ritual, worship, and community outside the purview of state regulation.<sup>15</sup> These 'Neo-Reformation liberals' deplore the emerging influence of Enlightenment values, reject attempts to expand the definition of toleration to encompass non-religious comprehensive doctrines and deploy claims of religious toleration to protect themselves from the surveillance and regulation of the liberal state.<sup>16</sup> John Witte expresses such a sentiment when he argues that

Jewish and Christian communities participated actively as midwives in the birth of this modern rights revolution, and special religious rights protections were at first actively pursued. (...) After expressing some initial interest, how-

13 Cécile Laborde, 'Equal Liberty, Non-Establishment and Religious Freedom', *Legal Theory* 20(1) (2014): 52-77 at 55.

14 Jan Dobbernack and Tariq Modood, 'Tolerance and Cultural Diversity in Europe: Theoretical Perspectives and Contemporary Developments', *ACCEPT PLURALISM Working Paper 3/2011*, 8, 9. <[www.eui.eu/Projects/ACCEPT/Documents/Research/wp2/ACCEPTPLURALISMWP2D2-1Stateoftheartreport.pdf](http://www.eui.eu/Projects/ACCEPT/Documents/Research/wp2/ACCEPTPLURALISMWP2D2-1Stateoftheartreport.pdf)>.

15 Michael W. McConnell, 'Accommodation of Religion', *Supreme Court Review* (1985), 1-59.

16 Collins, 'Redeeming the Enlightenment', 608.

ever, leaders of the rights revolution consigned religious groups and their particular religious rights to a low priority. Freedom of speech and press, parity of race and gender, provision of work and welfare captured most of the energy and emoluments of the rights revolution. After the 1960s, academic inquiries and activist interventions into religious rights and their abuses became increasingly intermittent and isolated, inspired as much by parochial self-interest as by universal golden rules. The rights revolution seemed to be passing religion by.<sup>17</sup>

We can situate the fault line in liberalism in this distinction, separating two quite distinct liberal traditions. Equality-leaning liberals accept that liberalism developed from a post-Reformation movement to also include Enlightenment values and defend a more inclusive religious freedom in terms of equal liberty of conscience. Neo-Reformation liberals like Witte express a sense of loss resulting from liberalism losing its Reformation-centred base and developing into a more universal theory of justice. They deplore Christianity losing its foundational role in liberalism and merely becoming one of the various comprehensive ideals that the liberal state should tolerate.

Cohen's central discussion can fruitfully be analyzed from this fault line in liberalism. The *Hobby Lobby* and *Hosanna-Tabor* cases can very well be understood in terms of a re-invention of the pre-modern conception of religious freedom. This neo-Reformation defence can be characterized in terms of two features. First, these claims are made by historically well-established majority groups aiming to have their religious autonomy protected. After all, since these claims are grounded in sectarian post-Reformation arguments, they can only be made by religious groups that were part of the post-Reformation process of liberal nation building. It is not a coincidence that these cases concern Protestant groups in the US – indeed, it would be very odd if a Muslim organization in the US would make similar claims. Secondly, these claims are not grounded in comparative arguments of unequal treatment but, instead, in a presumed higher-order pre-legal entitlement of immunity towards state interference. As such, members of hegemonic communities manoeuvre themselves into the role of victims that are unjustly treated. Cohen emphatically takes issue with this neo-Reformation line of argument:

To view constitutional guarantees of religious freedom in this way is to de-secularize the civil state at its deepest foundations. If such a project were to succeed, it would take us out of the continent of constitutional democracy and into the terrain of religious status based legal pluralism and, potentially, constitutional theocracy.<sup>18</sup>

17 John Witte Jr., 'Law, Religion, and Human Rights', *Columbia Human Rights Law Review* 28(1) (1996): 1-31.

18 Cohen, 'Freedom of Religion Inc.', 204-205.

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But the problem is, obviously, that such a program *has* already succeeded. The US Supreme Court has legally and successfully made this seizure of power in the *Hobby Lobby* and *Hosanna-Tabor* cases. And they are only two examples in a larger trend. While I write this paper, another relevant story unfolded around the *Religious Freedom Restoration Act* in the state of Indiana, which quite unapologetically justifies and invites blatant discrimination of gays and lesbians in the name of freedom of religion. Finally, the 2016 US presidential candidate Mick Huckabee vowed that, once elected, he would ignore the Supreme Court gay marriage ruling. He argues that, after all, ‘the Supreme Court is not the Supreme Being’.<sup>19</sup>

These are just some examples of an emerging trend in which the religious right in the US has re-invented the two-worlds theory and employed it as a trump in the current cultural war. Cohen discusses it in terms of ‘resurrected tropes’,<sup>20</sup> Jeffrey Collins describes it in terms of ‘theocracy reborn’.<sup>21</sup> What remains underdeveloped in Cohen’s article is that, at the end of the day, this is not an academic dispute about the correct interpretation of the liberal-democratic tradition. Instead, it is a political struggle on which of the two incompatible liberal interpretations of religious freedom should be endorsed in exemption policies today. Cohen and I endorse the more *equality-leaning* defence of liberalism, while others – including the majority of the US Supreme Court – endorse a reinvention of a more *tolerance-leaning* interpretation. It does not suffice to conclude that the US Supreme Court, the Indiana State Legislature, and Mick Huckabee have got it all wrong. The genealogy of liberalism shows that the tolerance-leaning tradition, viewing the freedom of religion as *sui generis*, long dominated liberal political theory and practice. It cannot be dismissed out of hand as an illiberal idea, as Cohen seems to suggest when she argues that they ‘involve exceptions from valid general laws required by a liberal conception of justice’,<sup>22</sup> since many liberals still actually consider it to be the quintessential interpretation of liberalism.

*Equality-leaning* liberals should recognize that neo-Reformation liberals base their argument on *one* legitimate interpretation of religious freedom in the liberal tradition, but should give their best arguments why the equality-leaning interpretation provides a better liberal articulation of religious freedom in contemporary plural societies. This is my aim for the remainder of this paper.

## 5 Re-conceptualizing religious freedom for the twenty-first century

In contemporary liberal orders, freedom of religion implies roughly that citizens should have the opportunity to live according to the ethos of their religion without interference of government or law – at least up to some point. Rather than working with a predefined list of legitimate religious options, liberal states usu-

19 <<http://crooksandliars.com/2015/05/huckabee-president-can-ignore-gay-marriage>>.

20 Cohen, ‘Freedom of Religion Inc.’, 169.

21 Collins, ‘Redeeming the Enlightenment’, 607.

22 Cohen, ‘Freedom of Religion Inc.’, 170.

ally start with respecting the self-understanding of the citizens involved.<sup>23</sup> Indeed, what the freedom of religion implies exactly is initially determined by the religion in question:

when we say that we believe in something as a matter of faith, (...) we express a commitment to that which cannot be established by reason, or to that which can be established by reason, but not for that reason.<sup>24</sup>

All religions contain certain central beliefs that (1) make categorical demands on action – that is, demands that must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers – and (2) do not answer ultimately to *evidence* and *reasons* as they are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on 'Faith', are insulated from ordinary standards of evidence and rational justification we employ in both common sense and science.<sup>25</sup>

In this sense, freedom of religion serves as a firewall between two incompatible and conflicting normative systems: metaphysical religious prescriptions based on faith and secular state law based on democratic self-legislation. These two systems collide regularly in parliament and court. The *Hosanna-Tabor* case can serve as an example. Secular labour law, protecting employees against employment discrimination, conflicts with (for example, gender-specific) prescriptions of corporate religious groups on who can function as a minister. This raises the question of the *Kompetenz-Kompetenz*: does the civil democratic state have the ultimate right to limit and overrule the self-regulation of corporate religious groups? Or does freedom of religion ultimately trump secular law?

Tolerance-leaning and equality-leaning liberalism answer this question in opposite ways. The Supreme Court decision in *Hosanna-Tabor* is an example of the reinvention of the neo-Reformation idea of religious freedom as immunity – keeping certain decisions of organized religious groups outside of the purview of state regulation. The Court held that the First Amendment acknowledges religion to be special with respect to religious organizations' autonomy,<sup>26</sup> while Chief Justice Roberts gives such organizations a free hand to determine which employees fall under the ministerial exemption:

a religious organization's right to choose its ministers would be hollow (...) if secular courts could second-guess the organization's sincere determination

23 Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', *Human Rights Quarterly* 35(1) (2013): 33-68.

24 Timothy Macklem, *Independence of Mind* (Oxford: Oxford University Press, 2008), 133.

25 Brian Leiter, *Why Tolerate religion?* (Princeton: Princeton University Press, 2013), 34.

26 Cohen, 'Freedom of Religion Inc.', 173.



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that a given employee is a ‘minister’ under the organization’s theological tenets.<sup>27</sup>

This is in line with the way McConnell interprets the ideals underlying the US First Amendment: ‘the freedom to carry out one’s duties to God is an inalienable right, not one dependent on the grace of the legislature’.<sup>28</sup> Finally, Dutch courts have shown a reluctance to interfere in religious cases, endorsing a doctrine of ‘interpretive restraint’, arguing that in cases of inter-religious disputes it is not for outsiders – including secular judges – to pass judgment. This doctrine was initially merely implemented in purely interreligious disputes. However, over time it was also used in cases that involved outsiders, most prominently in cases where religious persons, referring back to scripture, discriminated against gays and lesbians. In 2001, the Court acquitted a Christian couple of discrimination because:

A statement that in itself is offensive and hurtful can lose its defamatory character if the statement designates the entrenched belief of the suspect that homosexuality must be considered a sin.<sup>29</sup>

What these decisions have in common is that they fit within a neo-Reformation re-invention of religious freedom that questions state sovereignty and justifies immunities to religious groups. I fully agree with Cohen’s critique that such defences can only be justified in the context of the pre-modern idea of legal plurality and the two-worlds theory of multiple sovereignty in which organized religion has certain non-disputed pre-legal privileges and has an equal standing beside the state.<sup>30</sup> It is outdated because over the last centuries two processes occurred simultaneously: (1) the locus of power shifted towards the state, and (2) the state itself democratized. State power once had an absolutist character and was located in the single organ of the Monarch, but it shifted over time to the plurality of citizens in their joint endeavour of democratic self-rule. This implies that the interests of religious persons should no longer be taken into account by providing organized religion its own jurisdiction; instead their interests have to be weighed in a different, more democratic way through individual suffrage in the process of democratic self-government. This implies that the two-worlds theory lost its relevance and, consequently, that freedom of religion ceased to have its *sui generis* character. Cohen is correct in her negative assessment that the reinvention of the two-worlds approach is merely an attempt by neo-Reformation thinkers ‘to negate the state as sovereign, to deny its ethical claim to highest obligation of citizens, and thus to relativize it vis-à-vis other, primarily religious, associations’.<sup>31</sup> Equality-leaning liberals should fight this attempt by neo-Reformation

27 *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* et al., 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012), Opinion Roberts.

28 Michael W. McConnell, ‘Accommodation of Religion: An Update and a Response to Critics’, *George Washington Law Review* 60 (1992): 692.

29 Dutch Supreme Court, 9 January 2001, NJ, 2001, 203.

30 Cohen, ‘Freedom of Religion Inc.’, 198.

31 *Ibid.*, 199.

thinkers to turn back the clock to pre-Enlightenment times tooth and nail. The twenty-first century liberal political order has and should have the final say in cases where state law and religious prescription conflict. The government can grant exemptions and can provide religious groups with a certain form of collective autonomy in order to protect their integrity by allowing participants to organize their internal relations in line with their ethos. But it is the government that grants these legal exemptions by partially transferring some of its jurisdictional authority towards the religious entity, and it is the government that can revoke it if this is deemed necessary. This answer to the *Kompetenz-Kompetenz* question is in line with Stephen Macedo's statement that the health of a liberal democracy ultimately 'depends on its ability to turn people's deepest convictions – including their religious beliefs – in directions that are congruent with the ways of a liberal republic'.<sup>32</sup>

There are two additional reasons why the neo-Reformation defence of religious freedom is unwarranted in current liberal political orders. Firstly, pre-modern freedom of religion merely implied a *pax politica*, a *modus vivendi* practice of non-interference – think again of the practice of tolerating clandestine churches. Current claims, like in the *Hobby Lobby* case, are, in contrast, phrased in Dworkinian terms of 'rights as trumps' that can be mobilized in court. Secondly, the pre-modern freedom of religion was quite limited, restricted to the freedom from persecution and the right to practice religion in private. Current court cases do not refer to the right to be left alone, but refer to the wish by religious persons to impose their norms upon non-believers. Consider the claims of the owners of *Hobby Lobby*, a commercial enterprise, to have the right to enforce their religiously inspired views regarding the use of contraceptives upon their employees. Religious groups cannot reasonably expect religious immunities from state interference when these exemptions impose unfair burdens on other categories of citizens.<sup>33</sup>

## 6 From immunity to equal respect and concern

A legal-philosophical analysis of important legal provisions – including religious exemptions – should not take law as a given but should, instead, analyze the law in light of the goals it seeks to promote.<sup>34</sup> In the post-Reformation time, religious freedom was interpreted as the immunity of organized religion towards state sovereignty and served an important role in pacifying inter-Christian religious conflict. In current liberal orders, inter-Christian civil war is no longer lurking and religious freedom serves a radically different role. It is one of a variety of instru-

32 Stephen Macedo, *Diversity And Distrust: Civic Education In Multicultural Democracy* (Harvard: Harvard University Press, 2000), 43.

33 Jon Mahoney, 'A Democratic Equality Approach to Religious Exemptions', *Journal of Social Philosophy* 42(3) (2011): 305-20 at 307.

34 Jeremy Waldron, 'One Law for All? The logic of Cultural Accommodation', *Washington and Lee Law Review* 59 (2002): 32.

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ments, employed by the liberal state to achieve the primary goal of law and policy nowadays: to treat all citizens with equal respect and concern. Religious freedom has lost the status of a freedom *sui generis*; nowadays the space for religious beliefs and practices has to be carved out explicitly in the form of exemptions to egalitarian and predominantly secular law. Indeed, over time, the burden of proof seems to have shifted: where earlier discussions revolved around the question which religious exemptions are *required* from the standpoint of justice, current discussions ask whether, if at all, religious exemptions are actually *permitted*.<sup>35</sup>

The idea of accommodating religious groups is in itself not inconsistent with the ideal of equal respect and concern, especially when it aims to protect members of minority groups against disproportional burdensome majority law. Indeed, the ideal might require some form of exemption or compensation in order to alleviate the particular burdens of the members of these minority groups that are not borne by others.

Changing the perspective from the neo-Reformation emphasis on pre-institutional immunity against state interference to a more post-Enlightenment idea of equal respect and concern makes clear what is wrong with the ominous cases that Cohen discusses. In current normative parlance, justice requires that equal cases are treated equally, not that old and outdated privileges should prevail. In evaluating religious exemptions, the first principle of equal respect and concern requires that all effects on all relevant parties should be incorporated in the analysis. Exemptions can only be granted after the equal respect and concern assessment has been made, taking into account both the justification for the exemption *and* the impact it has on other – categories of – citizens. It is beyond the scope of this paper to analyze in more detail what such an assessment would imply. But it is clear that the interpretation of religious freedom as immunity is incompatible with such an assessment, simply because it distorts the comparison: it only considers the interests of the claimants and ignores the effects on third parties.

The *Hobby Lobby* and *Hosanna-Tabor* claims are in fact reinventions of outdated sectarian claims to immunity from state interference that merely refer to unwarranted privileges of certain groups over others. They are on a par with other institutional arrangements that were long part and parcel of the liberal tradition but which were over time expelled – and for good reasons. They include the limitation of suffrage and access to higher education to men, the right to enter into marriage to heterosexuals, and the right to hold slaves to Caucasians. Abolishing these privileges were important steps in the direction of the ultimate first principle of a more Enlightenment-oriented liberalism: that government should treat all its citizens with equal respect and concern.

Moreover, an egalitarian analysis of religious exemptions should take into account the inherent asymmetrical positions of the various religious and non-religious comprehensive doctrines in society. Some religions are very much histori-

35 *Ibid.*, 19, n. 41.

cally embedded in the DNA of a specific society; others arrived much later as immigrant religions; still other comprehensive ideals cannot be understood as religions in the classic sense but have similar relevance to their adherents. Such an analysis should seek to find ways to treat equally relevant claims equally and criticize claims to preferential treatment. As such the analysis from equal respect and concern should help to uncover 'the hidden, invidious effects of facially neutral yet culturally biased institutions, practices, and laws'.<sup>36</sup>

## 7 Conclusion

In this paper, I have criticized the obsolete account of religious freedom that justifies exemptions for religious groups in terms of a presumed higher-order pre-legal claim of immunity from state interference. My conclusions dovetail with Jean Cohen's rejection of the ominous Court cases, although her argument primarily focuses on the fact that neo-Reformation arguments deny the constituent power of democratic self-rule and popular sovereignty today.

Although Cohen and I arrive at a similar conclusion, we disagree about the status of the debate; she construes the ominous Court cases as an anti-liberal attack on the liberal state order, whereas I see them as an instance of the tolerance-leaning tradition in liberalism, which once was characteristic of the liberal tradition. Still, I agree with Cohen that this tradition should be rejected because it reverts to an obsolete interpretation of religious freedom that is out of sync with the normative underpinnings of current liberal political orders, in which (religious) exemptions can only be justified in terms of the first principle of equal respect and concern.

36 Laborde, 'Equal Liberty, Non-Establishment and Religious Freedom', 56.