

## OBLIGATION, ANARCHY, AND EXEMPTION

**AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY.** By Abner S. Greene.<sup>1</sup> Cambridge, MA: Harvard University Press. 2012. Pp. ix + 333. \$49.95 (cloth).

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People embrace philosophical anarchism for different reasons. Sometimes anarchists adopt this view, which holds in part that there is no general moral duty to obey the law,<sup>3</sup> because they are disillusioned with or alienated from the modern state, which they may believe is oppressive, exploitative, or unjust. Others may be attracted by utopian ideals that have difficulty flourishing under existing political regimes. Sympathy for anarchism might also arise from confrontation with laws believed to be draconian, morally obtuse, or worse—for example, drug laws, prohibitions on homosexual conduct, or mandatory military conscription. In some cases, people become skeptical about the existence of political obligations because, despite the best efforts of generations of political philosophers, they have yet to encounter a persuasive argument for the proposition that states have a moral right to command their general obedience.<sup>4</sup>

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3. As discussed below, *see infra* notes 23–24 and accompanying text, philosophical anarchists not only reject political obligation but also the legitimacy of all existing states. For defenses of this view, see ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1970); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); Joseph Raz, *The Obligation to Obey the Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233–49 (2d ed. 2009).

4. *See* A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 102–04 (2001) (describing various motivations for philosophical anarchism).

Yet another path to philosophical anarchism might begin with reflection on the problem of religious exemptions from generally applicable laws. Twenty years ago, in the aftermath of *Employment Division v. Smith*,<sup>5</sup> Abner Greene proposed a novel theory for why the state ought to provide constitutional religious exemptions.<sup>6</sup> He argued that the two Religion Clauses of the First Amendment—the Establishment Clause and the Free Exercise Clause—were best interpreted as balancing against each other. Under the Establishment Clause, laws must be based primarily on secular purposes, rather than on religious convictions. The reason is that religious beliefs are not publicly accessible, and so relying expressly on such beliefs to justify laws would unfairly exclude nonbelievers. But at the same time, limiting the role of religious beliefs in the democratic process effectively excludes religious believers. Since their views are not represented in the process, they have no reason to obey the laws produced by it. To remedy this problem, the Free Exercise Clause provides religious exemptions from the law. If believers have no say in how the law is made, then at the very least, the law should account for their exclusion by accommodating them to the extent possible.<sup>7</sup>

Initially, this argument for religious exemptions might seem like a fairly straightforward application of a political process theory. Religious citizens are disadvantaged in the democratic process. As a result, courts should exercise judicial review in a manner that provides them with special protections in the form of constitutional exemptions from laws that substantially burden their beliefs and practices. But this theory can point toward more radical and anarchical possibilities. If citizens are owed legal exemptions because they have no reason to obey laws resulting from an exclusionary political process, perhaps they should receive exemptions whenever they conscientiously object to laws that they otherwise have no duty to obey. After all, political exclusion is only one reason why citizens might lack political obligations. If there are others, then perhaps the state should widen the scope of its legal exemptions to cover them as well.

In *Against Obligation*, Abner Greene develops this general line of argument. Without abandoning his earlier balancing

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

6. Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *YALE L.J.* 1611 (1993).

7. *Id.* at 1634.

theory of the Religion Clauses, he now argues for a broader and more ambitious set of claims focused on the idea of “permeable sovereignty,” which holds that citizens have a plurality of obligations based on their religious and philosophical views, family responsibilities, ethnic and tribal affiliations, and so on (p. 20). These sources of obligation may conflict with the state’s demands, and Greene argues that there is no reason to privilege the latter. Citizens should treat all of their obligations as having equal standing, rather than giving presumptive weight to their political obligations (pp. 2, 117). Moreover, Greene argues, when citizens have competing duties and lack political obligations, states should provide them with a form of exit through legal exemptions, unless doing so would threaten compelling state interests (p. 118).

In addition to rejecting conventional accounts of political obligation, Greene devotes two substantial chapters to arguing against what he calls “interpretive obligation” (p. 11), which includes fidelity to constitutional law and modes of legal interpretation that require deference to past authorities (such as original meaning or precedent) and to interpretive authorities (such as the Supreme Court). Just as citizens have plural sources of obligations that compete with their political obligations, legal interpreters confront diverse sources of legal meaning, none of which should be given presumptive authority. In short, according to Greene, citizens and public officials should both reject the general idea of fidelity to the law.

In showing how attacks on political obligation are continuous with challenges to constitutional fidelity and judicial supremacy, *Against Obligation* demonstrates the sustained force of a skeptical approach to a broad array of claims concerning legal authorities. Densely argued and provocative, the book should be of interest to lawyers concerned about matters of religious freedom, constitutional interpretation, and the obligations of judges and political officials. It should also interest philosophers who may be somewhat less familiar with the constitutional and judicial implications of a skeptical or anarchical approach to political obligation.

In what follows, after summarizing Greene’s main arguments against political obligation and in favor of exemptions, I raise two questions about the position defended in the first half of the book, while leaving aside for purposes of this review the interesting and important discussions of interpretive obligations presented in the later chapters. The first question is whether

Greene is committed to philosophical anarchism, despite his repeated and emphatic protestations to the contrary. The second is whether Greene’s account of political obligation and his conception of permeable sovereignty are adequate to support a full range of religious exemptions, including some paradigmatic examples. Even if there are reasons to deny political obligation and to adopt a view near to, and perhaps identical with, philosophical anarchism, that theory may not be well-suited to justifying accommodations for many citizens who confront the law with competing religious and moral obligations. For those who aim to defend a robust exemption regime, anarchism may be less helpful in many cases than more conventional arguments based on the values of freedom and equality.

### I. FROM OBLIGATION TO EXEMPTION

The first half of *Against Obligation* is devoted to establishing two claims: first, that citizens lack general duties to obey the law and, correlatively, that states have no authority to impose them; and second, that states should provide legal exemptions as a partial remedy for their political illegitimacy. Before raising some questions about these claims, I provide a brief summary of Greene’s main arguments for them.

#### A. REJECTING POLITICAL OBLIGATION

Greene begins his attack on political obligation by offering some parameters for his argument. He describes political obligations as moral requirements—whether duties or obligations<sup>8</sup>—to obey the law. These requirements are *prima facie* (or, more accurately, *pro tanto*) obligations, which are taken to be defeasible or open to being overridden by conflicting obligations. Such obligations are also *content-independent*, meaning that one has a duty to obey the law simply because it is the law, rather than because there is a moral reason to comply with the content of the law. Furthermore, political obligations must be *general* in the sense of applying to “all laws at all times” (p. 15), as well as to all citizens. In sum, Greene follows standard

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8. Since nothing here turns on the distinction, I shall follow Greene in using the terms “duty” and “obligation” interchangeably as describing moral requirements. *But see* SIMMONS, *supra* note 3, at 14–15 (discussing various differences between duties and obligations).

accounts of defining political obligation as a general, content-independent, defeasible, moral duty to obey the law (pp. 14–20).<sup>9</sup>

Greene also endorses and defends the *correlativity thesis*, which holds that a state’s political legitimacy is correlative with the existence of its citizens’ political obligations (pp. 24–29).<sup>10</sup> Although Greene does not discuss the Hohfeldian logic of this thesis, the basic idea is that a legitimate state has a claim right to rule and that citizens have a correlative duty to obey. If citizens have no political obligations, then a state cannot have a right to rule. Thus, if a state’s legitimacy is defined in terms of it having such a right, then the rejection of political obligation is also a rejection of the state’s political legitimacy. As Greene writes, “[P]olitical legitimacy is correlated with political obligation—when one is present so is the other; when one is absent so is the other” (p. 27). Somewhat confusingly, Greene calls this the “justification conception” of political legitimacy (p. 32),<sup>11</sup> but I shall refer to it simply as the *correlativity conception*.

In contrast to this standard view of political legitimacy, Greene describes a second and more minimal account, which holds that a state is legitimate whenever it maintains a functioning legal system consistent with basic rule of law values (p. 24). We might call this the *legality* conception. Greene argues that it is too thin to support political obligations. A more robust conception of legitimacy would add to the requirements of legality demands for democratic participation and institutional rules that satisfy a threshold of political justice. But Greene claims that even a state that meets these additional demands does not have the right to alter the moral duties of its subjects and to require their obedience (p. 25).

In rejecting the legality (and somewhat thicker) conceptions of legitimacy, Greene effectively replicates an important distinction, drawn by A. John Simmons, between *justification* and *legitimacy*. According to Simmons, a state is justified when it

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9. See William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215, 215–17 (2004) (“The obligation at issue . . . is usually taken to be prima-facie, comprehensively applicable, universally borne, and content-independent.”).

10. For criticisms of the correlativity thesis, see Arthur Isak Applbaum, *Legitimacy Without the Duty to Obey*, 38 PHIL. & PUB. AFF. 215 (2010); KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 47–61 (1989).

11. I say confusingly because, as discussed below at notes 12–14 and accompanying text, it is possible to distinguish between the concepts of *justification* and *legitimacy*. See SIMMONS, *supra* note 4, at 126–30. I think Greene’s terminology makes it more difficult to track the content of this distinction. It might make sense to do that if he rejected the force of the distinction, but he appears to accept it.

is “on balance morally permissible (or ideal) and . . . rationally preferable to all feasible nonstate alternatives.”<sup>12</sup> A justified state may generate or maintain important public goods, such as an effective legal system and just political and economic institutions. But this is not sufficient for a state to acquire legitimacy, which Simmons describes as the state’s moral right “to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties.”<sup>13</sup> On this view, a just state might be *justified* but nevertheless *illegitimate*, at least in the sense of lacking the exclusive right to create, impose, and coercively enforce moral duties upon those within its jurisdiction.<sup>14</sup>

To bridge the gap between a state’s justification and its legitimacy, at least under something like the correlativity conception, requires an argument showing that citizens have a duty to obey states that have certain positive moral attributes (e.g., legality or justice) or that produce certain public goods (e.g., stability, the rule of law, democratic participation). Like others who are skeptical about political obligation, Greene claims that no such argument is available. He groups existing accounts of political obligation into three categories: agent-centered, status-based, and state-centered (pp. 6–8). Agent-centered arguments focus on actions taken by a state’s subjects that might give rise to political obligation. These include most famously consent and its weaker cousin, tacit consent, as well as fair play theories and arguments based on the value of political participation. An account is status-based when it relies on role-based or positional obligations. For natural duty theories, the relevant role is the subject of a just (or justified) state, whereas theories of associative obligation emphasize citizens’ special obligations to their compatriots. Finally, state-centered accounts focus on the need for states to provide political stability, social coordination, institutional settlement, and other important public goods.

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12. *Id.* at 126.

13. *Id.* at 130.

14. One could accept the conceptual distinction between justification and legitimacy but argue that a state’s justification may be sufficient, at least in some cases, to establish its legitimacy. Like Simmons, Greene clearly rejects this view. But for a competing account, see JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* (2011), ch. 4. Quong defines legitimacy in terms of the state’s right to impose and coercively enforce duties on agents, although he stops short of saying that legitimacy entails a duty to obey the law. For present purposes, however, the important contrast is with the claim that legitimacy may be a function of a state’s justification. As Quong writes, “[A] certain kind of liberal state is justified and *is legitimate for that reason.*” *Id.* at 109 (emphasis added).

In the first (and longest) chapter of the book, Greene sets about demolishing all of these accounts of political obligation (pp. 35–113). Although developed with nuance and sophistication, the main lines of argument are familiar from the existing literature, and I will not rehearse them here. The basic strategy, pioneered by John Simmons more than thirty years ago,<sup>15</sup> is to line up the various positive accounts and show how they, singularly and in combination, fail for one or more reasons.

If there is a unifying thread or theme to Greene’s attack on political obligation, however, it is usefully summed up in his invocation of “rule-sensitive particularism” (p. 100).<sup>16</sup> Morally responsible individuals cannot blindly follow the rules (or laws) imposed by the state. Because they confront a plurality of conflicting sources of moral obligation, they must continuously evaluate the balance of reasons available to them in particular contexts. In their decision-making, they ought to take into account the systemic benefits of following the law as the state demands. But there is no reason, on Greene’s view, to think that the state is either morally or epistemically better situated than individuals to determine whether, all-things-considered, they ought to obey the law. That judgment is always a particular one, made with sensitivity to rules and the goods they provide, but never fully determined by them (pp. 100-01).

Given the correlativity conception of political legitimacy, Greene’s rejection of political obligation means that the state is illegitimate, at least in the sense that it has no right to demand obedience from those subject to its control. Rather, on Greene’s view, the state has what he calls “permeable sovereignty,” which is contrasted with “plenary” sovereignty (p. 33). A state has *plenary* sovereignty when it has the moral right to require that its subjects obey all of its laws. Its sovereignty is *permeable* when its demands for obedience must be weighed in the balance with citizens’ other sources of moral obligation. In some cases, the state may nevertheless be justified in imposing duties to obey specific laws. That will be true when following the law is morally required, regardless of the state’s demands for compliance, as in

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15. See SIMMONS, *supra* note 3, chs. 3–7 (rejecting arguments from consent, tacit consent, fair play, the natural duty of justice, and gratitude); see also A. John Simmons, *Associative Political Obligations*, 106 ETHICS 247 (1996) (rejecting arguments from association obligation).

16. Greene borrows the phrase from FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 97 (1991).

the case of laws prohibiting murder and other *mala in se* crimes. But the state may be able to justify imposing duties in other cases as well, when all-things-considered, the morally right course of action is to follow its commands. The rejection of general, content-independent, political obligations is thus compatible with the existence of duties to comply with certain laws. Such duties may be justified by various considerations underlying some of the standard accounts of political obligation (e.g., consent, fair play, social coordination), or some combination of those considerations. Whether any particular demand for compliance is justified, however, must be assessed independently and on its own merits, without relying on the notion that the state has any general claim to a presumption in favor of its moral authority.

#### B. EXEMPTIONS AS PARTIAL REMEDIES

A state with permeable sovereignty will sometimes be justified in imposing moral duties and demanding that its subjects comply with them. But when the state lacks such authority, Greene argues that it ought to provide exit options through legal exemptions. Of course, as Hume long ago recognized,<sup>17</sup> most people are in no position to exit the state. The costs are too high for emigration to be an either realistic or reasonable option (p. 117). Instead, Greene suggests, legal exemptions can serve as “[r]epresentations of exit” (p. 114). By accommodating conscientious objectors, the state provides a “partial remedy” for its unjustified impositions upon them. Exemptions cannot fully remedy the state’s illegitimacy, since they cannot establish the conditions for the state’s right to demand general obedience. But a robust exemption regime can at least ameliorate conflicts between the state and those who claim that they cannot, in good conscience, comply with the law (pp. 114–15).

Greene adopts a balancing approach to legal exemptions. To screen out frivolous cases, he argues that conscientious objectors should be required to initiate claims against the state (pp. 118–19), and they must show that the law substantially burdens their sincere religious or moral views (p. 130). If an objector establishes these elements of a claim, the burden shifts to the state to show, on a case-by-case basis, that granting an

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17. David Hume, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 462 (Eugene F. Miller ed., 1985).



exemption would threaten a compelling state interest. Thus, the right to a legal exemption is not absolute, but merely *prima facie*. Claims for exemptions can be defeated if the state can demonstrate that it is morally justified in requiring compliance with the law (p. 123).

Although nearly all of Greene's examples of exemptions involve religious claims, it is worth emphasizing that his moral argument from permeable sovereignty is not limited to those with religious objections but rather "includes all deeply held sources of normative authority" (p. 124). In extending his theory in this way, Greene departs from existing and prior First Amendment doctrine, which has never explicitly authorized exemptions for overtly non-religious claims of conscience.

Given the breadth of its scope, Greene's theory of "represented exit" sits uneasily next to his earlier claim, which he repeats here for consideration as a possible "stand-alone argument" (p. 149), that religious believers have a special constitutional right to judicial exemptions, one that does not apply to those with non-religious claims of conscience. I have already mentioned the outlines of this argument above,<sup>18</sup> and elsewhere I have offered various criticisms of it.<sup>19</sup> For now, I merely observe the incongruity of claiming a special set of legal exemptions for religious conscientious objectors, when the entire argument would appear to be swamped by larger considerations stemming from Greene's more general denial of political obligation. If the First Amendment states a case for privileging religious over non-religious conscientious claims,<sup>20</sup> Greene would seem to be in a good position to criticize the law for failing to provide non-believers with some positive basis for adjudicating their *prima facie* claims of conscience. It is puzzling why he is so circumspect about the constitutional rights of non-believers.<sup>21</sup>

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18. See Greene, *supra* notes 6–7 and accompanying text.

19. See Micah Schwartzman, *What If Religion Is Not Special?* 79 U. CHI. L. REV. 1351, 1390–95 (2012).

20. I have suggested some possible interpretations of the First Amendment that close the gap between religious and non-religious claims of conscience. See *id.* at 1414–26.

21. Greene acknowledges that "[o]ne could construct an argument for judicial exemptions beyond religious practice, as a matter of constitutional right" (p. 116), and he briefly mentions some possibilities without settling on anything specific and, for that matter, without stating that non-religious conscientious objectors are morally entitled to exemptions as a matter of constitutional law.

## II. WHY NOT ANARCHISM?

Despite the title of his book, and his forceful attack on political and interpretive obligations, Greene claims that he does not “endorse anarchism, of either the philosophical or political stripe” (p. 32). Indeed, Greene is concerned enough about the risk of being labeled an anarchist that he repeats his denial in the book’s penultimate paragraph, declaring that his “argument is not for anarchy” and that “government may play a role . . . in seeking and perhaps even achieving a more harmonious republic” (p. 253). These statements abjuring anarchism are difficult to reconcile with Greene’s views about political obligation, which seem to place him squarely within the skeptical tradition of philosophical anarchism that has been developed and refined over the last few decades with greater clarity, precision, and sophistication than ever before.<sup>22</sup>

Greene’s rejection of philosophical anarchism is unpersuasive. This is primarily because he accepts the two main propositions to which all anarchists are committed, namely, that all states are politically illegitimate and that there is no general duty to obey the law.<sup>23</sup> Indeed, at times, Greene appears to embrace a strong version of philosophical anarchism, what Simmons calls *a priori* anarchism, which holds that it is morally impossible for citizens to give presumptive authority to the state.<sup>24</sup> According to Greene, citizens cannot consent or take some other voluntary action (such as receiving benefits from the state), inhabit some role or status, or defer to a practical authority in a manner that creates a general obligation to obey the law. As he says: “One can never displace the authority for a normative judgment” (p. 101). Of course, citizens may be morally required to comply with specific laws. But no anarchist denies that proposition. The central question is whether there are, and indeed could ever be, general political obligations, and, assuming the correlativity conception of legitimacy, whether the

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22. See especially A. John Simmons, *Philosophical Anarchism*, in *FOR AND AGAINST THE STATE* 19–39 (John T. Sanders & Jan Narveson eds., 1996). Simmons’ essay, which is the clearest and most sophisticated exposition of philosophical anarchism to date, is reprinted in SIMMONS, *supra* note 4, ch. 6.

23. See SIMMONS, *supra* note 4, at 107 (“This, we may say, is the minimum moral content of anarchist judgments of state illegitimacy: the subjects of illegitimate states have no political obligations.”).

24. In contrast to *a priori* anarchism, *a posteriori* anarchism holds that while it is possible for states to have political legitimacy and, correlatively, for citizens to have political obligations, no actually existing states are legitimate, and no citizens (or very few) have political obligations. See *id.* at 104–07.

state is, or could ever be, politically legitimate. To the extent he rejects political obligation and its logical correlate, political legitimacy, Greene does, in fact, embrace the central tenets of philosophical anarchism.

Greene attempts to resist this conclusion in a few ways. First, he identifies weaker conceptions of political legitimacy that the state might satisfy. The *legality* conception mentioned above is one possibility. Since many states maintain recognized and effective legal systems that comply with and promote rule of law values, Greene says this “version of political legitimacy is all around us” (p. 32). But this response cannot distinguish Greene’s view from philosophical anarchism, because he concedes that the legality conception is not sufficient to generate political obligations. States may have the moral authority to impose some laws, but acknowledging that fact does not yield a right to demand general compliance with the law.

Second, Greene argues that unlike philosophical anarchists, he believes the state is justified in providing important public goods, which private action, including the use of markets, is incapable of supplying (p. 33). But this response is based on a conflation of the distinction noted above between the state’s justification and its legitimacy.<sup>25</sup> Although a state might be morally justified in the sense that it is effective in solving coordination problems or in maintaining decent and even just institutions, it might nevertheless be politically illegitimate in not having the right to demand general obedience to its laws.<sup>26</sup> Sensitivity to the distinction between justification and legitimacy allows philosophical anarchists to say exactly what Greene wants to say, which is that states may have significant moral virtues, even if they lack presumptive moral authority.

Finally, Greene distinguishes his position from anarchism by claiming that, on his view, “we do better living under the rule of a government in a liberal democracy than we would otherwise” (p. 5). One might wonder why, if this is the case, Greene does not reject the correlativity thesis and claim that liberal democratic states are politically legitimate in the sense of being morally justified, even if they cannot always demand compliance with the law. But philosophical anarchism has a

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25. See *supra* notes 12–14, and accompanying text.

26. See SIMMONS, *supra* note 3, at 198 (“Governments which are just and beneficial, as well as responsive and open to change are not reduced to the level of tyrannical government simply because they share with it ‘illegitimacy’ in the traditional sense.”).

response to this question, relying again on the distinction between justification and legitimacy. The answer is that we do better living under many institutions and associations—including some religious organizations, corporations, universities, etc.—but that does not give them the right to coerce our compliance with their rules and regulations. We might be better off living in a world with Google in it. Perhaps Google can provide important goods that no other firm can supply. But that does not give Google the moral right to compel our use of its services.<sup>27</sup>

My point here is not to press the argument for philosophical anarchism, except perhaps to avoid certain confusions about it, which I think Greene's rejection of it may unfortunately encourage. Early in his book, Greene acknowledges that his conclusions "may seem frightening (are we living in a state of nature? should we be taking up arms against this illegitimate force?)" (p. 5). Repudiating philosophical anarchism might be seen as a way to alleviate such concerns. But this is a mistake. Philosophical anarchism may not be the correct view of political legitimacy or political obligation, but it does not necessarily lead to an endorsement of lawlessness, civil disobedience, or armed resistance to the state, and certainly no more than Greene's view does. Instead of dismissing philosophical anarchism as a fearsome and potentially violent doctrine, Greene's argument against political obligation and in favor of permeable sovereignty is more consistently interpreted, I think, as a contribution to anarchical political philosophy, which is itself part of a respectable tradition of skeptical moral reflection about the nature and limits of state authority.

### III. HOW (NOT) TO JUSTIFY LEGAL EXEMPTIONS

I have suggested that Greene has no reason to reject philosophical anarchism given his stated commitments. But proponents of legal exemptions for conscientious objectors may have different reasons to be concerned about relying on anarchical claims or similar arguments based on the denial of political obligations. More specifically, Greene's argument that the state should grant exemptions as a partial remedy for its illegitimacy may not be sufficient to account for an important range of cases, including some paradigmatic examples of religious accommodation. In such cases, Greene's remedial

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27. See SIMMONS, *supra* note 4, at 136.

strategy may be less successful than more familiar, and perhaps less philosophically controversial, arguments based on the values of freedom and equality.

To illustrate this concern, consider a few cases that Greene mentions as examples in which exemptions are justified under his remedial theory. The first is *Goldman v. Weinberger*,<sup>28</sup> in which a Jewish chaplain challenged an Air Force regulation that prohibited him from wearing a yarmulke indoors. This might seem like an easy case for Greene. The chaplain has a sincere religious obligation to wear a yarmulke, and the state has no serious countervailing interest. Because the state cannot justify the law, at least not as applied in these circumstances, and because Goldman has no obligation to obey it, the state should remedy its illegitimate imposition of the law by granting an exemption.

But *Goldman* turns out not to be so simple under Greene's theory. The chaplain in that case might well have had a specific duty to obey the law. After all, he not only volunteered to serve in the military, and to draw a salary from the state, but as a military officer, he also swore allegiance to uphold the laws of the United States. Under these circumstances, there are colorable arguments under fair play and consent theories that Goldman had an obligation to comply with military regulations. Even if his receipt of public benefits and his oath of allegiance were not sufficient to obligate him in perpetuity to obey all otherwise valid laws—though some philosophical anarchists might well consider his consent binding in this way—taken together these voluntary actions undermine any claim that Goldman was morally unencumbered in his relationship with the state. If he did have a duty to obey the law, then he was not entitled on that basis to an exemption on remedial grounds.<sup>29</sup>

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28. 475 U.S. 503 (1986).

29. Relying on his earlier theory of religious exemptions, Greene might respond here that Goldman had an independent basis for claiming an exemption, namely, that his religious views were excluded in the legislative process, pursuant to the Establishment Clause's secular purpose requirement. Because his religious beliefs were not taken into account in the formation of the military's regulations, Goldman had no *prima facie* obligation to obey them when they burdened his religious practice. For reasons I have given elsewhere, *see* Schwartzman, *supra* note 19, at 1390–95, I think this argument fails. But here I would add two further points: first, this argument will not be available in cases when the conscientious objector's claim is non-religious. A secular military officer would not be in a position to invoke it. Second, it is not clear that harms from political exclusion will always be sufficient to overcome obligations incurred on the basis of fair play considerations or through informed consent. A person who knowingly and *voluntarily* accepts public benefits (especially if they are excludable goods), or who freely consents

If the problem in *Goldman* is that the state could demand at least a limited duty to obey, in others cases the difficulty will be that the state has not coercively enforced compliance with the law. For example, in the paradigmatic case of *Employment Division v. Smith*,<sup>30</sup> two Native Americans were fired from their jobs for consuming peyote, which was a banned substance under state and federal law. If the case had involved a criminal prosecution, it might have been fairly straightforward under Greene's theory, since the state almost certainly lacked a compelling interest to enforce its prohibition on the sacramental use of peyote. But *Smith* was not about a challenged criminal conviction; rather, it involved the state's denial of a claim for unemployment compensation.<sup>31</sup> The claimants in *Smith* were seeking a public benefit in the form of financial assistance from the state. Setting aside that they might thereby incur fair play obligations to comply with state policies, the state did not impose upon them any requirement to claim unemployment compensation. They were not under any moral or legal duty to seek or accept state benefits and were not, in that sense, coerced by the state. They were incidentally burdened, and perhaps wrongly so, but it is not obvious that the wrong involved had anything to do with the state coercively imposing upon them a duty to obey the law.

Even if the claimants in *Smith* could assert that they were indirectly coerced by the state conditioning access to public benefits on compliance with an unjust law, there may be other cases in which parties seeking accommodations cannot easily claim that they were either directly or indirectly coerced to obey the law. For example, in *Kiryas Joel*,<sup>32</sup> a community of Satmar Hasidic Jews lobbied the New York state legislature to create a special school district, ostensibly for the purpose of educating the community's handicapped children, who had suffered emotional trauma attending secular schools.<sup>33</sup> The question in the case was whether the state's effort to assist the Satmar community was an impermissible religious accommodation

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to serve in a particular role, might incur specific obligations even if that person's convictions were not accounted for in the provision of those benefits or in the creation of that role. Of course, as discussed below, there might be other reasons to accommodate even those who have incurred obligations through fair play or consent. But a remedy for illegitimately imposing a duty to obey will not be among them.

30. *Emp't Div. v. Smith* 494 U.S. 872 (1990).

31. *Id.* at 874.

32. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

33. *Id.* at 690–93.

under the Establishment Clause. (The Supreme Court held that it was.<sup>34</sup>) But if the question had been whether the state had a duty to provide financial support for a separate religious school, the Satmar would have had no valid claim on the state, especially not under a theory of religious exemptions as partial remedies for the state's political illegitimacy. The state did not require the Satmar to send their children to public schools or to secular private schools.<sup>35</sup> Nor did it impose or attempt to coerce obedience with any law that conflicted with their religious obligations. Far from seeking a remedy for an illegitimate demand that they obey the law, the Satmar participated in the political system—quite successfully, as it turned out—to obtain state subsidies for what Greene describes as a “partial exit” from the broader social and political community (p. 146). But notice that we are now a long way off from remedying the state's political illegitimacy through exit from the law. The accommodation in *Kiryas Joel* is not about allowing for exit, but rather about actively promoting and subsidizing it.

None of the religious accommodations claimed in these three cases—*Goldman*, *Smith*, and *Kiryas Joel*—fits easily within Greene's remedial theory. Two of them, *Goldman* and *Smith*, are probably better justified on more familiar grounds involving the values of freedom and equality. *Goldman* need not deny that he has a *prima facie* duty to obey the law to make out a claim for a religious exemption. He can admit having such a duty, but claim that the state ought to respect his religious liberty by granting him a minor exception from its uniform regulations. He can also argue that failure to grant such an exemption is a form of religious discrimination, since it is highly unlikely that a religious majority would impose a burden on its own members' religious practices based on such an inconsequential state interest.<sup>36</sup> The same arguments from freedom and equality would hold, *mutatis mutandis*, for the Native Americans in *Smith*. Even if they were not directly coerced by the state, and even if they had some *prima facie* obligation to comply with state policies regulating receipt of public benefits, they can argue that the state better respects the freedom of conscience if it does not require

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34. *Id.* at 698 (“[A] State may not delegate its civic authority to a group chosen according to a religious criterion.”).

35. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding the state could not compel Amish parents to send their children to school beyond the 8th grade).

36. For development of this line of argument, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 88–89 (2007).

citizens to choose between accepting public benefits and adhering to their religious beliefs and practices. And they can also argue that a religious majority obviously would not ban its own sacramental use of a drug, including alcohol, except perhaps under exceptional circumstances. That the majority did so in this case either reflected neglectful indifference or religious discrimination.<sup>37</sup>

Perhaps the Satmar in *Kiryas Joel* could make similar appeals to freedom of conscience and equality, but their case does not fit the conventional pattern of religious exemptions from the law. Furthermore, their demand for what effectively amounts to state delegation of jurisdictional control raises numerous and difficult questions about whether and to what extent the state should treat religious groups as sovereign powers, let alone subsidize the illiberal among them.<sup>38</sup> Although Greene offers a thoughtful and sophisticated discussion of these issues, his claim that the state should underwrite the “partial exit” of insular religious communities seems to beg the question of what they are exiting from when the state has not imposed any moral duty or otherwise placed any coercive burden upon them.

### CONCLUSION

Greene’s argument against political obligation and in favor of permeable sovereignty is a substantial and valuable philosophical undertaking. It is creative, thought-provoking, and an important contribution, especially to the literature on religious exemptions. In evaluating his attempt to link obligation and exemption, I have raised two questions. The first is whether Greene is committed to philosophical anarchism, despite his insistence to the contrary. For lay readers (and perhaps some philosophers as well), anarchism may have scary connotations. But when carefully described, certain forms of philosophical anarchism are committed to a balance-of-reasons approach to moral and political obligations that shares much with, and may indeed be identical to, the account Greene offers in his book.

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37. *See id.* at 92–93.

38. I have elsewhere expressed skepticism about the idea of treating religious institutions as sovereigns, at least in the sense of exercising political and coercive power. *See* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. (forthcoming 2013); Richard Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. CONTEMP. LEGAL ISSUES (forthcoming 2013).



Clarity on this point is important for analytical purposes, but also because philosophical anarchism is easily misunderstood and sometimes mischaracterized in the existing literature.

The second question is about the limits of a theory of exemptions based on the idea of remedying political illegitimacy. Even if Greene can distinguish his account from philosophical anarchism, his view rests on controversial claims about the nature of political authority and the extent of our obligations as citizens. Those claims are at least as contentious as arguments for exemptions based on the values of freedom of conscience and equality, and it is not entirely clear what is gained by framing the debate about exemptions in terms of political obligation. As I have tried to suggest, in many cases, questions about duties to obey the law do not seem to be centrally at issue in deciding whether exemptions are justified. And even when the duty to obey is implicated, other arguments may be sufficient to determine the issue. In saying this, I do not mean to suggest that the debate about political obligation is unimportant or irrelevant—far from it. My point is rather that the question of whether to grant exemptions extends beyond whether we have duties to obey. It is a question about the state's justification—that is, about whether the state acts justly—and not only about its legitimacy.