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**SOME THOUGHTS ON THE FIRST AMENDMENT'S RELIGION  
CLAUSES AND ABNER GREENE'S *AGAINST OBLIGATION*, WITH  
REFERENCE TO PATTON OSWALT'S CHARACTER "PAUL FROM  
STATEN ISLAND" IN THE FILM *BIG FAN***

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Some Thoughts on the First Amendment's Religion Clauses and Abner Greene's *Against Obligation*,  
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Jay Wexler

In *The Political Balance of the Religion Clauses*, published nearly twenty years ago in the *Yale Law Journal*, Abner Greene sketched out one of the more elegant solutions ever proposed for reading the Free Exercise Clause together with the Establishment Clause.<sup>1</sup> According to Greene, because nonbelievers do not have “meaningful access”<sup>2</sup> to the “extrahuman source of value”<sup>3</sup> that is at the heart of religious belief, the Establishment Clause should be read to “forbid enacting legislation for the express purpose of advancing the values believed to be commanded by religion.”<sup>4</sup> In turn, and “precisely because religious should be excluded from politics in this way,”<sup>5</sup> Greene argued that the Free Exercise Clause—*contra* *Employment Division v. Smith*<sup>6</sup>—should be read to give religious believers a right, under some circumstances, to be exempt from generally applicable laws that burden their religious belief and practice.<sup>7</sup>

Greene's argument has been extremely influential in the legal academy (I count 125 cites to the piece in Westlaw's JLR database), and it has certainly influenced my own thinking about how we ought to read the Religion Clauses. Now, twenty years later, Greene has brought the argument back

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<sup>1</sup> Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1992-1993).

<sup>2</sup> *Id.* at 1614.

<sup>3</sup> *Id.* at 1617.

<sup>4</sup> *Id.* at 1613.

<sup>5</sup> *Id.*

<sup>6</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>7</sup> Greene, *supra* n. 1, at 1633-39.

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on the scene once again, as one part of his new book *Against Obligation*, which concerns the nature of political and interpretive obligation more generally.<sup>8</sup> It is great to see the argument return to the spotlight; it's as though a studio has reissued a classic film to celebrate a milestone anniversary or a rock band has embarked on a tour where they're playing their most beloved album in its entirety.

But with the argument's new packaging come new questions. *Against Obligation* ranges far beyond religion, and its argument is aimed broadly at supporting what Greene calls "permeable sovereignty"—the notion that "we should see all of our sources of value, of how to live," whether those be "religious, philosophical, family/clan/tribal, etc. . . . as [not] subservient to the law . . . as at least presumptively on par with each other, as equal, even though in some circumstances we'll have to let our separate norms go and adhere to the law."<sup>9</sup> According to Greene, society should recognize broad exit rights for individuals whose fundamental commitments—whether those commitments are religious or otherwise—place them at odds with the general laws enacted by the majority.<sup>10</sup>

This broader argument leaves me wondering what role religion itself, as traditionally understood, plays in Greene's ideal political and constitutional world as compared to other types of fundamental commitments—the commitments he refers to as "philosophical, family/clan/tribal." Greene suggests, I think, that legislators should give some consideration to claims of exit made by anyone with a serious case for an exemption, although he also allows some room for nuance in how legislators are supposed to evaluate these claims, which makes me wonder whether religious claims (some religious claims?) should be considered to be more strong than (some?) non-religious claims.<sup>11</sup> When it comes to discussing judicially-enforced exemptions to general laws, Greene revisits *The*

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<sup>8</sup> ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *See id.* at 114-15.

<sup>11</sup> *Id.* at 129-33.

*Political Balance* to argue for a judicially-enforced right of exit for religious believers; as to whether such a right should exist for non-religious claims, he suggests, I think, that such a right should exist, but he only “summarize[s] three arguments” in support of the notion and explicitly avoids “offer[ing] an extended argument” for it.<sup>12</sup>

At the end of *Against Obligation*, I found myself unsure whether *The Political Balance* has any ongoing relevance in Greene’s political and constitutional vision and, if so, what that relevance is. If, for example, a constitutional exemption right should exist for all fundamental commitments, then the unique balance of the Religion Clauses would appear not to matter anymore; the case for exemption would reside in a more general theory of political justice that would render the precise reading of the Religion Clauses largely irrelevant. And, in turn, religion would cease to be an important political or constitutional category. I want to discuss these questions in somewhat more detail, as well as raising one well-worn argument against the original *Political Balance* itself, but since it’s always more fun to talk about these issues with some specific characters in mind, first I want to talk about a movie.

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If you haven’t seen Robert Siegel’s 2009 film *Big Fan*, starring the hilarious Patton Oswalt<sup>13</sup> as “Paul,” a thirty-six year old bachelor who lives with his mother in Staten Island and whose life revolves entirely around his fanatical devotion to the New York football Giants, then you should go out right now and see it. I say that even if you’ve somehow picked up this paper having no interest

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<sup>12</sup> *Id.* at 116, 149.

<sup>13</sup> If your only exposure to Patton Oswalt is his role in *King of Queens*, then you have no idea how hilarious this guy really is.

at all in the Religion Clauses. If you *are* interested in the Religion Clauses, however, then consider your obligation to see the movie doubled.

In almost every law and religion class taught in any law school in the United States, at some point someone (usually the professor) will raise the question of why religion and not other types of belief should be constitutionally protected. This usually transitions into a discussion of the various definitions that scholars and courts (not the Supreme Court, but a few lower courts) have used to mark out what counts as religion and what does not. One way of defining religion is by reference to the *content* of the belief system in question—does the system entail belief in a god or some gods or the divine or some extra-human source of authority, etc., etc.<sup>14</sup> The problem with most if not all content-based definitions, however, is that they tend to leave out some belief systems that most people would say are unquestionably religious. Do Confucianists believe in an extra-human source of authority? Hard to know. Is Confucianism perhaps not a religion? Seems hard to square with common sense.

The next step is to introduce so-called *functional* definitions of religion—those that define what counts as religion with reference to what role or function the belief system plays in the individual's life.<sup>15</sup> For one person, Catholicism plays a central role in making sense of the world, but for someone else, perhaps it's communism, or environmentalism, or family. Maybe those sources of meaning should be protected as religious. But then inevitably somebody (usually the professor) points out that, *hey wait*, does this mean that someone whose whole life revolves around baseball should be constitutionally protected? At that point, everyone in the class laughs heartily, though also somewhat uncomfortably, because, let's face it, it's not that easy to identify precisely why someone

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<sup>14</sup> For an early attempt at a content-based definition from the Supreme Court, see *Davis v. Beason*, 133 U.S. 333, 342 (1890) (“the term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”). This was dicta only; the Supreme Court has never defined the term “religion” for constitutional purposes.

<sup>15</sup> See, e.g., JESSE CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 69-74 (1995).

whose life revolves around environmentalism or family deserves protection but not someone whose life revolves around the Boston Red Sox should not.

Or, for that matter, the New York Giants. Under any functionalist definition of religion, Paul's maniacal devotion to his favorite football team qualifies. His fandom is the thing that gives his life meaning. He dresses in Giants clothes, thinks and talks incessantly about the Giants, adorns the room of his boyhood home where he still lives in Giants paraphernalia, has only one friend, with whom he talks almost exclusively about the Giants (the two do engage in a couple of "debates" over whether Hawaiian pizza and/or Root Beer are any good, but other than that, the Giants are their only topic of conversation), and works as a parking lot attendant so he has the time and opportunity to draft the passionate pro-Giant, anti-Philadelphia Eagle speeches he gives in the middle of the night on sports talk radio, where he is known as "Paul from Staten Island."

Paul lives for Sunday, when he and his buddy get together to watch the Giants play, either in his friend's living room or, if the Giants are playing at home, in the parking lot of the stadium (they tailgate, but with no money to buy tickets, they watch and cheer by themselves outside on a television they hook up to a car battery). A week when the Giants have won is a good week; if the team loses, then the next Sunday can't come quickly enough. Paul worships the Giants' star linebacker Quantrell Bishop (a/k/a "Quantrell *Fucking* Bishop," as Paul exclaims when he and his friend spy him driving around their Staten Island hangouts). When Paul introduces himself to Bishop at a Manhattan club they have followed him to, Bishop SPOILER ALERT beats the hell out of Paul, sending him to the hospital. Paul wakes up three days later, and his first question, after he finds out it's Monday, is whether the Giants won (they didn't).

I will stop with the plot summary there, but it is probably worth noting that the filmmakers understand and indeed emphasize the religious-like nature of Paul's devotion for the Giants and their star linebacker. Paul drives around in his mother's car that sports rosary beads hanging from

the rear view mirror and a statue of the Virgin Mary on the dashboard; as Paul drives to the game or follows Bishop, the religious imagery of his quest is evident. Everything about Paul's dedication to the Giants is sketched in religious terms—he wears the religion's garb (his hat; his #54 shirt), occupies the religion's sacred space (the stadium), celebrates the religion's sacred time (Sunday), worships the religion's charismatic leader (QFB), sings the religion's music ("Let's Go Gi-ants"); and follows the religion's ethical creed (anti-Eagles). As the trailer for the movie proclaims: "For Millions of Americans . . . Football is a Religion . . . and the Stadium is Their Church." When confronted by his mother with the fact that, unlike his two siblings, he lacks a family and a career, he erupts with an outburst: "I don't want that. I don't want what they've got." All Paul wants is for the Giants to win.

And now back to the Religion Clauses.

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Because football, unlike almost all other professional team sports, pretty much has its own day of the week, it is easier to compare it with traditional religions than, say, hockey or basketball, when thinking about whether fans ought to have exit rights from government regulations that burden their fandom. One of the classic early Free Exercise cases, of course, is *Sherbert v. Verner*,<sup>16</sup> which held (this was pre-*Smith*, although *Smith* affirmed that *Sherbert* and its progeny remain good law for reasons I have never really understood) that North Carolina could not deny unemployment benefits to Adele Sherbert, a Seventh Day Adventist who refused to work on Saturdays. What should happen to Paul if his employer decided that he would have to work on Sunday? What if Paul worked for the government and he was forced to work on Sunday? What if the government

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<sup>16</sup> 374 U.S. 398 (1963).



wouldn't let Paul have the day off on Super Bowl Sunday when the Giants were set to play the Patriots? Should Paul be allowed—either as a matter of a discretionary government accommodation for his fundamental beliefs or as a constitutional right enforceable by the courts—to join his fellow worshippers in the stadium parking lot despite the general rule that he work on Sunday?

We can imagine other contexts where Paul's Giants-worship could come into conflict with the law. What if Paul wanted to put an enormous neon "Go Giants" sign on his lawn in violation of local zoning laws? Or if he insisted on wearing his "Bishop #54" shirt at work instead of his government issued uniform (or to keep on his Giants cap despite a "no headgear" rule)? What if he were in prison and demanded the right to receive the team's official yearbook in the mail or to watch the big Cowboys game on Monday night?

I kept thinking about Paul as I was reading *Against Obligation*. In a political system characterized by "permeable sovereignty," in which the government does not enjoy any general authority to require its citizens to obey the law and in which those citizens do not have any necessary obligation to follow the law (though, of course, as Greene emphasizes, this does not necessarily mean they won't—in fact they usually will), what should the legislative, executive, and judicial branches do with Paul? And how should what they do with Paul differ, if at all, from what they should do with Adele Sherbert? If there is a difference, why? And if there isn't a difference, then what happens to *The Political Balance* and to "religion" as a separate meaningful category in American law? Finally, if Greene would have the government exempt Paul, is this really a system that—for all its theoretical strengths—we would really want to support in practice?

Would Paul get an accommodation from the legislature under Greene's new vision of our political system? I'm not sure. I do feel fairly confident that Paul's fandom would count as a legitimate source of obligation, or "competing normative structure," as Greene puts it.<sup>17</sup> Paul is not

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<sup>17</sup> Greene, *supra* n. 8, at 20-21.

just a guy who roots for the Giants; he is someone whose entire world view revolves around his commitment to the Giants. Were he to challenge the government in some of the ways hypothesized above, he would not be insisting on “disobedience for its own sake or for mere preference or self-interest,”<sup>18</sup> but rather because his “source of normative authority”<sup>19</sup>—the football team and the community of fans that is devoted to it—demands disobedience. But of course this is just the beginning of the inquiry. Greene would not have the state grant exemptions for all claims rooted in a competing normative structure; instead, he calls for “a nuanced approach to relaxing the demands of the state.”<sup>20</sup>

This “nuanced approach” would seemingly involve balancing the harms to the individual of requiring obedience to the law against the state’s interest in requiring such obedience, with a heavy burden placed on the state to justify its insistence on uniformity.<sup>21</sup> As to how the state would weigh the harm to somebody like Paul, Greene suggests that legislatures inquire into “whether the practice is obligatory or central, and it may involve other questions as well, such as the long-standing nature of the practice, its connection to other aspects of the practice, and whether its contours are well-enough defined for an appropriate exemption to be crafted.”<sup>22</sup> One could easily imagine Paul prevailing on at least some of his claims under these inquiries. Could the government really insist that he give up watching the Giants play on Sunday? Reading *Against Obligation*, I’m not sure, but my intuition is that if Paul were to ask the New York legislature to craft a *Sherbert*-like exemption for his fandom (“*Good Cause* for refusing employment under the unemployment compensation statute shall include . . . a demonstrated devotion to a sports team (as defined in section (F)(3)(b)(iv) below) that would be undermined by said employment”), he should probably succeed.

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<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 115.

<sup>21</sup> *See id.* at 118, 123-24.

<sup>22</sup> *Id.* at 130.

Greene recognizes that, because it might be quite difficult for someone like Paul to convince a legislature to give him an exemption, he might need to seek redress in the courts.<sup>23</sup> Here things get somewhat more complicated, because courts can only grant an exemption if some specific source of legal authority, like a constitutional provision, authorizes them to. In *The Political Balance*, Greene specifically argued that “although the Constitution should be read to require exemptions for religious conscience, exemptions for secular conscience should receive no such protection.”<sup>24</sup> In *Against Obligation*, however, although Greene does not go so far as to “argue for a constitutional right to judicial exemptions for nonreligious norms,”<sup>25</sup> he does “summarize”<sup>26</sup> three possible arguments for extending judicial exemptions “beyond religious practice, as a matter of constitutional right”<sup>27</sup> and even notes that elsewhere he has in fact argued in favor of one of those reasons.<sup>28</sup> In my reading, this suggests that Greene would support a system where courts enforce his conception of permeable sovereignty, as it applies to fundamental non-religious commitments like Paul’s, through the granting of judicial exemptions. If this is the case, we have to recognize the radical nature of Greene’s proposal. Paul from Staten Island would be treated just the same as Adele Sherbert from North Carolina. I’m not sure whether that’s good or bad, but I think it is worth keeping in mind when we decide what we think about Greene’s new constitutional worldview.

Greene is very clear that his argument in *The Political Balance*, which he reasserts in the new book,<sup>29</sup> should be understood as independent from the rest of the argument he puts forward in the book. “This argument [the one from *The Political Balance*] fits with my theme but could be

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<sup>23</sup> *Id.* at 134 (“[L]egislative majorities are not always the best judges of how to ameliorate the impact of legislation on small, relatively powerless groups.”). Of course, football is so popular that Paul might actually not have as much trouble getting an exemption as someone basing his or her claim on a minority religion. Unless, I suppose, the legislature is dominated by Jets fans.

<sup>24</sup> Greene, *supra* n. 1, at 1640.

<sup>25</sup> Greene, *supra* n. 7, at 116.

<sup>26</sup> *Id.* at 149.

<sup>27</sup> *Id.* at 116.

<sup>28</sup> *Id.* (citing Abner Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 *FORDHAM L. REV.* 1401 (2005)).

<sup>29</sup> *See Id.* at 149-157.

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.<sup>30</sup> Even on *The Political Balance* itself, though, Paul remains relevant. One of the controversial aspects of Greene’s original argument is his notion of “meaningful access”—according to Greene, the reason that laws cannot be based on religious belief under the Establishment Clause is that nonbelievers lack “access” to the source of the believer’s “normative authority.”<sup>31</sup> Although I agree with Greene’s central argument that religious believers should have exemption rights under the Free Exercise Clause because they are limited to some degree in their ability to support laws with religious arguments by the Establishment Clause, I disagree that “access” is the reason that religious arguments must be limited, and I found that watching *Big Fan* increased my doubts on this score.<sup>32</sup>

What is “access” exactly? In *Against Obligation*, Greene suggests that when a religious person takes a position based on his or her religious belief, a nonbeliever is uniquely “denie[d] the ability to apprehend or affirm the source of commands under which he is being told to live.”<sup>33</sup> This, in turn, “excludes those who don’t share the relevant religious faith from meaningful participation in the political process.”<sup>34</sup> Greene grants that religious beliefs can be “based in human reason and experience” and that “secular as well as religious beliefs are based in an important sense on faith.”<sup>35</sup> But he insists that from an “access” perspective, religion is ultimately distinctive.

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<sup>30</sup> *Id.* at 149.

<sup>31</sup> *Id.* at 150.

<sup>32</sup> My own view, for what it’s worth, is closer to what Greene describes as Justice Souter’s view in the Ten Commandments case of *McCreary County*, *see id.* at 153, where the religious purpose inquiry tends to blend into Justice O’Connor’s endorsement test—the problem with relying too much on religion when passing a law is that such reliance may pose the danger of creating an endorsement.

<sup>33</sup> *Id.* at 154.

<sup>34</sup> *Id.* at 150.

<sup>35</sup> *Id.* at 154.

Others have raised objections to Greene's notion of access before,<sup>36</sup> and I raise no new substantive arguments here. Must there really be an inherent difference, in any meaningful way, from an access perspective, between someone completely devoted to Christianity and someone completely devoted to, say, the writings of Karl Marx? It is true that the former believes in something extra-human, but for the Marxist, Marx may function in his or her mind and emotions in precisely the same way as Jesus or the Bible does to the Christian. Marx, for the Marxist, may essentially take on extra-human characteristics. "Christ said so," insists the Christian, at the end of a bitter argument with a nonbeliever. "Marx said so," replies the Marxist, at the end of a similarly bitter battle with a capitalist. Is there really a difference?

"I do it because of the Giants!" Paul adds, and I'm at a loss to see how any non-fan can access the source of Paul's "normative authority" any more than a nonbeliever can access Jesus or Marx. When Paul's mother tells him to get a real job or to start dating, or his brother tells him to sue Quantrell Bishop for millions in damages, or a detective tells him to explain what happened on the day of the beating, and Paul refuses, all in the name of his team, do any of these people have "the ability to apprehend or affirm the source of commands under which" Paul lives? I don't think so. Watch the movie and see if you disagree.

Or at least watch the movie. And while you're at it, read Greene's book.

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<sup>36</sup> See, e.g., Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. Ill. L. Rev. 337, 343-52. For Greene's response, see *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. Ill. L. Rev. 535