

# FEDERALISM, DEMOCRACY, AND DEEP DISAGREEMENT:

## DECENTRALIZING BASELINE DISPUTES IN THE LAW OF RELIGIOUS LIBERTY

*Roderick M. Hills, Jr.*\*

ABSTRACT.....	915
INTRODUCTION .....	915
I. LIMITING GOVERNMENTAL RESPONSIBILITY FOR RADDs WITH THE REQUIREMENTS OF STATE ACTION AND “PURPOSEFUL DISCRIMINATION” .....	918
A. <i>The State Action Doctrine as RADD-Avoiding Institutional         Deference</i> .....	919
B. <i>The Discriminatory Purpose Doctrine as RADD-Avoiding         Formalism</i> .....	923
II. IRREPRESSIBLE RADDs IN BASELINES DEFINING THE LAW OF RELIGIOUS FREEDOM.....	928
A. <i>The Indeterminacy of Baselines in the Burger Court’s Pre-         1981 Doctrine of Religious Liberty</i> .....	930
1. <i>Decisions Allowing Facially Discriminatory Aid to             Religion: Walz and Zorach</i> .....	931
2. <i>Decisions Forbidding Facially Neutral Laws that Aid             or Burden Religion: Lemon and Sherbert</i> .....	932
B. <i>The Failed Effort to Redefine Religious Liberty with Anti-         Discrimination Principles</i> .....	935
1. <i>Anti-coercion Baselines in Doctrines Barring Facial             Discrimination Against Religion</i> .....	936
2. <i>Anti-coercion Baselines in Doctrines Barring             Discrimination Favoring Religion</i> .....	939

---

\* William T. Comfort III Professor of Law, NYU School of Law. Many thanks to comments from the participants at the Annual Law and Religion Roundtable hosted by Notre Dame’s Program on Church, State, and Society on June 15–16, 2017. Likewise, thanks to the Princeton Program in Law and Public Affairs for comments from the participants at the Program’s conference on Religions, Rights, and Institutions, held on November 23rd and November 24th, 2014, where I presented an early version of this Article. Special thanks to Nelson Tebbe and Chip Lupu for their candid comments. Many thanks to Elizabeth Ginevra Janszky for excellent research assistance. I also gratefully acknowledge generous support from the Filomen D’Agostino Research Fund at NYU School of Law.

3. <i>Anti-coercion Baselines in Doctrines Allowing Facially Neutral Laws that Burden Religion</i> .....	941
4. <i>Anti-coercion Baselines in Doctrines Allowing Facially Neutral Laws that Benefit Religion</i> .....	944
C. <i>The Case for Managing Reasonable Disagreement over Baselines with a Meta-Accommodation</i> .....	945
III. DECENTRALIZATION OF RADDs AS EQUAL CONCERN AND RESPECT .....	950
A. <i>How Decentralization of RADDs Promotes Democratic Equality</i> .....	950
1. <i>Outcome-neutral Choice of Decision-making Scale</i> .....	951
2. <i>Presumption of Subnational Decision Making</i> .....	952
3. <i>Why Not National Deliberation and Compromise?</i> .....	952
B. <i>Reasonability as a Limit on the Presumption of Decentralization</i> .....	955
IV. INSTITUTIONALIZING THE DECENTRALIZATION OF ACCOMMODATIONS WITH CONSTITUTIONAL LAW AND STATUTORY CONSTRUCTION.....	959
A. <i>Two Ways for Courts to Defer to States' Resolutions of RADDs About Baselines</i> .....	960
1. <i>Deferring to States' Definition of Non- "Coercive" Religious Accommodations: Employers' Accommodations from Contraception Mandates</i> .....	960
2. <i>Deferring to States' Facially Neutral Laws Against Religious Freedom Claims: The Problem of "Facilitated Referrals"</i> .....	966
a. <i>The Ambiguity of Precedent Regarding Facilitated Referrals</i> .....	966
b. <i>The Case for the Presumption of Decentralization of Facilitated Referrals</i> .....	970
B. <i>Limiting Congress's Enumerated Powers to Resolve RADDs Over Baselines</i> .....	973
1. <i>Boerne v. Flores and Lopez-Morrison as Constitutionally Mandated Decentralization of RADDs</i> ...	974
2. <i>Catholic Bishop v. NLRB: Statutory Construction as Decentralization of RADDs</i> .....	977
3. <i>Combining Constitutional and Statutory Constraints: Hobby Lobby and Boerne as a Case Study in Constitutional Decentralization</i> .....	979
V. CONCLUSION .....	981

## ABSTRACT

*Citizens disagree vehemently about their rights. Democracies can sometimes resolve these disagreements by majority vote, but, where each side of a disagreement makes plausible arguments that their interests are fundamental, refraining from taking any official position on the dispute can beneficially reduce political acrimony. In many areas of the law, the “state action” or “discriminatory purpose” doctrines can provide at least the illusion of such governmental neutrality. For some areas of the law, however, political and legal traditions foreclose such side-stepping maneuvers. In these areas, disagreements are “deep” in the sense that any governmental vindication of one side’s version of fundamental rights is a plausible violation of the other side’s version.*

*The Religion Clauses’ doctrines provide an example of such intractably deep disagreements. Because such doctrines frequently rest on notions of “coercion” that resist responsibility-limiting theories of state action and discriminatory purpose, there is no way for state officials to escape choosing sides: officials’ accommodating or failing to accommodate either religious belief or unbelief can be plausibly regarded as a violation of religious liberty. Such disputes are “reasonable and deep disagreements”—“RADDs”—that pose a special threat to democratic equality in the definition of rights.*

*This Article urges that decentralization protects what Jeremy Waldron calls the “right of rights”—that is, the right to enjoy an equal share of power in defining disputed rights. Applying a presumption that religious RADDs should be decentralized, the Article argues for a broad power of the states across the board either to extend or deny exemptions from regulatory burdens for religious believers in cases like *Hobby Lobby* and *Masterpiece Cakeshop*. By contrast, following the example of *NLRB v. Catholic Bishop* and *City of Boerne v. Flores*, courts ought to construe narrowly the power of the federal government to define religious accommodations. Such decentralization protects state power to vary accommodations for religious believers and non-believers alike, thereby assuring equal concern and respect to both.*

## INTRODUCTION

Citizens disagree about their rights. Electoral democracy provides a procedurally fair way to resolve such disagreements. By allowing each side’s representatives to decide the dispute by a majority of equally weighted votes, democratic procedures extend equal concern and respect to the contestants, thereby protecting what Jeremy Waldron has called “the

right of rights”—that is, the right to have an equal say in the definition of rights.

Resolving such disputes through voting can, however, be costly. Where the arguments closely balance, sore losers can claim, perhaps sincerely, that their fundamental interests were sacrificed by an unprincipled majority. The majority naturally resents the accusation that they acted unjustly. The cycle of accusation and counter-accusation generates culture wars and acrimony that can mire the government in gridlock.

In periods of political and social upheaval, democratic governments naturally seek ways to limit their responsibility for taking sides in such disputes. In the wake of the Vietnam War protests and the public opposition to busing, the Burger Court devised two doctrines with which to side-step such responsibility. First, the Burger Court emphasized the distinction between private action and state action, and second, it emphasized the distinction between governmental actions with and without a discriminatory purpose. Armed with these distinctions, the Burger Court limited the government’s constitutional responsibility to cure merely de facto school segregation allegedly produced by private households’ residential choices. The Court also upheld “content-neutral” restrictions on expression. Under these two doctrines, officials who impose “incidental” burdens are deemed to be innocent bystanders, “neutral” on the issue over which citizens disagree. Even if the neutrality supplied by such doctrines is illusory under some plausible theories of causation or baseline entitlements, the judicial consensus in favor of such doctrines provides sufficient political cover to mitigate the acrimony that disagreements over rights might otherwise generate.

Suppose, however, that such responsibility-evading strategies have not been ensconced in the law. Suppose, for instance, that existing doctrine makes plausible the idea that the consequences of both facially neutral state actions and private actions authorized by the state are the responsibility of state officials to correct. In such cases, courts cannot easily side-step responsibility for resolving disputes about rights, and any resolution of such disputes is likely to constitute a violation of one side’s conception of their fundamental interests.

This Article dubs such disputes “reasonable and deep disagreement” (or “RADD,” for the sake of convenience). A RADD arises whenever the enforcement of one person’s reasonable conception of fundamental liberty deprives another person of an equally reasonable and fundamental conception of liberty. Such a disagreement is “deep,” because it poses a zero-sum game. In the ordinary constitutional conflict, one side’s constitutional entitlement is not the denial of anyone else’s rival constitutional entitlement. The claim, for instance, that commercial speech is protected by the First Amendment’s Free Speech Clause is not

confronted by a rival claim that the Free Speech Clause obliges the government to regulate commercial speech. By contrast, RADDs present an intractable fight in which the vindication of one right is the violation of a rival and opposite right.

Since at least the Peace of Westphalia, nations have used an alternative mechanism for defusing bitter conflicts over rights: rather than try to impose a single definition of liberty over the entire nation, they have decentralized some portion of rights-defining decisions to subnational governments.<sup>1</sup> Using the example of accommodations for religious belief and unbelief, this Article suggests that RADDs present an especially powerful case for such a federalism-based solution.

Doctrines under the Religion Clauses of the U.S. Constitution's First Amendment present a plethora of RADDs because such doctrines have not been cabined by the requirements of state action and "discriminatory governmental purpose" that limit other constitutional doctrines like the First and Fourteenth Amendment doctrines protecting freedom of expression or racial equality. As explained in Part I, RADDs have been side-stepped in those other areas of constitutional doctrine by the idea that officials are not responsible for burdens on constitutionally protected interests if they lacked a purpose to target that interest. As explained in Part II, First Amendment doctrines protecting religious freedoms are different because they lack the responsibility-limiting device of discriminatory purpose. Doctrines defining religious liberties have instead focused mostly on avoiding "coercion." The Religion Clauses have been construed to allow and sometimes even require limits on "coercive" burdens, even when those burdens are caused by private action and facially neutral laws. Coercion, however, requires the Court to define baselines departures from which are deemed to place improper pressure on private choice. The Court has never defined clear baselines defining coercion, leading to pervasive but reasonable disagreement about the scope of religious liberty.

Part III of this Article suggests that decentralization of a federal regime can help reduce these RADD-induced maladies. Rather than assign the power to resolve RADDs exclusively to the national government, the law ought to allow subnational governments some power to modify or waive national rules on accommodation. The choices of such subnational bodies will inevitably leave the secular or religious side of a RADD dissatisfied in any particular case. The federal system as a whole, however, extends equal concern and respect to rival and reasonable conceptions of religious liberty by giving each conception a larger area in which it can be acknowledged as authoritative.

---

1. Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *FORDHAM L. REV.* 769, 781–93 (2006).

Part IV of this Article explores specific mechanisms with which some mix of constitutional law and statutory construction can safeguard subnational governments' power to define religious and secular accommodations. Starting from a presumption that states should have the power to either benefit or burden religion where constitutional doctrines defining religious liberties are reasonably disputed, the Article defends states' powers to extend religious exemptions to, or withhold religious exemptions from, anti-discrimination laws. The Article also defends decisions like *City of Boerne v. Flores*,<sup>2</sup> limiting Congress' power to define religious liberties. Combined with principles of statutory construction like those in *Catholic Bishop* and *Hobby Lobby* limiting the preemptive scope of federal law, such doctrines leave open a space for states to vary subnationally religious accommodations. Whatever the doctrinal merits of these decisions, they can be understood as broadening what Jeremy Waldron calls the "right of rights"—that is, the right of citizens to say what their rights mean subnationally, where disagreement about the rights' content is reasonably disputed at the national level.

#### I. LIMITING GOVERNMENTAL RESPONSIBILITY FOR RADDs WITH THE REQUIREMENTS OF STATE ACTION AND "PURPOSEFUL DISCRIMINATION"

In theory, deep disagreements could arise in any area of constitutional law. Deep disagreements occur whenever the enforcement of one plausibly "fundamental" right constitutes a violation of a rival and equally plausibly "fundamental" right. Consider, for instance, the right to bear arms protected by the Second and Fourteenth Amendments. To the extent that privately owned firearms lead to private violence, this right collides with the right to be free from violent injury and death. Likewise, the right to send one's children to a private school is plausibly a fundamental interest protected by the Fourteenth Amendment's Due Process Clause,<sup>3</sup> but such a right plausibly conflicts with the right to attend a racially integrated school.<sup>4</sup> One person's First Amendment right to hand out leaflets at a mall runs into the mall-owner's right to not have her property dragooned into communicating a message with which the owner disagrees.<sup>5</sup> The right of a gay or lesbian student to join a student organization at a public university, arguably

---

2. 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015).

3. *See* *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

4. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. *See* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

protected by the Fourteenth Amendment's Equal Protection Clause, contradicts the student organization's right of expressive association.<sup>6</sup>

These sorts of conflicts are deep because they force constitutional decision makers to choose between interests that the disputing parties each plausibly deem to be fundamental. The loser sacrifices not merely an interest but a principle. To the extent that the loser is emotionally invested in the vindication of that principle, the defeat can be expected to inspire not only intense acrimony but also intense efforts to overturn the decision. It is one thing to acquiesce in a defeat of one's interests: "Win some, lose some" is the ordinary motto of a democracy in which disagreeing citizens work out their differences. It is another matter altogether to sacrifice interests that one deems to be fundamental liberties guaranteed by the society's fundamental charter.

Constitutional decision makers naturally seek doctrines that allow them to resolve such disputes without taking sides as to which interest "outweighs" the other. Rather than "balance" two rights against each other by comparing their importance or priority, such decisions allow the decision maker to decide that the government has not burdened any fundamental interest at all because some challenged policy actually is not directed against either asserted right. Such governmental disclaiming of responsibility allows the government to assume a stance of neutrality towards the disputants, taking neither's side and expressing no opinion about which interest outweighs the other.

The state action and the discriminatory purpose doctrines both serve this responsibility-disclaiming function. These two doctrines are mirrors of each other: the absence of state action often turns on the nature of the government's purpose in turning power over to private institutions, and the purpose to turn power generally and impartially over to private institutions is precisely what makes such delegations "non-discriminatory." Their combination neatly allows constitutional decision makers to side-step responsibility for some asserted burden on a fundamental right by arguing that the balance of interests ought to be worked out by private institutions or the ordinary political process.

#### A. *The State Action Doctrine as RADD-Avoiding Institutional Deference*

Consider, first, how the state action doctrine allows constitutional decision makers to duck the task of deciding RADDs by passing the buck to private actors. Starting with the Burger Court in the 1970s and early 1980s, the U.S. Supreme Court used this buck-passing move across a variety of doctrinal areas, including substantive and procedural due

---

6. See *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010).

process, First Amendment Press and Speech Clauses, and equal protection. Underlying all such state action arguments is the refusal of constitutional decision makers—usually the courts—to balance rival constitutional arguments by invoking the private character of the institution that made the controversial decision affecting private rights.

The Burger Court began its reconfiguration of state action doctrine with *Moose Lodge No. 107 v. Irvis*,<sup>7</sup> a case that involved a conflict between a black patron and a social club that denied service to the patron on account of race. *Moose Lodge* implicated one of the oldest conflicts in the struggle over black Americans' civil rights—the clash between blacks' demand for equal access to public accommodations and whites' demand for associational freedom.<sup>8</sup> This conflict between equality and due process associational liberty re-emerged in the Court's state action decisions of *Shelley v. Kraemer*<sup>9</sup> and *Bell v. Maryland*<sup>10</sup> during the Civil Rights Movement, creating the uncertain backdrop of precedent against which *Moose Lodge* was decided.<sup>11</sup>

In holding that a social club's refusal to serve a black patron did not constitute state action, the *Moose Lodge* Court avoided any reference to due process or associational liberties. Instead, the Court emphasized that Pennsylvania's conferring a liquor license on *Moose Lodge* did not make the state complicit in the club's racist policies. The board, *Moose Lodge* emphasized, "plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor."<sup>12</sup>

7. 407 U.S. 163 (1972).

8. This conflict underlies Justice Bradley's state action argument in the *Civil Rights Cases* against the constitutionality of the 1875 Civil Rights Act forbidding racial discrimination in public accommodations. "Surely Congress cannot guarantee to the colored people admission to every place of gathering and amusement," Bradley wrote privately, because "[t]o deprive white people of the right of choosing their own company would be to introduce another kind of slavery." Jonathan Lurie, *Mr. Justice Bradley: A Reassessment*, 16 SETON HALL L. REV. 343, 367 (1986). "[S]urely it is no deprivation of civil rights," Bradley concluded, "to give each race the right to choose their own company." *Id.*

9. 334 U.S. 1 (1948).

10. 378 U.S. 226 (1964).

11. On whites' invocation of "associational freedom" to resist desegregation mandates, see Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987). Although *Shelley v. Kraemer* broadly read the state courts' Fourteenth Amendment responsibility to prohibit any judicial enforcement of racially restrictive covenants, worries about individual due process rights to private property led to indecision in *Bell v. Maryland*, over whether to extend *Shelley* to trespass laws used against sit-in protestors challenging private lunch counter owners' "Jim Crow" service policies. Dissenting, Justice Black worried that

when the property owner chooses . . . *not* to admit that person . . . then . . . he is entitled to rely on the guarantee of due process of law, that is, 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use.

*Bell*, 378 U.S. at 331 (Black, J., dissenting).

12. *Moose Lodge*, 407 U.S. at 175.



Moreover, issuing liquor licenses to a limited number of vendors did not make the state responsible for the licensee's racism because the state provided similar "state-furnished services" to citizens generally, including "electricity, water, and police and fire protection."<sup>13</sup> To hold that such state assistance made the state responsible for the recipients' policies "would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases* . . . ."<sup>14</sup>

*Moose Lodge* provided no explanation for its conclusory assertions about the insufficiency of a liquor license to make the state complicit. Such under-theorized assertions naturally have invited the response, familiar since the 1930s, that, because all private power ultimately stems from governmental decisions to back up private decisions with public power,<sup>15</sup> the state action doctrine is "analytically incoherent."<sup>16</sup> The lunch counter owner, after all, can exclude demonstrators only because, when the owner's gentle push comes to forceful shove, the owner can call the police to enforce the law of trespass. Rather than bestow a blanket exemption from constitutional norms to private organizations using such delegations of public power, the state action doctrine's critics call for ad hoc balancing of the values advanced by private ordering against the benefits advanced by constitutional norms of equality or dignity.<sup>17</sup>

The problem with such a "balancing" approach to state action, however, is that it would not allow the Court to evade a RADD. In striking the balance, the Court would necessarily have to weigh unmeasurable and intangible factors like the social value of free markets, the likelihood that market competition will produce the "optimal" amount of discrimination, and the social value of racial equality. The notion that courts could balance their way to a solution satisfactory to the contending sides of such a RADD seems wholly illusory. Judicial attempts to engage in such balancing would expose the Court as just another legislative body, driven by ideology rather than law. The state action doctrine allows the Court to avoid being so exposed.

---

13. *Id.* at 173.

14. *Id.*

15. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 917 (1987).

16. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49–71 (1996); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789–91 (2004).

17. For various defenses of such a "rights-balancing" version of the state action limit, see, e.g., *Bell v. Maryland*, 378 U.S. 226, 255 (1964) (Douglas, J., concurring); Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 94 (1967); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 390 (1988).

The state action mechanism for evading difficult RADDs is not limited to equal protection and race: it is also a tool for evading RADDs raised by conflicts between rival forms of self-expression protected by the First Amendment's Speech Clause. *Hudgens v. NLRB*<sup>18</sup> is illustrative. In invoking the state action limit to reject union organizers' First Amendment free expression claim, the *Hudgens* Court did not deny that the organizers had important expressive interests in distributing information about unionization to the workers at a privately owned mall.<sup>19</sup> The mall owner, however, also had property rights of constitutional magnitude, and the Court saw that resolving that balance would be a matter of exquisite delicacy.<sup>20</sup> By placing the mall owner's decision to exclude the union organizers categorically outside the scope of the First Amendment, the Court avoided the obligation to resolve a complex RADD, clearing the way for the NLRB to decide the question on statutory grounds.<sup>21</sup>

The state action doctrine became the Burger and Rehnquist Courts' tool of choice across a broad range of constitutional rights for side-stepping these sorts of RADDs. Repeatedly between the 1970s and the 1980s, the Court invoked the doctrine to evade RADDs raised by conflicts between the interests of private schools and their employees,<sup>22</sup> medical providers and patients,<sup>23</sup> investor-owned utilities and their customers,<sup>24</sup> and children and their parents.<sup>25</sup> In none of these decisions did the Court offer any theoretically elaborate reasons by which to distinguish between permissible and unconstitutional governmental delegations of power to private parties. It is not difficult, however, to imagine why the Court might exempt certain sorts of delegations from constitutional scrutiny. One could reconstruct the Court's state action doctrine by pointing to the special constraints imposed on private actors by market competition, internal constituents, and special norms.<sup>26</sup> Such private incentives are not perfect, and they sometimes fail

---

18. 424 U.S. 507 (1976).

19. *Id.* at 519.

20. The *Hudgens* Court noted that the NLRB was under a statutory, not constitutional, duty to reach an "[a]ccommodation between employees' § 7 rights and employers' property rights . . . 'with as little destruction of one as is consistent with the maintenance of the other.'" *Id.* at 521 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

21. *See id.* at 520–21.

22. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

23. *See Blum v. Yaretsky*, 457 U.S. 991 (1982).

24. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

25. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

26. *See, e.g.,* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1815 (2010) (justifying private immunity from constitutional norms by observing that "the potential for private actors to abuse their government power when they are acting as principals on their own behalf is subject to the discipline of common law rules, the competitive market, and a wide range of statutorily imposed regulatory mandates"); Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L.

disastrously.<sup>27</sup> The state action doctrine could, however, be re-interpreted as implicitly presuming that, over the range of cases, a category of organizations subject to a set of crudely defined constraints typical of “private” organizations will generally outperform policing by courts wielding constitutional norms, because those private decision makers can more carefully balance rival values than courts.<sup>28</sup>

The Burger and Rehnquist Courts’ state action decisions, however, never offered such a functional explanation for its state action doctrine. As a result, the doctrine’s justification and definition remained obscure. The plainest limit on state responsibility for private acts was provided, instead, by an ostensibly distinct doctrine also devised by the Burger Court—the idea of discriminatory purpose.

### *B. The Discriminatory Purpose Doctrine as RADD-Avoiding Formalism*

As with its state action doctrine, the Burger Court’s discriminatory purpose doctrine arose as a way to limit governmental responsibility to cure racial inequality. The doctrine initially arose in response to the public uproar over judicial decrees requiring race-based busing of students.<sup>29</sup> The Burger Court in *Swann* stated that the government had an obligation to eliminate “de jure” but not “de facto” racial segregation in schools.<sup>30</sup> Because the two types of segregation were not easily separable, however, this ruling left ample scope for lower courts to order children to be bused to schools in proportions defined by the children’s race, to eliminate the racial

---

REV. 1537, 1577–78 (1998) (describing superior incentives of universities to balance rival expressive liberties).

27. *DeShaney* remains the case that most plainly illustrates how particular private decision makers can lack the incentives that normally justify broad and constitutionally unreviewable delegations of power to private institutions. Randy DeShaney, a biological father who had repeatedly physically abused his son Joshua, plainly did not deserve deference as the decision maker most entitled to determine the best interests of a child, even if, as a general rule, biological parents have incentives to discern and protect the best interests of their children more reliably than courts or bureaucrats. *See DeShaney*, 489 U.S. at 194–95.

28. On the character of the public–private distinction as a crude proxy for a set of constraints typically imposed on private organizations, see Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 151–53 (2003) (noting that the category of “private organizations” is, like the categories of “local governments” or “state governments,” a crude proxy for a bundle of incentives justifying institutional deference). For an analogous account in which the existence of “state action” turns on whether government should have a duty actively to combat certain private acts, see Donald J. Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1 (2007). Professor Herzog offers a reconstruction of the state’s moral responsibility to correct private misbehavior—what he calls “the Kerr Principle”—that is the mirror image of the moral argument for allowing the state to delegate power to private parties where those parties are likely to balance morally relevant considerations better than judges. *Id.* at 28–29.

29. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968).

30. *See Swann*, 402 U.S. at 31–32.

identifiability of the schools and thereby render the school districts “unitary.”

As James Ryan and Michael Heise observe, this judicial effort inspired a ferocious bipartisan opposition.<sup>31</sup> In the wake of (and perhaps as a result of) this backlash, the Burger Court reversed course, holding in *Milliken v. Bradley*<sup>32</sup> that district courts lacked the power to order children to be bused across Detroit’s city boundaries to achieve integrated schools, because interdistrict segregation had not been proven to be the result of any official policy of racial segregation. *Milliken* held that, absent any proof that the laws creating local governments’ boundaries were driven by racial considerations, the choices of such private households produced merely de facto segregation that it was not the constitutional responsibility of government to correct.<sup>33</sup> *Milliken* thus linked together the state action and discriminatory purpose doctrines into a single limit on the scope of the government’s constitutional responsibility.

Shortly after *Milliken*, the Court extended the logic of *Milliken* into a broad barrier to all equal protection liability in the form of the principle that racially disparate impacts of official policies by themselves did not constitute racial classifications subject to any strict scrutiny.<sup>34</sup> Restrictive zoning might produce local jurisdictions with racially homogenous populations and reliance on test scores might lead to a disproportionately white police force, but because these official policies had not been proven to be the result of any race-conscious purpose, they must be reviewed as race-neutral rules subject only to a lenient “rational basis” test.<sup>35</sup>

Why impose such limits on governmental responsibility? As *Washington v. Davis* observed, the point of the discriminatory purpose doctrine was to cut off the chain of causation that would render the government responsible for correcting a myriad of racial inequalities.<sup>36</sup> The busing controversy illustrated how the extension of a governmental obligation to cure racial inequalities would entangle the Court in bitterly divisive RADDs. The remedies for racial disparities could involve race-based remedies, like busing decrees or affirmative action employment

---

31. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2053–55 (2002).

32. 418 U.S. 717 (1974).

33. *Id.* at 745.

34. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

35. *See Vill. of Arlington Heights*, 429 U.S. at 265.

36. 426 U.S. at 248 (“A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”).

plans, that inspired angry complaints of racial injustice from whites. As with state action, the Court could theoretically resolve such complaints by balancing the rival interests but that very process of balancing would require hotly contested rulings about the cause of racial disparities. Rather than tackle these vicious disputes constitutionally, the Court chose the better part of valor by limiting governments' constitutional responsibility with the discriminatory purpose requirement. The discriminatory purpose doctrine could indeed be simply understood as a restatement of the state action doctrine.<sup>37</sup> On this reading of state action, the State is responsible for private action only when its delegations of power to private actors have the discriminatory purpose of placing the state's imprimatur on constitutionally suspect private ends. By contrast, a broad delegation of power to private actors that is agnostic about how such actors use their authority would be largely immune from much constitutional scrutiny.

Such a purpose-based theory of state action, whatever its normative or doctrinal merits, satisfied one imperative of the Burger and Rehnquist Courts: it allowed the Court and government to sidestep RADDs by refusing to take sides in deep disagreements. Under the discriminatory purpose doctrine, the political branches could attack racial disparities and otherwise tackle sensitive RADDs just so long as their policies avoided express or implicit racial classifications. Legislative prohibition of employment or university admission practices leading to racial disparities, for instance, did not violate the discriminatory purpose doctrine even if the legislature was aware that the prohibition would have racial consequences because mere awareness of such consequences did not constitute a racially discriminatory purpose. To be sure, the legislatures deliberately pursuing racial consequences through race-neutral means could theoretically trigger strict scrutiny.<sup>38</sup> Under *Washington v. Davis*, however, the burden of showing such a deliberate pursuit of racial ends rests on the challenger to a law. That burden might be insurmountable if the legislature had multiple and individually sufficient reasons for forbidding or requiring a practice.<sup>39</sup>

As with the state action doctrine, the discriminatory purpose doctrine could be used to evade RADDs in doctrinal areas other than racial discrimination and Equal Protection. In particular, First Amendment

---

37. As commentators like Laurence Tribe have noted, *Shelley v. Kraemer*'s apparently capacious definition of "state action" could be narrowly read to apply only to racially selective judicial enforcement of private covenants. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 260 (1985) ("The real 'state action' in *Shelley* was Missouri's facially discriminatory body of common and statutory law—the quintessence of a racist state policy.").

38. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 *HARV. L. REV.* 494, 538 (2003).

39. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), is the canonical citation for the proposition that an impermissible purpose does not automatically invalidate a law with multiple purposes, some of which are permissible.

Speech and Press Clause doctrine eventually mirrored Equal Protection doctrine in focusing on discriminatory purposes and classifications while being indifferent to practical effects.<sup>40</sup>

The Burger Court's process of aligning Free Speech with equal protection doctrine emerged at the same time as the busing fights of the 1970s, when the Court was confronted with the problem of protests against the Vietnam War. These demonstrations frequently involved illegality of various degrees of disruptiveness. As with the controversy over desegregation of public facilities, constitutional doctrine's attitude towards governmental regulation of expression in the early 1970s was ambiguous about the relevance of legislative purpose.<sup>41</sup> In theory, the doctrine could have turned on a judicial balancing of protestors' rights of free expression against the rights of others in social order. The Burger Court's decision in *Cohen v. California*, for instance, initially followed traditional "fighting words" doctrine in focusing on the likely effects of expletives in directly provoking confrontations.<sup>42</sup> Likewise, in *Spence v. Washington*,<sup>43</sup> the Court tried to define the protections owed to symbolic conduct like displaying a flag containing a peace sign by measuring the flag's communicative impact on the intended audience.<sup>44</sup> Following the busing cases, one might call such a focus on the effects of speech a focus on de facto disruption or expressive impact.

The Burger Court, however, quickly abandoned any such effects-based balancing test in favor of an emphasis on content neutrality.<sup>45</sup> By the early 1990s, this doctrine of content neutrality had evolved into a principle closely analogous to the Equal Protection Clause's discriminatory purpose doctrine, insofar as both doctrines were focused primarily on impermissible governmental purposes without much consideration of practical effects.<sup>46</sup>

---

40. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 286–95 (2012).

41. *United States v. O'Brien*, 391 U.S. 367, 383–86 (1968), stated that legislative purpose by itself could not determine the constitutionality of a federal law prohibiting the burning of a draft card. *Palmer v. Thompson*, 403 U.S. 217, 225 (1971), likewise declared that legislative purpose could not determine the legality of a government's closing of a public swimming pool for racist reasons.

42. *Cohen v. California*, 403 U.S. 15, 15–20 (1971) (holding that the phrase "Fuck the Draft" on a jacket worn in a courthouse did not constitute fighting words under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

43. 418 U.S. 405 (1974).

44. The *Spence* test treats conduct as expression protected by the First Amendment only if "the likelihood was great that the message [intended by the actor] would be understood by those who viewed it." *Id.* at 410–11.

45. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), is the canonical citation.

46. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. . . . [T]o put the point another way, the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775–78 (2001) ("The only real First

Even apparently worthless speech, such as trespassing on someone else's front yard to burn a cross, could be protected if the law under which such speech was prosecuted targeted the speech only for the racist message it conveyed.<sup>47</sup> By contrast, a law's merely incidental effects of deterring expression would not trigger any serious scrutiny absent such content-based targeting, even if such laws were enforced against traditionally protected speakers like journalists and universities.<sup>48</sup>

The Court continued to invoke the effects of laws on expression as a test for liability only in a few narrow enclaves of First Amendment doctrine—most notably, in the doctrine of expressive association. After suggesting repeatedly that anti-discrimination laws' effects on associations' ability to express their chosen message could violate the First Amendment Speech Clause,<sup>49</sup> the U.S. Supreme Court used an effects-based test three times between 1995 and 2001 to strike down anti-discrimination laws that impeded the expression of private associations, barring state laws that interfered with an Irish-American society's selection of marchers in a parade,<sup>50</sup> the California Democratic Party's selection of voters in party primaries,<sup>51</sup> and the Boy Scouts' selection of scoutmasters.<sup>52</sup> *Rumsfeld v.*

---

Amendment question in these cases is whether the state's purpose was to punish someone *for speaking*.”)

47. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”).

48. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 198 (1990) (holding that discovery rules that could reveal the contents of tenure letters do not violate the First Amendment, because the University of Pennsylvania “does not allege that the Commission’s subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view”); *Branzburg v. Hayes*, 408 U.S. 665, 682–85 (1972).

49. The Burger Court upheld the enforcement of an anti-discrimination law against a racist school not by citing the law’s content neutrality but instead noting that “there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.” *Runyon v. McCrary*, 427 U.S. 160, 175–76 (1976) (alteration in original) (quoting the Court of Appeals) (holding that a racist private school had no First Amendment entitlement to exclude black children from its student body). Likewise, in assessing whether California could prohibit a mall owner from excluding from his mall high school students protesting the United Nation’s anti-Zionist message, the Court relied not only on the content neutrality of the California law but also on the minimal effects imposed by the law on the mall owner’s expression. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 78, 87–88 (1980) (noting that the “views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner” because the mall was generally open to the public and the mall owner could post signs disavowing any support for messages thus distributed). In allowing New York to apply its human rights ordinance to bar sex-based discrimination by large social clubs that admitted the public generally to their restaurants, the Court expressly reserved the question of whether an effects-based test might overturn anti-discrimination laws that prevented “an association . . . organized for specific expressive purposes” from being “able to advocate its desired viewpoints . . . as effectively” as it would if it had complete control over the selection of its membership. *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13–14 (1988).

50. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

51. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

*Forum for Academic & Institutional Rights, Inc.* suggested, however, that this effects-based doctrine might be narrowly confined to laws controlling an organization's membership, thereby excluding from the scope of the doctrine laws giving a speaker temporary access to the organization's property.<sup>53</sup>

As with equal protection doctrine, this focus on governmental purpose, whatever its normative merits, served the purpose of allowing the Court to evade RADDs. Any balancing test that weighed the effects of regulation on speech against the non-speech benefits of the law would force the Court to examine the effects on speech of innumerable laws.<sup>54</sup> The judicial balancing of costs and benefits necessary to reach a judgment about these effects would be impossible to conduct according to any sort of objective legal principles satisfactory to the contending sides.<sup>55</sup> By extricating the Court from adjudicating such hotly contested issues, the principle of content neutrality allowed the Court to assume an apparently impartial stance between positions that each plausibly urged constitutionally protected interests.

The Court, in sum, has avoided RADDs in equal protection and First Amendment free speech doctrine largely, but not entirely, by adopting narrow theories of state action and discriminatory purpose. The Court upholds laws that have burdensome effects on interests protected by the Constitution by maintaining that these effects are not really the government's responsibility: the government either did not intend them (the discriminatory purpose doctrine) or did not cause them (the state action doctrine). In this way, the Court can side-step debates over affirmative action, hate speech, civil disobedience, racial segregation, and other hotly contested RADDs while leaving the political branches free to balance the relevant interests with content-neutral and race-neutral laws.

## II. IRREPRESSIBLE RADDs IN BASELINES DEFINING THE LAW OF RELIGIOUS FREEDOM

The state action and discriminatory purpose strategies for side-stepping RADDs, however, are not available in the law of religious freedom. The reason is that American political and legal history has long embraced a

---

52. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). For criticisms of *Dale*'s effects-based test, see Hills, *supra* note 33, at 215–17; Rubinfeld, *supra* note 51, at 807–17.

53. 547 U.S. 47, 69 (2006) (holding that military recruiters “who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association” do not violate the law schools' rights of expressive association).

54. Kagan, *supra* note 51, at 495 (“Perhaps the explanation of current doctrine lies solely in a set of practical constraints. If all laws incidentally restricting speech were subject to First Amendment review, then (almost) all laws would be subject to First Amendment review.” (footnote omitted)).

55. See Rubinfeld, *supra* note 51, at 771–72, 787–93.



legal principle resistant to such responsibility-ducking maneuvers. For convenience's sake, I call this principle the "anti-coercion" doctrine, even though a few doctrines like those limiting the government's own religious expression resist such a characterization. Anti-coercion doctrines defy these responsibility-ducking moves by focusing not on governmental purpose or governmental endorsing of private ends (state action) but instead on whether governmental policies result in the coercion of religious choices. The result of coercion is a private outcome, an effect suffered by citizens, not a purpose of government. Therefore, the government's pursuit of perfectly legitimate ends can lead to constitutional liability under anti-coercion theories whenever the government's policies promote coercive outcomes, regardless of the purity of governmental purposes or the participation of private actors. The taxpayer who is forced to pay for a system of religious schools or the employee who is forced to work during a religious holiday can be impermissibly coerced, even if the system or work requirement is directed towards wholly legitimate ends having nothing to do with religion. It is the burden on believer or unbeliever, not the government's reasons, that counts.

For a generation, numerous scholars and judges have attempted to bring the doctrines defining religious liberties in line with equal protection and First Amendment Speech and Press Clause doctrine by promoting various species of "anti-discrimination theory" analogous to the doctrines of content neutrality and discriminatory purpose that dominate the latter areas of law. There have been urgent pleas<sup>56</sup> and optimistic predictions<sup>57</sup> that the concept of state action under the Religion Clauses would soon be brought into consistency with the analogous doctrines governing equal protection and First Amendment freedom of speech. Despite these various efforts to strike a knockout blow for some variant of anti-discrimination principles, however, the law has continued to oscillate between the anti-discrimination and anti-coercion attitudes without any final resolution.

As I shall suggest below, it is time to call a truce and concede that the two warring ideas will somehow have to coexist, because neither can achieve preeminence. The terms of that truce (spoiler alert: a geographically decentralizing truce, based on a theory of religious federalism) are the subjects of Parts III and IV. In Part II, below, this

---

56. For an example of such an effort almost thirty years ago, see David K. DeWolf, *State Action Under the Religion Clauses: Neutral in Result or Neutral in Treatment?* 24 U. RICH. L. REV. 253, 264 (1990) (attacking anti-coercion theories—what the author calls "the affirmative action" approach to religion—as requiring "constant supervision of state action to insure that it neither aids nor hinders religion unduly").

57. See, e.g., Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 718 (2001).

Article limits itself to describing the conflict with the aim of showing the futility of trying to resolve it.

A. *The Indeterminacy of Baselines in the Burger Court's Pre-1981 Doctrine of Religious Liberty*

Consider, first, how anti-coercion accounts of religious freedom played a major role under both Free Exercise and Establishment Clause doctrines prior to 1981. The basic structure of an anti-coercion argument is that the First Amendment's religious clauses should be regarded as a prohibition of a particularly bad outcome—the coercion of religious belief or action. Absent a sufficiently weighty reason, the law should not force non-believers to bestow benefits on actions motivated by beliefs that they do not share (the so-called Establishment Clause side of the doctrine) nor force religious believers to take actions inconsistent with their religious scruples (the so-called Free Exercise Clause side). The prohibition on such coercion has nothing to do with the government's reasons or classifications, nor can it be cured by the intervention of private actors: even if the law makes no reference to religion and has no purpose either to benefit or burden religious believers, the law may not coerce people into violating their religious or non-religious scruples.

The critical requirement of all anti-coercion theories is the definition of some baseline departures from which constitute coercion.<sup>58</sup> Not every burden on or benefit for counts as coercive. Instead, the law must benefit or burden religious or anti-religious choices in a particularly severe or unusual way that departs from the “neutral” baseline defining non-coercive governmental action.

This need to define a neutral baseline forces courts to confront hotly contested RADDs. The problem, as critical legal studies scholars have relentlessly pointed out,<sup>59</sup> is that such baselines are ideological constructions based on power and non-legal intuitions. There is no clean, crisp, legally non-controversial way to resolve baseline disputes. To root a doctrine in disputed baselines, therefore, is to force the courts to act as referees between contending claims of power unmediated by legal norms. In particular, the presence or absence of formal classifications in a law's text or purpose is neither necessary nor sufficient to insulate the government from the responsibility to determine whether some outcome is just or fair.

---

58. On the importance of defining coercion for limiting the scope of the Establishment Clause, see *id.* at 704. For a summary of baselines, see Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

59. See, e.g., Duncan Kennedy, *Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

As explained below, the Burger Court's Establishment and Free Exercise Clause doctrines, dominant before 1981, all required courts to define neutral baselines without recourse to clean, crisp notions of discriminatory purpose or state action. Facial discrimination in favor of religion was not sufficient to condemn a law, and facial neutrality in favor of religion was insufficient to save a law. Rather than rely on such formal characteristics, the Court defined religious neutrality with respect to ill-defined judicial baselines that usually involved some sort of reference to coercion. The result was that the Court was mired in the need to resolve intractable RADDs, a task that it performed to no one's satisfaction.

1. *Decisions Allowing Facially Discriminatory Aid to Religion: Walz and Zorach*

First, consider how the Court justified facially discriminatory accommodations for religious activity by pointing to the absence of coercion defined as the state's selectively waiving its laws.<sup>60</sup> *Zorach v. Clauston*<sup>61</sup> is an illustrative case. *Zorach* upheld "released time"—public schools' permitting their students to take time off in the middle of the school day to attend religious classes but not for other extra-curricular off-campus secular courses—despite the policy's facial discrimination in favor of religion.<sup>62</sup> Students with secular interests—say, a desire to attend an ACLU meeting or study Marxism—had no similar entitlement to leave school in the middle of the school day. On any theory of content neutrality remotely similar to that governing the First Amendment's Speech and Press Clauses, therefore, the Court should have skeptically reviewed such a selective waiver of school attendance rules only for religious extra-curricular activities. The *Zorach* Court, however, instead noted that the government need not show "callous indifference" to students' religious needs and that the released time program did not "coerce anyone to attend church."<sup>63</sup> The Court's implicit neutral baseline for defining coercion was the condition of being free from an obligation to attend school. Waiver of that obligation, therefore, did not confer on religious schoolchildren a special favor but instead removed a special coercive obstacle to religious freedom.

The Court used a similar distinction between state inaction (deemed neutral) and state action to justify religious organizations' exemption from

---

60. *Locke v. Davey*, 540 U.S. 712, 722 (2004), cited a long history of "popular uprisings against procuring taxpayer funds to support church leaders."

61. 343 U.S. 306 (1952).

62. *See id.* at 308–09.

63. *Id.* at 313–14.

property tax in *Walz v. Tax Commission of City of New York*,<sup>64</sup> reasoning that “[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.”<sup>65</sup> The idea that a discriminatory exemption from a tax is not state action merely because the state “abstains” from action is wholly alien to Equal Protection logic as well as common sense: receiving city services for free surely “transfer[s] part of [the city’s] revenue to churches.”<sup>66</sup> Like *Zorach*, however, *Walz* relied on the baseline defined as the world without government, such that New York City returning a church to this tax-free state of anarchy was not conferring a special benefit.

2. *Decisions Forbidding Facially Neutral Laws that Aid or Burden Religion: Lemon and Sherbert*

The mystery of anti-coercion baselines deepens when one moves from cases involving expressly religious classifications and instead considers facially neutral laws that the Burger Court struck down as either impermissibly aiding or burdening religion. The facially neutral laws struck down by *Lemon*<sup>67</sup> and *Sherbert*<sup>68</sup> would have been granted an easy pass under the equal protection logic of *Washington v. Davis*<sup>69</sup> or the logic of content neutrality in *Police Department of Chicago v. Mosley*.<sup>70</sup> The Burger Court’s early Religion Clauses doctrine, however, did not use such simple baselines of facial or purposive neutrality to determine constitutionality. The result was a notoriously muddled jurisprudence baffling to observers and, indeed, to the Court itself.

The Burger Court inherited its Establishment Clause baselines. After World War II, the U.S. Supreme Court adopted the theory in *Everson v. Board of Education*<sup>71</sup> that direct aid to religious schools could violate the First Amendment’s Establishment Clause even if such aid was provided to both religious and secular organizations alike.<sup>72</sup> The Burger Court, however, enthusiastically embraced *Everson*’s “no-direct-aid” doctrine in a

---

64. 397 U.S. 664, 666–67 (1970) (rejecting an Establishment Clause challenge to exempting church property from taxation).

65. *Id.* at 675.

66. *Id.* See generally David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143 (2015).

67. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

68. *Sherbert v. Verner*, 374 U.S. 398 (1963).

69. 426 U.S. 229 (1976).

70. 408 U.S. 92 (1972).

71. 330 U.S. 1 (1947).

72. *Id.* at 515–16.

string of cases most closely associated with *Lemon v. Kurtzman*.<sup>73</sup> Among the justifications for the *Lemon* line of cases was the idea that such subsidies coerce taxpayers into subsidizing beliefs with which they disagree.<sup>74</sup> In effect, such doctrine is a sort of “accommodation for unbelief,” roughly analogous to accommodations for religion, albeit an accommodation that imposes a greater burden than the First Amendment Speech and Press Clauses’ limits on subsidies for secular speech.<sup>75</sup>

It is a familiar point that *Lemon* requires the Court to define an elusive baseline of neutral public services that do not count as unconstitutional direct aid.<sup>76</sup> States are not required to deny to churches the ordinary benefits of police, fire, sewer, and water services. Indeed, any such religion-based discrimination against churches in access to basic services would likely be a violation of the churches’ free exercise rights. States are, however, required to withhold assistance too closely related to the churches’ religious mission, even if such aid is extended to secular schools as well.<sup>77</sup> *Lemon*, in other words, defined a baseline of neutrality that did not depend on the idea of discriminatory purpose.

The *Lemon* “no-aid” cases limiting government’s financial contributions to private religious schools were joined in the early 1960s by judicial bans on religious speech in public school that also arguably required discrimination against religion.<sup>78</sup> Unlike the *Lemon* line of cases, which rested on the idea that taxation of non-believers to subsidize religion injured taxpayers,<sup>79</sup> *Engel* explicitly disavowed the idea that ostensibly voluntary school prayer coerced non-believers.<sup>80</sup> The abandonment of the concept of coercion, however, did not make any clearer the line between

73. 403 U.S. 602 (1971).

74. As Justice Douglas’ concurrence noted, eliminating the state supervision limiting state subsidies to secular subjects would “make a shambles of the Establishment Clause” by requiring “taxpayers of many faiths . . . to contribute money for the propagation of one faith.” *Id.* at 627–28 (Douglas, J., concurring).

75. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1016–18 (1991).

76. On the confused character of *Lemon*’s baselines defining impermissible “advancement” of religion, see Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 802–08 (1993).

77. The state’s reimbursement of tuition, payment of the costs of state mandated testing, and reimbursement of the costs of educational materials, on this logic, all can constitute impermissible direct aid. See *Sloan v. Lemon*, 413 U.S. 825 (1973) (reimbursement of tuition); *Levitt v. Comm. for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973) (state mandated testing); *Meek v. Pittenger*, 421 U.S. 349 (1975) (educational assistance and equipment), *overruled in part by Mitchell v. Helms*, 530 U.S. 793, 835 (2000); *Wolman v. Walter*, 433 U.S. 229 (1977) (aid for educational materials), *overruled in part by Mitchell*, 530 U.S. at 835.

78. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down policy of Bible readings in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down teacher-led prayer in schools).

79. See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000); *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971).

80. See *Engel*, 370 U.S. at 430.

permissible facilitating of private religious belief and the state's own unconstitutional endorsement of religion. What principle explained why teachers were forbidden to lead students in a voluntary prayer but permitted religious students to leave the school for voluntary religious released time? Why was the former, like the latter, not merely just an effort not to show "callous indifference" to students' religion?<sup>81</sup> Like the *Lemon* line between non-educational and educational aid, these elusive distinctions cried out for a theory of state action that would provide a principle for distinguishing between proper and improper state delegations of speaking opportunities to private persons.<sup>82</sup> Mere non-discrimination on the basis of religion, however, could not supply such a state action principle under *Engel-Schempp*, because, like *Lemon*'s ban on aid to religious schools, the *Engel-Schempp* ban on religious speech in public school seemed to impose a special restriction on the state's own religious speech inapplicable to the state's secular expression.<sup>83</sup>

In *Sherbert v. Verner*,<sup>84</sup> the Court matched these "separationist" doctrines with an analogous anti-coercion rule requiring that South Carolina justify its refusal to accommodate Mrs. Sherbert's religiously motivated refusal to work on Saturdays not merely with some religiously neutral reason but rather by some "compelling state interest." Although *Sherbert* might have been rationalized on the basis of some sort of anti-discrimination rule,<sup>85</sup> *Sherbert*'s progeny applied a balancing test to determine whether the burden of exempting a religious belief from a generally applicable law served a sufficiently weighty purpose.<sup>86</sup>

---

81. Compare *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (use of public school classroom for private religious instruction, prohibited), with *Zorach v. Clauson*, 343 U.S. 306, 314–15 (1952) (released time, permitted).

82. See Nathan S. Chapman, *The Establishment Clause, State Action, and Town of Greece*, 24 WM. & MARY BILL RTS. J. 405, 408 (2015).

83. Ordinarily governmental officials enjoy broad discretion to make content- and even viewpoint-based distinctions in their speech and to inculcate even controversial values free from First Amendment restrictions. See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). One might plausibly argue that this discretion is qualified by a general rule against the government's engaging in partisan, divisive, or sectarian speech. See generally Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013). Even granting Tebbe's theory, however, there is little doubt that under the *Engel-Schempp* doctrine, the principle against sectarian speech applies with special force against religious speech. See Steven D. Smith, *Why is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DEN. U. L. REV. 945, 953–56 (2010) (noting that the absence of any general duty of neutrality eliminates any special duty of government to be neutral on matters of religion).

84. 374 U.S. 398 (1963).

85. South Carolina provided unemployment benefits to those persons who refused to work on Sundays, suggesting discrimination in favor of mainstream Christianity. See *id.* at 406–09.

86. See *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 835 (1989); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140–41 (1987); *Bowen v. Roy*, 476 U.S. 693, 706–08 (1986); *Thomas v. Review Bd.*, 450 U.S. 707, 717–19 (1981).

*Lemon*, *Engel–Schempp*, and *Sherbert*, in short, relied on baselines that defied explanation through any simple, purpose- or classification-based rule. From the beginning, members of the Burger Court recognized that the *Lemon* line separating permissible from impermissible aid to parochial schools was notoriously muddled.<sup>87</sup> *Sherbert*'s balancing test was easier to apply than *Lemon*'s test only because the Court paid lip service to *Sherbert*'s compelling interest standard and instead upheld with cursory review virtually all laws burdening religious exercise that did not involve unemployment insurance.<sup>88</sup> The whole rickety doctrinal machine creaked along through ad hoc decisions and hair-splitting casuistry until the 1980s, when the Burger Court began introducing anti-discrimination concepts to extricate itself from the mess that it had created.

*B. The Failed Effort to Redefine Religious Liberty with Anti-Discrimination Principles*

As John Jeffries and James Ryan have shown, the old coalition in favor of a constitutional prohibition on aid to parochial schools had crumbled away by the time that Ronald Reagan was elected President.<sup>89</sup> By the mid-1980s, conservative Catholics, white evangelical Protestants, Orthodox Jews, and African-American urban Protestant churches had joined together in an unprecedented alliance to support public aid for private religious schools in political lobbying and amicus briefs.<sup>90</sup> Between 1982 and 1990, Presidents Reagan and Bush added three Catholics (Justices Kennedy, Scalia, and Thomas) to the Court, creating a new majority that sought to replace *Lemon*'s idea of "separation" between church and state with some principle closer to governmental "neutrality" on religious matters.<sup>91</sup>

One such simple and clean revision, suggested by Justice Harlan as early as the 1960s,<sup>92</sup> would be a theory of "formal neutrality"<sup>93</sup> prohibiting all express or intentional religious classifications in a manner similar to the

---

87. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.")

88. See Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (describing *Sherbert*'s "compelling interest" doctrine as, in application, "strict in theory, but ever-so-gentle in fact"); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

89. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 312–18, 343–49 (2001).

90. *Id.* at 359.

91. On the idea that neutrality gradually replaced separation during the 1980s and 1990s, see Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

92. See *Welsh v. United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

93. Philip B. Kurland first developed the concept of formal neutrality in *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

Equal Protection Clause's ban on racial classifications or the First Amendment's requirement of content neutrality. Such a plain and simple doctrine of formal neutrality, however, has had few supporters.<sup>94</sup> As Douglas Laycock has noted, this sort of a simple prohibition on religion-based classification runs up against an intuition that religion ought to be exempt from especially onerous burdens even if they are imposed through generally applicable laws.<sup>95</sup> Formal neutrality also seemed foreclosed by the nation's history of exempting religiously motivated activities from otherwise generally applicable regulatory burdens and excluding such activities from generally available benefits.<sup>96</sup>

As a result, the Burger and Rehnquist Courts never could wholeheartedly assimilate the doctrines defining religious liberties to the simple anti-discrimination rules familiar from doctrines defining racial equality under the Equal Protection Clause or First Amendment freedom of expression. Instead, the doctrine that emerged from the 1980s and 1990s was a hodge-podge of anti-discrimination principles laced with ill-defined anti-coercion baselines. The result does little to extricate the Court from the business of resolving RADDs about religion.

### *1. Anti-coercion Baselines in Doctrines Barring Facial Discrimination Against Religion*

Consider, first, the effort to protect religion with a plain and simple anti-discrimination rule borrowed from First Amendment Speech doctrine. This effort started strong when the Burger Court held in *Widmar v. Vincent*<sup>97</sup> that the Free Speech Clause of the First Amendment prohibits government from discriminating against religious organizations in allocating access to public property if such property is provided to private secular organizations for the purpose of fostering those organizations' own expression.<sup>98</sup> The Rehnquist Court reaffirmed *Widmar* and extended it to

---

94. See, e.g., Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373, 402; Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 26–27 (2015).

95. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1001 (1990).

96. See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1142–49 (1994) (describing how the Congress that sent the Fourteenth Amendment to the state legislatures for ratification also provided exemptions to draft laws for religiously motivated pacifists); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468–69 (1990) (describing practice of exempting religiously motivated conduct from generally applicable military duties).

97. 454 U.S. 263 (1981).

98. See *id.* at 276–77; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832–34 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–95 (1993).



the public “forum” of funds for student groups in *Rosenberger v. Rector*,<sup>99</sup> holding that the University of Virginia’s funding for student organizations constituted a “public forum” to which a religious organization must enjoy equal access, free from viewpoint discrimination.<sup>100</sup>

This confident start, however, ran up against the longstanding tradition of states’ excluding religious organizations from enjoying equal access to public funds. Such statutory and constitutional provisions dated from the nineteenth century and flatly discriminated against religion. A simple rule of content neutrality borrowed from the First Amendment Speech doctrine would, therefore, lead to the invalidation of a lot of venerable state laws.

In *Locke v. Davey*,<sup>101</sup> the Rehnquist Court balked at extending *Widmar-Rosenberger*’s anti-discrimination principle so far. Upholding Washington’s law barring students from using state aid for theological studies even when such aid could be used for analogous secular studies, *Locke* relied on baselines rooted in both ill-articulated notions of coercion and discrimination, noting that Washington’s denial of a scholarship to Davey was “of a far milder kind” than “criminal [ ] or civil sanctions” and was not motivated by any “hostility” or “animus” toward religion.<sup>102</sup> Rather than burdening religious believers, Washington’s classification simply protected taxpayers from being coerced into subsidizing religious studies with public funds.<sup>103</sup>

*Locke*, however, offered no defense of its definition of the baseline by which to define coerced belief. As Justice Scalia asked in dissent, why should not otherwise generally available benefits like the scholarship program from which Davey was excluded define the “baseline against which burdens on religion are measured”?<sup>104</sup> On this definition of baselines, Washington was not protecting its taxpayers from a coercive tax: it was instead imposing just such a coercive tax on Davey.

The *Locke* Court could have borrowed a distinction between “penalties” and “subsidies” familiar from First Amendment cases dealing with selective funding of speech, under which the denial of a subsidy for a constitutionally protected activity is permissible so long as the denial does

---

99. 515 U.S. at 828–37.

100. *Id.*

101. 540 U.S. 712 (2004).

102. *Id.* at 720–25.

103. *Id.* at 721–22 (describing antiestablishment interest in preventing public funds from being used to subsidize religious studies).

104. *Id.* at 726–27 (Scalia, J., dissenting) (“When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.”).

not deprive the recipient of “unrelated” funds.<sup>105</sup> *Trinity Lutheran Church v. Comer*,<sup>106</sup> however, suggests the difficulty of defining how finely targeted funding conditions must be to avoid being unconstitutionally coercive. In holding that Missouri could not exclude Trinity Lutheran Church from receiving state-funded reimbursement for playground resurfacing, the Court distinguished between limits on funds that targeted religious uses from those that targeted religious users, noting that Davey “was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry” while “Trinity Lutheran was denied a grant simply because of what it is—a church.”<sup>107</sup> The state’s power to limit the use of its funds therefore turned on how carefully it tied the limits to specifically religious uses.

Such an earmarking principle sought to reconcile the doctrine’s prior ban on the state’s funding of religious institutions with *Widmar-Rosenberger*’s anti-discrimination principle.<sup>108</sup> The demand that states narrowly tie religion-based limits to specific religious activities, however, plainly runs up against *Lemon*’s “entanglement” test barring ear-marking that would require state intrusion into the details of pedagogy and curriculum.<sup>109</sup> Why did not *Lemon*’s “entanglement” factor suggest that states could enforce their antiestablishment goals without prying into the details of how the recipient ultimately spends the money? The majority did not say—leaving the doctrine hovering uneasily between a pure anti-discrimination theory and some sort of anti-coercion theory forbidding the states’ “excessive” meddling with religion. Justice Gorsuch suggested one simplifying solution to the conundrum: simply give the doctrine a shove into a pure non-discrimination theory by abandoning the idea that states may constitutionally discriminate against religiously motivated institutions or conduct.<sup>110</sup> Professors Lupu and Tuttle, however, are surely correct to

---

105. Compare *Regan v. Taxation Without Representation*, 461 U.S. 540, 551 (1983) (upholding tax law denying tax-exempt status to non-profits that engage in political lobbying), and *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (upholding denial of tax deductibility of lobbying expenses), with *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (striking down ban on all subsidies for radio stations that use only their private funds to editorialize).

106. 137 S. Ct. 2012 (2017).

107. *Id.* at 2023.

108. For a reading of *Trinity Lutheran* describing it as “a stunning and thoroughly unacknowledged move from the religion-distinctive principle of ‘no funding’ to one of nondiscrimination,” see Ira C. Lupu & Robert W. Tuttle, *Trinity Lutheran Church v. Comer: Paradigm Lost?* AM. CONST. SOC’Y FOR L. & POL’Y SUP. CT. REV. 131–33 (2017), [https://aclslaw.org/pdf/sc\\_review/sc\\_review-9.pdf](https://aclslaw.org/pdf/sc_review/sc_review-9.pdf).

109. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (“A comprehensive, discriminating, and continuing state surveillance will inevitably . . . involve excessive and enduring entanglement between state and church.”). Justice Sotomayor’s dissent emphasized this entanglement problem with the majority’s demand for ear-marking. *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).

110. *Id.* at 2025–26 (Gorsuch, J., concurring).

say that such a simplification would “repudiate[] hundreds of years of American constitutional experience.”<sup>111</sup>

## 2. *Anti-coercion Baselines in Doctrines Barring Discrimination Favoring Religion*

Roughly while they were issuing the *Widmar–Rosenberger* line of cases protecting religious actors from anti-religious discrimination, the Burger and Rehnquist Courts issued two opinions striking down facial discrimination in favor of religion. In *Estate of Thornton v. Caldor* and *Texas Monthly v. Bullock*, the Court struck down religion-specific exemptions from the common-law principle of employment at will and taxation, respectively, holding that both were unconstitutional establishments of religion.<sup>112</sup> To distinguish the long history of statutory exemptions for religious activities, however, the *Texas Monthly* plurality drew a distinction between Texas’s blanket tax exemption for religious publications and permissible “legislative exemptions that did not . . . impose substantial burdens on nonbeneficiaries.”<sup>113</sup> The *Texas Monthly* plurality reasoned that Texas’s tax exemption for religious publications “burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications.”<sup>114</sup> Likewise, *Estate of Thornton* reasoned that Sabbath observers taking advantage of Connecticut’s blanket exemption from “employment at will” could impose costs on employers and other workers who would have to make up for the time lost from the accommodation.<sup>115</sup> Acceptable accommodations did not injure third parties.<sup>116</sup>

All such arguments about third-party “harms” or “burdens,” however, imply some baseline against which to measure changes that are harmful. Why, for instance, should it count as a harm to non-Sabbath-observing

111. Lupu & Tuttle, *supra* note 113, at 145.

112. *Tex. Monthly v. Bullock*, 489 U.S. 1, 17 (1989) (exemption of religious periodicals from sales tax held unconstitutional); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985) (requirement that private employers allow employees to abstain from work on their holy day of rest held unconstitutional).

113. *Tex. Monthly*, 489 U.S. at 18 n.8.

114. *Id.*

115. *Thornton*, 472 U.S. at 710 n.9.

116. For a similar distinction between harm-imposing accommodations and harmless accommodations, see Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2566–79 (2015) (describing harms imposed on employees and others by claims for exemptions from contraception mandates). For a thoughtful overview of how burdens on third parties might be one of four general principles defining constitutional religious accommodations, see NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 49–71 (2017).

employees in *Thornton* that they must work harder as a result of another employee taking Sunday off to attend church? One might instead regard such slight shifts in work load and schedule as normal incidents of an ordinary job. It is true that, as a matter of fact, employees' ability to enjoy a work schedule flexible enough to accommodate church-going is limited by the power of the boss wielding the doctrine of employment at will. But why should this normal state of affairs be normatively privileged, such that departures from the common-law baseline of employment at will "impose substantial burdens on nonbeneficiaries"?<sup>117</sup> Why not instead regard Connecticut's limit on employment at will as the baseline against which to measure each employee's work load? Likewise, why is the trivial extra revenue that non-beneficiaries would have to pay to make up for revenue lost as a result of religious publications' tax exemption a harm? Sales tax codes are complex enough that taxpayers surely should expect that their tax burden will vary with a myriad of tax exemptions for which they are not always eligible.

Confusion about baselines plagues the Court's rhetoric attempting to define non-coercive religious accommodations. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>118</sup> for instance, the Court upheld Title VII's blanket exclusion of religious employers from Title VII's ban on religious discrimination, thereby allowing religious employers to fire workers who did not join the employer's church.<sup>119</sup> In explaining why this statutory accommodation did not harm the employees, *Amos* dropped a cryptic footnote suggesting that, because Title VII's prohibition on religious discrimination might not have been enacted at all absent Title VII exempting religious corporations from its scope, employees were not injured by the exemption.<sup>120</sup> Such a "predictive baseline" might possibly be a plausible basis for defining coercion,<sup>121</sup> but *Amos* offered no argument in its defense.

In sum, the *Texas Monthly–Thornton* line of cases, like the analogous *Widmar–Rosenberger* line, could not generally extend strict scrutiny to all religious classifications without colliding with the traditional use of such classifications to accommodate religion and avoid establishments. The Rehnquist Court's distinguishing between classifications based on how

---

117. *Tex. Monthly*, 489 U.S. at 18 n.8.

118. 483 U.S. 327 (1987).

119. *Id.* at 339–40.

120. *Id.* at 337, 337 n.15 (“[W]e find no persuasive evidence . . . that the Church’s ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964.”).

121. See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 45–46 (2001); Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 574 (2016).

burdensome they were to believers and unbelievers, however, never defined the baselines against which such burdens are measured: without a defense of these baselines, such distinctions remained question-begging assertions, not reasons.

### 3. *Anti-coercion Baselines in Doctrines Allowing Facially Neutral Laws that Burden Religion*

The Rehnquist Court also attempted to extend the doctrines governing race and speech to facially neutral classifications burdening religiously motivated acts. In *Employment Division v. Smith*,<sup>122</sup> the Court upheld Oregon's ban on all uses of peyote, including religious uses by Native Americans, against a challenge under the First Amendment's Free Exercise Clause by citing precedents defining racial equality and freedom of speech.<sup>123</sup> If requiring a newspaper to pay a generally applicable tax did not abridge the freedom of press, Justice Scalia's opinion urged, then requiring a church to pay a religiously neutral tax should not be regarded as a prohibition on the free exercise of religion.<sup>124</sup> Likewise, just as *Washington v. Davis* held that "race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause," so too religiously neutral laws should not be subject to heightened scrutiny merely because they substantially burdened religious practices.<sup>125</sup>

Like *Washington v. Davis*, *Smith*'s effort to govern religion by the same doctrines applicable to race and speech was expressly justified by concerns of judicial manageability. Strict scrutiny for every substantial but incidental burden on religion "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," *Smith* warned<sup>126</sup>—a warning that was followed by a litany of laws vulnerable to such a doctrine similar to the analogous list in *Washington v. Davis*.<sup>127</sup> *Smith* was, in short, an effort to evade RADDs

122. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Holt v. Hobbs*, 135 S. Ct. 853, 858–60 (2015).

123. *Id.* at 888–90.

124. *Id.* at 878 ("It is no more necessary to regard the collection of a general tax, for example, as 'prohibiting the free exercise [of religion]' by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as 'abridging the freedom . . . of the press' of those publishing companies that must pay the tax as a condition of staying in business." (alteration in original)).

125. *Id.* at 886 n.3 (emphasis omitted).

126. *Id.* at 888.

127. *Compare id.* at 889 (observing that strict scrutiny for religiously neutral classifications would affect laws ranging from "compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal

about religion using the same techniques that the Burger Court had used fourteen years earlier to evade RADDs about racial equality.

This effort, however, faced the same obstacle of historic tradition and precedent that stymied *Widmar–Rosenberger’s* and *Texas Monthly–Thornton’s* efforts to apply strict scrutiny to religious classifications. In order to avoid overruling either *Sherbert* or *Wisconsin v. Yoder*,<sup>128</sup> *Smith* left two loose threads on which later courts could pull and cause the entire fabric of *Smith’s* anti-discrimination rule to unravel. First, *Smith* distinguished *Wisconsin v. Yoder* by stating that simultaneous burdens on both religious freedom and other fundamental rights constitute “hybrid situations” subject to some sort of balancing of religious burdens against state interests.<sup>129</sup> Second, *Smith* distinguished *Sherbert* by suggesting that courts could presume an excessive risk of discrimination against religion from a law’s system of individualized exemptions.<sup>130</sup> Neither exception was well-explained by *Smith*. In particular, the *Yoder* hybrid rights exception seemed not only mysterious but also nonsensical: If neither of the rights in the “hybrid” pair are sufficient alone to invalidate a state’s action, then how can the two insufficient theories amount to one good one?<sup>131</sup> Listening, however, to the spirit of the exceptions—the music rather than the words—one could infer that the *Smith* Court’s commitment to a thoroughgoing discriminatory purpose test was less than complete.

It should not be surprising, therefore, that the Court has, since *Smith*, pushed back against *Smith’s* “governmental discrimination” requirement by exempting churches’ selection of leaders from a generally applicable statute in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>132</sup> Under *Hosanna-Tabor’s* “ministerial exception,” churches have a right to select their “ministers” and, therefore, an immunity from laws that interfere with ministerial hiring or firing.<sup>133</sup> So stated, *Hosanna-Tabor’s* specific holding does not seem to carve out much of an exception to *Smith*. The implications of *Hosanna-Tabor’s* reasoning, however, are less plain.

---

cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races”(citations omitted)), *with* *Washington v. Davis*, 426 U.S. 229, 248 (1976) (noting that strict scrutiny for racially neutral laws would “perhaps invalidate[] a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white”).

128. 406 U.S. 205 (1972).

129. *Smith*, 494 U.S. at 882.

130. *Id.* at 883–84.

131. As Fred Gedicks puts it, “zero plus zero still equals zero.” Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192, 192 (2008), <https://www.yalelawjournal.org/forum/three-questions-about-hybrid-rights-and-religious-groups>.

132. 565 U.S. 171, 195–96 (2012).

133. *Id.* at 192.

On one hand, as Professors Lupu and Tuttle have noted, *Hosanna-Tabor* relied on three decisions that seem to stand for a narrow and uncontroversial principle: the government cannot make judgments about ecclesiastical principles, including the principles by which churches choose their ministers.<sup>134</sup> Accordingly, *Hosanna-Tabor* might stand for nothing more than the uncontroversial idea that federal anti-discrimination law cannot dictate to the Lutheran Church who is fit to be a minister because ministerial fitness is a matter of ecclesiastical principle beyond the power of courts to evaluate. On the other hand, the dispute in *Hosanna-Tabor* did not, at least on its face, require any court to express any opinion about ecclesiastical questions. Cheryl Perich, a teacher at a religious school, claimed that the school had illegally retaliated against her for filing a lawsuit against the school under the Americans with Disabilities Act (ADA).<sup>135</sup> Nothing in this anti-retaliation claim required the Court to make any judgment about the meaning or truth about Lutheran doctrines concerning Perich's fitness to serve as a minister: The ADA claim required only that the judge or jury decide whether or not the school's reason for Perich's dismissal was that she filed a lawsuit against the school.<sup>136</sup> *Hosanna-Tabor*'s holding, therefore, seemed subtly broader than the three decisions involving disputes about church property cited by the *Hosanna-Tabor* Court. The latter declared merely a doctrine of *forbidden reasons* under which courts may not opine about church doctrine in awarding title to church property.<sup>137</sup> *Hosanna-Tabor*, however, issued an opinion about *forbidden outcomes*, under which courts may not impose on religious organizations a minister that the church regards as unfit. Although *Hosanna-Tabor*'s specific holding concerned the government's

---

134. Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1274 (2017). The three decisions on which *Hosanna-Tabor* relied are *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevic*, 426 U.S. 696 (1976); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Hosanna-Tabor*, 565 U.S. at 185–87. The three decisions cited by *Hosanna-Tabor* all held that courts or legislatures could not assess whether or not a church's ecclesiastical principles entitle a claimant to title over church property because courts have no business interpreting or evaluating ecclesiastical principles. *Id.* at 185–87.

135. *Id.* at 178.

136. One might plausibly argue that by seeking a judgment that the school's dismissal of Perich was a violation of the ADA, the EEOC was implicitly seeking a declaration that Perich was fit to serve as a minister. In this sense, the ADA judgment sought by the EEOC contradicted the school's ecclesiastical judgment that Perich was unfit to serve as a minister under the school's own ecclesiastical standards. The *Hosanna-Tabor* Court, however, never relied on such an interpretation of the ADA judgment. The Court instead focused on the effect rather than the purpose of Perich's lawsuit, noting that even if Perich did not seek reinstatement, the remedy of damages or back pay "would operate as a penalty on the Church for terminating an unwanted minister" and would, therefore, be forbidden. *Id.* at 194.

137. *Orthodox Diocese*, 426 U.S. at 720; *Kedroff*, 344 U.S. at 116; *Watson*, 80 U.S. (13 Wall.) at 727.

interference with a church school's decision to fire a minister, the ban on certain outcomes seemed to rest on a broader principle—the principle that, regardless of the government's reasons, the government cannot intrude too deeply into “an internal church decision that affects the faith and mission of the church itself.”<sup>138</sup>

What sorts of decisions qualify as “an internal church decision that affects the faith and mission of the church itself”? *Hosanna-Tabor* did not say, beyond noting that such decisions differ from the “government regulation of only outward physical acts” such as Oregon's prohibiting the ingestion of peyote.<sup>139</sup> Forcing an unwanted minister on a church certainly qualifies, but nothing in *Hosanna-Tabor* suggests that such intrusions are the only way in which the government encroaches into a religious organization's “internal decision.” Like *Yoder's* hybrid exception, in sum, *Hosanna-Tabor* seems to invite further, albeit uncertain, erosion of *Smith's* authorization for generally applicable laws.

#### 4. *Anti-coercion Baselines in Doctrines Allowing Facially Neutral Laws that Benefit Religion*

The Rehnquist Court steadily chipped away at *Lemon's* ban on facially neutral aid by relying on concepts of state non-responsibility for private choices familiar from equal protection doctrine. Upholding state-provided scholarships to private students usable at religious or secular institutions, the Court deemed the programs to be neutral with respect to religion because the criteria by which the funds were allocated to the students were devoid of either religion-promoting purpose or classification and the choice to attend a religious school was entirely the students' own private decision.<sup>140</sup>

In the end, however, the Rehnquist Court just could not let go of the idea that the Court should assess the practical coercive effect of aid for religious education. In *Zelman v. Simmons-Harris*,<sup>141</sup> it upheld Ohio's pilot voucher program providing tuition aid for Cleveland's low-income households so that they could better afford to send their child to a private school. The *Zelman* Court nevertheless reaffirmed special limits on such aid to insure that secular parents would not be coerced into sending their

---

138. *Hosanna-Tabor*, 565 U.S. at 190.

139. *Id.*

140. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court permitted Larry Witters to use Washington's grants for vocational rehabilitation of the blind to pay for his education as a minister of religion. In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), James Zobrest, a deaf student, was permitted to use public school monies intended to aid disabled students' education to pay for a sign-language interpreter's translations in a Roman Catholic School.

141. 536 U.S. 639 (2002).



child to a religious school, drawing a “distinction between government programs that provide aid directly to religious schools and programs of true private choice.”<sup>142</sup> Only if state funds ended up in the coffers of private religious schools as a result of “genuinely independent and private choices of aid recipients” could the program be upheld.<sup>143</sup> Focusing on whether the parents’ choice of religious schools was voluntary or coerced, the Court found that Cleveland parents’ choices were sufficiently free and independent because of the variety of secular options available to them.<sup>144</sup>

*Zelman*’s focus on the sufficiency of secular options once more plunged the Court into defining baseline of sufficient options to insure that parents’ choices were “genuinely independent” rather than coerced. How good did the secular voucher-eligible schools have to be to give parents a real choice? If Catholic schools, for instance, created social networks that increased a neighborhood’s social capital, did this advantage show that such schools enjoyed an advantage over secular options that rendered the choice of the former involuntary?<sup>145</sup> If not, then why not? The *Zelman* Court did not say, preferring to rely on conclusory assertions that the secular options were good enough without specifying the baseline of quality that defined voluntariness.

### C. *The Case for Managing Reasonable Disagreement over Baselines with a Meta-Accommodation*

In sum, the Burger and Rehnquist Courts failed to move Religion Clause doctrine toward the simple concepts of state action and discriminatory purpose familiar from equal protection and First Amendment speech and press doctrines. Instead, the doctrine is a dog’s breakfast of anti-discrimination and anti-coercion principles governing different but vaguely defined factual contexts. Dividing the doctrine into judicially crafted rules that forbid, allow, or require discrimination on the basis of religion to avoid coercion of either religious believers or non-believers, one can conveniently organize the precedents discussed above into six categories:

---

142. *Id.* at 649 (citations omitted).

143. *Id.* at 650–51.

144. Although the overwhelming majority of private schools accepting the voucher were Roman Catholic schools, parents could use their voucher at public schools in districts adjacent to Cleveland, and Ohio provided much larger subsidies for students attending one of Cleveland’s twenty-three magnet schools or ten community schools—all secular and public options. *Id.* at 646–48.

145. On Catholic schools’ cultivation of neighborhood social capital, see MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS’ IMPORTANCE IN URBAN AMERICA* (2014).

I. Discrimination in favor of religion to avoid coercion of religious believers is . . .

A. . . .required: E.g., *Hosanna-Tabor*, *Yoder's* "hybrid" exception, *Sherbert's* balancing test for "systems of individualized exemptions";

B. . . .allowed: E.g., *Amos*, *Cutter*;

C. . . .forbidden: E.g., *Texas Monthly*, *Estate of Thornton*

II. Discrimination to avoid coercion of religious non-believers is . . .

A. . . .required: E.g., Remnants of *Lemon's* "secular effects" test in *Zelman*;

B. . . .allowed: E.g., *Locke v. Davey*;

C. . . .forbidden: E.g., *Widmar-Rosenberger*, *Trinity Lutheran Church v. Comer*

The Religion Clause doctrines described in Parts I.C and II.C above come closest to the prevailing concepts of discriminatory purpose governing Equal Protection and First Amendment Speech and Press doctrines. These doctrines, however, are qualified by four important exceptions described in Parts I.A, I.B, II.A, and II.B above, all of which all depend on baselines rooted in either "balancing" or "coercion." As explained in Part II.B, the U.S. Supreme Court has never provided any well-defined baseline against which to measure the excessively burdensome or coercive effects that either trigger state liability for facially neutral laws or allow states to use facially religion-based classifications. These baselines, therefore, define RADDs. Depending on how these baselines are drawn, one group's conception of constitutional rights will be vindicated, while another group's will be violated.

Is there no hope for a principle that would permit a simple and non-controversial definition of baselines of either coercion or discrimination? It is difficult to prove a negative, but two efforts to reconcile the cases suggest the scope of the challenge.

Consider, first, Douglas Laycock's theory of "substantive neutrality" under which the baseline distinguishing coercion from neutrality is defined by balancing the likely effect of a government's decision on religious choices.<sup>146</sup> Under Laycock's theory, if the enforcement of a generally applicable law against a religious practice would impede that practice while granting an exemption for that practice from that law would not substantially increase the attractiveness of the religion to non-believers,

---

146. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1001-05 (1991) discusses a similar theory of neutrality in selective funding under which the state must avoid funding close substitutes for constitutionally protected activities as a way of discouraging those activities.

then the absence of that exemption counts as constitutionally forbidden coercion.<sup>147</sup> Laycock offers an intuitively easy case to illustrate his theory, arguing a general prohibition on minors' consuming alcoholic beverages should contain an exception for the minors' consumption of wine for religious rituals like the Roman Catholic Eucharist.<sup>148</sup> The absence of such an exemption, Laycock notes, will "powerfully discourage[] an act of worship," while the inclusion of such an exemption is unlikely to "encourage any child to take communion, or any parent to take his child to a communion service, who is not already religiously motivated [to] do so."<sup>149</sup>

Laycock's baseline of substantive neutrality, however, turns out to be tricky to apply. RFRA's exempting employers from a contraception mandate might, at first glance, seem to qualify as substantively neutral, because few businesses would appear to be tempted to adopt a religious rationale for resisting a mandate that has few material costs. On the other hand, appearances can be deceptive. One could imagine that any religion-specific exemption might create subtle incentives for secular libertarian opponents of all mandates to frame their general objections to governmental regulation in religious terms, launching their assault on the regulatory state with a Bible (or Quran or whatever) opportunistically in their hand even when their real agenda is weakening state regulation more generally for purely secular ideological reasons.<sup>150</sup>

What about unifying the law around anti-discrimination concepts that might avoid the difficulty of measuring coercion? Consider, as such a theory, Lawrence Sager and Christopher Eisgruber's theory of "equal liberty."<sup>151</sup> Under this theory, religion-based exemptions from regulatory burdens are permitted just so long as "persons [are] not . . . treated unequally on account of the spiritual foundations of their deep commitments."<sup>152</sup> To defend such religion-specific accommodations, therefore, one must show that the accommodation relieves religious believers of some burden from which "analogous" secular conduct is exempt. They offer the example of a federal court's striking down a landmark law enacted by the City of Cumberland, Maryland, that subjected historically significant buildings, religious and secular alike, to landmark

---

147. Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 55 (2007).

148. *Id.*

149. *Id.*

150. For a discussion of the subtle ways in which the availability of religion-specific exemptions might shape incentives of those challenging facially neutral regulations, see Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J. L. & GENDER 1, 11 (2015).

151. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 241 (2007).

152. *Id.* at 241.

restrictions.<sup>153</sup> According to Sager and Eisgruber, the court properly held that Cumberland's landmark law illegally discriminated against a Roman Catholic Church by barring the church from replacing an aging monastery building with a more modern structure because the law allowed variances where landmarking imposed "financial hardship."<sup>154</sup> By not making *religious* hardship an equal basis for receiving a variance, the law covertly discriminated against religious reasons.

Sager and Eisgruber's own examples, however, illustrate why their concept of analogous activities creates as many RADDs as it resolves. In place of arguing whether a facially neutral law improperly coerces religious or secular persons, the theory requires one to determine whether the burdens imposed by the law on some secular or religious activity are analogous to each other. In assessing whether religious actions are analogous to the secular actions protected by these exemptions, the court will have to make controversial assumptions that will seem to partisans to favor religion too much or protect religion too little.

With respect to the example of the Cumberland variance law, for instance, why should exemptions based on economic but not religious hardship be regarded as analogous? Economic hardships from landmark laws are, by definition, capitalized into the value of land, lowering the value of the property to potential buyers.<sup>155</sup> Landowners, therefore, cannot escape such hardships by selling their land because the hardship imposed by the law will be reflected in the offers that they receive from buyers. By contrast, if a land-use regulation imposes only a religious but not an economic hardship on a landowner, then that landowner can always escape the religious hardship simply by selling the land and using the proceeds to purchase a substitute parcel where they can practice their religion. By extending the "economic hardship" exemption to cover "religious hardship," one can plausibly argue that the Maryland district court conferred a sort of "most favored nation" status on churches, entitling them to the benefit of exemptions denied to other landowners with non-religious objections to landmark laws.<sup>156</sup> By straining to find analogies between religious and secular conduct to give the former the benefits of regulatory exemptions enjoyed by the latter, Sager and Eisgruber's theory expresses

---

153. *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996).

154. EISGRUBER & SAGER, *supra* note 156, at 98.

155. For an explanation of how zoning restrictions are capitalized into the value of land, see WILLIAM A. FISCHER, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* (2015).

156. Under the general doctrine of economic hardship applicable to variances in Maryland (as in most other states), economic hardship must be extraordinarily severe to qualify landowners for variances. *See, e.g., Marino v. City of Baltimore*, 137 A.2d 198, 202-03 (Md. Ct. App. 1957).

favoritism towards religion under the guise of equality<sup>157</sup> by exempting religious objections from what Adam Samaha calls the “process” baseline of being subject to the normal outcomes produced by the democratic process.<sup>158</sup>

Here, then, is our predicament. That some sort of exceptions ought to be drawn for at least some sorts of generally applicable burdens on both religious beliefs and anti-establishment values has been a “nearly unanimous” opinion in the United States.<sup>159</sup> That such exemptions can constitute unconstitutional establishments of religion when they impose excessive costs on third parties is equally uncontroversial.<sup>160</sup> Between these two propositions lies a mass of legal and factual disagreement impossible to hedge by any general nationwide rule, because the definition of baselines for defining those excessive costs (coercion) is hopelessly contested.<sup>161</sup> In the end, we are faced by unbridgeable, reasonable, and vociferous disagreement because our traditions of religious liberty are irreducibly plural.<sup>162</sup> Taking rights seriously means taking disagreement about rights seriously.<sup>163</sup>

Rather than paper over this disagreement with a nationally uniform system of accommodations for belief and unbelief, we should seek a *meta*-accommodation that acknowledges unresolvable disagreement. A “meta-accommodation” is an accommodation of rival theories of accommodation that gives each side of a RADD the comfort of knowing that their view of their liberties was given a fair shake. The knowledge that their views about accommodations were fairly accommodated would ideally provide the basis for social peace and civil discourse. As explained below, such a principle lies outside the doctrines defining religious liberty and is, instead, found in the idea of federalism—that is, the idea that a political division of geography can be a substitute for an ideological division over faith.

---

157. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 36–37 (2000).

158. Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97, 111–13 (2014).

159. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 5 (2013).

160. See, e.g., *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (striking down special sales tax exemption for religious periodicals alone).

161. See Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115, 148–49 (1992).

162. See generally Steven Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004) (arguing that the principles underlying the Religion Clauses cannot be reduced to the value of equality but are instead irreducibly plural and include special solicitude for religion).

163. For other more general arguments about the persistence of disagreement about rights, see AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 35–36 (1996); JEREMY WALDRON, *LAW AND DISAGREEMENT* 243–49 (1999).

### III. DECENTRALIZATION OF RADDs AS EQUAL CONCERN AND RESPECT

Suppose that a nation afflicted with RADDs about accommodations for religious believers and unbelievers already possesses a system of decentralized jurisdictions. Suppose, for instance, that in the ordinary case, subnational jurisdictions normally have broad autonomy to govern education, a field in which disputes over religious accommodations frequently arise. In such a regime, national decision makers have an option available to them aside from deciding the RADD themselves: They could devolve the choice between the various and equally reasonable anti-discrimination and anti-coercion theories to subnational governments.

Under what circumstances might such a decentralization of RADDs constitute a better meta-accommodation than a single, uniform national decision? Part II below argues that the value of equal concern and respect in the process by which RADDs are resolved suggests a “*ceteris paribus*” norm of decentralization. National officials ought presumptively to defer to subnational governments’ “reasonable” resolution of RADDs. By reasonable, I mean any accommodation that is consistent with either the anti-discrimination or anti-coercion principles that have surfaced in the American legal tradition described above in Part II. This presumption in favor of decentralization can be overcome for reasons unrelated to national officials’ views about the RADD, such as the practical need for national scale in the regulation or regulator, given the scale of the problem posed by the RADD. Disagreement about how the RADD ought to be resolved, however, is no justification for supplanting the reasonable decisions of subnational officials with those of national officials, even if the latter are equally reasonable. This presumptive tolerance for divergent religious and secular accommodations is the natural extension of the voting equality that counts the ballots of citizens and legislators equally, regardless of how those ballots are cast. By representing the contestants’ views more in proportion to their share of the population, subnational accommodations avoid “winner-takes-all” definitions of rights that discount the losers’ votes. More important, by providing a physical space for each reasonable conception of religious liberty, the federal solution demonstrates each side’s commitment to equal concerns and respect for the other side.

#### A. *How Decentralization of RADDs Promotes Democratic Equality*

To appreciate the egalitarian advantages of decentralization, it is helpful to recount how legislation more generally provides an egalitarian process for resolving disputes about rights. As Jeremy Waldron has persuasively argued, the legislative process provides a mechanism by which citizens can “resolve disagreements about what rights they have

among themselves and on roughly equal terms.”<sup>164</sup> Waldron felicitously describes this right to a fair dispute-resolution process as the “right of rights,” meaning the right to have an equal say over the definition of one’s rights.<sup>165</sup> If each citizen casts an equally weighted vote for legislative representatives who, in turn, each have an equally weighted vote to cast for legislation, then the process by which decisions are reached by a majority vote of legislators respects the equality of citizens. Assuming that the disagreement settled by the vote is a reasonable disagreement and that everyone agrees that it must be resolved collectively, then the minority cannot invoke what they regard as the substantive wrongness of the result as a reason to overturn the decision, because the wrongness or rightness of the outcome is, by hypothesis, the very question subject to a reasonable disagreement.<sup>166</sup> Instead, any complaint needs to be directed at the egalitarian merits of the process by which the decision is made: Does that process respect the contestants by treating their views with equal concern and respect, giving equal weight to their views on a topic that “is the subject of good-faith disagreement”?<sup>167</sup>

An important aspect of that process is the definition of the constituency entitled to vote on the dispute about rights. Should the decision be made for the entire nation by a vote of the entire nation’s elected representatives? Such a question could itself be a subject of reasonable dispute, with some citizens arguing that the decision has nationwide effects requiring a nationwide constituency, while others argue that the scale of the effects will mostly be confined within each subnational jurisdiction’s boundaries, allowing each subnational unit to decide the question for itself. Are there any general principles or presumptions that might suggest how such a disagreement ought to be resolved?

Consider two principles suggesting a weak presumption in favor of subnational decision making.

### *1. Outcome-neutral Choice of Decision-making Scale*

First, the question of scale should be made on an outcome-neutral basis. By hypothesis, the underlying substantive dispute that the constituency, whatever its proper scale, is called on to decide is a reasonable disagreement. Disagreements about the process by which the disagreement is decided, including the scale of the constituency that should do the deciding, cannot, therefore, be determined by one side’s view of the

---

164. WALDRON, *supra* note 168 at 254.

165. *Id.* at 232.

166. *Id.* at 294.

167. *Id.* at 303.

merits of that underlying substantive dispute because those merits are precisely what are up for grabs. Decentralizing or centralizing the decision opportunistically to achieve one's preferred substantive outcome is like rigging the voting rules to insure one's own team's maximal success. It is intuitively unacceptable for a legislative majority to change the voting rules in the legislature (say, from a pairwise tournament method to a modified Borda count) with each vote to insure that the majority's preferred outcome always triumphs. Either method might be perfectly acceptable, but switching the rules for outcome-based reasons is not. The same intuition applies to opportunistic decisions to switch the level of decision maker or size of constituency to insure maximum victory for one's side.

## 2. *Presumption of Subnational Decision Making*

Second, where deep disagreements are at stake, there should be a presumption in favor of decision making by subnational constituencies if there is unresolvable procedural doubt about the proper scale of constituency to decide a RADD. The justification for this presumption is rooted in the definition of deep disagreement. With such disagreements, each side reasonably believes that a decision for the other side constitutes an invasion of their own fundamental interests. Any resolution of the disagreement, therefore, will provoke maximum resentment that needs to be assuaged by assurances of fair play. Subnational decision making provides such assurance by producing a multiplicity of substantive outcomes under normal demographic circumstance because the populations of federal regimes (which tend to be large republics) are heterogeneously distributed across subnational jurisdictions. Some jurisdictions will tend to opt for the more secular accommodation, while others will lean toward the more religious outcome. By foreclosing winner-take-all outcomes especially favorable to one side, this multiplicity of outcomes reassures each side that their interests have been treated with respect. Just as proportional representation better insures the representation of each interest than first-past-the-post plurality voting, federalism better assures representation for each reasonable point of view than national legislation.

## 3. *Why Not National Deliberation and Compromise?*

One might object that a single, uniform decision by the national legislature can be just as likely to embody deliberation and compromise as multiple, spatially divided decisions by subnational governments—just a different sort of compromise. Consider two ways in which losers get a fair shake with a single uniform, nationwide decision.



First, as famously predicted by James Madison's *Federalist No. 10*, legislative moderation increases with the size of a republic's territory, population, and resulting demographic heterogeneity because such heterogeneity undermines the cohesiveness of any majority in the national legislature.<sup>168</sup> On Madison's theory, each side of a RADD would have to bend a bit in the national legislature, offering a watered-down version of its ideal version of accommodations in order to secure a stable majority from which the minority cannot pick off defectors with a different bill. This legislative moderation is itself a compromise that the majority could cite to placate losers. Why is such a centralized form of moderation not just as good as the decentralized version in which the two sides agree to divide up territory and go their separate ways?

Imagine, for instance, that Congress is debating colleges' and universities' eligibility for federal aid. The hard-core secularists might demand a secular accommodation barring any use of taxpayers' money to purchase any services from any religiously affiliated institution. The hard-core religious believers might demand absolute non-discrimination: Religious institutions ought to be eligible for federal funds precisely to the extent that they provide services similar to analogous secular organizations—and the analogies should be construed broadly to require religious institutions to get “most favored organization” status. Given the results of the last legislative election, however, neither faction can press through their ideal form of accommodation because neither contains a solid majority of legislators, and their opponents are able to pick off allies by trading votes on unrelated legislation. The Congress, therefore, settles for a middle ground unsatisfactory to each side—say, a special ban on religious colleges' and universities' receiving direct aid that allows such schools to receive aid indirectly as a result of students using their federal loans and grants at religious institutions.

Madison's point about the moderation of a heterogeneous deliberative body can be reframed as a case in favor of reflective deliberation rather than interest group pluralism. (Indeed, Madison's references to “refinement” of public views suggests such an understanding).<sup>169</sup> Perhaps a collective body representing rival views can achieve some sort of reflective equilibrium by drawing on and reconciling general principles and specific intuitions. Nelson Tebbe makes such a plea for such reflective equilibrium in an elegant and erudite book defending a coherence-based theory of religious freedom.<sup>170</sup> Tebbe's basic claim is that, by moving between our

---

168. On *Federalist No. 10* as a liberal theory for promoting pluralism, see Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *FORDHAM L. REV.* 769, 771–74 (2006).

169. *Id.*

170. NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

specific intuitions and four general principles (avoiding harm to others, fairness to others, freedom of association, and government nonendorsement), people of good faith can reach a consensus about apparently irreconcilable views on religious accommodation.<sup>171</sup>

Why is a national compromise not just as respectful of the minority's views as a policy of decentralization? Consider two different responses based on whether one understands the Madisonian solution as sheer interest-group pluralism or as a sincere attempt at achieving Tebbe's consensus rooted in social coherence.

To the extent that a single national rule is merely an interest-group compromise, that rule ignores the reasons that each side has for its views. Far from being an expression of equal concern and respect for equally valid reasons, such a solution ignores reason-giving altogether. The religious side believes, with some reason grounded in national precedents, that the special ban on direct aid to religious schools is unconstitutional anti-religious discrimination. Also citing plausibly relevant precedents, the secular side regards the religious schools' eligibility to receive federal money through the route of students spending their federal aid at religious schools as impermissible federal subsidies for theology studies. The "moderate" congressional solution brands both as "too extreme," despite these "extreme" views' reasonable basis in American traditions of liberty and equality. While satisfying to the congressional "moderates," the outcome is actually an insult to both the "extremist" factions in the legislature, whose views have thereby either been branded beyond the pale of polite legislation or traded away in a compromise based on voting power rather than constitutional principles.

If the extremists are, in fact, offering reasonable positions, however, then the enforced compromise can only be expected to make them smolder in resentment, as what they believe to be the just resolution is drowned in an orgy of political horse-trading. By contrast, the decentralized solution acknowledges the legitimacy of both sides, including by allowing their "pure" versions of accommodations to be enforced against some subset of citizens. The decentralized solution also gives the national legislature a reason to wash its hands of an unresolvable debate that gives each side reason to press for a different compromise after the next round of federal elections: The norm of decentralization can be used to take the question off of Congress's agenda entirely. In a decentralized system, the acrimony of interminable debate can thereby be reduced by a simple vote, but that simple vote does not suppress truly legitimate differences of opinion with a gratuitous compromise.

---

171. See generally *id.*

But what about Tebbe's social coherence? Without presuming to do justice to a complex argument in a paragraph, one can respond to Tebbe by accepting his premise of social coherence but adding a fifth principle to his canonical four: the principle of decentralization of religious disputes. Decentralization is deeply rooted in American political and legal traditions pertaining to religion.<sup>172</sup> Social coherence can, therefore, easily incorporate this value as a qualification of the other four. When in doubt about the balance of reasons, let a subnational decision maker strike that balance. To the extent that Tebbe's plea for social coherence is, as he says, "a form of deliberation that is capable of handling variegated values,"<sup>173</sup> geographic decentralization might seem to be an ideal tie-breaking principle for reconciling those "variegated values," by foregoing the "Waring Blender" model of toleration that imposes a mushy compromise on the entire nation and instead allows each variegated value to have a geographic place to roost.

*B. Reasonability as a Limit on the Presumption of Decentralization*

The presumption of decentralization for RADDs set forth above presupposes that subnational power is limited by a principle of "reasonability." Subnational governments can choose one of the versions of religious and secular accommodations that fit within our traditions of religious liberty and equality—that is, one of the six packages of accommodations outlined in the list at the end of Part II.C. Given this presumption, the list should be construed generously to uphold subnational laws: Where there is reasonable disagreement about whether a state's chosen accommodations fits within one of the six categories, the doubt should be resolved in favor of upholding the law.

One might reasonably ask: Why have such a reasonability limit at all? If *some* decentralization of RADDs is comforting to the losers in a national debate, then why should not total decentralization be totally comforting?

The limit follows from the same principle as the presumption itself. By allowing citizens who are in a national minority on a disputed RADD to opt for a position different from the national majority's favored view, the presumption favoring decentralization of RADDs provides assurance of equal concern and respect. The national minority is getting everything that the national majority can give them consistent with a proportional and similar right of self-governance for the national majority. Neither the

---

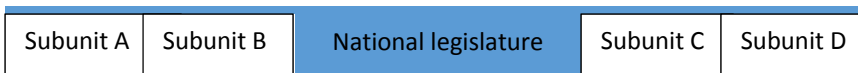
172. For a distinguished American historian's elegant statement of this tradition of decentralizing ethnocultural disputes, see ROBERT H. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* (1975).

173. TEBBE, *supra* note 175, at 30.

national majority nor minority, however, would ever purchase such assurance by providing each other with unlimited powers of subnational self-governance because unlimited power invites the insult of disparaging discrimination in *subnational* jurisdictions. For any given citizen, the benefits of gaining one's preferred accommodations in one subnational jurisdiction would not necessarily outweigh the burden of this subnational insult. As noted above, subnational accommodations are likely to be more extreme in their content than the national legislation. One would expect, therefore, that each citizen whose preferences were at risk of defeat by a vote in the national legislature would prefer *some* sorts of subnational accommodations over the national legislature's accommodations yet simultaneously prefer the national legislature's wishy-washy, less-than-ideal compromises over the most extremist subnational jurisdictions dominated by voters with views furthest from that citizen's ideal point.

This ordering of preferences can be illustrated with a simple federal regime containing only four subunits: A through D. Because the nation's population is heterogeneously distributed, imagine that the attitude of each subunit's population towards religious and secular accommodations can be arrayed on a single left-right dimension from most secular (A) to most religious (D). On Madison's theory, the national legislature, constrained by the heterogeneity of the constituencies that it represents, is predicted to adopt some sort of mushy compromise measure somewhere in roughly the center of the spectrum. As noted above in Part III.A, that compromise will still leave many citizens dissatisfied: The Extremists in Subunits A and D would each feel that their preferences were given short shrift by Moderates in Subunits B and C because the national legislature's decision would be closer to the views of the Moderates than the Extremists (see Diagram 1 below).

**Diagram 1:**

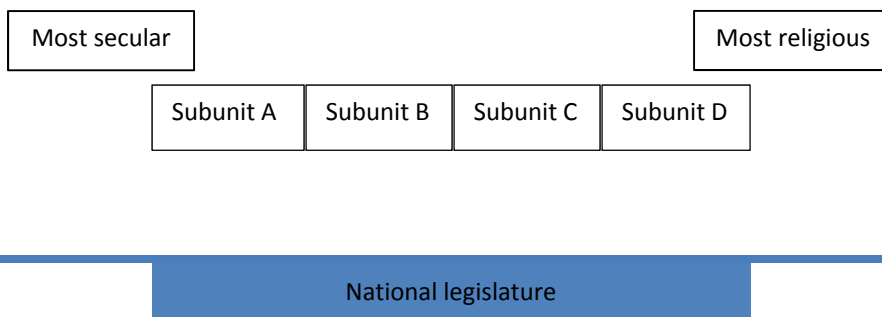


Decentralization of all accommodations without any constraints of “reasonability,” however, also aggrieve these same extremist national

minorities, because they would resent the treatment of their views and fellow citizens in the subunits that adopted policies furthest from their own ideal point. For instance, the residents of A (the most secular regimes, analogous to, say, Massachusetts) would not regard the national legislature's choice of accommodations as ideal—but that choice, although a defeat for their ideal position (leftwards of the likely outcome in the national legislature), would still be much closer to the more secular citizens' choice than the likely much more “pro-religious” policies in Subunits C and D. Citizens in A, therefore, might logically be willing to sacrifice their own right to subnational self-rule for the sake of saving their fellow citizens from C's and D's extremism. National legislation is, in effect, an insurance policy against local extremism purchased at the price of sacrificing the right to obtain one's most preferred outcome in those subunits of the nation where one's views are dominant.

If all subnational jurisdictions are constrained by a norm of reasonability, then the value of such “moderation insurance” from the national legislature diminishes because the distance between what the national legislature might enact and the laws of the most extreme subnational jurisdiction disappear. Subnational jurisdictions in such a constrained system of decentralization would be limited to choosing among accommodation policies falling within the broad but nonetheless constrained traditions on national liberty. This constrained set of policies can still be arrayed on a single dimension from most secular to most religious, but the range of permissible subnational outcomes is narrower, clustered in the middle and—critically—largely overlapping with outcomes that the national legislature (constrained by its heterogeneity) might plausibly approve (see Diagram 2 below).

**Diagram 2:**



In effect, the subunits, constrained by law, would simply gain a local option to choose one of the accommodations policies that the national legislature, constrained by demographic heterogeneity, could also choose if

the electoral stars were properly aligned. That set of options is still capacious: Just because the national legislature is more moderate than any given subunit does not mean that it would not lean right or left at any given moment after any given set of elections. Assuming that national elections are subject to Duverger's Law<sup>174</sup> because the national legislature is elected through first-past-the-post plurality elections, one or another of two political parties will dominate the national legislature at any given time and (if one regards the constitutional court as a legislative body) the judiciary as well. Such national bodies, although moderate, still produce moderate defeats for the minority party from which the losers might like to opt out. Decentralization that is constrained by a norm of moderation simply allows the losers at the national level to opt out of one among several possible "moderate" accommodation policies in favor of another "moderate" policy closer to their ideal point.

Under this constrained form of decentralization, no one would gain much by allowing the national legislature to trump subnational accommodations, because the national legislature's choices would not necessarily be any more "moderate" than any of the (properly constrained) subunits. True, a national law could eliminate subnational accommodations far from one's ideal point: A member of the majority in Subunit A would applaud the national legislature's preempting accommodations preferred by the citizens of Subunit D. Because Subunit D's choices were already constrained, however, Subunit D's most extreme preferences could be possibly enacted as national legislation just as easily as the (equally extreme) preferences prevailing in Subunit A. Putting the question of religious accommodations on the national preemption without constraint, therefore, would place the citizens of Subunit A (as well as the rest of the nation) at risk of being governed by Subunit D's preferred rule—what they regarded as the worst possible outcome.

This defense of moderation in subnational as well as national accommodations assumes that citizens residing in one subnational jurisdiction care about how their fellow citizens are treated in other subnational jurisdictions. The evidence supports this assumption. When people deal in fundamental principles, they adopt a "sociotropic" attitude, taking into account the interests of the whole nation rather than their personal self-interest.<sup>175</sup> The mere knowledge that a subnational minority is

---

174. Christoffer Dunstan, *The Systematic Exclusion of Third Parties in American Politics*, 4 LAW & SOC'Y J. U.C.S.B. 41, 45 (2005).

175. See Donald R. Kinder & D. Roderick Kiewiet, *Sociotropic Politics: The American Case*, 11 BRIT. J. POL. SCI. 129 (1981). As Abraham Lincoln stated in explaining why the issue of slavery in the western territories could not be left to the decision of those territories' residents alone, "[the subject of slavery] is upon us; it attaches to the body politic as much and as closely as the natural wants attach to

governed elsewhere in the nation according to what a citizen regards as an unjust rule is “externality” enough to drive that citizen to want some sort of national corrective, regardless of where the unjust rule applies or where the citizen happens to reside. On this assumption, subnational majorities would not be satisfied by a rule that left their fellow citizens in neighboring jurisdictions to be governed by what they regarded as an unreasonably unjust accommodation regime. This same moral externality, however, would also induce subnational minorities to forgo lobbying for a national “compromise” law that might improve their lot where they actually live but could also just as easily sacrifice that subnational minority’s most preferred policies in subnational jurisdictions where that minority did not reside.

Constrained decentralization, in sum, assures citizens that their *reasonable* views will receive equal concern and respect by giving those views some place within the nation where they can prevail. Reasonability, under this theory, is simply that space within which one can make a persuasive argument rooted in shared national history that one’s preferred view of religious liberty is indeed the correct one. Because there are mutually inconsistent theories of baselines rooted in discrimination and coercion within this space, some mechanism for choosing between them is needed. The advantage of a presumption in favor of constrained decentralization is that it makes such a choice in a way maximally respectful of all views within the pale of shared national traditions—that is to say all reasonable views—by not watering such views down further than necessary.

#### IV. INSTITUTIONALIZING THE DECENTRALIZATION OF ACCOMMODATIONS WITH CONSTITUTIONAL LAW AND STATUTORY CONSTRUCTION

Suppose that one were persuaded by the abstract arguments above to adopt some sort of presumption against preemption for RADDs. How can such an abstraction be practically implemented within existing doctrine?

This question resists sweeping generalizations: Both the presumption in favor of decentralization and the scope of reasonable variation are mushy standards, not hard and fast rules. Nevertheless, the spirit of these principles can be illustrated with a couple of case studies designed to show how a properly deferential court can nudge the American system of federalism into (meta-)accommodating our disagreements about religious liberties.

Part IV provides four such case studies. Two of these case studies illustrate a properly decentralizing attitude toward state law regarding three

---

our natural bodies.” President Abraham Lincoln, Speech in New Haven, CT (Mar. 6, 1860), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 15 (Roy P. Basler ed., 1953).

controversial Religion Clause baselines. Two illustrate a properly decentralizing attitude toward the doctrine of Congress's enumerated powers and the interpretation of federal statutes. Both sets of illustrations show generally how federalism can operate as a tiebreaker in existing doctrine to resolve RADDs in ways that maximize each side's power to vindicate their beliefs somewhere within the capacious physical space of a federal republic.

*A. Two Ways for Courts to Defer to States' Resolutions of RADDs About Baselines*

As Part II.B explained, modern Religion Clause doctrine is defined by four different sorts of RADDs regarding baselines of "coercion." Judicial doctrine is murky about the baseline for defining when (1) religious accommodations are improperly "coercive" under cases like *Texas Monthly* and *Amos*; (2) facially neutral laws impose excessive burdens under *Sherbert's* doctrine for individualized exemptions, *Yoder's* hybrid exception, and *Hosanna-Tabor's* implicit concept of religious autonomy; (3) states' protection of their citizens' antiestablishment goals exceeds the "play in the joints" permitted under *Locke v. Davey* and *Trinity Lutheran Church*; and (4) states' providing facially neutral benefits to religious institutions has an insufficiently "secular effect" under *Lemon* and *Zelman*. This section explores two of these baseline controversies below, using current controversies to show how arguments for and against a broad state power at best end in a tie best broken through the presumption against preemption.

*1. Deferring to States' Definition of Non-"Coercive" Religious Accommodations: Employers' Accommodations from Contraception Mandates*

Consider, first, religious employers' arguments against the so-called "contraception mandate."<sup>176</sup> Those arguments can be framed either as demands for coercive power or as pleas for freedom from state coercion. By forcing employers to pay for medical services that they deem to be sinful, the mandate can be characterized as forcing employers to violate their consciences. By exempting certain categories of secular employers from the duty to provide insurance for their employees, the Affordable Care Act (ACA) also could be said to discriminate against religious employers for whom ACA provides no analogous religion-based objection.

---

176. Patient Protection and Affordable Care Act §2713(a)(4), 42 U.S.C. § 300gg-13(a)(4) (2012).



Religious employers can find a home for such anti-coercion and anti-discrimination theories in the various mini-RFRAs enacted by states to codify some version of *Sherbert's* “compelling state interest” limit on generally applicable laws, requiring religion-specific exemptions to mandates substantially burdening religious free exercise.<sup>177</sup> Relying on precedents like *Amos*, religious employers can respond that such exemptions, although expressly discriminating on the basis of religion, are permissible religious accommodations.

Against these arguments, however, opponents of a special religious exemption from the contraception mandate have coercion arguments of their own. In particular, they can cite decisions like *Texas Monthly* and *Estate of Thornton* for the proposition that specifically religious exemptions from the contraception mandate are forbidden establishments of religion. Such accommodations, in this argument, not only discriminate impermissibly against employees who do not share their bosses' religious scruples but also impermissibly coerce those employees by stripping workers of statutory rights to healthcare.<sup>178</sup>

Is there any way to resolve this conflict to the reasonable satisfaction of the contestants? The problem is that the definition of a permissible religious accommodation turns on baselines of entitlement that are themselves reasonably disputed. Consider, for instance, Gedicks and Van Tassell's argument<sup>179</sup> that *Burwell v. Hobby Lobby Stores, Inc.*<sup>180</sup> violated the Establishment Clause by broadly construing the federal RFRA to overrule the ACA's<sup>181</sup> mandate that employers insure their employees against the cost of “preventive care and screenings” “with respect to women.”<sup>182</sup> Gedicks and Van Tassell argue that by depriving employees of their statutory right to contraception, RFRA (as construed by *Hobby Lobby*) “harms” workers and, therefore, exceeds the scope of permissible religious accommodation.<sup>183</sup> Their argument is suggested as well by Professors

177. Those state RFRAs are loosely modeled on the federal RFRA codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2012). For an overview of states' RFRAs, see NAT'L CONF. STATE LEGIS., STATE RELIGIOUS FREEDOM RESTORATION ACTS (2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

178. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014) (arguing that the Establishment Clause bars “permissive accommodations” of religion that “impose significant burdens on third parties who do not believe or participate in the accommodated practice”).

179. *Id.* at 379.

180. 134 S. Ct. 2751 (2014).

181. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

182. 42 U.S.C. § 300gg-13(a)(4) (2012).

183. Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 336, 340–41 (Micah Schwartzman, Chad Flanders, and Zoë Robinson, eds., 2015).

Nejaime and Siegel's argument that "complicity-based" claims for accommodation threaten material harms on employees, consumers, patients, and others who are thereby denied otherwise available statutory benefits.<sup>184</sup>

Gedicks and Van Tassell's argument, however, turns on their assumption that the baseline for defining third-party harms is the distribution of burdens and benefits immediately preceding the Court's decision in *Hobby Lobby*.<sup>185</sup> If one instead uses a predictive baseline by which to define harm, then the harmfulness of RFRA's religious exemption from ACA's contraception mandate becomes much more obscure. Predictive baselines maintain that a limit on an entitlement is not harmful if one predicts that the entitlement would never have been created by the legislature without the accompanying limit. The intuition underlying predictive baselines is that the challenged limit is the political price for the entitlement, such that no one is left worse off by the limit without which the entitlement would never had existed in the first place.

Applying the theory of predictive baselines to ACA and RFRA, one would ask a question of statutory interpretation roughly akin to an inquiry into severability of an unconstitutional provision in a statute: If Congress had known that RFRA's protections for employers would be held unconstitutional under *Estate of Thornton*, would Congress have simply eliminated the contraception benefit entirely from the set of services that employers were obligated to finance? Unlike Gedicks and Van Tassel's view of baselines, applying this sort of predictive baseline to ACA transforms the inquiry into harm into a tangled metaphysical knot resistant to any simple unraveling.

To be sure, one can make a plausible case that Congress would have eliminated the contraception mandate entirely rather than force employers to fund it against their conscience. ACA, after all, expressly preserves all "[f]ederal laws regarding . . . conscience protection,"<sup>186</sup> suggesting a congressional preference for preserving RFRA. By contrast, ACA makes no specific mention of contraception, referring instead generally to "preventative care and screenings" "with respect to women."<sup>187</sup> One could, therefore, surmise that had Congress been forced to choose between

---

184. Nejaime & Siegel, *supra* note 121, at 2566–78 (describing harms imposed on employees and others by claims for exemptions from contraception mandates).

185. Gedicks & Van Tassell, *supra* note 183, at 371–72; *see also* Gedicks & Van Tassell, *supra* note 188, at 323.

186. 42 U.S.C. § 18023(c)(2)(A)(i) (2012).

187. 42 U.S.C. § 300gg-13(a)(4). Senator Mikulski's press release accompanying this amendment was equally discrete, referring to preventative screenings for female-specific diseases like breast cancer, not to contraception or family planning. Press Release, Senator Barbara Mikulski, Senate Approves Mikulski Amendment Making Women's Preventive Care Affordable and Accessible (Dec. 3, 2009), <http://perma.cc/7TMB-L36E>.

providing employer-financed contraception to workers and providing “conscience protection” for religious employers, they would have chosen the latter by carving contraception benefits out of ACA’s “preventative care and screenings” “with respect to women.” The *Amos* Court apparently invoked a similar sort of predictive baseline in holding that employees like Frank Mayson were not harmed by Title VII’s exemption for religious corporations, reasoning (plausibly) that Title VII’s prohibition on religious discrimination might not have been enacted at all absent Title VII’s exempting religious corporations from its scope.<sup>188</sup>

Such an inference of Congress’s likely preferences, however, is merely an educated guess. It is also possible that Congress would have faced down religious objections to contraception and left the Mikulski Amendment untouched. In favor of this alternative view, one could note that ACA has detailed provisions limiting insurance benefits for abortions—a response to vociferous opposition to abortion funding from Democratic Representative Bart Stupak.<sup>189</sup> One might infer from the absence of similarly detailed provisions limiting contraception funding that protecting religious employers from contraception mandates was simply not a congressional priority.

Uncertainty about predictive baselines is not unique to ACA and contraception: such uncertainty is endemic to the problem of guessing about what a legislature would have done if some challenged part of a benefits package were eliminated. Would they have enacted the bill without the severed provision? Voted against the whole bill? Amended the bill with a different but analogous provision to compensate for the eliminated part?<sup>190</sup> Predictive baselines, in sum, give rise to complex counterfactuals about which reasonable people can disagree. To the extent that notions of coercion and harm turn on those counterfactuals, predictive baselines give rise to RADDs.

The presumption favoring decentralization suggests that, when courts are dealing with state-created religious accommodations limiting state-created programs, the courts should presume baselines, facts, and counterfactual assumptions that would sustain states’ religious accommodations under the federal Establishment Clause. That is, courts should presume that states’ religious accommodations are the necessary political price for the

---

188. *Corp. of the Presiding Bishop of the Church of the Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987) (“[W]e find no persuasive evidence . . . that the Church’s ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964.”).

189. David M. Herszenhorn & Jackie Calmes, *Abortion Was at Heart of Wrangling*, N.Y. TIMES (Nov. 7, 2009), <http://www.nytimes.com/2009/11/08/health/policy/08scene.html>.

190. On the complexity of the severability analysis, see David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008).

states' enacting state laws conferring benefits on third parties, such that the accommodations cannot be regarded as coercive deprivations of the benefits provided under those laws. Nothing in any federal precedent forecloses such an assumption, and the inherent difficulty of defining appropriate baselines suggests that any judicial finding of coercion based on a different baseline would be no more reliable than the rejection of coercive impact based on the presumption favoring decentralization.

Does such a presumption leave the constituents served by state laws unprotected from excessively pro-religious discrimination? Hardly: the states' internal political processes contain ample safeguards limiting the scope of broad accommodations of religious belief. Even the smallest and most homogenous states contain significant political diversity. Our political demographics are characterized by "red" exurban and rural areas surrounding an archipelago of "blue" urban areas, ensuring that there will be, in every state, a mix of politics surrounding religious exemptions.<sup>191</sup> Constitutionally protected mobility across state lines and political sorting at the county rather than state level also insure internal political diversity within every state.<sup>192</sup> States are also institutionally complex, with constitutions containing tools like bicameralism, state court judicial review, and home rule for local governments, all of which constrain simple majoritarian politics.<sup>193</sup> The result is that in even the most conservative states, there is healthy political pushback against religious accommodations viewed as burdensome on third parties.<sup>194</sup> The key advantage of federalism over localism is precisely that states, unlike local governments, are guaranteed a level of political diversity that softens the majoritarian factionalism predicted by Madison.<sup>195</sup>

---

191. See MORRIS P. FIORINA, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2004); David A. Graham, *Red State, Blue City*, ATLANTIC (March 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/> (describing intrastate divisions between rural/exurban and urban areas).

192. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART* 19–57 (2008) (describing ideological sorting at county level).

193. For a defense of the idea that states contain internal institutions for resolving inter- and intra-local conflicts, see Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005).

194. See Campbell Robertson & Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. TIMES (March 31, 2015), [https://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?\\_r=0](https://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0). Even conservative states are reluctant to enact mini-RFRAs allowing businesses to discriminate on the basis of sexual orientation for fear of the consequences of economic boycotts and other protests against such laws. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 420 (2016) (noting that efforts to enact state RFRAs "have been unavailing, largely because politicians of both parties realize how devastating such enactments would be to the economic well-being of enterprises in their states").

195. For a defense of such local resolution of disagreements over religious liberties, see Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1820–31 (2004). Professor Schragger insists that Madison's "defense of an expansive

But what about religious accommodations that, instead of broadly protecting religion, narrowly target non-religious minorities? The presumption favoring decentralization is not a clarion call for wholesale decentralization. As explained in Part III above, it is instead a modest acknowledgment that sometimes we are divided by deep and reasonable disagreements over the scope of our liberties. The reasonability of that disagreement cannot be presumed: It must be defended. Part II set forth an extensive argument for why the baselines defining coercion are reasonably disputed in the Court's doctrines of religious liberty. An analogous argument about persistent disagreement about the legitimacy of burdens on non-religious minorities is frequently not possible. As explained in Part III.B, unlimited decentralization of power over deep disagreements can be just as threatening to equal concern and respect as unlimited centralization: "Unreasonable and Deep Disagreement" (UADD) is neither an appealing acronym nor an attractive basis for decentralizing the definition of our rights.

As an example of such an UADD, consider Mississippi's statute accommodating religious objections only when they are directed against same-sex marriage. As a district court held, such an underinclusive accommodation targeting one narrow minority looks suspiciously like an effort to burden the minority rather than protect religious belief.<sup>196</sup> Such a law cannot get the benefit of the presumption favoring decentralization unless some argument can be made that there is reasonable disagreement about the equal citizenship of LGBT citizens within the United States today. Unlike predictive (or other) baselines in Religion Clause doctrine, the status of LGBT citizens has not been the subject of a half-century of conflicting and ambiguous constitutional precedents. Instead, the precedents relegating LGBT citizens to second-class status have been squarely overruled, and the contemporary decisions all point in one direction.<sup>197</sup> There is, therefore, little affront to equal concern and respect from a judge's simply applying a national judicial consensus to suppress Mississippi's law, if indeed that national consensus suggests that the law is an unreasonable deprivation of equality.

---

republic is not inconsistent with a local institutional role in creating the conditions for pluralism." *Id.* at 1823. But he cites no evidence for this proposition beyond an extended discussion of David Hume's defense of local power within the Congregationalist Church—a defense that Madison concededly rejected. *Id.* at 1825–28. For a criticism of such a local role along Madisonian lines, see Steven K. Green, *Religion Clause Federalism: State Flexibility Over Religious Matters and the "One-Way Ratchet,"* 56 EMORY L. REV. 107, 117–20 (2006).

196. *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

197. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Romer v. Evans*, 517 U.S. 620 (1996).

2. *Deferring to States' Facially Neutral Laws Against Religious Freedom Claims: The Problem of "Facilitated Referrals"*

As a second example of a RADD, consider the question of “facilitated referrals” as alternatives to legal obligations to supply goods and services that a vendor regards as religiously offensive.<sup>198</sup> With a facilitated referral, a vendor responds to a customer’s query about a product or service by giving the customer detailed information about nearby vendors who will sell the product or service that the religiously constrained vendor refuses to sell.<sup>199</sup>

Should a vendor with religious objections to a good or service have a constitutional entitlement to make such a facilitated referral and thereby escape a legal obligation to serve a customer? The problem has recently arisen in contexts ranging from pharmacies objecting to the sale of “Plan B” contraception<sup>200</sup> to bakeries objecting to the sale of wedding cakes for same-sex ceremonies.<sup>201</sup> As Justice Alito noted in his dissent from the denial of certiorari review in *Stormans, Inc. v. Wiesman*, the material inconvenience of a customer’s having to travel to an alternative vendor can often be trivial: In *Storman’s*, Plan B contraceptives were stocked by more than thirty other pharmacies within five miles of the small family-owned pharmacy with religious objections to selling the product.<sup>202</sup> If the state could require such pharmacies or bakeries to give detailed information about alternative convenient venues where a desired product can be obtained, then what legitimate justification can there be for instead unconditionally requiring the vendor with religious objections to stock the product?

a. *The Ambiguity of Precedent Regarding Facilitated Referrals*

Consider how three different responses to this question ignore difficult baseline questions that are left unresolved by the precedents—the argument based on “dignitary harms,” the argument based on commercial actors’ lack of expressive associational rights, and the argument that *Smith* sanctions facially neutral laws with incidental burdens on religion.

---

198. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 932–33 (W.D. Wash. 2012) (discussing facilitated referral as alternative to pharmacy’s obligation to fill prescription for emergency contraceptives), *rev’d sub nom.* *Stormans Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

199. *Id.*

200. *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

201. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 137 S. Ct. 2290 (2017).

202. 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting).

First, the refusal to allow facilitated referrals is defended as a way to prevent dignitary harm to the referred customer.<sup>203</sup> The vendor's refusing to serve a customer because of religious objections to the customer's request can carry the social meaning that the customer is, by virtue of that request, morally flawed. Prohibiting facilitated referrals insures that such an insulting message is not conveyed to the customer.

Such a justification rooted in avoiding insult, however, runs into First Amendment principles requiring governmental neutrality on the value of private persons' secular or religious messages. Under the First Amendment Speech Clause principle of content neutrality, the government may not "make[] communicative harm the basis for liability."<sup>204</sup> Under the First Amendment's Free Exercise Clause, government may not enact facially neutral laws for the purpose of stigmatizing a religious belief or practice.<sup>205</sup> If the purpose of anti-discrimination law is to insure access to material goods, then the law's incidental effects on vendors' expression do not violate these prohibitions on discriminatory purpose.<sup>206</sup> If facilitated referrals completely protect the customers' access to goods and services, however, then anti-discrimination law seems to do nothing more than suppress an insulting message conveyed by a refusal to serve. Suppressing disfavored messages is precisely the purpose that the First Amendment condemns. *Boy Scouts of America v. Dale* suggests such a purpose-based review of anti-discrimination law when it states that the state may not forbid discrimination by the Boy Scouts for the purpose of "promoting an approved message or discouraging a disfavored one."<sup>207</sup> Justice Alito also seems to have relied on such a purpose-based view of Free Exercise rights in his *Stormans, Inc.* dissent when he noted that Washington's refusal to permit Ralph's Family Pharmacy to satisfy its regulatory obligations by making a facilitated referral to another pharmacy seemed to be motivated

---

203. Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodation Laws*, 22 J.L. & POL'Y 705, 707 (2014); Nejaime & Siegel, *supra* note 116, at 2574–78.

204. Rubinfeld, *The First Amendment's Purpose*, *supra* note 51, at 777 (emphasis omitted).

205. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

206. The conventional justification for the state's limiting commercial enterprises' First Amendment rights of expressive association is that anti-discrimination law serves the content-neutral goal of securing access to goods and power. See, e.g., Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 Nw. U.L. REV. 839, 877 (2005).

207. 530 U.S. 640, 661 (2000) (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995)) (state "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government"). For an interpretation of *Dale* as implicitly regarding anti-discrimination laws as content-based attacks on expressive associations' message, see Hills, *supra* note 33, at 231–33.

by the state's hostility to the pharmacy's religious belief, a hostility forbidden by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>208</sup>

Second, the expressive burdens on commercial enterprises are said to be constitutionally insignificant because commercial actors, by entering the marketplace, relinquish First Amendment associational rights.<sup>209</sup> The argument against commercial actors' First Amendment interests, however, is rooted in their lack of expressive interests, not their lack of interest in religious integrity. Because commercial actors undertake to sell to the public generally, the public does not attribute customers' views to the businesses that they patronize. Businesses are, therefore, not at risk of being forced to express views with which they disagree simply by virtue of serving customers with whom they disagree.<sup>210</sup>

This argument against First Amendment expressive associational rights, however, has no force against a claim for protection of religious integrity, because the latter is not rooted in expression of any view to the public but rather in obedience to religious commands. The kosher butcher who is forced by law to stock pork in his shop suffers an injury to his religious integrity regardless of whether or not his selling pork constitutes symbolic expression and regardless of whether the public infers from such sales that the butcher's faith in Jewish dietary laws has weakened. When a claim of religious integrity is at stake, the public's interpretation of the business owner's actions is simply irrelevant: the injury is not to a relationship between a speaker and her audience but rather to a relationship between believer and her God.

Finally, opponents of commercial actors' claims for protection of religious integrity can invoke *Smith's* sanction for facially neutral laws,

---

208. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2436–40 (2016) (Alito, J., dissenting). For an argument that anti-discrimination laws serve precisely such an expressive function to stigmatize discriminators as bigots, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 18–24 (1996).

209. This “waiver” argument is commonly associated with Justice O’Connor’s concurrence in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O’Connor, J., concurring) (“An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.”). For a summary of the argument against commercial actors’ rights of expressive association, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1567–70 (2001) (describing lesser protection afforded to various forms of commercial expression); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2034–36 (2007); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986).

210. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980) (noting that the “views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [at a mall] . . . will not likely be identified with those of the owner [of the mall]” because the mall was generally open to the public and the mall owner could post signs disavowing any support for messages thus distributed). For an application of this logic to wedding vendors, see Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241 (2015).



placing the burden on religious business to prove that such laws have a purpose of stigmatizing religious beliefs.<sup>211</sup> As explained above in Part II.B.3 however, *Smith* is riddled with ambiguities. *Smith* preserved, for instance, *Sherbert*'s interest balancing for laws providing for the exercise of individualized exemptions.<sup>212</sup> Any law that provides for secular waivers, therefore, invites the business owner with religious objections to demand greater judicial scrutiny of the law's justification. *Smith* also preserved *Yoder*'s "hybrid" exception requiring more demanding scrutiny of laws that simultaneously burden Free Exercise and other constitutional rights.<sup>213</sup> The business owner with an incomplete claim of expressive association might, therefore, plausibly bolster that claim with an additional free exercise claim to assert such a "hybrid right." Finally, *Hosanna-Tabor* distinguishes between a religious actor's "internal governance" and "outward physical acts."<sup>214</sup> It is a familiar idea from other areas of constitutional law that a law's requirement of action is a greater intrusion on an actor's autonomy than the prohibition on action.<sup>215</sup> It would not be implausible for a court to infer that a business owner's refusal to supply a religiously offensive good is mere inaction, a matter of "internal" religious self-governance, if such a refusal were accompanied by a facilitated referral to a willing seller that leaves the customer materially unharmed.

At bottom, these arguments for and against constitutionally requiring facilitated referrals are essentially quarrels about baselines. The customer views the religious business owner's refusal to serve as a dignitary harm. The religious business owners view the law's demand that they violate their conscientious objections as a harm to religious integrity. With each side claiming to be playing defense, who is coercing whom? The First Amendment precedents do not answer this question with any clarity because, as explained in Part II above, our traditions of religious liberty are a mess of contradictory anti-discrimination and anti-coercion principles.

---

211. See *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127–30 (9th Cir. 2009). The same argument applies to First Amendment Speech clause claims against content-neutral regulations that have incidental effects on speech. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1236 (2014).

212. *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 882–85 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Holt v. Hobbs*, 135 S. Ct. 853 (2015), *held unconstitutional in* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

213. *Id.* at 881–82.

214. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 188–90 (2012).

215. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (excluding from Congress's commerce and necessary and proper powers the power to command individuals to purchase health insurance); *Printz v. United States*, 521 U.S. 898 (1997) (excluding from Congress's commerce and necessary and proper powers the power to command states to implement federal law).

*b. The Case for the Presumption of Decentralization of Facilitated Referrals*

There is, in short, a difficult RADD about the appropriate scope of religious vendors' rights to use facilitated referrals to satisfy facially neutral laws. Rather than resolve such a RADD, the presumption favoring decentralization suggests that courts ought to defer to states' political resolutions of reasonably contested questions. In particular, on the critical questions of governmental purpose and private burdens, the courts ought to resolve all factual uncertainties about governmental purposes in favor of state law.

To illustrate how such a presumption would operate in a specific factual setting, consider, for instance, the case of the family-owned pharmacy in *Stormans, Inc. v. Selecky*.<sup>216</sup> The State of Washington's Board of Pharmacy pervasively regulates such pharmacies, requiring pharmacists to achieve certain educational qualifications and subjecting pharmacies to the rules of a specialized regulatory commission.<sup>217</sup> It is reasonable to infer from such pervasive regulation that Washington generally seeks to reassure pharmacies' customers that pharmacies' decisions are rooted solely in economic and medical criteria. While generally requiring pharmacies to stock and deliver drugs approved by the Food and Drug Administration, Washington's regulations exempt pharmacies from these obligations for business or medical reasons, such as "[I]ack of specialized equipment or expertise" or "[u]navailability of drug or device despite good faith compliance [with the Stocking Rule]."<sup>218</sup> Pharmacies that face medical or practical obstacles in stocking a drug may make a facilitated referral, directing the customer to another pharmacy. There is no equivalent exemption for pharmacies the owners of which seek to avoid stocking a drug for religious or moral reasons.

Does the selectivity in the state agency's grounds for exemption from the obligation to stock drugs suggest unconstitutional bias against religious reasons? The district court thought so, relying on the political pressure brought on the board by the state's governor and Human Rights Commission to bar pharmacies from declining to stock Plan B for moral or religious reasons.<sup>219</sup> The district court also relied on the board's practice of allowing pharmacies to make referrals for secular reasons not set out in the

---

216. 586 F.3d 1109 (9th Cir. 2004).

217. Washington's regulations of pharmacies can be found in Title 246, Chapter 869 of the Washington Administrative Code. WASH. ADMIN. CODE §§869.010–869.255 (2018).

218. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 951–52 (W.D. Wash. 2012), *rev'd sub nom Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (quoting Washington's pharmacy regulations).

219. *Id.* at 986. Such pressure included threats by the governor to remove members of the board. *Id.* at 938.

rules.<sup>220</sup> Viewed skeptically, one might regard these facts as sufficient to indicate that the board was affected by anti-religious bias.

Consider, however, an alternative interpretation: the governor may simply have wanted to exclude all non-medical moral criteria from pharmacies' decision making. The justification for such exclusion would follow a familiar liberal justification: because the states' residents disagree on moral matters, pharmacies charged with duties to serve the public ought to act only on the morality peculiar to the pharmaceutical profession.<sup>221</sup> Such an exclusion of all non-medical moral reasons might have incidentally excluded all religious criteria, but it would also exclude secular moral criteria not recognized by the pharmaceutical profession as relevant to the treatment of patients. The board's rules, for instance, would bar pharmacies from refusing to stock a drug because their owners believed that the drug was subject to unnecessary and inhumane animal testing. Such an exclusion of non-medical morality might have a disproportionate impact on religious criteria, perhaps because more small pharmacies are owned by Christians than, say, members of PETA. Disparate impact, however, has not ordinarily been regarded as grounds for inferring a discriminatory impact unless it is extraordinarily stark.<sup>222</sup> The district court never found any instance in which the board accepted a moral but non-religious ground as an acceptable basis for a referral,<sup>223</sup> distinguishing *Stormans, Inc.* from cases like *Yick Wo v. Hopkins*<sup>224</sup> and *Lukumi Babalu Aye*,<sup>225</sup> where individualized exemptions for white-owned laundries or Jewish slaughter rituals indicated an implicit bias on a suspect ground.

One can make a similar argument in favor of deferring to Colorado's characterization of its purpose in enforcing its anti-discrimination laws against bakers with religious objections to providing cakes for same-sex weddings. In *Craig v. Masterpiece Cakeshop, Inc.*,<sup>226</sup> the Colorado Court of Appeals rejected the argument that, because the Colorado Civil Rights Commission granted exemptions for bakers who refused to make cakes bearing messages condemning same-sex relationships, the commission was obligated to grant an exemption to a baker who objected to baking a cake celebrating a same-sex wedding.<sup>227</sup> The state court reasoned that the

---

220. *Id.* at 980.

221. On the idea that the powers of a private organization ought to be defined by the social function of that organization, see Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 325 (1984).

222. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (upholding Georgia's capital sentencing system despite disparate impact on African-Americans).

223. *Stormans, Inc.*, 854 F. Supp. 2d at 982.

224. 118 U.S. 356 (1886).

225. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

226. 370 P.3d 272 (Colo. App. 2015).

227. *Id.* at 282 n.8.

commission's distinction was based on "the offensive nature" of the two different sorts of messages, not on the messages' religious character.<sup>228</sup> On this reading of *Smith*, the Colorado commission, like the Washington Board of Pharmacies, was not obligated to make an exception for a religious objection to a regulation just because it made exceptions for some, but not all, secular objections.

Should the Court import such lenient equal protection principles of discriminatory purpose into free exercise doctrine? As noted above, *Smith* is ambiguous on the question of how a discriminatory purpose is proven. There is a long and distinguished legal and political tradition that would justify a more aggressive standard for reviewing laws with a disparate impact on religious practices. Moreover, there often is partial circumstantial evidence that a disparate impact might be motivated, at least in part, by hostility towards religion. As Justice Kennedy noted during oral argument before the U.S. Supreme Court, there was at least some evidence in the record that at least one commissioner arguably (albeit ambiguously) expressed hostility towards religious reasons by saying (in Justice Kennedy's paraphrase) that "freedom of religion used to justify discrimination is a despicable piece of rhetoric."<sup>229</sup> Counsel for Colorado was surely correct to concede to Justice Kennedy that, "if there was evidence that the entire proceeding was begun because of a—an intent to single out religious people, absolutely, that would be a problem."<sup>230</sup> On the other hand, First Amendment Speech doctrine ordinarily allows the State to show that the statements of one official in a multi-member body do not represent the motives of the majority.<sup>231</sup> If the *Masterpiece Cakeshop* Court believes that the record contains sufficient evidence that anti-religious animus motivated some commissioners, then deference to subnational decision makers suggests that the Court ought to remand the case for findings about whether such a motivation was the but-for cause of the commission's decision.

Why adopt a stance so deferential to state officials on the question of motive and causation? The benefit of a lenient standard is that it allows states with different views on religious exemptions to go their own way with respect to a RADD. There is no national consensus about whether exemptions from generally applicable laws for religious grounds are

---

228. *Id.*

229. Transcript of Oral Argument at 51, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111 (argued Dec. 5, 2017).

230. *Id.* at 53.

231. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (holding that, when there is evidence that constitutionally protected conduct "was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor,'" then the trial court should find "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct").

protections from special harms endured by the faithful or instead special benefits that inflict harm on non-believers. As noted in Part II.C, there is also no consensus about whether religious grounds should enjoy some sort of “most favored nation” status like that defended by Sager’s and Eisgruber’s theory of “equal liberty” whereby the extension of any exemptions for secular reasons automatically entitles “analogous” religious grounds to a similar exemption.

Why, then, not show equal concern and respect for two contending sides, by giving each side jurisdictions in which their view of the matter can prevail? The governor of Washington and Colorado Human Rights Commissions lean “left” on the question, but other jurisdictions will likely elect politicians who will lean “right,” providing for facilitated referrals to protect rights of conscience. As explained above,<sup>232</sup> the presumption favoring decentralization allows generous accommodations, even if there is a colorable argument that such accommodations impose costs on third parties, just so long as they could plausibly be viewed as the political price for enacting an anti-discrimination law, ensuring that the constitutional limits on such accommodations will be minimal. The same presumption allows jurisdictions to forgo such accommodations. Agreeing to disagree with such a meta-accommodation of rival views of facilitated referrals is the best way to insure that both sides have the maximum chance for a fair share of power.

*B. Limiting Congress’s Enumerated Powers to Resolve RADDs Over Baselines*

The presumption favoring decentralization does not merely require deference to states’ judgments about RADDs but also skepticism about Congress’s national resolutions of RADDs through uniform federal statutes. As explained below, existing constitutional and statutory interpretation doctrines provide a home for such skepticism by constraining the federal government with both “hard” and “soft” limits on gratuitous resolutions of religious RADDs. The hard limits consist of constitutional doctrines prohibiting Congress from defining Fourteenth Amendment rights in ways that contradict reasonable alternative state conceptions of those rights. The soft constraints consist of principles of statutory interpretation disfavoring those interpretations that override reasonable state resolutions of contested RADDs. Together, these constraints give states something like a “local option” to vary religious liberties on topics ranging from contraception mandates to collective bargaining of teachers at parochial schools.

---

232. See *supra* Part IV.A.1.

1. *Boerne v. Flores and Lopez-Morrison as Constitutionally Mandated Decentralization of RADDs*

*City of Boerne v. Flores*<sup>233</sup> provides the most obvious example of a hard constitutional constraint on Congress's power to nationalize the resolution of RADDs. In *Boerne*, the U.S. Supreme Court trimmed back on the Congress's power to impose on state governments a duty to accommodate religious practices by carving out exemptions in religiously neutral state laws. The subnational law at issue in *Boerne* was a landmarking ordinance enacted by the City of Boerne that prevented Archbishop Flores from expanding a church to accommodate a growing congregation.<sup>234</sup> The Religious Freedom Restoration Act (RFRA) arguably required the City of Boerne to justify this imposition on a church with some compelling governmental purpose, but *Boerne* struck down the RFRA as applied to subnational governments, reasoning that Section Five of the Fourteenth Amendment authorized Congress to enact only those laws that were "congruen[t] and proportional[]" to the likelihood of a constitutional violation as defined by the Court.<sup>235</sup> The RFRA lacked such "proportionality or congruence between the means adopted and the legitimate end to be achieved," because it preempted a broad swathe of facially neutral state laws that were not intended to target any person's or group's religious free exercise.<sup>236</sup> Congress could not impose any presumption that religious groups were entitled to accommodation from the burdens of such laws because the Court itself did not require such accommodations.

*Boerne* thus chained Congress to the Court's narrower definition of religious accommodations, thereby earning criticism from scholars arguing that Congress should have the power to expand federally protected rights beyond the judicially defined minimum.<sup>237</sup> The claim that *Boerne* imposed "judicial supremacy" over "popular constitutionalism,"<sup>238</sup> however, overlooks the decentralizing effect of the limit on Congress that, in combination with lenient Establishment Clause doctrine, opens the way for *subnational* popular constitutionalism by allowing states to adopt their own view of accommodations free from federal preemption. As explained

---

233. 521 U.S. 507 (1997).

234. *Id.* at 512.

235. *Id.* at 520.

236. *Id.* at 533.

237. See, e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 144-45 (2001); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

238. See Kramer, *supra* note 242, at 144-45.

above,<sup>239</sup> the notion of harm to third parties leaves ample room for states to enact laws providing protections for religious practice foreclosed to Congress. Twenty-one state legislatures have taken advantage of this option by enacting “mini-RFRAs” imposing a broad obligation of religious accommodation on themselves and their subdivisions, thereby engaging in a variety of popular constitutionalism.<sup>240</sup> By curbing Congress’s power to impose a single regime of accommodations on the nation, *Boerne* enabled a form of popular constitutionalism compatible with equal concern and respect for rival conceptions of accommodations that are more secular than those selected by Congress.

Doctrinal limits on Congress’s Fourteenth Amendment Section Five powers do not prevent Congress from enacting laws affecting religious liberties: any of Congress’s other enumerated powers might be exercised in ways that resolve difficult RADDs. To the extent that Congress regulates employment by religious organizations pursuant to its Commerce Power, for instance, the resulting statute could impinge on church autonomy in ways that offend at least some reasonable conceptions of religious liberties.<sup>241</sup> How can such other enumerated powers be constrained to insure space for states to pursue their rival reasonable conceptions of religious liberty?

One critical constraint is the interpretative principle that Congress’s necessary and proper implied powers should be narrowly construed to exclude what James Madison called “important power[s].”<sup>242</sup> In inferring whether Article I, Section Eight’s Necessary and Proper Clause delegates an implied power, Madison argued that “the degree of [an implied power’s] importance” should be taken into account, “since on this will depend the probability or improbability of its being left to construction.”<sup>243</sup> This interpretive principle has since been followed by the U.S. Supreme Court in cases ranging from *McCulloch v. Maryland*<sup>244</sup> to *National Federation of Independent Businesses v. Sebelius*,<sup>245</sup> and it implies that Congress’s

---

239. See *supra* Part IV.A.1.

240. NAT’L CONF. STATE LEGIS., STATE RELIGIOUS FREEDOM RESTORATION ACTS (2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

241. For examples of ways in which labor regulations affect church “autonomy” precisely defined, see Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1395–1402 (1981).

242. See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 189 (2003) (quoting 1 ANNALS OF CONG. 1946 (Joseph Gales, ed., 1791)).

243. *Id.*

244. 17 U.S. (4 Wheat.) 316, 411 (1819) (arguing that the power to charter a bank falls within Congress implied powers because it is not a “great substantive and independent power”).

245. 567 U.S. 519, 561 (2012) (quoting *McCulloch* distinguishing prior precedents on ground that laws at issue “did not involve the exercise of any ‘great substantive and independent power’ of the sort at issue here”) (citation omitted).

implied powers to define religious liberties while executing its enumerated powers should be narrowly construed.

The power to affect religion is an important power in Madison's sense, suggesting a canon of interpretation disfavoring any construction of the Necessary and Proper Clause that gives Congress the power to define religious liberties. The framers' fears about congressional control over religion is evident from the First Amendment's barring both congressional establishment or *disestablishment* of religion, thereby preserving an area for state religious policy.<sup>246</sup> This federalism-based reading of the Establishment Clause<sup>247</sup> has been superseded by the incorporation of the Establishment Clause against the states through the Fourteenth Amendment,<sup>248</sup> and the federalism-based reading of incorporated rights suggested by Justice Harlan<sup>249</sup> has been superseded by *McDonald v. City of Chicago's* unitary interpretation.<sup>250</sup> Nevertheless, the Establishment Clause's original federalism-promoting purpose provides a basis for concluding that the Congress's powers to define religious liberties by federal statute is such an important power that the Court should cast a cold eye on federal statutes that either limit or expand the religious rights of believers or non-believers.

Such a narrow construction of Congress's power over religious questions helps explain the U.S. Supreme Court's Commerce Clause doctrine disfavoring federal regulation of "noneconomic" matters. In holding that Congress lacked the power to prohibit possession of firearms near schools<sup>251</sup> or enact civil remedies for domestic violence,<sup>252</sup> the Rehnquist Court refused to defer to congressional judgments that federal regulation of noneconomic matters was necessary and proper for the

---

246. On the original understanding of the Establishment Clause as a federalism-protecting provision intended to prevent Congress from either establishing or disestablishing any state church, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1157–58 (1991); Ira C. Lupu & Robert Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 30–33 (2006) (summarizing debate over whether Establishment Clause was originally "jurisdictional" limit on Congress's power and concluding that "the reconfigured Establishment Clause may well have had a jurisdictional component designed to protect states against federal interference with state religion policy, as well as to block the creation of a national church").

247. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15–16 (1947).

248. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1092–99 (1995).

249. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (arguing that Fourteenth Amendment Due Process constraints on states are more lenient than Bill of Rights constraints on federal government); *Roth v. United States*, 354 U.S. 476, 501–02 (1957) (Harlan, J., concurring) (arguing that First Amendment limits on federal power to regulate sexual material are stricter than "incorporated" First Amendment limits on states).

250. 561 U.S. 742, 784–85 (2010) (rejecting the "two-track approach to incorporation" in favor of principle that Bill of Rights "is fully binding on the States" to same extent that it binds national government).

251. *United States v. Lopez*, 514 U.S. 549, 576–68 (1995).

252. *United States v. Morrison*, 529 U.S. 598, 628 (2000).



regulation of interstate commerce. Critics of the *Lopez–Morrison* doctrine have attacked “the formalistic economic/noneconomic distinction” as unconnected to any deep purpose of Article I.<sup>253</sup> In pointing to marriage, divorce, child custody, and education as examples of noneconomic matters,<sup>254</sup> however, the *Lopez* majority hinted at one possible deep purpose underlying the distinction: such issues have been traditionally core concerns of the churches and ecclesiastical courts, and they remain sources of religious acrimony in today’s “culture wars.”<sup>255</sup> By adopting a canon of construction narrowly construing Congress’s commerce power over such topics, the *Lopez–Morrison* doctrine thereby limits Congress’s power to resolve religiously sensitive RADDs.

## 2. Catholic Bishop v. NLRB: Statutory Construction as Decentralization of RADDs

Constitutional constraints on Congress’s enumerated powers are strong medicine that federal courts administer with reluctance. Statutory construction, however, provides an alternative and less intimidatingly potent route to decentralization of RADDs. Courts can construe a national statute to contain religious exemptions from otherwise generally applicable statutory duties but simultaneously construe the preemptive force of that statute narrowly to permit subnational governments to adopt a different set of state statutory duties that effectively overrule that exemption.

The interpretation of the National Labor Relations Act in *NLRB v. Catholic Bishop of Chicago*<sup>256</sup> illustrates how statutory construction can settle a RADD by providing a national default rule that state legislatures are free to waive. In *Catholic Bishop*, the Court held that schools operated by a church to teach both religious and secular subjects were not within the jurisdiction granted by the National Labor Relations Act, such that the National Labor Relations Board could not adjudicate the claim of unfair labor practices brought by the schools’ lay teachers.<sup>257</sup> The NLRB had attempted to resolve this RADD by arguing that the Board could enforce federal law with respect to a parochial school’s purely secular employees and aims.<sup>258</sup> The Seventh Circuit had rejected this theory of religious

---

253. *Id.* at 644 (Souter, J., dissenting).

254. *Lopez*, 514 U.S. at 564 (illustrating implications of theory of congressional power by observing that it would enable Congress to regulate “family law (including marriage, divorce, and child custody)” and “criminal law enforcement or education where States historically have been sovereign”).

255. Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 900 (2006).

256. 440 U.S. 490 (1979).

257. *Id.* at 507.

258. *NLRB v. Catholic Bishop of Chicago*, 559 F.2d 1112, 1125 (7th Cir. 1977).

accommodations, arguing that the Board's oversight of labor practices at a Catholic high school would unconstitutionally entangle the government with religious affairs.<sup>259</sup> *Catholic Bishop*, however, sought to side-step "serious constitutional questions"<sup>260</sup> implicated by the Seventh Circuit's narrow view of permissible accommodations by invoking the principle of *Murray v. Charming Betsy*<sup>261</sup> that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."<sup>262</sup> Finding that "the Board's exercise of its jurisdiction here would give rise to serious constitutional questions," *Catholic Bishop* held that the Board could not exercise jurisdiction over the parochial school unless Congress "clearly expressed" some "affirmative intention" to reach such employers.<sup>263</sup> Finding no such "affirmative intention," the Court construed the statute narrowly to exclude such jurisdiction.<sup>264</sup>

At first glance, one might assume that *Catholic Bishop* had avoided one "serious constitutional question[]" only by stumbling into another. Under one reasonable interpretation of the Religion Clauses, the NLRB's enforcement of the nation's collective bargaining rights of lay teachers at a parochial school presented "a significant risk that the First Amendment will be infringed"<sup>265</sup> by entangling the government in religious affairs, thereby invading church autonomy.<sup>266</sup> Against this anti-coercion conception of religious liberty, however, there is the rival and equally reasonable anti-discrimination idea that religious organizations ought not to have special exemptions from general laws that other private organizations are obliged to obey. If there are serious constitutional questions on either side of the case, then how does the Court avoid such questions by choosing the view favored by religious organizations?

*Catholic Bishop*'s neutrality rests not on the result in the particular case but rather on the doctrine's preservation of state power. Because *Catholic Bishop* insures that parochial schools fall outside the scope of federal collective bargaining law, federal law does not prevent state courts from enforcing state collective bargaining laws against parochial schools, free from constitutional objections. State courts have not been indifferent to this option: Following *Catholic Bishop*, the state courts of New York, Minnesota, and New Jersey have upheld the enforcement of state laws to

---

259. *Id.*

260. *Catholic Bishop*, 440 U.S. at 501.

261. 6 U.S. (2 Cranch) 64, 118 (1804).

262. *Catholic Bishop*, 440 U.S. at 500.

263. *Id.* at 501.

264. *Id.* at 506–07.

265. *Id.* at 502.

266. For defenses and explanations of the idea of religious institutions' "sphere sovereignty," see Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R. – C.L. L. REV. 79 (2009).

protect the collective bargaining rights of lay teachers employed by parochial schools.<sup>267</sup> The state courts acknowledged that such rights limited church autonomy but held that those limits were justified by the employees' interest in autonomy in the workplace.<sup>268</sup> In effect, these state courts simply adopted a different attitude toward the RADD identified in *Catholic Bishop*, effectively reducing the church autonomy safeguarded by the limits on the federal statute to a statutory default rule that states could set aside by enforcing their own broader laws.

Statutory construction, in short, can preserve states' power to choose an accommodation rule different from that attributed to the federal statute by federal courts. So long as the federal statute's preemptive force is construed narrowly, states can "dial back" the exemptions carved into federal law by adopting state laws without such exemptions.

### 3. *Combining Constitutional and Statutory Constraints: Hobby Lobby and Boerne as a Case Study in Constitutional Decentralization*

*Burwell v. Hobby Lobby Stores, Inc.*<sup>269</sup> illustrates how the hard constraint of *Boerne* can be combined with the softer constraint of *Catholic Bishop*'s canon of statutory construction to give states a local option to reduce the default level of religious liberties provided by federal statute. Like *Catholic Bishop*, *Hobby Lobby* involved a federal statute (the Affordable Care Act) with an ambiguous accommodation of religion (the Religious Freedom Restoration Act).<sup>270</sup> In construing the latter broadly to exempt religious employers from the duty to finance their employees' contraception, *Hobby Lobby* took sides on a RADD and thereby inspired an outpouring of outrage.<sup>271</sup>

*Boerne v. Flores*, however, preserved a decentralized political forum within which these rival claims on a RADD could be fought. As a result of *Boerne*'s protection for federalism, each of the fifty state governments can impose precisely the same employer mandate to provide contraceptives that

---

267. *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709 (1997); *Emp't Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960, 964 (1997) (upholding New York's State Labor Relations Act as applied to parochial school employers because it is "a facially neutral, universally applicable and secular regulatory regimen"); *Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992).

268. *South Jersey Catholic Sch. Teachers Org.*, 696 A.2d at 723 ("As for the concerns regarding church autonomy: while these are legitimate, they are outweighed in this situation by the compelling governmental interest expressed in our State's constitutional provision guaranteeing the rights of working men and women.").

269. 134 S. Ct. 2751 (2014).

270. *Id.* at 2759.

271. See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155–56 (2014).

federal law precludes without any obligation (insofar as federal law is concerned) to justify such measures as necessary for a compelling purpose. If one regards the system of voice and exit in private markets to be flawed, then one might regard *Boerne*'s federalism-based limit on Congress's powers as providing a rival and different system of voice and exit. Congress's RFRA-based limits on its own federal laws create "private governments" with the power to discriminate against constituents on religious grounds.<sup>272</sup> States' regulation in the gaps opened by those limits allows subnational governments to curb those private governments' religious regimes. Underlying both the federally protected private government and the state regulation hedging those protections are those minimum accommodations that the federal courts enforce against both levels, such as the ministerial exception to anti-discrimination law. So long as those judicial protections do not resolve RADDs, the system of decentralized accommodations can give each side of the culture wars a voice and a chance to resolve a RADD in their favor in a small part of the nation.

Is this *Boerne* local option cold comfort for those employees residing in states where the chance of such an option's being exercised is currently practically non-existent? It is true that, in such a state, local residents who seek such a mandate are unlikely to prevail in the short- or perhaps even the medium-term. There are, however, some compensations. First, the same decentralization that obstructs the enforcement of a contraception mandate against local employers also impedes the nationalization of a ban on *state* contraception mandates. To this extent, decentralization is an insurance policy that guarantees a local option at the cost—a "risk premium," one might say—of losing the option of nationalizing one's own preferred policy. If one were guaranteed the power to succeed at the national level, the insurance of decentralization would, of course, not be worth the risk premium. Precisely because they are RADDs, however, constitutional norms with respect to accommodation of religious belief and disbelief are deeply unstable: There is no guarantee that any side will control the commanding heights of the federal government. In such a policy-making environment, securing a guarantee of local options might be worth paying the risk premium of fewer options for national laws one favors. Second, policy innovations in one state can be contagious. The success of the contraception mandate in states where it is enacted can be an inducement for other states—even conservative states—gradually to move towards the mandate: An insurance benefit that actually costs insurers very little while preventing costly and unwanted pregnancies could be difficult for even a conservative state legislature or insurance commission to resist.

---

272. See Hills, *supra* note 28.

## V. CONCLUSION

From the point of view of equal concern and respect, the benefit of decentralization is that it gives each side of a reasonable dispute a fair shot at enacting theories of individual rights about which there can be reasonable disagreement. It is true that the diehard proponents of any particular theory of religious liberties will inevitably be disappointed by such a compromise. Those who believe that there is indisputable authority that commercial enterprises cannot be covered by any plausible theory of religious liberty, for instance, would resist allowing a state to confer such liberties on the owners of such firms. The only response to such advocates of the One True Theory of religious liberty is that the U.S. Supreme Court has repeatedly confounded their expectations of a coherence-based, unified-field theory of religious liberty. The doctrine simply has resisted making any plain choice between coercion- or discrimination-based theories of religious liberty. It has tolerated definitions of permissible religious accommodations that defy any coherence-based rationalization.

This does not mean that law professors should stop trying: Shoe-horning irreconcilable precedents into tidy constitutional theories is, after all, what we do best. But America, perhaps, is not well-suited to be ruled by any law professor's theory. It is too heterogeneous, too polarized, too stubbornly divided. Rather than try to give each side its due in a single national mosh pit of coherence-based dialogue, it might be best to let each side have its say—within reasonable bounds—in geographic subsections. Perhaps we will converge onto a common view. Until then, our willingness to let the other side have its share of policy-making space is a mark of our tolerance and respect for our fellow citizen.