GIVING OUR BETTER ANGELS A CHANCE: A DIALOGUE ON RELIGIOUS LIBERTY AND EQUALITY

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This essay is a collaborative effort to engage in a dialogue on church–state issues that are often hotly debated in our society. Each of us has strongly held positions on the disputes we discuss. Our purpose here, however, is not to present our own views as forcefully as we can. Instead, our goal is to move away from the bitter polarization and demonization that characterizes so much of the arguments about law and religion today. We are searching for ways to discuss and resolve difficult church–state issues that may reduce acrimony and divisions within our society, foster bridge building among divergent communities, identify common ground, and provide opportunities for compromise.

Obviously, some readers may reject our goals out of hand. They are so angry at, and fearful of, those holding opposing views that the only resolution of church–state disputes they can accept is the total domination of their adversaries. We understand these feelings. Sometimes we feel them ourselves. Anger and fear are easy emotions to experience today. We believe, however, that these emotions tend to create an increasingly unproductive

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cycle in which each side focuses exclusively on how to respond ever more forcefully to what they perceive to be the other side's transgressions. This essay is for readers who want to try to move beyond these cycles of recrimination—at least in this one area of the law.

We reject the position that our society is confronted with a zero-sum game of unrelenting culture war requiring the complete repudiation of the losing side's needs and interests. Thus, for example, in the conflict between religious liberty and LGBTQ rights, we do not believe that religious liberty rights must be denied all recognition and essentially treated as a non-right in order to protect the humanity and rights of the LGBTQ community. We also reject the contention that the LGBTQ community must be denied their basic human rights, such as the right to marry, and other important interests in order to protect religious liberty.[1]

We recognize that the resolution of any church–state dispute will be more acceptable to one side than its opponents. We think however, that many disputes may be resolved in a way that takes the interests and needs of both sides into account so that neither side wins nor loses everything. And it is possible to employ reasoning in decisions that reflects respect for both sides in the dispute.

We accept the constraints of the society we live in. Devoutly religious individuals are not going to abandon their faith and their religious obligations. The members of the LGBTQ community are not going to transform themselves into some other identity or accept the denial of their humanity. Religious minorities will not subjugate themselves into oblivion to accommodate majoritarian preferences. Judicial decisions cannot move us forward to bridge the divides that separate our

1. Justice Thomas and Justice Alito issued a statement asserting that the constitutional right of same-sex couples to marry must be repudiated and overruled in order to protect religious liberty. Davis v. Ermold, 141 S. Ct. 3 (2020) (statement of Thomas, J., joined by Alito, J., respecting denial of certiorari). We categorically reject this position.

communities without recognizing this reality. The other side is not going away.

In this article, we address four aspects of church–state disputes:

- **Foundational principles and values**. Here we focus on the core interests, such as religious liberty and equality, that underlie and justify constitutional commitments relating to religion.
- **Substantive doctrine**. Here we describe and evaluate the doctrines developed through case law implementing core constitutional principles in two key areas: (1) free exercise of religion and (2) Establishment Clause restrictions on government religious exercises and displays.
- **The understanding of social reality**. Even assuming agreement on principles and doctrine, considerable controversy may arise as to the social reality to which doctrine is applied. The recognition that state coercion of religious exercise is impermissible, for example, leaves open the question of what as a factual matter constitutes coercion.
- **The tone and content of reasoning in opinions**. The language expressed in judicial opinions may communicate that the court understands and respects the concerns and experiences of litigants even if it rules against them. Alternatively, courts may write opinions that are dismissive and hostile to the interests of losing parties.

We employ a dialogue format for this piece. Other than the introduction and conclusion, which are co-authored, each section of this essay will offer a primary discussion of the issues by one of us, followed by a brief response by the other.

I. FOUNDATIONAL PRINCIPLES AND VALUES

Alan Brownstein

The following principles and values provide a foundation on which doctrine can develop to resolve church–state disputes in a way that contributes to bridge building, the search for common ground, and civil compromises. While each of these principles and values are relevant to the interpretation of the Free Exercise Clause and the Establishment Clause of the First Amendment,[2] they are equally important outside of the adjudicatory sphere in working through legislative and administrative solutions to conflicts related to law and religion.

Religious liberty is a fundamental right. It is grounded primarily in our commitment to human dignity. Living with dignity in a free society requires the recognition that the decision to adhere to the tenets of a religious faith, or to decline to do so, is the kind of life determining and identity defining choice that belongs as of right to the individual, and not to the state.[3] Religious liberty also serves instrumental goals. It provides a privately developed and independent source of moral values that can be used to monitor and check abuses of

2. I do not base these principles and values on an originalist interpretation of the Constitution, although many of them can be justified under this methodology. Generally speaking, I believe originalism is an unsatisfactory tool for understanding the religion clauses of the First Amendment. *See* Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 CARDOZO L. REV. DE NOVO 196, http://cardozolawreview.com/wp-content/uploads/2018/07/BROWNSTEIN_2009_196.pdf (last visited May 12, 2021).

3. Professor Berg and I have written extensively on the justification for free exercise rights. *See, e.g.*, Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 UNIV. ST. THOMAS L.J. 504 (2003) [hereinafter Brownstein, *Justifying Free Exercise*]; Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55 (2006) (hereinafter Brownstein, *Taking Free Exercise Seriously*); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279 (2013); Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015) [hereinafter Berg, *Religious Accommodation*]. We cite these and other articles throughout this essay.

government power.[4] Many major movements for social change in American history were grounded in religious beliefs and benefited from the support of religious institutions.[5]

Religious liberty, however, is only one of several fundamental rights grounded in a vision of human dignity. There is a panoply of rights, such as the right to marry or to have and raise children, that exists and extends beyond religious belief and practice. Recognizing the full nature and scope of human dignity does not undermine respect for religious liberty. We suggest that doing so reinforces religious liberty by grounding it in an understanding of human dignity accessible to and valued by both religious and non-religious people.[6]

The free exercise of religion is recognized as a fundamental right because we do not trust the government or the majority to adequately protect the religious liberty of minorities. Accordingly, government must justify its abridgement of this right under some standard of judicial review. However, determining that a right is fundamental does not assign any heightened moral or utilitarian value to the decision to exercise the right or the way the right is exercised. Thus, one can recognize a right is constitutionally protected while criticizing the way that a person or group chooses to exercise the right.[7]

This can be easily seen if we are talking about other rights, such as freedom of speech. People who exercise this right and talk a lot are no more worthy of respect than quiet individuals who are more judicious and speak less often and less loudly. Further, we protect speech

4. *See, e.g.*, Ashutosh Bhagwat, *Religious Associations:* Hosanna-Tabor *and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 105–07 (2014).

5. *See* STEVEN WALDMAN, SACRED LIBERTY, AMERICA'S LONG, BLOODY, AND ONGOING STRUGGLE FOR RELIGIOUS FREEDOM 7 (2019).

6. *See generally* Brownstein, *Justifying Free Exercise*, *supra* note 3, at 523; Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 793 (1998).

7. *See* Brownstein, *The Right Not To Be John Garvey*, *supra* note 6, at 815–18.

even when we consider the message being expressed to be morally reprehensible,[8] such as the hurtful, invidious speech expressed by members of the Westboro Baptist Church at the funerals of American soldiers killed while serving their country.[9]

In a basic sense, when we protect a right, we are protecting the right to act wrongfully in the eyes of the majority. This is the essence of religious liberty. Many devoutly religious individuals believe that other faiths are false and dangerous in that they lead people away from truth. Yet we protect all faiths, whatever their merits or failings. The same analysis applies to other rights. We do not only protect the exercise of rights that best reflect the majority's values. It is constitutionally counterintuitive to insist that we should only protect the best religions, the best speech, or the best marriages.[10]

Religious liberty is an inalienable right. This means that religious beliefs and commitments are determined by the individual and voluntary private associations, not by the state. We do not determine religious truth on transcendent matters or modes of worship at the ballot box or debate these matters in the legislature. Also, government is not vested with the authority to speak for individuals to G-d. Putting the matter in personal terms, no government official or institution is vested with the authority to speak to G-d in my name.

Our constitutional system recognizes both the virtues and the failings of our people. It assumes that while people will often try to use private and public power to benefit the community, everyone also has the tendency to act to aggrandize power, promote one's status, and accrue wealth and resources. The structure of the Constitution deals with this reality by decentralizing and diffusing power among the branches of government and

8. *Id.*

9. *See* Snyder v. Phelps, 562 U.S. 443, 447 (2011).

10. *See generally* Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 406–08 (2010).

between the national government and the states. The religion clauses of the First Amendment are similarly grounded in a commitment to checks and balances.[11] To take these human failings into account, courts and the political branches of government must review with some suspicion free exercise claims that provide substantial secular benefits to the claimant and must employ some framework to limit the costs and harms that the protection of free exercise rights imposes on third parties or the public interest.[12]

Religious equality, as well as religious liberty, is also a foundational principle. People of all faiths and those who are not religious are entitled to be treated by government with equal respect. This requirement extends to material interests and to status in the community. Religious minorities and non-religious people cannot be treated as if they do not exist or are unworthy of recognition. They are not guests, but full member of the communities in which they live, deserving of the same respect as members of majoritarian faiths. Here again we constitutionally codify this equality principle because we do not trust the government or the majority to sufficiently protect religious equality any more than we trust the government or the majority to adequately protect the religious liberty of minority faiths.[13]

Acceptance of these foundational principles and values would be a valuable first step toward developing a church–state jurisprudence focusing less on domination and winning tribal conflicts and more on bridge building and the possibility of harmony among individuals and groups who disagree about the intersection of religion and law. These principles and values, however, are not all that easily translated into clear and coherent legal

11. WALDMAN, *supra* note 5, at 5.

12. *See* Brownstein, *Taking Free Exercise Seriously*, *supra* note 3, at 70–81; Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

13. *Cf.* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 871 (2001).

doctrine. We turn to a discussion of substantive doctrine in the next section of this article.

Professor Berg's Response

I generally endorse Professor Brownstein's introduction and statement of foundational principles; I add a few comments. First, I support the goal of discussing competing rights, such as religious liberty and LGBTQ equality, in ways that reduce acrimony and polarization, but I would go further. Reducing polarization also requires protecting those rights vigorously, taking (all of) them seriously. Polarization has become bitter today in part because it is "negative" in nature, driven less by positive proposals than by each side's existential fear of the other. Today's conflict between progressives and traditionalists is a mild (for now) version of the European wars of religion, where Protestants attacked Catholics, and vice versa, to preempt the other from attacking them.[14] Religious liberty was meant to stop that vicious cycle, to avoid the "[t]orrents of blood . . . spilt in the old world," in James Madison's words.[15] We can reduce fear and resentment if we give people of every faith, and those of other identities, security that they can live by their deep commitments.

To be clear: I do not claim that "both sides do it" applies to all aspects of our polarization. When I say we need to assuage fears, I certainly do not include, for example, the paranoia, stoked by too many conservative politicians, that helped bring on violent insurrection against President Biden's election. But I believe that on certain issues, even reasonable people have contributed to fear and resentment by disregarding important rights

14. *See* Thomas C. Berg, *'Christian Bigots' and 'Muslim Terrorists': Religious Liberty in a Polarized Age*, *in* LAW, RELIGION, AND FREEDOM: CONCEPTUALIZING A COMMON RIGHT 164, 171–72 (W. Cole Durham et al. eds., 2021).

15. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶11 (1785), *accessed at* NAT'L ARCHIVES FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited May 12, 2021).

of the other side. Reducing those fears is a small but necessary part of reducing polarization.

One way to reduce acrimony is to cultivate sympathy for the predicament in which people with whom we disagree can find themselves. For example, although same-sex couples and religious traditionalists conflict, they actually make "essentially parallel claims on the larger society"; recognizing these parallels should encourage efforts to protect both rights.[16] Both groups engage in conduct stemming from commitments central to their identity: love and fidelity to a life partner, faithfulness to the moral norms of God. Both seek to live these commitments in public settings: same-sex couples participating in civil marriage, religious believers following their faith not just in worship but in charitable efforts and their daily lives. And both face hostility that exposes them to discriminatory or unjustifiably burdensome regulation.

Finally, I agree there are limits on "the costs and harms that protection of free exercise rights can impose on third parties or the public interest"—but likewise there are limits on the extent to which such asserted harms can justify impositions on religious exercise. Determining those respective limits is the challenge; I discuss it in detail in the next section.

II. SUBSTANTIVE DOCTRINE: FREE EXERCISE OF RELIGION AND RELATED ESTABLISHMENT CLAUSE CONCERNS

Thomas Berg

Today's most polarizing religious freedom questions involve clashes between religious practice and

16. Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 3 (2013); *see also* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 212–24 (2010) (elaborating the parallels). Professor Brownstein also has described analogies between the two claims. Brownstein, *supra* note 10, at 409.

government restrictions: mandatory insurance coverage of contraception, President Trump's travel ban against Muslim nations, disputes between LGBTQ persons and religious conservatives. These cases intensify resentment between conservatives and progressives, in turn damaging both religious freedom and the social fabric. Although some principles in this area command consensus, others are disputed, and each side is guilty of dismissing significant claims by the other.

As Professor Brownstein emphasizes, religious freedom rests on both liberty and equality values. Free exercise of religion is a fundamental substantive liberty. Government can protect it strongly and distinctively, not merely in the course of protecting other rights like speech or association (although religious claimants have those rights too). The liberty also has equality components. It must extend to all faiths, and it must coexist with other important interests that may set boundaries on religious freedom.

Two regimes of legal rules govern free exercise questions. Under the First Amendment, as interpreted in *Employment Division v. Smith*, government can apply a "[religion-]neutral law of general applicability" to religious conduct without any strong justification for doing so.[17] But *Smith* triggered widespread opposition, because formally neutral laws, reflecting the majority's views, can severely restrict minority or unpopular practices. Religious freedom restoration acts (RFRAs) passed in response to *Smith* now govern in federal law and about twenty states. These, along with constitutional rules in ten other states, create a second regime under which any "substantial burden" on religious exercise, even from a "neutral" law, must be justified by a compelling or other important government interest.[18]

17. 494 U.S. 872, 879 (1990).

18. *See generally, e.g.*, Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018). What constitutes a "substantial burden" on religion has caused dispute. To save space, I omit discussing that issue except as it bears on free exercise rights and government funding (*infra* notes 57–63 and accompanying text).

The first two sections following discuss both regimes: what constitutes a neutral and generally applicable regulation, and what interests justify limiting religious exercise.

A. Free Exercise Under Smith: Neutrality and General Applicability

When does a law fail the *Smith* test of "neutrality and general applicability"? This question implicates two potential violations: (1) targeting religion for regulation and (2) devaluing it compared to other activities.

1. Targeting of Religion

A law clearly violates neutrality and general applicability when it targets or singles out religion for regulation or especially severe regulation. Such a law, it is widely agreed, is almost always unconstitutional under strict scrutiny. The key Supreme Court decision on this point, *Church of the Lukumi Babalu Aye v. City of Hialeah*,[19] makes clear that targeting can appear not just from the law's text but from more subtle features, including its "real operation";[20] as such, courts "must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders."[21] This expansive understanding of targeting is crucial to ensuring religious freedom for all.

The caselaw (correctly, I think) does not require that targeting must reflect government's "animus" or "hostility" toward religion or a particular faith. Because religious exercise is a substantive liberty, imposing distinctively burdensome restrictions on it is a violation regardless of the decisionmaker's mental state. Moreover, a focus on "animus" can aggravate polarization

19. 508 U.S. 520, 523 (1993).

20. *Id.* at 535.

21. *Id.* at 534 (quoting Walz v. Tax Commission of N.Y. City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

rather than calm it. If a court must find animus in order to give relief, it will be inclined to portray the decisionmakers in the most negative light, labeling them hostile or bigoted. That may simply trigger a new cycle of charges and countercharges.[22]

Even so, invalidating an action based on hostile intent seems warranted in a limited class of cases. President Trump expressed blatant religious hostility when he initiated a campaign for a "total and complete shutdown of Muslims entering the United States" based on the assertion that "Islam hates us." The travel ban ultimately narrowed to a half-dozen mostly Muslim nations; the Supreme Court then upheld it as a facially neutral exercise of executive power over immigration, refusing to consider Trump's original statements.[23] I understand the Court's reluctance to create precedent recognizing officeholders' campaign statements as evidence of their ultimate intent. But the Court could've written a narrow opinion invalidating the ban because Trump's animus was singularly blatant and he was the sole decisionmaker issuing the order. The Court missed a chance to affirm, in our polarized age, that guarantees of equal freedom protect Muslims as much as other believers.[24]

2. Devaluing Religion: Selective Exemptions

Even when a law has not singled out religion, courts have found violations of neutrality and general applicability when the law provides exceptions or protections for other interests but not for religion. The leading lower-court decision, written by then-Circuit Judge Alito, ordered an exemption for Muslim police officers from a no-beard policy when the department already gave an

22. For elaboration, see Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2018 CATO SUP. CT. REV. 139, 154–59.

23. Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018).

24. For elaboration, see Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 LOY. U. CHI. L.J. 181, 190 (2018).

exception to officers with a medical need to wear beards.[25] The decision rests on a different wrong from the targeting of religion: the department had "unconstitutionally devalued . . . religious reasons for wearing beards by judging them to be of lesser import than medical reasons."[26]

I believe this "devaluing" rationale is sound. If government recognizes some meaningful set of secular interests as important enough to exempt, it should not treat religious practice as unimportant in comparison. Religious exercise is a fundamental constitutional interest; government should presumptively classify it with interests that are highly rather than lowly valued. When the other, exempted activities similarly undermine the purposes that government asserts for the law, the failure to exempt religion indicates devaluing.

There is debate over how many analogous secular exemptions it takes to show such devaluing.[27] But perhaps we could agree that exemptions for a significant number of analogous secular activities are troubling even if they do not amount to singling out religion alone. For example, with respect to the recent cases involving COVID restrictions and religious worship gatherings, I agree that the Court should give leeway to public-health orders in determining which activities are especially risky. But the Court took that too far in upholding a Nevada order that restricted worship services more than casinos, bars, gyms, and indoor restaurants—a host of activities creating equal or greater risks.[28] That order

25. Fraternal Order of Police v. City of Newark, 170 F.3d 359, 367 (3d Cir. 1999).

26. *Id.* at 365.

27. *See* Thomas C. Berg & Douglas Laycock, Masterpiece Cakeshop *and Reading* Smith *Carefully: A Reply to Jim Oleske*, TAKE CARE BLOG (Oct. 30, 2017), https://takecareblog.com/blog/masterpiece-cakeshop-and-reading-smith-carefully-a-reply-to-jim-oleske.

28. Calvary Chapel of Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020) (mem.); *see also* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (mem.). After editing of this article was substantially complete, the Court in a later COVID case indicated that the granting of even a single secular exemption but not a comparable religious exemption presumptively shows

showed troubling indicia of devaluing religion compared with many risky but more economically lucrative activities.

C. Governmental Interests

If heightened scrutiny applies, either because the government's action flunks *Smith* or because a federal or state RFRA applies, the question becomes whether government's interests are strong enough. When government singles out religion, it will rarely have a compelling reason to justify the discrimination. But when the law is generally applicable and the claimant seeks an exemption, drawing the line becomes more complicated.

1. How Strict a Standard in Exemption Cases?

When the claimant seeks an exemption, how strict should judicial scrutiny be? This question is complicated. Although the compelling-interest test when applied in other contexts—racial discrimination, core protections of free speech—is very likely to invalidate government action, it has been less absolute when applied in free exercise challenges to general laws.[29] Some critics claim that to call the test "strict scrutiny" is misleading, even dishonest.[30]

Despite these complications, I believe that the compelling-interest test remains appropriate for free-exercise exemption cases. The test properly holds that only substantial harms justify prohibiting religiously motivated conduct. The leading decisions, *Sherbert* and

unconstitutional devaluing of religious exercise. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.") (emphasis in original).

29. *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844, 857–58, 861 (2006).

30. *See, e.g.*, James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 709–11 (making, and collecting examples of, the criticism).

Yoder, explicated the test to mean that government must show the conduct in question "posed some substantial threat to public safety, peace or order."[31] RFRA, the primary vehicle for applying the test today, states that its purpose is "to restore the compelling interest test as set forth in *Sherbert* . . . and *Wisconsin v. Yoder*."[32]

Although the compelling-interest test is demanding, it will be satisfied more often in religious-exemption cases than in speech or discrimination cases. Government has interests in regulating conduct that do not apply to belief or speech.[33] And generally applicable regulations of conduct will be justified more often than discriminatory or selective regulations. A pattern of exceptions tends to undercut the government's "supposedly vital" interest.[34] Overall, the compelling-interest test is strong but flexible: as Congress found in 1993, it's "a workable test for striking sensible balances between religious liberty and . . . governmental interests."[35]

One reason the test strikes "sensible balances" is that it assesses the government interest "at the margin": the interest in regulating the particular claimant, not in applying the law overall. RFRA's text, as confirmed by the Supreme Court, requires that there be a compelling interest in "application of the burden to the person."[36] As with other instances of "as applied" challenges, this allows a court to protect the claimant while the law goes forward in the vast majority of cases.

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31. Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

32. 42 U.S.C. § 2000bb (2018); *see also* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 26–27 (1994).

33. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("freedom to believe . . . . is absolute, but . . . . [c]onduct remains subject to regulation for the protection of society.").

34. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993).

35. 42 U.S.C. § 2000bb(a)(5).

36. 42 U.S.C. § 2000bb-1(b); *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).

In some contexts, granting one exemption will invite a host of others, creating a serious problem. That is more likely to happen if the religious conduct coincides strongly with secular self-interest; in such a case, exempting risks creating incentives for other claims. Often, however, the nature of the conduct itself places a burden on the believer, making a flood of claims unlikely. Peyote, the drug that some Native Americans use as a sacrament, is unpleasant to ingest. Jehovah's Witnesses who refuse blood transfusions are not self-interested. When no such inherent burden already exists, the government can create one to reduce the secular benefits of exemption—as when the federal government required draft objectors to perform alternative, non-military service.

2. Harms to Others or Society: Direct Evaluation

Ultimately, the question is what harms to others or society set boundaries on religious freedom. One has no right to engage in force or fraud—assaulting or stealing from another—based on religious motivation. But the modern state, regulating a complex, interconnected society, has general power to declare other harms and to regulate to prevent them. Some of that expanded regulation will set new limits on religious freedom.

But if we take religious freedom seriously, not every harm declared by government can suffice to prohibit a religious practice. Many constitutional rights cause concrete harms, not just to society but to discrete individuals. Freedom of speech allows false attacks on the reputation of public figures and statements causing severe emotional distress to grieving families.[37] Criminal procedure rights can prevent conviction of guilty defendants, leaving victims or their families aggrieved. Rights have costs, and free exercise should be no exception.[38]

37. *See, e.g.*, N. Y. Times v. Sullivan, 376 U.S. 254, 256 (1964); Snyder v. Phelps, 562 U.S. 443, 447 (2011).

38. For elaboration of the points in this section, see Berg, *Religious Accommodation*, *supra* note 3, at 130–42.

Moreover, many familiar, widely accepted protections for religious practice involve clear, non-trivial effects on other individuals. The clergy–penitent privilege can shift harm to the crime or tort victim who loses the benefit of testimony. Religious organizations, the Court has unanimously held, have constitutional rights to fire "ministers" for otherwise impermissible reasons[39] and statutory rights to fire other employees who do not adhere to the faith or its standards of conduct.[40] Faith-based homeless shelters and food pantries have been protected from exclusionary zoning regulations,[41] even though such ministries can affect neighbors' property values.

If religious freedom confers no right to harm others and modern government can define anything it chooses as a harm, religious freedom will shrink dramatically. That approach can never provide the security for personal rights that will reduce fear and polarization. By the same token, ignoring significant harms can intensify polarization rather than calm it.

The question with respect to protections under federal or state RFRAs is whether penalizing a given harm constitutes a "compelling interest." (A later section discussion discusses Establishment Clause limits on accommodations.) To reiterate, that standard is demanding but not absolute. Several factors are relevant to evaluating harms.

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39. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 179 (2012).

40. *See* 42 U.S.C. § 2000e-1 (upheld in Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987)).

41. *See, e.g.,* Chosen 300 Ministries v. City of Philadelphia, 2012 WL 3235317 (E.D. Pa. 2012) (entering preliminary injunction for feeding ministry under Pennsylvania RFRA); W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 544–47 (D.D.C. 1994) (ruling for church-operated homeless shelter under federal RFRA).

a. The immediacy and concentrated nature of the harm

There is a difference between prosecuting someone who (for religious reasons) assaults another or trespasses on property, and someone who (for religious reasons) ingests an illegal drug where some of the supply might later be trafficked and harm others. Both cases involve harms to others. But the harm of trespass is direct, immediate, and particularized; the harm in the drug case is indirect, contingent on other events, and diffused throughout society. Government can regulate to stop indirect, diffuse harms. But when such regulation substantially burdens religious exercise, courts should demand that the regulation be necessary to prevent severe harm. This follows from the premise, accepted by a wide range of commentators, that religious freedom is a "public good" whose costs "may be imposed on the public or one of its broad subsets."[42] In contrast, direct, particularized harms to an individual are more likely to justify denying an exemption.

b. Proximity to the core of religious life

Even actions with particularized effects on others must be protected when the actions lie near the core of religious exercise. As already noted, religious organizations have substantial rights to fire or refuse to hire "ministers" as well as non-ministerial employees.[43] In short, in matters involving how they govern themselves, determine their beliefs, and choose persons to carry out their missions, religious organizations have absolute or presumptive protection, notwithstanding the effects on individuals.

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42. Frederick M. Gedicks & Andrew Koppelman, *The Costs of the Public Good of Religion Should Be Borne by the Public*, 67 VAND. L. REV. EN BANC 185, 187 (2014); *see also* Brownstein, *supra* note 3, at 129–30.

43. *See* authorities cited *supra* notes 39–40 and accompanying text.

By contrast, protections from generally applicable laws for commercial businesses must be much more limited. For-profit businesses seeking exemption generally differ from religious nonprofits for several reasons. Openness and fairness in the commercial marketplace are especially important to ensure that all persons can participate fully in economic life, as providers or consumers. As a shared space, that commercial marketplace differs from the organizations that are distinct to each religious community and carry out its mission. Moreover, expectations differ in the two contexts: people should certainly expect that a religiously affiliated school or social service will operate on religious principles, but they have less reason to expect this of an ordinary commercial business.

To be clear: this does not mean that religion is unimportant to commercial life or that businesspeople cannot have serious religious interests. That is particularly true for sole proprietors and small businesses providing personal services, like wedding vendors (regardless of whether we think their claims should ultimately prevail). The Supreme Court also correctly held in *Burwell v. Hobby Lobby Stores*[44] that closely held for-profit corporations and their controlling shareholders can exercise religion and therefore bring claims under RFRA challenging the contraception-coverage mandate. But exemptions will be narrower for commercial businesses than for churches or religious nonprofits.

c. Seriousness of the harm

The ultimate question is the severity of the harm. Consider that question in the context of disputes between LGBTQ persons and traditionalist religious adherents: bakers or videographers declining to serve same-sex weddings, Catholic foster-care agencies declining to place children with same-sex couples, religious colleges applying sexual-conduct policies to faculty, staff, or

44. 573 U.S. 682, 714 (2014).

students. One harm that nondiscrimination laws seek to prevent is that the protected class might lack access to economic transactions and opportunities. That harm is clearly unacceptable, and a religious provider has little or no chance of receiving protection under a RFRA if its refusal significantly limits access.[45] But usually there are ample alternative providers: many foster-care agencies or wedding vendors that gladly serve same-sex couples, and many colleges that welcome LGBTQ students.

The other government interest is what one court has called "transactional": preventing every act of illegal discrimination, regardless of whether it materially impedes access to goods or services, because it "degrades individuals [and] affronts human dignity."[46] Nondiscrimination laws can and do aim to prevent such dignitary harms, which for same-sex couples can undoubtedly involve surprise and embarrassment. But the litigants dispute whether these dignitary harms suffice to override a significant religious freedom claim and require an individual or organization to violate their beliefs or exit their business or charitable work.[47] The religious objectors point out that at least some of the dignitary harm occurs through the "communicative impact" of the refusal—the message of moral condemnation it conveys—and in cases of expressive conduct at least, such communicative impact cannot be the basis for overriding a First Amendment interest.[48] Moreover, individuals forced to violate

45. *See, e.g.*, Attorney General v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994) (holding that a free exercise exemption might be required for small for-profit landlords refusing to rent to unmarried cohabiting couples, but not if refusals would "significantly imped[e] the availability of rental housing for people who are cohabiting or wish to cohabit").

46. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994).

47. *See, e.g.*, Brief for Petitioners at 35–37, Fulton v. City of Philadelphia, No. 19-123 (May 27, 2020), https://www.supremecourt.gov/DocketPDF/19/19-123/144320/20200527150724005_19-123ts.pdf.

48. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) ("expressive conduct" like flag-burning may not be prohibited when the law is "'directed at the communicative nature of [the] conduct'"); United States v. Eichman, 496 U.S. 310, 317 (1990) (same).

their religious beliefs also suffer emotional and dignitary harms.

There is little hope for consensus in approaching these cases. Religious traditionalists see the imposition of liability, when ample alternative providers exist, as a campaign to drive them from occupations and public life. LGBTQ-rights proponents see protection for refusals as an affront to LGBTQ persons' dignity, one that would never be allowed for refusals of interracial or interreligious weddings. I support (1) substantial protection of bona fide religious nonprofits, and (2) narrow protection of for-profit sole proprietors or very small businesses declining to provide personal or expressive services in the commercial setting when alternative providers are readily available.[49] But obviously, others disagree.

An especially challenging aspect of these arguments is that the law generally rejects any religious exemptions for racial discrimination. How then, it is asked, can discrimination against LGBTQ persons be treated as less serious and receive exemption? My own response is that we can recognize various forms of discrimination as serious without treating them as identical. Racial discrimination, for historical and constitutional reasons, stands as uniquely pervasive and damaging. Discrimination against LGBTQ persons shares features with racial discrimination, in that it is based on a status that is involuntary and irrelevant to one's ability to contribute to society.[50] At the same time, as I have argued above,[51] there are many parallels between LGBTQ claims and religious-freedom claims: both often involve conduct rather

49. *See, e.g.*, Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common, supra* note 16; Douglas Laycock & Thomas C. Berg, *We're Lawyers Who Support Same-Sex Marriage. We Also Support the* Masterpiece Cakeshop *Baker*, VOX (Dec. 6, 2017, 10:40 AM), https://www.vox.com/the-big-idea/2017/12/6/16741602/masterpiece-cakeshop-same-sex-wedding.

50. *See. e.g.*, Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009) (adopting heightened scrutiny because sexual orientation, whether or not "absolutely" immutable, is "central to a person's identity" and "highly resistant to change") (quotations omitted).

51. See *supra* text accompanying note 16.

than pure status but conduct that directly flows from and is intertwined with a crucial aspect of a person's identity. The parallels suggest that we should seek ways to protect both LGBTQ and traditionalist religious identities, rather than subordinating religious freedom entirely to nondiscrimination goals as in race cases.

The distinctions between different forms of discrimination explain why the law allows bona fide religious nonprofits to make distinctions based on religion or on religiously based rules of conduct, or based on sex, but not based on race.[52] And the distinction could also support carefully defined exemptions for small vendors objecting to same-sex or interreligious weddings but not for those objecting to interracial weddings. Again, however, others will reject that distinction.

Perhaps, however, there could be agreement on modest points. First, commercial businesses can only claim narrow, carefully defined protections—if they can claim any—but religious nonprofits merit broader protection. Religious conservatives fear that progressive officials will categorically refuse protection to nonprofits, just as they do to small wedding businesses. For example, President Obama's Solicitor General caused a furor when he said, answering a question at oral argument in the same-sex marriage case, that potential removal of tax exemptions from religious nonprofits engaging in LGBTQ discrimination was "certainly going to be an issue."[53] Such statements stoked conservatives' fear, helping to cement their support for Donald Trump in 2016.[54]

52. *Compare* 42 U.S.C. § 2000e-1(a) (2018) (exemption for decisions based on religion), *with* 20 U.S.C. § 1681(a)(3) (2018) (sex-discrimination exemption for religious schools), *and* Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) (no exemption for race discrimination).

53. Transcript of Oral Argument at 38, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_l5gm.pdf (last visited May 12, 2021).

54. David Bernstein, Opinion, *The Supreme Court Oral Argument That Cost Democrats the Presidency*, WASH. POST (Dec. 7, 2016, 1:29 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm_term=.e9c500597ca9.

Acknowledging the substantial religious-freedom concerns of religious nonprofits would be a step in calming our anxiety-roiled politics.

Second, when legislatures or courts declare an exemption, they should consider means of mitigating the consequences for others. Mitigation devices may constitute "less restrictive means" of achieving the government's important interests—the last component of heightened scrutiny—as I will now discuss.

3. Less Restrictive Means and Mitigating Harm

The "least restrictive means" component can help resolve disputes by pushing the government to consider alternative ways of accomplishing its goals. *Hobby Lobby* provides an example. The case inspired tremendous acrimony, but the Court ultimately found a relatively simple solution. The government had already adopted an accommodation for religious nonprofit employers who objected to covering contraception: the insurer provided direct coverage, assuming all costs (which was possible because contraception reduces net healthcare costs compared with pregnancy). This less restrictive means of providing coverage, the Court held, could also apply to closely held for-profits.[55]

There are almost as many possible creative solutions as there are religious-exemption disputes, and courts can push governments to consider them. For example, in cases of conscience-based refusals to provide goods or services, it is possible to reduce the occasions of surprise or humiliation by ensuring notice to those seeking service. Requiring businesses to advertise their opposition to same-sex marriage has serious problems, but the government might compile lists of businesses that are happy to serve same-sex couples or publicize lists that already exist.

If notice can mitigate harm in some cases, "exit" can do so in others. That requires alternative providers, of

55. Burwell v. Hobby Lobby Stores, 573 U.S. 682, 731 (2014).

course; it may also require steps to facilitate using them. For example, LGBTQ students can choose from plenty of initial college options besides traditionalist religious schools, but what about students who fully recognize their sexual identity only after enrolling in a traditionalist college? One suggestion is that the colleges could streamline their transfer policies in such cases to ensure students "administrative, emotional, and practical support."[56]

Alternative burdens (like alternative service for draft objectors) can achieve some of the government's goals and also place limits on exemptions that coincide too much with self-interest. As another example, employers who object to covering a particular procedure could provide an actuarially equivalent increase in coverage for other health needs.

C. Funding Cases

Even if substantial burdens on religious exercise trigger heightened scrutiny, there's debate whether that analysis applies when the government withdraws a benefit rather than imposing civil or criminal liability. It definitely applies in some cases. The Court has repeatedly held that states cannot deny unemployment benefits, without compelling reason, to a person who has quit or refused a job because of a conflict with her beliefs.[57] Denial of a benefit also triggers strict scrutiny when it is based explicitly on a claimant's religious status.[58] I would hold generally that withdrawing significant benefits because of a religious practice must satisfy heightened scrutiny. Governments spend enormous amounts of

56. Alan Noble, *Keeping Faith Without Hurting LGBT Students*, ATLANTIC (Aug. 15, 2016), https://www.theatlantic.com/politics/archive/2016/08/christian-colleges-lgbt/495815/.

57. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 399–402 (1963); Thomas v. Rev. Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 709 (1981); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 830 (1989).

58. Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2019 (2017); Espinoza v. Mont. Dept. Revenue, 140 S. Ct. 2246, 2257 (2020).

money; funding rules can significantly pressure people's religious choices.[59]

The Court's recent funding decisions have forbidden government to discriminate against religious claimants, that is, to deny them funds because they are religious.[60] I would also apply heightened scrutiny—at least in some cases—when the denial of funds comes because of a general condition that clashes with a religious practice. That issue arises in *Fulton v. City of Philadelphia*,[61] where the city ended its funded partnership with a Catholic foster-care agency—preventing the agency from doing much of its work placing foster children—because the agency refused to certify same-sex couples as parents. A formally neutral, general condition withdrawing funds (in that case, a nondiscrimination condition) can pressure individuals or entities to change their religious practices just as much as an explicitly religion-based condition can. And with many such conditions, as with many burdensome regulations, "exemptions create little or no incentive for anyone not already inclined to engage in the practice on religious grounds. It is hard to imagine a secular foster-care agency seeking to discriminate against same-sex families and adopting or feigning a religious belief in order to claim an exemption."[62] As with exemptions from regulation, the key value should not be formal equality, but rather liberty: minimizing government pressure on religious decisions. The rule should be different, however, for funding exemptions that would provide a secular benefit attractive to nonreligious and religious claimants.[63]

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59. *See Sherbert*, 374 U.S. at 404 (denying unemployment benefits to Saturday sabbath observer "puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship").

60. *See* decisions cited *supra* note 58.

61. 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (mem.).

62. Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & RELIGION 361, 377–78 (2020) (elaborating the argument in this paragraph).

63. For a problematic example involving the COVID-19 Paycheck Protection Program, see *id.* at 370–71, 370 n.72.

D. Establishment Clause Limits on Exemptions

Some commentators argue that the existence of "third-party harms" means not just that courts should decline to require an exemption from a law, but that legislators and regulators should be barred from enacting an exemption. The Establishment Clause, on this argument, prohibits a religious exemption that causes a meaningful harm, or perhaps even anything more than a "minimal" harm.

This more stringent position against accommodation of religious exercise is unwarranted, in my view. The Establishment Clause places some limits on how far a statutory exemption may go, but the limits should be lenient. An exemption should not be invalidated unless the direct, immediate burdens it imposes on others are clearly disproportionate to the legal burdens it removes from religious practice. I say that for several reasons. One is precedent. The Court has twice unanimously upheld statutory exemptions even though they could impose costs on other individuals.[64] And the one case invalidating an exemption, *Estate of Thornton v. Caldor*, involved a state law that gave employees an absolute right to have their Sabbath day off, regardless of the costs to employers or other employees: it reflected an "unyielding weighting in favor of Sabbath observers over all other interests."[65]

More importantly, even-handed exemptions of religious practice from government regulation were not historically components of a state-established religion.[66] Exemptions protect minority religions, not the established majority, which usually faces no conflict with laws in the

64. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (exemption for hiring or firing employees based on religion); Cutter v. Wilkinson, 544 U.S. 709, 712 (2005) (religious accommodation claims by prison inmates).

65. 472 U.S. 703, 710 (1985).

66. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796, 1803 (2006).

first place. Moreover, valuing religious freedom means giving legislatures latitude to protect it. As Michael McConnell has observed, "[W]hen legislatures adjust the benefits and burdens of economic life among the citizens, they regularly impose more than a de minimis burden for the purpose of protecting important interests of the beneficiary class"—as, for example, with the duty of reasonable accommodation of disabilities.[67] Legislatures should have equal room to protect the important interest in religious freedom.

At the same time, it is justified to police accommodations, like that in *Caldor*, that permit significantly disproportionate effects on other persons. Polarized legislatures will too often deny respect for the interests of one group or another. Courts ought to draw some lines, if only in extreme cases. When Mississippi passed a law allowing any closely held business to refuse services to a same-sex wedding, no matter how large the business, how impersonal the services, or how severe the effect on couples' access to services, a federal district judge invalidated the provision—and rightly so.[68]

Perhaps for Establishment Clause limits on accommodations, as for other issues, we can identify areas of consensus and of legitimate dispute. There should be consensus that accommodations of religious exercise are permissible even in some cases of non-trivial harm to other persons. There will remain debate over precisely when that harm becomes too much.

Professor Brownstein's Response

Professor Berg and I agree on many important points. We are both dubious of the holding of *Employment Division v. Smith* because it provides inadequate protection to religious liberty. Also, we both recognize

67. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1992).

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

that while the Establishment Clause precludes religious liberty accommodations that impose unacceptable harm on third parties, protecting rights often imposes costs on others. Interpreting the Establishment Clause to prohibit any accommodation that causes harm to third parties would unreasonably undercut the protection religious liberty requires. However, Professor Berg and I disagree on several key issues.

I am unpersuaded by the argument that the existence of secular exemptions from a general law requires the granting of religious exemptions because the failure to do so would unconstitutionally devalue religion. Secular exemptions to laws are so commonplace that this analysis would require strict scrutiny review in most cases when a requested religious exemption was rejected by government.[69] Moreover, the fact that religious liberty is a fundamental right, standing alone, does little to support this approach. This "devaluation" or "most favored nation" analysis bears scant resemblance to the doctrinal frameworks used to adjudicate the alleged abridgement of other rights. Most problematically for the goal of this article, claims grounded on secular exemptions that allegedly devalue religion will be viewed by many as privileging religion in comparison to the protection provided to other rights.[70]

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69. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1494 (1999).

70. I know of no other right where courts determine the level of review a law alleged to abridge the right receives by asking whether the state values some other interest more than the exercise of the right.

The most favored nation (MFN) analysis does not seem to focus on the extent to which the right is burdened, a common foundation of fundamental rights doctrine. Indeed, it is not clear to me how one determines whether or not a right is infringed under this analysis. As long as some secular interest is treated more favorably than the exercise of religion, even an insubstantial burden, which would be ignored if other rights were at issue, might require strict scrutiny review under the MFN analysis.

Further, where does the idea come from that we only protect interests as rights because we always assign a higher value to the exercise of a right than we do to secular interests? I do not trust the state to be the arbiter of permissible speech or the exercise of religion. Some interests belong as of right to the individual, not to the state. That seems to me to be a very different question than

The attention directed to secular exemptions may make some sense as an attempt to circumvent the unreasonably limited protection of free exercise rights *Employment Division v. Smith* provides. If that is the goal of this doctrine, however, the far better approach would be to overrule *Smith*.[71]

I also disagree with Professor Berg with regard to his commitment to strict scrutiny review in free exercise cases. A key question for jurists and scholars is this: if *Smith* is overruled, what doctrinal model should be adopted in its place? Professor Berg's answer is a very fluid form of strict scrutiny.

Historically, there have been clear problems with such an approach. As Justice Scalia correctly explained in *Smith*, pre-*Smith* case law attempting to operate under strict scrutiny was chaotic.[72] Further, if strict scrutiny were to be applied with something less than its traditional "fatal in fact" rigor, courts would employ a subjective and indeterminate balancing test.[73] We are unlikely to reduce acrimony under a doctrinal model that provides little guidance to courts or litigants as to how cases should be resolved and opens the door to criticism that decisions are grounded on judicial ideology and personal values rather than law.

I suggest that a better approach would be to develop free exercise doctrine in a way that parallels the nuanced, complex framework courts have adopted to

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asking if we think the exercise of the right is always more valuable than secular interests, like public health or extending life through access to medical care.

Assume, hypothetically, that a court upholds a city ordinance requiring private parades marching through city streets to stop at traffic lights at intersections. Should that analysis change and the standard of review to be applied increased in its rigor because ambulances driving patients to the hospital are exempt from these traffic regulations? It would not change a free speech analysis. Yet under an MFN analysis, requiring a parade that can be characterized as the exercise of religion to stop at traffic lights would receive preferential protection under strict scrutiny review because to do otherwise would allegedly unconstitutionally devalue religion.

71. *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 146 (2002).

72. *See* Emp. Div. v. Smith, 494 U.S. 872, 883–84 (1990).

73. *See id.* at 882–88.

adjudicate free speech cases. Courts clearly take freedom of speech seriously and protect it as a fundamental right. In doing so, however, they do not adjudicate all free speech cases under some form of strict scrutiny review. Instead, courts consider numerous factors such as the kind of speech at issue, the location where speech occurs, and the nature of the regulation at issue to determine the appropriate standard of review to apply in a given case.[74]

This multi-faceted framework employing varied standards of review reflects the pervasive role that speech plays in our society. It is unavoidable that speech rights will frequently conflict with a broad range of governmental interests in myriad contexts. Sorting out how these disputes will be resolved requires doctrinal guidance to enable courts to take freedom of speech and competing public interests into account in a principled way. The complexity of free speech doctrine reflects the complex nature of speech conflicts in our society.

A similar analysis could be developed for free exercise doctrine. Like speech, religious belief and practice is pervasive in American society. And like speech, the range of potential conflicts between religious exercise and competing governmental interests is extraordinarily broad. In such circumstances, courts need to create doctrine that formally takes into account various factors that come into play in free exercise cases. Doing so will guide and cabin their discretion in adjudicating cases and increase the likelihood that judicial decisions will be perceived as principled responses to free exercise claims. I do not believe that a single standard of strict scrutiny review, however fluid it may be in its application, is adequate for this purpose.[75]

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74. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1988) (determining the appropriate standard of review to apply to a municipal anti-picketing ordinance by evaluating the place where the restricted speech would occur (the public streets, a traditional public forum), the nature of the restricted speech (speech on a matter of public concern), and the nature of the regulation (a content neutral regulation of speech)).

75. Brownstein, *supra* note 3, at 57–59.

Perhaps my most fundamental disagreement with Professor Berg involves government funding of religious institutions for the provision of public services. If such funding is permitted, I would argue that the religious grantee receiving state support cannot discriminate on the basis of protected characteristics such as religion or sexual orientation in hiring staff to operate taxpayer-funded programs for the public's benefit or in determining the eligibility of beneficiaries for the services provided.[76]

Permitting such discrimination would distort incentives in a way that burdens religious liberty. For example, if otherwise eligible applicants for government funded jobs are denied employment because they are of the wrong faith, such discrimination pressures applicants to conform their religious beliefs and practices to the dictates of the employer. A similar analysis would apply to beneficiaries of government-funded services.

Further, as noted previously, "courts and the political branches of government must review with some suspicion free exercise claims that provide substantial secular benefits to the claimant and must employ some framework to limit the costs and harms that the protection of free exercise rights imposes on third parties or the public."[77] Allowing religious institutions to discriminate in the operation of government-funded programs raises both of these concerns. Surely there is substantial secular benefit accruing to religious groups if they can reserve government-funded job opportunities exclusively for adherents of their own faith. Also, there is clear harm

76. Space limitations prevent me from addressing the *Fulton* case discussed by Professors Berg & Laycock, *supra* notes 62–62, at any length. I note here only that the core issue in the case was not the funding of religious foster care agencies, standing alone, but the fact that the agencies were delegated the legal authority to determine which families might be certified as eligible to be foster care parents. When a private agency is delegated such legal power, the government has the constitutional authority to determine the terms under which that legal power will be exercised. *See* Brief of Alan Brownstein et al. as Amici Curiae In Support Of Respondents, Fulton v. City of Philadelphia, No. 19-123 (Aug. 19, 2020), 2020 WL 5027314.

77. *See supra* text, at 6.

to third parties denied employment because they hold the wrong beliefs.

The more difficult question is whether discrimination in government-funded programs can be prohibited in a way that reduces acrimony and moves polarized factions toward compromise. One potential approach for finding common ground here is to emphasize the relationship between the special prerogatives available to religious institutions when they discriminate in hiring or the provision of social services using their own private resources and the limitations on religious institutional prerogatives when they are using government funds. I join Professor Berg in emphasizing the protection provided to religious institutional autonomy when private resources are at issue, notwithstanding the costs and burdens imposed on third parties by institutional discrimination. The funds donated to religious nonprofits are intended to further the spiritual mission of these institutions. Allowing these private resources to be reserved for their intended religious purposes furthers our commitment to religious voluntarism and religious liberty.

The opposite analysis applies when religious institutions are operating government-funded programs, however. Here, government receives and employs taxes for the purposes of serving secular, public goals. As such, it should be empowered to guarantee that private conduits receiving government funds for the provision of public services comply with non-discrimination requirements to ensure that public resources are available to the public as job applicants or beneficiaries of goods and services.

This dividing line between religious institutional autonomy for programs utilizing private resources and government control of programs employing government funds for public purposes has the potential for moving toward a working compromise.

Finally, I agree with Professor Berg that disputes involving religious objectors to providing wedding services to same-sex couples will be difficult to resolve and that religious exemptions from civil rights laws must be

limited. I disagree, however, with his contention that the harm experienced by the LGBTQ community can be minimized in cases when it is primarily derived from the communicative impact of the objectors' discriminatory conduct. The essential act of discrimination in employment or places of public accommodation is conduct, not speech.[78] It is an affront to the human dignity of those denied goods and services. When conduct devalues the dignity of individuals, the fact that there is a communicative dimension to such conduct does not diminish the harm it causes or undermine society's interest in restricting it. If our purpose is finding common ground and reducing acrimony, courts must recognize the importance of the interests on both sides of these disputes. Failing to appreciate the full extent of the harm experienced by the victims of discrimination will not facilitate that process.

III. SUBSTANTIVE DOCTRINE: THE ESTABLISHMENT CLAUSE AND STATE-DIRECTED PRAYER AND STATE-SPONSORED RELIGIOUS DISPLAYS

Alan Brownstein

Establishment Clause disputes about state-directed prayer and state-sponsored religious displays can certainly be acrimonious, but there is more potential for

78. The nature of discrimination in employment or the provision of commercial goods and services could hardly be characterized otherwise without rendering all civil rights laws subject to rigorous First Amendment scrutiny. *See, e.g.*, Wisconsin v. Mitchell, 508 U. S. 476, 487 (1993) (characterizing various civil rights laws prohibiting discrimination as "example[s] of a permissible content-neutral regulation of conduct"); Hishon v. King & Spaulding, 467 U.S. 69, 78 (1984) (rejecting the argument that Title VII infringed the First Amendment rights of employers discriminating on the basis of gender); Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (recognizing that civil rights laws prohibiting "business owners and other actors in the economy and in society [from denying] protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. . . . do not, as a general matter, violate the First or Fourteenth Amendment.") (citations omitted).

achieving some measure of common ground and doctrinal compromise on these issues than one might expect.

Status and equality concerns are a primary source of conflict in this area. Religious minorities and non-religious individuals challenge state action that treats them as if they do not exist or are unworthy of recognition and respect. It is difficult to discuss or resolve disputes in this area in a way that reduces acrimony and resentment without some commitment to equal respect among adherents of different faiths and non-religious beliefs.

There are arguments by jurists and scholars that reject judicial recognition of these concerns. I think they are unpersuasive. One contention is that status or message harms are not constitutionally cognizable and cannot be the basis of viable constitutional claims. The offense caused by government endorsing majority faiths and disfavoring the beliefs of minorities is not a justiciable harm warranting judicial attention or redress.[79] Drawing an analogy to speech jurisprudence, it is argued, the experience of being offended does not justify judicial intervention to limit the government messages causing offense.[80]

I challenge these arguments. Constitutional equality concerns have frequently been directed at status harms. Indeed, in *Brown v. Board of Education*,[81] the injury caused by assigning students to racially segregated, but allegedly equal, public schools was a status harm afflicting the hearts and minds of Black children.[82] Because *Brown* was litigated under the pretense that racially segregated schools for white and Black children

79. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring).

80. County of Allegheny v. Am. Civ. Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

81. 347 U.S. 483 (1954).

82. *Id.* at 494. For additional discussion of status harms, see Brownstein, *supra* note 13, at 843–51.

were materially equivalent, the constitutionally cognizable injury that required the invalidation of state mandated segregated schools was grounded in stigma and status. The Court's failure in *Plessy v. Ferguson*,[83] fifty-eight years earlier, to acknowledge the badge of racial inferiority imposed by racial segregation led to its rejection of plaintiff's equal protection claims. The *Brown* Court emphatically rejected the *Plessy* Court's arguments in concluding that status harms are real and cause serious injury.[84]

This analogy to *Brown,* of course, is not intended to suggest that racial segregation and the preferential religious promotion of majority faiths and disfavoring of minorities through state sponsored prayers and religious displays cause equally severe stigma or status harm. It is the nature, not the magnitude, of the harm identified in *Brown* that connects Equal Protection and Establishment Clause principles.

The most explicit emphasis on status harms in Establishment Clause jurisprudence was expressed by Justice O'Connor when she wrote that "direct government action endorsing religion or a particular religious practice is invalid . . . because 'it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[85] Justice Stevens further explained and elaborated on this constitutional concern for status harms, asserting that the state cannot provide "comfort, even inspiration, to many individuals who subscribe to particular faiths" while ignoring the beliefs of others.[86] This protection against religious hierarchy extended to non-religious persons as well as religious minorities. "[T]he Establishment Clause requires the same

83. 163 U.S. 537 (1896).

84. *Brown*, 347 U.S. at 494–95.

85. Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).

86. Van Orden v. Perry, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting).

respect for the atheist as it does for the adherent of a Christian faith."[87] Put simply, "Whether the key word is endorsement, favoritism, or promotion, the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community."[88]

The contention that free speech doctrine precludes any recognition of offense or emotional injury as a constitutionally cognizable injury is equally unpersuasive. Putting aside the obvious distinction between the harm caused by government messages as opposed to private speech, this argument is backwards. Freedom of speech is an expensive political good. We recognize the reality of the harm that speech can cause when we elect to protect it. We protect freedom of speech notwithstanding the harm that messages can cause because of the importance of this right and because we do not trust government to legitimately distinguish valuable from wrongful speech.

Most importantly, the argument requiring courts to ignore status and message harms makes it difficult to develop respectful, bridge-building jurisprudence in this area. There is no surer way to aggravate the experience of minorities who claim that they are being publicly disfavored and treated without respect than for courts to insist that the status harms they are asserting are entirely unworthy of recognition or attention.

In addition to status harms, state-directed prayer and state-sponsored religious displays are challenged as coercive. Coercion here ranges from general implied coercion to more specific coercive contexts. In addressing general implied coercion, the Supreme Court explained in *Engel v. Vitale*, the case striking down the state

87. *Id.* at 711.

88. Salazar v. Buono, 559 U.S. 700, 742 (2010) (Stevens, J., dissenting) (quoting County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (quoting *Lynch*, 465 U.S. at 687)) (internal quotation marks omitted)).

drafted, allegedly voluntary, "Regents' Prayer" that New York public school students recited each morning,[89] "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[90]

More focused coercion contexts involve situations where government specifically directs or "requests" people to engage in prayer. Put simply, whenever government officials direct or "request" individuals over whom the officials have the discretionary authority to impose sanctions or to provide or withhold benefits to engage in religious activities, the circumstances are intrinsically coercive. If a judge requests litigants or their counsel to join her in prayer before a trial begins, or a government administrator asks applicants for social welfare benefits to pray with him before their claims for assistance are evaluated, or a city council directs residents in the audience to stand and join in prayer before they petition the council during public comment, the experience is coercive whether it is intended to be or not.[91]

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89. *See* Engel v. Vitale, 370 U.S. 421 (1962). *Engel v. Vitale* has special resonance to me. I attended public school in New York and was directed to recite the Regents' Prayer each morning. At that time in my life, my belief in G-d and prayer was virtually absolute—without the struggles of intellectual doubt that become part of the faith of many adults. I also believed that prayer was a personal communication that had special meaning because it expressed what I chose to say to G-d. Even as a child I recognized that there was something profoundly intrusive and unholy about the government attempting to put words in my mouth and control the content of my prayers.

The Court's decision in *Engel v. Vitale* freed me from this daily coercion. The Court's opinion was also a revelation to me. I remember being directed to recite the Regents' Prayer each morning. And I remember when my teachers told me that we were no longer required to recite the prayer. What I do not remember was anyone ever telling me that the prayer was voluntary and that students could decline to recite it. I did not learn that that this was a voluntary prayer until I read the Court's opinion in *Engel v. Vitale* during my second year at Harvard Law School.

90. *Id.* at 431.

91. *See* Alan Brownstein, Town of Greece v. Galloway*: Constitutional Challenges to State-Sponsored Prayers at Local Government Meetings*, 47 U.C. DAVIS L. REV. 1521, 1530–31 (2014) [hereinafter Brownstein, *Constitutional*

Two primary arguments support state-directed prayer and state-sponsored religious displays. First, religion needs the endorsement of the state in order to continue as a viable belief system in our society. This contention has an historical foundation,[92] although it is more often associated with financial support than expressive promotion.[93] In contemporary times, this argument most commonly asserts the need for prayer in the public schools as opposed to religious messages directed at adults.[94] I find this argument unpersuasive. State-supported religious messages generally reflect majoritarian religious preferences and do so at the expense of minority faiths. The very fact of their majority status undercuts the claim that these religions need the government to maintain the allegiance of their adherents. As for prayer in the public schools, it is intrinsically coercive and should be rejected on that ground alone.[95]

A corollary argument has more force to it. Because government can speak out and endorse a broad range of secular beliefs without running afoul of constitutional constraints, rigorously enforced Establishment Clause

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Challenges to State-Sponsored Prayers]; Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in* Town of Greece v. Galloway, 48 LOYOLA L.A. L. REV. 371, 402–03 (2014).

92. *See, e.g.*, MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 18 (4th ed. 2016) ("Throughout our history, many have argued for support of religion based on the idea that public virtue . . . is essential to republicanism and . . . is best inculcated through religious instruction."); *see also* George Washington, Farewell Address (1796), *reprinted in id.* at 18.

93. *See, e.g.*, A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION (1784), *reprinted in id.* at 41 (declaring that, in Virginia, "the general [and socially valuable] diffusion of Christian knowledge . . . cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing . . . citizens").

94. *See, e.g.*, Helen Andrews, *Banning School Prayer Made America More Secular*, AM. CONSERVATIVE (May 15, 2020), https://www.theamericanconservative.com/articles/banning-school-prayer-made-america-more-secular/ (arguing that Americans became less religious because many were "never exposed to the rudiments of religious practice as children" in public schools).

95. See *supra* notes 89–91 and accompanying text (discussing coercion in *Engel*, 370 U.S. at 421).

limits on government religious speech promotes the secularization of society. To avoid the misleading implication that secular beliefs are more deserving of recognition than religious ideas, there must be a place in public discourse for faith-based expression.[96]

This concern should not be cavalierly rejected if our goal is to find common ground. It rings true to many people. This concern can be alleviated, however, without involving the state in the business of directing prayer or sponsoring religious displays. Indeed, the most effective way to guarantee the place for religious ideas in public life is not to reduce Establishment Clause constraints on state religious expression, but rather to strengthen mandatory and discretionary free exercise protection for the religious beliefs and practices of private individuals and associations.

It cannot seriously be disputed that the exercise of religion involves expressive activities. Sermons, prayer, lyrical religious music, proselytizing and missionary work, the distribution of religious books and pamphlets, and signs and icons on houses of worship are just some obvious examples. Religious ideas emanating from houses of worship, religious schools, and other faith-based institutions are powerful voices in our society.

Because so much of religious practice is expressive in nature, and the Free Exercise Clause and discretionary religious accommodations provide protection to religious institutions and activities that are unavailable to their secular counterparts, the effect of rigorously enforcing free exercise doctrine is to privilege religious voices in public discourse. There are numerous examples. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[97] provides that religious land uses are provided protection against burdensome land use regulations that is unavailable to their secular counterparts. Thus, houses of worship displaying religious icons,

96. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 193 (1992).

97. 42 U.S.C. § 2000cc(a) (2018).

expressing statements of belief, and engaging in myriad other expressive activities are exempt from land use regulations that secular expressive institutions must obey. The result is a landscape providing preferential treatment of religious imagery and assemblies.[98]

Schools are clearly expressive institutions. According to recent cases upholding and extending what courts describe as a "ministerial exception," required by a hybrid analysis of both religion clauses, religious schools are immunized from complying with virtually all civil rights laws prohibiting discrimination against protected classes with regard to not only the employment of clergy, but also teachers whose instructional duties include some religious content.[99] Secular private schools receive no comparable immunity. Further, all religious institutions are exempt from Title VII's prohibition against discrimination in employment on the basis of religion and can choose to hire only applicants who adhere to the dictates of the employer's faith.[100] Again, secular institutions receive no comparable exemption permitting them to discriminate on the basis of religion. Indeed, it may be fair to argue that any and all exemptions of secular value for expressive religious institutions from laws that their secular counterparts must obey privilege religion in public discourse.

Accordingly, one might plausibly argue that Establishment Clause limitations on the state's ability to endorse religious messages are offset by the enhanced private religious messaging that necessarily results from providing distinctive protection to religious practices and institutions through the free exercise clause and

98. *See* Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1711–21 (2011).

99. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171 (2012); *supra* note 39 and accompanying text.

100. *See* Corp. of Presiding Bishop of Church of Jesus Christ Latter-Day Saints v. Amos, 483 U.S. 327 (1987); *supra* note 40 and accompanying text.

discretionary religious liberty accommodations. By privileging religion through free exercise decisions and discretionary accommodations while restricting access to government promotion of religion through the enforcement of Establishment Clause mandate, we create a rough quid pro quo that provides a substantial place for religion in public discourse while avoiding the equality and coercion risks that are intrinsic to state endorsements of religious displays and prayer.[101]

I think this should be a viable compromise. I support some serious separation between church and state because I do not trust government when it engages in or promotes religious activities. If it were up to me, for example, I would interpret the Establishment Clause to prohibit state-directed prayer at public meetings.

A central premise of this article, however, is that we have to move beyond positions that we strongly support, but which we know are unacceptable to a significant part of the community. Here, many people want some recognition of religion by government. The question then is whether there are ways to move forward to permit some state involvement with religious messaging that allows for non-acrimonious dialogue and compromise between groups who see government-endorsed religion as a recipe for inequality and coercion and those who see it as a necessary and valuable affirmation of the importance of religion in public life.

A. State-Directed Prayer

State-directed prayer can occur in numerous contexts: town board meetings, public school classrooms, court proceedings, and many others. Given space limitations, I will focus on only one controversial dispute: inviting clergy to town board meetings to offer prayers directed at the board members and the public audience and encouraging those in attendance to stand and join in the

101. Brownstein, *supra* note 98, at 1711–21.

religious proceeding. If the goal is finding common ground and building bridges between those who hold different positions on this issue, can we identify mutually acceptable arrangements, or at least some basis for dialogue, that would permit some state prayer activities to go forward with appropriate constraints that work to mitigate inequality and coercion concerns?

I suggest there are numerous possible ways to interpret the Establishment Clause to promote such solutions. First, to avoid religious preferentialism prohibited by the Establishment Clause. representatives from varied denominations within the community should be invited.[102] This includes minority faiths that may have too few adherents in a community to sustain an organized congregation, but worship in adjacent towns. Non-religious individuals can also offer meaningful words to solemnize the event and inspire the participants. Even with inclusive invitations, clergy from majoritarian faiths will offer prayers at most board meetings, but expanding the scope of those invited to offer prayers communicates the critical message that smaller faith communities and non-religious residents exist and deserve recognition and respect.[103]

To achieve meaningful diversity, the government must provide adequate guidelines to the functionaries empowered to issue invitations for the offering of prayers at meetings. This requirement should not be controversial. It is commonplace and common sense that decisions involving constitutionally salient interests should not be left to the unfettered discretion of low-level officers. As

102. Justice Kagan explains that one way a Town Board could begin meetings with a prayer without violating Establishment Clause requirements would be to "invite[] clergy of many faiths to serve as chaplains," Town of Greece v. Galloway, 572 U.S. 565, 632 (2014) (Kagan, J., dissenting). Kagan's conclusion is grounded on the long-recognized admonition that a primary mandate of the Establishment Clause is the prohibition against religious preferentialism, *see, e.g.*, Larson v. Valente, 456 U. S. 228, 244 (1982); County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989).

103. *See* Brownstein, *Constitutional Myopia*, *supra* note 91, at 386–92; Brownstein, *Constitutional Challenges to State-Sponsored Prayers*, *supra* note 91, at 1531–33.

the Court has recognized in free speech cases, clear guidelines must control the decisions of officials to grant or deny licenses or permits for expressive activities. Unfettered official discretion is unacceptable because it invites bias and makes it too difficult for courts to evaluate official actions to identify discriminatory decisions.[104] The same analysis holds true for state-directed prayer.

Further, the process for selecting and inviting clergy and others should be as public, accessible, and transparent as possible. This should not be a logistical problem. Virtually all public meetings today are announced on government websites. A town board website should announce that clergy and others will be offering a prayer at the beginning of board meetings and explain how community members interested in participating can contact local officials to secure an invitation.[105]

Two other related suggestions to protect the dignity interests of minorities and reduce coercion might be more controversial. The first requires a distinction between what I describe as "I" prayers and "We" prayers. When members of the clergy express an "I" prayer at a public meeting, they are speaking to G-d on their own behalf. They may be praying for the benefit of the community, but they are not praying in the name of the community or as its religious representative. A "We" prayer, on the other hand, purports to express the community's prayer to G-d and to speak in its name.[106]

"We" prayers are particularly problematic for minorities. Their expression conflicts with the basic principle discussed earlier that government is not vested with the authority to commandeer the voice of individuals and assert that it is speaking to G-d in their name.[107] "We" prayers are also much more intrinsically coercive than

104. *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988); Brownstein, *Constitutional Myopia*, *supra* note 91, at 392–94.

105. *See, e.g.*, *Town of Greece*, 572 U.S. at 612 (2014) (Breyer, J., dissenting).

106. *See* Brownstein, *Constitutional Challenges to State-Sponsored Prayers*, *supra* note 91, at 1529.

107. *Id.*

"I" prayers. Minorities will feel a need to respond to prayers purporting to express their beliefs.[108] There is no comparable compulsion to distance oneself from a prayer offered by clergy who are clearly speaking for themselves, and not the community.

Second, invited clergy should not request that the audience stand and join in the offered prayer. To begin with, doing so is inconsistent with the idea of an "I" prayer. Further, such directions place minorities in a situation where they have to either join in a prayer they consider a false expression of their beliefs or publicly demonstrate their unwillingness to participate in a religious exercise approved by the town board and the majority. These requests magnify the coercive nature of offering prayers at public meetings. Given that most people attending a town board meeting do so to use public comment periods to try to persuade the board to take particular positions on matters coming before it, by refusing to join in an offered prayer, minorities risk alienating the very political actors they are trying to influence.[109]

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108. Justice Kagan's forceful dissent in *Town of Greece* (joined by Justices Breyer, Ginsburg, and Sotomayor) is grounded on the recognition that adherents of minority faiths will feel obliged to respond to and distance themselves from "We" prayers that directly or implicitly implicate their joining in prayers that are foreign to their beliefs. Kagan emphasizes that the offered prayers at the challenged Town Board meetings "almost always begin[] with some version of 'Let us all pray together'. . . . [o]ften . . . call[] on everyone to stand and bow their heads . . . . [and] refer[], constantly, to a collective 'we' . . . ." 572 U.S. at 627 (Kagan, J., dissenting). Kagan then explains the predicament these prayers create for religious minorities. They do not want to distance themselves from the community but cannot easily escape the demands of conscience requiring them to "opt[] not to participate in what [they do] not believe—indeed, what would, for [them] be something like blasphemy." *Id.* at 621. In a later hypothetical, Kagan posits a Muslim resident of the town who is asked to pray "in the name of God's only son Jesus Christ." She does not want to antagonize her neighbors or the Board members. But she cannot "acknowledge Christ's divinity[] any more than many of her neighbors would want to deny that tenet." Accordingly, she will decline to participate, perhaps standing up and leaving the room. *Id.* at 630. The pressure experienced by religious minorities in these coercive circumstances is a result of their need to separate themselves from prayers they cannot join.

109. Brownstein, *Constitutional Challenges to State-Sponsored* Prayers, *supra* note 91, at 1529–31; *see also* Brownstein, *Constitutional Myopia*, *supra* note 91, at 400–03; *Town of Greece*, 572 U.S. at 620–21 (Kagan, J., dissenting).

These suggestions may risk acrimony because they require majorities to move outside of their comfort zone. At their home houses of worship, many community members may join in prayer when their clergy tells the congregation, "Let us pray." In a pluralistic society comprising diverse faiths and non-religious residents as well, however, the search for common ground requires the acknowledgment that prayers offered at public meetings cannot simply reflect what is meaningful and spiritually acceptable in homogeneous congregations. Indeed, the goal here is to identify ways in which prayer can be offered at public meetings in which the heterogeneity of the audience is recognized and respected, not treated as if it does not exist.[110]

The primary difficulty with moving forward on most of these suggestions is that they are at least partly foreclosed by the Supreme Court's decision in *Town of Greece v. Galloway*.[111] *Town of Greece* makes it much more difficult to avoid acrimony and achieve any kind of common ground in disputes about prayers offered at public meetings because it interprets the Establishment Clause to permit substantial domination by the majority and virtually complete lack of respect for minority residents. As Justices Breyer and Kagan make clear in their dissenting opinions, there were numerous steps the Town could have taken in inviting clergy to offer prayers at Town Board meetings that would acknowledge the existence and worth of residents who adhere to minority faiths or are not religious. The Court upheld the Town's practices even though no such steps were taken.[112]

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110. I have delivered talks to diverse audiences describing the distinction I draw between "I" and "We" prayers and found a general receptivity to this compromise approach.

111. 572 U.S. at 565.

112. *See, e.g.*, *id.* at 628–30 (Kagan, J, dissenting) (describing the prayer practices upheld by the majority as "constantly and exclusively" of one faith, the offering of which appeared to assume that everyone in the audience shared the same religion); *id.* at 612–14 (Breyer, J., dissenting) (detailing the numerous and varied steps the Town could have taken to acknowledge non-Christian residents.) For a detailed discussion of how the Court's opinion in *Town of Greece*

According to *Town of Greece*, religious minorities that are too small to establish an organized congregation in a community need not be invited to offer prayers at public meetings. A record of ten years of invitations to clergy that virtually never include non-Christians can be ignored as mere incompetence by lower-level functionaries in issuing invitations. No guidelines to control the discretion of officials issuing invitations are required. Nor must the there be any transparency in the invitation process or notice provided to the community about how they might be considered for invitations. Indeed, overtly proselytizing prayers disparaging minorities are acceptable as long as they do not occur too frequently. Finally, the case holds that there is nothing intrinsically coercive about requesting audience members to stand and join in prayers offered at town board meetings.[113]

The most expedient way to move forward in this area would be for the Supreme Court to overrule *Town of Greece*. Candor requires the concession that this is very unlikely to occur. There are limits to the scope of the *Town of Greece* analysis and holding, however, that permit federal judges to avoid some of its conclusions. On its face, the case only applies to prayers offered by invited clergy. It provides limited if any support to prayers offered by government officials.[114] More importantly, the plaintiffs withdrew their initial claim of intentional religious discrimination, and accordingly, the Court did not consider intentional discrimination to be relevant to its analysis.[115] A case which continued to assert intentional religious discrimination on review would require a different analysis.[116] Similarly, the plaintiffs' claim was

allows for the domination by the majority and disrespect for religious minorities, see Brownstein, *Constitutional Myopia*, *supra* note 91, at 386–438.

113. 572 U.S. at 583–92.

114. Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1134 (9th Cir. 2018).

115. *Town of Greece*, 572 U.S. at 593 (Alito, J., concurring).

116. In his concurring opinion, Justice Alito explicitly acknowledged that his analysis was predicated on the foundation that the failure to invite non-Christians to offer prayers "was not done with a discriminatory intent" and that he

predicated on generic coercion—which the Court rejected. The Court did acknowledge, however, that coercion was fact sensitive.[117] A case in which specific facts supporting coercion were litigated would also require a different analysis.

While these distinctions allow federal courts to avoid some of the limitations of *Town of Greece*, they have significant drawbacks for pursuing our goal of reducing acrimony. By refusing to impose any generic constraints on government discretion in inviting clergy to offer prayers at public meetings, excluded minorities in these cases have to allege and pursue claims of deliberate discrimination or coercion. As we discussed previously, these kinds of allegations of wrongdoing are more likely to polarize a community than to facilitate the search for compromise or common ground.[118]

State court judges may have more flexibility on these issues. To the extent that they serve in states with an independently interpreted Establishment Clause type provision in the state constitution, they are not confined by the problematic reasoning of *Town of Greece*. Nor does *Town of Greece* prevent government officials from adopting many acrimony reducing approaches to the offering of prayers at public meetings in an effort to find common ground and compromise on these disputes.

B. State-Sponsored Religious Displays

State-sponsored religious displays are less directly coercively than state-directed prayers. However, they raise significant equality concerns. Once again, I would argue that the best way to deal with this issue is to protect free exercise rights with sufficient diligence so that private religious displays can be meaningfully communicated by religious individuals and institutions, rather

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"would view this case very differently if the omission of . . . synagogues were intentional." *Id.* at 597.

117. 572 U.S. at 587 (majority opinion).

118. *See supra* text accompanying note 22.

than the state. As before, however, I recognize that this approach is unacceptably restrictive to many religious people.

If some government-sponsored displays are permitted, the foundation for achieving common ground and reducing divisiveness in this area is not difficult to identify. Put simply, government should be as inclusive as it can be of the faiths and beliefs that are represented by the displays that it sponsors. By doing so, the search for common ground shifts the discourse of dispute from *closing the door* to keep imagery and messages reflecting majoritarian faiths *out* of government-sponsored displays to *opening the door widely* to allow imagery and messages reflecting minority faiths and non-religious beliefs *in* on the basis of equal respect.

One example should be sufficient to illustrate this approach. Erecting a stand-alone Latin Cross as a war memorial ignores the service and sacrifice of non-Christians who served our country in the military. As an alternative, we need only compare this single icon display with the Department of Veterans Affairs policy that permits everyone who served in the military who is eligible for a headstone for their gravesite to choose one of seventy-four different belief symbols to be placed on the marker.[119]

To promote compromise and reduce polarization, there are various possibilities for dealing with very long-standing but exclusive religious displays. One approach would be to grandfather in historical displays and distinguish them for Establishment Clause purposes from contemporaneously created icons or imagery. Another would be to transfer the land on which a display is located and the cost of maintaining it from the government to private owners. The majority opinion in *American Legion v. American Humanist Association*[120] allows considerable

119. *Available Emblems of Belief for Placement on Government Headstones and Markers*, U.S. DEP'T VETERANS AFF., https://www.cem.va.gov/cem/hmm/emblems.asp (last visited May 12, 2021).

120. 139 S. Ct. 2067 (2019).

room for interpretation in distinguishing long-standing from contemporary displays and requiring inclusivity in the latter.[121] Further, as was true with regard to state-directed prayers at public meetings, the political branches of government can seek to reduce polarization by choosing inclusivity rather than exclusivity in creating religious displays in their community.

Professor Berg's Response

I share Professor Brownstein's concerns about government-directed prayers and government-sponsored religious symbols. The former practice can be coercive in many settings, if we understand coercion broadly (as we should). Both practices can inflict status and equality-based harms on religious minorities. And both inject government influence into an area of life where people's choice should be as free from government influence as possible. Religious matters are unlike other disputed matters, on which government can and should take positions. Religion is distinctive—and state-favored religious exercises that effectively exclude religious minorities cause a distinctive harm—because, as Justice Kagan wrote in her *Town of Greece* dissent, "[a] person's response to [religious] doctrine, language, and imagery . . . reveals a core aspect of identity—who that person is and how she faces the world."[122]

Of course, the same distinctive sensitivity and importance of religion justify distinctive protection for free exercise rights too. There is a "quid pro quo," as Professor Brownstein puts it, in limiting both government interference with voluntary religious activity and government promotion of its own favored religious position. Professor Brownstein calls this a "privileging" of religion with respect to free exercise that is matched by restrictions on religion with respect to government promotion of religion

121. *Id.* at 2091 (Breyer, J., concurring).
122. 572 U.S. at 636 (Kagan, J., dissenting).

through prayers and displays.[123] Rather than describing these as opposing but offsetting rules, I would say that both free exercise protections and non-establishment limits work together: both of them help preserve the autonomy of religious decisions and religious life from government pressures, for or against religious activity. Courts can reduce acrimony if they emphasize that limits on government-sponsored displays or prayers are meant to preserve that autonomy—not to drive religion from public life.

Government religious speech is a complex subject because some examples, like "In God We Trust" on our coins, seem innocuous even to fair-minded people. Professor Brownstein rightly focuses on practices that pose real risks of coercing people or communicating inequality. His suggestions for reducing those risks are sensible.

IV. SOCIAL REALITY

Alan Brownstein

The resolution of disputes adjudicated in courts requires more than a determination of what the law is. It also requires a determination of the social reality to which the law is to be applied. This is a particularly critical element of many church–state controversies. During these times of intense polarization and negative attitudes toward the "other," groups that constitute the majority in a jurisdiction (and that will vary by place and demography) may dismiss minority grievances as manufactured, trivial, or unworthy of attention. The courts have a critical role to play in recognizing the social reality that minorities experience when their claims are adjudicated.

Because the majority, either religious or secular, is often comfortable with the status quo, they may

123. *See supra* notes 97–101 and accompanying text.

mistakenly interpret it to be harmless to others.[124] But disputes cannot be usefully discussed much less resolved without acrimony if the majority begins its narrative by denying that claimants suffer any injury or cost that justifies relief. To minorities, rejecting their sensibilities and commitments as illusory or *de minimis* is simply another way of ignoring their worth or existence.[125]

Regrettably, the failure to appreciate the social reality of claimants is a common problem in church–state disputes. In the *American Legion v. American Humanist Association* case, the plaintiffs asserted that a Latin Cross was a distinctive Christian symbol. Accordingly, they argued that maintaining this stand-alone sectarian symbol as a war memorial recognized the patriotism and sacrifice of soldiers of one faith and ignored the patriotism and sacrifice of non-Christians.[126] Many briefs responded to this argument by insisting that the Latin Cross was a universal symbol of sacrifice recognizing the valor and value of soldiers of all faiths.[127] Thus, non-Christians were being treated with equal respect by a Latin Cross memorial.

I understand that the majority's comfort level with imagery of their faith has a natural tendency to support presumptions of generally accepted meaning. The foundation of a pluralistic society, however, is that no religion's beliefs or icons can subsume the beliefs and identity of other faiths. In the social reality of non-Christians, a Latin Cross does not symbolize their faith and identity and is not used to memorialize their dead.[128] Starting the

124. *See* Brownstein, *supra* note 13, at 856.

125. *Id.* at 857.

126. *See* Brief for Baptist Joint Comm. for Religious Liberty et al. as Amici Curiae in Support of Respondents at 7, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019), 2019 WL 495118 [hereinafter Religious Organizations' Brief].

127. *See* Brief for Petitioner Md.-Nat'l Cap. Park & Plan. Comm'n at 34, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019), 2019 WL 697568; Brief of Retired Gens. & Flag Officers as Amici Curiae Supporting Petitioners at 10–11, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019), 2018 WL 6807241.

128. *See Religious Organizations' Brief*, *supra* note 126, at 17. See also the discussion of oral argument in Salazar v. Buono, 559 U.S. 700, 723, 744 n.3 (2010)

conversation with a claim of universality ends the possibility for finding common ground before it begins.

Determinations about social reality are contextual and fact specific. Still, keeping the focus of finding common ground and reducing acrimony as our goal, there are generic understandings of social reality which should be presumptively accepted in the adjudication of church–state cases.

Religious individuals are defined by their beliefs and the practice of their faith. These are profound commitments. They cannot just change their convictions and identity to comply with government regulations or the majority's sensibilities any more than members of the LGBTQ community can just change their sexual orientation, or their commitment to the spouse with whom they want to share their lives, to respond to government restrictions.

Status harms are real injuries, and minority perceptions of the meaning of sectarian displays must be afforded serious respect. In one of the most infamous decisions in American constitutional history, *Plessy v. Ferguson*,[129] the Court refused to accept the understanding of social reality described by the plaintiffs. To the Court, the plaintiffs' contention that state-mandated racial segregation imposed a badge of inferiority on Black people was an imaginary slight, divorced from objective reality.[130] Contemporary church–state cases do not involve the egregious misconstruction of social reality and close-minded cruelty exhibited by the *Plessy* Court. But the underlying principle extends beyond *Plessy*. The social reality experience described by minorities are not figments of their imagination. Their claims are grounded in the world in which they live and must be afforded

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and in Brownstein, *Constitutional Challenges to State-Sponsored Prayers*, *supra* note 91, at 1526–27.

129. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

130. *Id.* at 551. *See also* Alan Brownstein, *Law and Social Reality in Constitutional Adjudication*, HILL (Oct. 24, 2020, 1:00 PM), https://thehill.com/opinion/judiciary/522201-law-and-social-reality-in-constitutional-adjudication.

considerable respect. Recognizing the social reality of minorities does not necessarily require the invalidation of the state action they are challenging. It is, however, a place where discourse can begin to identify common ground and the development of doctrinal bridges taking the interests of both sides into account.

Similarly, as a matter of social reality, the experience of coercion asserted by minorities is real and deserving of serious attention. One of the most disturbing discussions in the majority opinion in *Town of Greece* was its description of the social reality of minorities in the audience of a town board meeting who are asked to stand and join in a sectarian prayer of a faith other than their own. To the Court, there was nothing intrinsically coercive about this arrangement because anyone who did not want to participate in the prayer could remain seated or leave the room when the prayer was offered. No one would notice or be offended if they did so.[131]

This understanding of social reality is astonishingly distorted.[132] Anyone who believes that no one will notice or be offended when someone fails to stand for G-d or country when the majority expects them to do so should ask Colin Kaepernick about the reactions to his kneeling during the playing of the national anthem.[133] More importantly, an unwillingness to appreciate the social reality asserted by plaintiffs in these kinds of cases precludes any meaningful discussion on how the concerns of both sides in these disputes can be taken into account to pursue the search for common ground and doctrinal compromise.

A final generic understanding of social reality relates to the mistrust minorities experience when government makes decisions related to religion. This reality extends to both religious liberty and religious equality

131. Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (arguing that "[s]hould nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy").

132. *See* Brownstein, *Constitutional Myopia*, *supra* note 91, at 405–07.

133. *See* Brownstein, *supra* note 130.

concerns. Conservatives do not trust the majority and government to respect religious liberty, but they trust the majority and government in cases involving religious displays or state-directed prayer when status harms, equality concerns, and intrinsic coercion are at issue. Liberals trust the majority and government to adequately protect religious liberty, taking the costs of doing so fairly into account. But they mistrust government and the majority when religious equality concerns, status harms, and intrinsic coercion are at issue.

In my judgment, there is no more reason to trust government to take account of the religious liberty of minorities than there is to trust government to take account of the equal status of religious or secular minorities. Indeed, if we are going to reduce acrimony and identify common ground, this is an essential understanding that all sides should consider. Mistrust can be mitigated through doctrine and dialogue. But doing so requires a willingness to move beyond the one-sided perspective that only my side and not the other can be trusted to respectfully take competing interests into account.

Professor Berg's Response

I agree with Professor Brownstein that various harms to religious freedom and equality should be taken seriously in seriously in light of social reality. Government can coerce people without imposing formal penalties, as for example when a city council invites citizens to stand in prayer shortly before they have business with the council.

But it is precisely because I read coercion broadly that I believe withdrawals of otherwise-available government funds can pressure religious practice and should trigger close judicial scrutiny. Professor Brownstein rejects that proposition at least in the case where a religious organization discriminates in hiring or service in

the government-funded program itself.[134] I'd respond that religious organizations have legitimate interests in ensuring that persons carrying out their missions support the religious vision underlying the mission, and that this interest applies even in educational or social services that government chooses to support—especially when many alternative providers exist.

However, since we are identifying areas of possible compromise, I acknowledge that government generally has a stronger interest in prohibiting discrimination in the specific, directly funded program. But even granting that point, it does not support withdrawing funds from a whole institution on the basis of discrimination in one directly funded program or withdrawing funds that are provided to individuals who choose to use funds at the institution in question. For example, in 2016 California nearly passed legislation saying that modest-income students could not use their state-funded scholarships at any religious college that discriminated against LGBTQ students. That law would have reduced rather than advanced pluralism, given the harm it would have done to students losing scholarships and to the institutions they chose to attend—and given the many public, private, and religious colleges in the state that welcome LGBTQ students.[135] We could draw distinctions between these varying situations if courts applied heightened scrutiny when government withdraws otherwise-available funding on the basis of a religious practice.

I also agree with Professor Brownstein that government religious displays can cause real, and unacceptable, status-based harms to religious minorities. In contrast, he says that I "minimiz[e]" how private persons' religiously based refusals to serve can cause status-based harms to LGBTQ people.[136] But in suggesting limited

134. *See supra* notes 76–77 and accompanying text.

135. *See, e.g.*, Thomas C. Berg, *Does This New Bill Threaten California Christian Colleges' Religious Freedom?*, CHRISTIANITY TODAY (July 5, 2016), https://www.christianitytoday.com/ct/2016/july-web-only/california-sb-1146-religious-freedom.html.

136. *See supra* note 78 and accompanying text.

exemptions for small vendors, I have acknowledged those harms. I have simply noted questions whether those harms alone (without material effects on access) should override significant constitutional interests in religious freedom; and I have made clear that any for-profit exemptions from public-accommodations laws must be narrow.[137]

I appreciate Professor Brownstein's statement that who constitutes a religious majority or minority "will vary by place and demography." Some groups, like Muslims, are a minority nearly everywhere, but the status of others varies. For example, it is too common to label Christians an undifferentiated "majority" in every setting, when the social reality is that they split sharply on many relevant issues. White evangelicals, although a majority in many places, are typically an unpopular minority in many other settings (like the academy and professions) and locations (politically liberal cities). Given the complexities of defining religious "minorities," I favor legal rules that protect *whoever* is the minority in a given context. Thus, I support limiting government-sponsored religious displays because they tend to favor majority religions and exclude minorities. And I support exempting religious conduct from (some) generally applicable laws

137. *See supra* notes 44–49 and accompanying text. Professor Brownstein cites numerous cases ruling that discrimination is conduct. *See supra* note 78. But in the specific instances when such conduct involves strong First Amendment interests like expressive association, prohibitions on it must satisfy strict or heightened scrutiny. Boy Scouts of Am. v. Dale, 530 U.S. 640, 658–59 (2000) (following Hurley v. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 572–73 (1995)). I simply argue that the same should hold for free exercise of religion, another explicit First Amendment interest. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012) (holding that religious organizations' right to choose leaders, even in face of nondiscrimination law, is protected not just by expressive-association freedom but by the "special solicitude" given to free exercise of religion). If the fact that a defendant's conduct is discriminatory is always sufficient to override its free-exercise interests (even when ready alternative providers exist), then legal prohibitions will fall on core religious organizations, not simply on for-profit businesses.

because such laws tend to reflect the majority's perspective and burden whoever is the minority.[138]

V. OPINION TONE AND METHOD

Thomas Berg

Even if we identify areas of consensus, there will remain many cases where reasonable, deeply felt arguments are irreconcilable: one side will lose. I expect that court rulings protecting religious liberty will calm polarization on balance and in the long run; but there's potential for resentment whichever way the court rules. Judges can reduce that potential, however, by the tone they adopt in writing opinions. When cases stir deep feelings and fears, judicial craft is especially important.

As in all cases, judges must pay attention to the facts. They must state the parties' arguments—especially the losing party's—fairly and in their strongest form. They must explain the holding and reasoning clearly and fully. They must acknowledge the costs of their ruling for the losing party and, where possible, suggest how to mitigate those costs. Throughout, they must show respect for all parties.

Justice Kavanaugh took such steps in his concurring opinion in *American Legion v. American Humanist Association*,[139] the decision upholding the cross erected in 1921 to commemorate World War I dead. Professor Brownstein and I both have doubts about the ruling, but we think Kavanaugh's efforts deserve credit. He joined the ruling but also wrote separately to acknowledge its costs, including the "distress and alienation" felt by "Jewish war veterans who in an *amicus* brief say that the cross on public land sends a message of exclusion."[140] He reemphasized the "bedrock constitutional principle" that

138. For elaboration of this paragraph's points, see generally Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004).

139. 139 S. Ct. 2067 (2019).

140. *Id.* at 2093 (Kavanaugh, J., concurring).

"[a]ll citizens are equally American, no matter what religion they are, or if they have no religion at all."[141] And he noted means of recourse for the cross's opponents, such as encouraging transfer of the land by legislative or executive action.[142]

By contrast, one reason *Employment Division v. Smith* caused outrage (although far from the only reason) was the Court's dismissive tone and method of proceeding.[143] In ruling that burdens on religion from general laws need not pass heightened scrutiny, the Court remade a case about state interests when *drug counselors* use illegal drugs into a broad test of the drug law's validity in all circumstances. Without requesting supplemental briefs, it remade a case that had been litigated under the compelling-interest test into a case about whether to jettison that test. The opinion ultimately distinguished the main precedents (*Sherbert* and *Yoder*) weakly, even disingenuously.[144] And it dismissed the harms to minority faiths when religious freedom protections are left solely to majoritarian bodies, calling such harms the "unavoidable consequence of democratic government."[145]

Professor Brownstein's Response

I agree with Professor Berg's emphasis on the importance of judges employing a tone and reasoning in their opinions which will reduce, or at least not aggravate, acrimony among already polarized communities in our society. I offer one more example.

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141. *Id.* at 2094 (Kavanaugh, J., concurring).

142. *Id.*

143. For elaboration of this paragraph's criticisms, see Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990) and Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111–16 (1990).

144. *See* Laycock, *supra* note 143; McConnell, *supra* note 143.

145. Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

In his dissent in *Lawrence v. Texas*,[146] Justice Scalia castigated the majority for having "largely signed on to the so-called homosexual agenda" in striking down anti-sodomy laws as unconstitutional. Such pejorative language is unacceptable. We cannot find common ground and reduce polarization if judges characterize claims as reflecting a Jewish or Catholic agenda, a Black or white agenda, or a homosexual agenda.

VI. CONCLUSION

Religious-liberty and equality debates are bitterly polarized today, and they contribute materially to the overall polarization and fear that are tearing at the fabric of our democracy. We think that it is important to pursue ways to reduce the bitterness, and we have tried both to describe and to model some ways to do that here. Citizens and officials will have to cultivate sympathy for the concerns and conflicts faced by those with whom they disagree, whether that be religious minorities, LGBTQ persons, or religious conservatives. Each side will have to recognize that its own claims will ultimately be stronger and more credible if it acknowledges and makes room for reciprocal claims by the other side.

Of course, sympathy and reciprocity will not eliminate sharp conflicts over the important issues of equality and freedom at stake. For example, even the two of us, while sharing support for religious exemptions in principle, differ sharply on whether exemptions should extend to cases of public funding or for-profit public accommodations. But sympathy and reciprocity can increase the space for possible compromise, and when compromise is impossible, they can produce a more respectful debate that will not aggravate polarization unnecessarily.

146. 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).