



NOTE

Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since *Obergefell*

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Abstract. As the LGBT rights movement has begun to achieve tangible successes at the national level—in particular, marriage equality and workplace protections—legislatures and courts alike have grappled with how to address those who claim their religious beliefs require them to discriminate. Since *Obergefell v. Hodges*, this process has gone into overdrive: Both legislative and judicial accommodations for religious dissenters have taken on novel and expansive forms. Several prominent federal court decisions have relied on *Burwell v. Hobby Lobby Stores, Inc.* to expand courts’ conception of what constitutes a burden on religious practice and constrict the category of government action that meets the least-restrictive-means test under the Religious Freedom Restoration Act of 1993. And legislatures have considered and enacted expansive new exemptions from nondiscrimination laws with the novel feature of singling out for protection particular beliefs rather than particular actions.

This new wave of religious accommodations has revived the question of what limits, if any, the First Amendment’s Establishment Clause places on government’s ability to protect religious exercise. So far, scholars opposed to the accommodations have emphasized the harm that religious exemptions from nondiscrimination laws impose on third parties and argued that the Establishment Clause as interpreted by the U.S. Supreme Court prohibits religious accommodations with such substantially negative effects. The only federal court opinion so far to invalidate a nondiscrimination accommodation—the Northern District of Mississippi’s decision in *Barber v. Bryant*—adopted that reasoning in substantial part.

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This Note argues that focusing on the harm caused by nondiscrimination accommodations comes at the problem from the wrong angle. In general, the Establishment Clause is directed at structural problems: preventing government from interfering in the operation of religious bodies and preventing religious entities from wielding governmental power. In particular, Supreme Court holdings since *Larkin v. Grendel's Den, Inc.* in 1982 have consistently prohibited governments from giving parties the power to decide, by virtue of their religious beliefs, how governmental benefits are distributed. This Note argues that the new wave of nondiscrimination accommodations does just that, impermissibly giving religious actors a veto over LGBT people's and others' statutory rights to do business on equal terms. That perspective places objections to religious accommodations on a stronger, and more circumscribed, doctrinal footing, affording governments more flexibility to design constitutionally valid religious accommodations. But it also acknowledges that the conflict between religious accommodation and nondiscrimination is fundamentally a conflict between two visions of governmental power—one that ultimately must be resolved by the Constitution's command that government cannot interpose a religious veto point between a citizen and her rights.

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Introduction

In its landmark decision recognizing the constitutional right to same-sex marriage in *Obergefell v. Hodges*,¹ the U.S. Supreme Court included a curious bit of dicta:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.²

On one reading, this statement is a truism: The Constitution protects the free exercise of religion.³ What's curious is its mention in a case where the only claim was for a private civil right against state governments.⁴ Civil rights judgments do not often come with such disclaimers, even in hot-button areas.⁵ Of course, the statement could simply be puffery, but its inclusion by the Court suggests that in the realm of same-sex marriage, "proper protection" for religious liberty might take on new dimensions or require special solicitude.

In the two years since *Obergefell*, courts and legislatures have started to consider what "proper protection" might mean. Early efforts have largely taken the form of expansive carve-outs from state and federal nondiscrimination laws for religious actors. These actions have not been limited to the marriage context; rather, they appear to be part of a broader reevaluation of the appropriate balance between the rights of equal treatment for LGBT consumers and employees on one hand and the religious exercise rights of businesses and employers on the other.

Courts have principally undertaken this reevaluation through broad interpretations of longstanding accommodations for religious believers. In particular, several prominent district court decisions (some now on appeal) have applied the federal Religious Freedom Restoration Act (RFRA) of 1993⁶ to

1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2607.

3. See U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

4. See *Obergefell*, 135 S. Ct. at 2593.

5. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (striking down restrictions on abortion without disclaimers about religious liberty); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down bans on interracial marriage).

6. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2016)). RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can demonstrate "that application of the burden

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deny protections for LGBT employees and consumers. In doing so, they have relied heavily on the Supreme Court's logic in *Burwell v. Hobby Lobby Stores, Inc.*,⁷ the most recent major case interpreting RFRA, and extended it far beyond the narrow context of contraception benefits at issue there. If this trend continues, it will expand the spaces in which governments must refrain from enforcing generally applicable nondiscrimination laws, and it will ultimately require the Supreme Court to clarify the outer limits of *Hobby Lobby*.

Legislators, meanwhile, have proposed a rash of bills offering specific accommodations for religious believers in areas involving LGBT rights.⁸ These bills vary widely.⁹ An interesting feature many of them share, however, is designating enumerated beliefs—for example, “marriage is or should be recognized as the union of one man and one woman”¹⁰—and protecting any practices consistent with those beliefs across a variety of areas.¹¹ The most prominent of these bills, and the first to be successfully enacted since *Obergefell*, is Mississippi’s Protecting Freedom of Conscience from Government Discrimination Act,¹² commonly referred to as HB 1523.¹³ Mississippi’s law is similar to proposed accommodations in other states, and its ultimate fate may

to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. RFRA can be asserted as a cause of action for “appropriate relief” or as a defense against government enforcement. *Id.*

7. 134 S. Ct. 2751 (2014). In *Hobby Lobby*, the Supreme Court famously held that closely held corporations are “person[s]” that can assert RFRA claims. *Id.* at 2769. More relevant here, the Court went on to hold that a U.S. Department of Health and Human Services (HHS) regulation requiring employers to provide employees with insurance covering all Food and Drug Administration (FDA)-approved contraceptives could not be applied against a corporation asserting that facilitating access to certain contraceptive methods violated its sincere religious beliefs. *See id.* at 2759, 2762, 2765-66. The Court held that such a mandate constituted a substantial burden on the corporation’s religious beliefs and that requiring employer coverage was not the least restrictive means of furthering the government’s interest in providing for women’s healthcare. *Id.* at 2775, 2780.
8. *See generally* Memorandum from Public Rights/Private Conscience Project, Columbia Univ. in the City of N.Y., to Interested Parties, State & Federal Religious Accommodation Bills: Overview of the 2015-2016 Legislative Session (Sept. 20, 2016), <https://perma.cc/3H2L-AHB3> (collecting and summarizing all religious accommodation bills introduced in state legislatures between *Obergefell* and September 2016, which ranged from state versions of RFRA to bills targeted specifically at same-sex marriage or adoption).
9. *See generally id.*
10. *See, e.g.*, First Amendment Defense Act, H.R. 2802, 114th Cong. § 3(a) (2015).
11. *See, e.g., id.* § 3(a)-(b).
12. Ch. 334, 2016 Miss. Laws 427 (codified at MISS. CODE ANN. §§ 11-62-1 to -19 (2017)).
13. *See, e.g.*, Mark Joseph Stern, *Mississippi’s Uniquely Cruel Anti-LGBTQ Law May Be Heading to the Supreme Court*, SLATE (Oct. 2, 2017, 1:40 PM), <https://perma.cc/J7GJ-BHQ7> (“Mississippi passed HB 1523 as a direct response to *Obergefell*....”).

serve as a bellwether for those accommodations. HB 1523 was the first successfully enacted religious exemption for private businesses from LGBT nondiscrimination laws. It was also the first to be enjoined by a federal court, on both Equal Protection Clause and Establishment Clause grounds.¹⁴ That injunction was subsequently reversed on justiciability grounds,¹⁵ but the district court decision nonetheless stands as an example for states and other courts to look to as they consider targeted accommodations in the nondiscrimination realm. Ultimately, the religious freedom issues raised in this area may also call for clarification from the Supreme Court.

Scholarly responses considering the limits the Constitution places on religious accommodations from nondiscrimination laws have been robust but largely unsatisfying. Proponents of such accommodations argue that they fall squarely within the “play in the joints” of the First Amendment’s Religion Clauses—the recognized flexibility government has, beyond the limits imposed by the Constitution, to both protect religious exercise and prevent establishment of religion.¹⁶ Those proponents argue that accommodations from nondiscrimination laws allow government to ensure that religious exercise is properly protected¹⁷ and that these sorts of protections ensure the continued vitality of religious pluralism by preventing government coercion of religious actors.¹⁸ Opponents claim that these accommodations go too far in allowing harm to third parties, either because that harm elevates certain

14. See *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017), *petition for cert. filed*, No. 17-547 (U.S. Oct. 12, 2017). The Fifth Circuit reversed solely on standing grounds, *see Barber v. Bryant*, 860 F.3d 345, 358 (5th Cir. 2017), and the plaintiffs petitioned the Court to review that standing analysis, *see Petition for a Writ of Certiorari at i-ii*, *Barber v. Bryant*, No. 17-547 (U.S. Oct. 10, 2017), so the merits of the decision will for the immediate future remain unaddressed.

15. *See Barber*, 860 F.3d at 358.

16. See *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (“Short of . . . expressly proscribed governmental acts there is room for *play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” (emphasis added)). The Religion Clauses provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The first clause is commonly referred to as the Establishment Clause; the second, as the Free Exercise Clause.

17. See, e.g., Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After Hobby Lobby*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 257, 280–81 (Micah Schwartzman et al. eds., 2016).

18. See, e.g., John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 592, 602 (2015).

religious beliefs over others¹⁹ or because it imposes too severe a burden on others.²⁰

Both positions are more or less recitations of standard arguments sounding in the Religion Clauses. Most of these arguments were made about contraceptive mandates before *Hobby Lobby*.²¹ To the extent they grapple with the unique features of nondiscrimination law, it is usually only to note that nondiscrimination implicates especially serious equities.²² But nondiscrimination laws are distinct, both in terms of the burden they impose on regulated parties and the benefit they provide to protected parties, and very few Establishment Clause analyses have grappled in precise terms with these distinctive features. This Note attempts to do so.

Part I assesses the current state of Religion Clauses doctrine as applied to nondiscrimination mandates. It discusses both the statutory and judicial expansions of protection for religious practice, and it explains the doctrinal and structural forces underlying that expansion. Part II turns to the scholarly response to an expanding world of religious nondiscrimination exemptions. It lays out two major schools of thought challenging that expansion, using as its framework the district court decision enjoining Mississippi's HB 1523.²³ In doing so, it doubles as a thorough analysis of that decision's Establishment Clause reasoning. It ultimately concludes that the current treatment of nondiscrimination accommodations is unsatisfying as a matter of both precedent and principle. Part III proposes a new framework, arguing that case law typically read to stand for a sharp limit on third-party harm makes far

19. See, e.g., Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 755 (2016).

20. See, e.g., Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 169-70 (2015); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 54 (2015).

21. See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 383-84 (2014); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877-78; Kara Loewenthal, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 469-70, 486 (2014).

22. For examples from the pro-religious accommodation side, see Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 628-29 (2015); and Douglas Laycock & Thomas C. Berg, *Essay, Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 8-9 (2013). For examples from the anti-religious accommodation side, see Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 189 (2015); Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 941 (2015); and Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDozo L. REV. 2069, 2071-72 (2011).

23. See *supra* text accompanying notes 12-15.

more sense if framed as setting out a structural limit on government's ability to allow religious actors to control who receives governmental benefits. That framework more accurately captures the decisions reached in those cases and more closely hews to the purposes of the Establishment Clause. I argue that applying such a rule would invalidate most nondiscrimination accommodations for private actors but would leave religious liberty protections mostly untouched in other areas. Finally, the Conclusion attempts to justify that rule as a normative matter, suggesting that a rule occasionally forcing a party to refrain from religious discrimination is ultimately more likely to promote respectful discourse, foster well-functioning markets, and prevent fracturing of the polity along religious lines.

I. An Expansion in Three Forms of Religious Accommodation

Religious accommodations from nondiscrimination laws can take three forms: (1) constitutionally required accommodations under the Free Exercise Clause; (2) "general" accommodations like RFRA, extending across a wide variety of substantive areas, applied by a court to a particular case of nondiscrimination enforcement; and (3) "targeted" statutory or administrative accommodations instituted to insulate a particular area of religious belief or practice from nondiscrimination laws that might otherwise apply.²⁴ The past several years have seen expansions in all of these areas, especially in the lower courts and the states, and especially (but not exclusively) with application to LGBT nondiscrimination issues. As states continue to legislate and as more courts are confronted with questions of nondiscrimination and religious liberty, they will do so in a framework shaped by these decisions. This Part discusses in depth the doctrinal moves made in all three areas and their implications, and it suggests some underlying factors that may be driving these actors to expand religious liberty protections in the nondiscrimination context.

A. Free Exercise Clause Accommodations

Before 1990, the primary analytical framework for religious exemptions was the First Amendment's Free Exercise Clause. The Supreme Court's decision in *Employment Division v. Smith* largely brought to a close the era of constitutionally compelled religious accommodations from generally applicable laws.²⁵ Prior to *Smith*, courts had analyzed claimed burdens on the

24. See Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 14-16 (2015) (developing a distinction between targeted and general accommodations of religion).

25. See 494 U.S. 872, 879, 885 (1990).

free exercise of religion using a strict scrutiny framework²⁶ first laid out in *Sherbert v. Verner*.²⁷ In *Smith*, the Supreme Court effectively limited *Sherbert* to its facts and held as a general matter that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²⁸ In other words, a government prohibition that is generally applicable and nondiscriminatory is presumptively consistent with the Free Exercise Clause, irrespective of its effect on religious practice.

At first blush, *Smith* seems to settle the question whether the Free Exercise Clause requires religious accommodations from nondiscrimination laws. The Supreme Court has not addressed the issue of noncompliance with nondiscrimination laws after *Smith*, but nondiscrimination laws are, in most cases, neutral laws of general applicability, and so it would seem logical that an individual cannot invoke the Free Exercise Clause to excuse himself from compliance. In *Smith* itself, the Court suggested that its rule precludes religious exemptions from “laws providing for equality of opportunity for the races.”²⁹ The same logic would prevent free exercise claims for religious exemptions from laws prohibiting discrimination on any other basis, and other courts have dismissed free exercise claims demanding exemptions from nondiscrimination requirements for that reason.³⁰

The Supreme Court has squarely held, however, that the Free Exercise Clause (and the Establishment Clause) can be invoked to allow noncompliance with nondiscrimination requirements in one context: “ministerial” employees

26. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Gillette v. United States*, 401 U.S. 437, 462 (1971).

27. 374 U.S. 398, 403 (1963). In *Sherbert*, the plaintiff challenged South Carolina’s denial of unemployment benefits after she was fired for refusing to work on her Sabbath. *Id.* at 399-401. The Supreme Court found for the plaintiff. If the restriction on religious practice “is to withstand appellant’s constitutional challenge, it must be . . . because any incidental burden on the free exercise of appellant’s religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

28. *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in the judgment)); *id.* at 883 (limiting *Sherbert* to “the unemployment compensation field”).

29. *Id.* at 888-89 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983)).

30. See *N. Coast Women’s Care Med. Grp. v. San Diego Cty. Superior Court*, 189 P.3d 959, 963-67 (Cal. 2008) (applying *Smith* to reject doctors’ claim that the Free Exercise Clause allowed them to turn away, in violation of state civil rights law, a lesbian patient seeking in vitro fertilization); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58-59, 73, 75 (N.M. 2013) (applying *Smith* to reject a photography studio’s claim that the Free Exercise Clause allowed it to decline, in violation of state civil rights law, to photograph a same-sex wedding).

of a religious organization.³¹ In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court held that the Free Exercise Clause categorically protects “a religious organization’s freedom to select its own ministers” and therefore precludes a claim of employment discrimination by an employee who qualifies as such a minister.³² The Court reached this holding even while acknowledging that employment nondiscrimination laws are “valid and neutral law[s] of general applicability,” explaining that regulation of ministerial employment “concerns government interference with an internal church decision that affects the faith and mission of the church itself.”³³

It is not clear *Hosanna-Tabor* will have much reach beyond the narrow class of employees who qualify as ministerial. The Court was quite clear that the ministerial exception is based on the premise that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon *more than a mere employment decision*.”³⁴ It consequently limited its holding to the precise situation in *Hosanna-Tabor*: “an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.”³⁵ Arguments can and will be made at the margins both as to which organizations qualify as “church[es]” and which employees qualify as “minister[s].”³⁶ But absent a major departure from current Religion Clauses doctrine, the ministerial exception will remain just that.

Some litigants are currently seeking such a departure, and the Supreme Court has now agreed to take up a free exercise challenge to state nondiscrimination regulations that lack a religious exemption in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.³⁷ If the Supreme Court rules for the petitioners in that case on free exercise grounds, the playing field could shift

31. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

32. See *id.* at 188-90.

33. *Id.* at 190.

34. *Id.* at 188 (emphasis added).

35. *Id.* at 196.

36. Compare, e.g., *id.* at 196 (Thomas, J., concurring) (“[T]he Religion Clauses require civil courts to . . . defer to a religious organization’s good-faith understanding of who qualifies as its minister.”), with *id.* at 199 (Alito, J., concurring) (“The ‘ministerial’ exception should . . . apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”).

37. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 290-92 (Colo. App. 2015) (holding that a state LGBT nondiscrimination law “is a neutral law of general applicability, and does not offend the Free Exercise Clause of the First Amendment”), cert. granted sub nom. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017); see also Petition for a Writ of Certiorari at 25-30, *Masterpiece Cakeshop*, No. 16-111 (U.S. July 22, 2016), 2016 WL 3971309.

dramatically in this area. But for now, no modern court has endorsed the position that the Free Exercise Clause limits the application of nondiscrimination law to private parties.

B. General Accommodations

In the post-*Smith* era, religious protection more commonly takes the form of a “general” legislative accommodation. By a general accommodation, I mean one that applies across a broad range of substantive areas and that is neutral as to the content of the religious belief—aside from requiring that the belief be religious. The paradigmatic general accommodation is RFRA, passed by Congress in 1993.³⁸ RFRA provides: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³⁹ RFRA is transsubstantive: Any action by “a branch, department, agency, instrumentality, [or] official (or other person acting under color of law) of the United States” is subject to its constraints,⁴⁰ regardless of the type of action.⁴¹ RFRA is also neutral to the content of the religious belief: It protects “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁴² All that matters is that the regulated action is religious.

Other religious accommodations at the state and federal levels follow this model. At the state level, twenty-one states had passed statutes similar to the federal RFRA as of October 2017.⁴³ At the federal level, the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000⁴⁴ applies the same two-

38. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2016)).

39. 42 U.S.C. § 2000bb-1(b).

40. *Id.* § 2000bb-2(1).

41. *See id.* § 2000bb-1(a).

42. *Id.* § 2000cc-5(7)(A); *see also id.* § 2000bb-2(4) (defining “exercise of religion” by reference to § 2000cc-5(7)(A)’s definition of “religious exercise”).

43. *See State Religious Freedom Restoration Acts*, NAT’L CONF. ST. LEGISLATURES (May 4, 2017), <https://perma.cc/8CGC-3WD3> (listing existing statutes); *see also Jonathan Griffin, 2017 Religious Freedom Restoration Act Legislation*, NAT’L CONF. ST. LEGISLATURES (May 4, 2017), <https://perma.cc/N8NZ-C58L> (listing pending legislation in nine states); *Legislation Affecting LGBT Rights Across the Country*, ACLU, <https://perma.cc/R72P-RGHP> (archived Oct. 10, 2017) (tracking pending legislation).

44. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5). Another example of a general accommodation at the federal level is the Church Amendment, which provides:

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered

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part test set forth in RFRA to any government action that imposes “a substantial burden on the religious exercise of a person residing in or confined to an institution”⁴⁵ or that “implement[s] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,”⁴⁶ so long as the government actor receives federal funds or the burden brings the action within reach of Congress’s commerce power.⁴⁷

The application of general accommodations to nondiscrimination laws might be expected to track courts’ pre-*Smith* analysis under the Free Exercise Clause. The explicit purpose of RFRA was “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened.”⁴⁸ RFRA’s congressional sponsors and commentators after its enactment emphasized that it was meant to restore the law to its pre-*Smith* state.⁴⁹

The Court’s pre-*Smith* jurisprudence had never held that the Free Exercise Clause compelled accommodations from nondiscrimination laws. In *Bob Jones University v. United States*, the Supreme Court considered a free exercise challenge to the denial of tax-exempt charitable status to educational institutions that banned interracial dating on religious grounds.⁵⁰ The Court held squarely that the government has a “compelling . . . interest in eradicating

by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

42 U.S.C. § 300a-7(d); *see also* National Research Service Award Act of 1974, Pub. L. No. 93-348, § 214(b), 88 Stat. 342, 353 (enacting the Church Amendment).

45. 42 U.S.C. § 2000cc-1(a).

46. *Id.* § 2000cc(a)(1).

47. *See id.* §§ 2000cc(a)(2), 2000cc-1(b).

48. *See id.* § 2000bb(b)(1) (setting out the “[c]ongressional findings and declaration of purposes”). For a full articulation of the pre-*Smith* test, see *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (holding that if a restriction on religious practice “is to withstand [a] constitutional challenge, it must be . . . because any incidental burden on the free exercise of [the plaintiff’s] religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate’” (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

49. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 217-21 (1994); *see also, e.g.*, 139 CONG. REC. 26,178 (1993) (statement of Sen. Kennedy) (“The Religious Freedom Restoration Act is designed to restore the compelling interest test for deciding free exercise claims. It does so by establishing a statutory right that adopts the standard previously used by the Supreme Court. In essence, the act codifies the requirement for the Government to demonstrate that any law burdening the free exercise of religion furthers a compelling governmental interest, and is the least restrictive means of achieving that goal.”).

50. 461 U.S. 574, 580-81, 602-03 (1983).

racial discrimination in education” that “substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”⁵¹ Lower courts generally reached the same conclusion in considering the application of nondiscrimination requirements to religious actors in the marketplace, although they did not do so universally.⁵²

Courts appear to have continued this acceptance of racial nondiscrimination mandates without accommodation in the RFRA context. The Supreme Court has not addressed the question in a holding, but dicta in *Hobby Lobby* unequivocally stated that the Court’s decision provided no shield to “discrimination in hiring, for example on the basis of race,” which “might be cloaked as religious practice to escape legal sanction,” because “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial

51. *Id.* at 604.

52. The leading case is *Newman v. Piggie Park Enterprises*, 256 F. Supp. 941 (D.S.C. 1966), a suit under Title II of the Civil Rights Act of 1964, the federal public accommodations provision, *see* Pub. L. No. 88-352, tit. II, 78 Stat. 241, 243-46 (codified at 42 U.S.C. §§ 2000a to 2000a-6). The district court rejected a free exercise challenge to the statute, noting: “This court refuses to lend credence or support to [the defendant’s] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.” *Piggie Park*, 256 F. Supp. at 945. The plaintiffs appealed a separate statutory holding, and the Fourth Circuit reversed on that issue. *See Newman v. Piggie Park Enters.*, 377 F.2d 433, 434-35 (4th Cir. 1967) (en banc). In doing so, it set out a subjective standard for awarding attorneys’ fees. *See id.* at 436-37. The plaintiffs appealed the fee issue to the Supreme Court, which rejected the Fourth Circuit’s standard and held that prevailing Title II plaintiffs are entitled to attorneys’ fees absent special circumstances. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401-02 (1968) (per curiam). In a footnote, the Court observed that the defendants had “interposed defenses so patently frivolous” that denying attorneys’ fees “would be manifestly inequitable.” *Id.* at 402 n.5. One such defense: their free exercise challenge. *Id.*

Other courts reached similar conclusions. *See, e.g.*, EEOC v. Pac. Press Publ’g Ass’n, 676 F.2d 1272, 1277 (9th Cir. 1982) (“Every court that has considered Title VII’s applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin.”); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (holding that the application of nondiscrimination statutes to a for-profit employer was justified by a compelling state interest in “eliminating discrimination based upon sex, race, marital status, or religion” in the marketplace and was the least restrictive means of achieving that interest), *appeal dismissed for lack of jurisdiction sub nom. Sports & Health Club, Inc. v. Minnesota ex rel. Gomez-Bethke*, 478 U.S. 1015 (1986). *But see Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm’n*, 766 F.2d 932, 935, 955 (6th Cir. 1985) (holding that the application of nondiscrimination laws without any accommodation to a religious school was unconstitutionally burdensome because it was not the least restrictive means of achieving the state’s compelling interest in nondiscrimination), *rev’d on other grounds*, 477 U.S. 619 (1986).

discrimination are precisely tailored to achieve that critical goal.”⁵³ The same logic would presumably apply to other general accommodations like RLUIPA.

In the case of nondiscrimination mandates for characteristics besides race, however, courts have been more likely to hold that the *Hobby Lobby* dicta is limited and to apply the logic of *Hobby Lobby* to find that RFRA requires an accommodation. The protections at issue in post-*Hobby Lobby* cases are very new and involve gender identity; it is unclear how courts’ RFRA analysis—of both the compelling interest furthered by the protections and the appropriate tailoring for such protections—will evolve as cases work their way to higher courts and as social norms continue to change. It is too soon to make any concrete predictions about the ultimate fate of those protections. That said, two recent decisions from district courts—*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*⁵⁴ and *Franciscan Alliance, Inc. v. Burwell*⁵⁵—suggest that employers and service providers may be able to successfully use RFRA as a shield against nondiscrimination suits and as a sword against nondiscrimination regulations. It is worth discussing the reasoning in those decisions in some detail because they illustrate how, post-*Hobby Lobby*, RFRA and other general accommodations may be read expansively to exempt religious actors from nondiscrimination requirements.

1. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*

The first decision, in *R.G. & G.R. Harris Funeral Homes*, held that RFRA prevented the U.S. Equal Employment Opportunity Commission (EEOC) from enforcing Title VII of the Civil Rights Act of 1964’s prohibition on sex discrimination in the workplace against a funeral home on behalf of a transgender employee.⁵⁶ The case concerned a funeral home with strict and distinct dress codes for its male and female employees.⁵⁷ The funeral home was a privately incorporated for-profit entity, and the owner believed that “God ha[d] called him to serve grieving people and that his purpose in life [was] to minister to the grieving.”⁵⁸ An employee of the funeral home who had previously presented as a man informed the owner that after a long struggle with gender dysphoria, she had come to terms with the fact that she was a trans

53. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

54. 201 F. Supp. 3d 837, 841-42 (E.D. Mich. 2016), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016).

55. 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016).

56. See 201 F. Supp. 3d at 841; see also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)).

57. See *R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. at 840, 843-44.

58. *Id.* at 855.

woman.⁵⁹ The employee explained that she planned to conform to the funeral home's dress code for female employees going forward.⁶⁰ Two weeks after the employee conveyed this information to the owner, he fired her, telling her "coming to work dressed as a woman was not going to be acceptable."⁶¹ The employee complained to the EEOC, and the EEOC filed suit under Title VII.⁶² The EEOC proceeded under the theory that the funeral home terminated the employee on the basis of her failure to conform to sex stereotypes in the workplace—specifically, the stereotype that someone born with a male body should dress in a traditionally masculine manner rather than a traditionally feminine one—and thus violated Title VII as interpreted in *Price Waterhouse v. Hopkins* and subsequent Sixth Circuit decisions.⁶³

On summary judgment, the district court found that the employee had been fired on account of her refusal to comply with the men's dress code and held that the firing would constitute employment discrimination under Sixth Circuit case law, but the court nevertheless ruled for the funeral home.⁶⁴ The court held that RFRA prevented the EEOC from enforcing Title VII against the funeral home.⁶⁵ The funeral home's owner testified that he "believes that he 'would be violating God's commands' if he were to permit one of the Funeral Home's biologically-male-born funeral directors to wear the skirt-suit uniform for female directors while at work" because he "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift."⁶⁶ Forcing the home to employ a transgender woman who dressed as a woman, the court said, would therefore impose a substantial burden on the funeral home's ability to operate in accordance with its owner's religious beliefs.⁶⁷ As such, the EEOC could only enforce Title VII

59. See *id.* at 844-45.

60. *Id.* at 845.

61. See *id.* (quoting the employee's deposition).

62. *Id.* at 845-46.

63. See *id.* at 849; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality opinion) (holding that Title VII's ban on sex discrimination prohibits employers from taking employment actions on the basis of sex stereotypes), superseded in other part by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 and 42 U.S.C.); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (holding that a trans woman had stated a Title VII claim on a sex stereotyping theory).

64. See *R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. 3d at 840-41.

65. See *id.* at 841-42.

66. *Id.* at 856.

67. See *id.* at 857. Technically, because the funeral home was a closely held corporation, the court applied *Hobby Lobby* and held that enforcing Title VII would impose a substantial burden on the funeral home's ability to conduct business in accordance with its beliefs.

footnote continued on next page

on behalf of the trans employee if doing so was supported by a compelling state interest and was the least restrictive means of furthering that interest.⁶⁸ The district court rejected the contention that dicta in *Hobby Lobby* controlled and expressed skepticism that enforcing Title VII against any one business owner was justified by a compelling state interest.⁶⁹

The court ultimately did not resolve that question, however, because it resolved the case on the second prong of RFRA.⁷⁰ Requiring the funeral home to allow its employee to wear traditionally feminine clothing, the court said, was not the least restrictive means of furthering a government interest in “removing or eliminating gender stereotypes in the workplace.”⁷¹ The court suggested a less burdensome means of enforcing the purported interest: The EEOC could merely require gender-neutral uniforms instead of requiring the funeral home to allow an employee to wear a female-identified one.⁷² The EEOC’s failure to consider this hypothesized less restrictive means was sufficient under RFRA to prevent EEOC enforcement of Title VII.⁷³

2. *Franciscan Alliance, Inc. v. Burwell*

In the second illustrative case, *Franciscan Alliance, Inc. v. Burwell*, the district court issued a preliminary injunction against U.S. Department of Health and Human Services (HHS) regulations interpreting Affordable Care Act (ACA) provisions banning discrimination by healthcare providers on the basis of sex.⁷⁴ The ACA prohibits “any health program or activity” receiving federal money from categorically excluding participants on a number of grounds.⁷⁵ Among the prohibited bases for categorical exclusion is “the ground prohibited under . . . title IX of the Education Amendments of 1972”⁷⁶—the federal law

Id. at 854-55, 857. But the distinction between the business and its owner is immaterial here.

68. See *id.* at 857.

69. See *id.* at 857-59.

70. See *id.* at 859, 863.

71. See *id.* at 863.

72. See *id.* at 862.

73. See *id.* at 841, 863.

74. 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116 (2016)); 45 C.F.R. § 92.4 (2016) (interpreting the ACA’s sex discrimination provision). The court has since stayed the case at the United States’s request while HHS reconsiders the rule at issue. See *Franciscan All., Inc. v. Price*, No. 7:16-cv-00108-O, 2017 WL 3616652, at *3 (N.D. Tex. July 10, 2017).

75. See 42 U.S.C. § 18116(a).

76. See *id.*; Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (2016)).

prohibiting discrimination in education “on the basis of sex.”⁷⁷ Interpreting that provision after notice-and-comment rulemaking, HHS defined “[o]n the basis of sex” to include “discrimination on the basis of pregnancy, false pregnancy, *termination of pregnancy*, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and *gender identity*.⁷⁸ HHS further determined that “a categorical coverage exclusion or limitation for all health services related to gender transition” would be prohibited under the statute; providers would thus be required to make an individualized determination, based on nondiscriminatory grounds, before they could decline to provide transition-related healthcare to a patient seeking it.⁷⁹

A Catholic hospital system and the Christian Medical and Dental Society, along with a number of states, challenged this definition under the Administrative Procedure Act.⁸⁰ The plaintiffs argued that prohibiting discrimination on the basis of “termination of pregnancy” and “gender identity” might force them to provide services or refer patients to other providers, both of which would violate their religious beliefs.⁸¹ For example, they feared that a surgeon who provides mastectomies to women with breast cancer might not be able to categorically refuse to provide a mastectomy to transgender men as part of their transitions, or that an obstetrician who performs dilation and curettage in treating a miscarriage might also be required to consider doing so for the purposes of abortion.⁸² The challengers made both administrative law and RFRA arguments.⁸³

The district court enjoined the regulation on administrative law grounds.⁸⁴ But the court also held that RFRA would likely prohibit applying the regulations to the religious plaintiffs in any event.⁸⁵ The hospital system’s and medical professionals’ religious exercise rights under RFRA were substantially burdened, the court said, because a prohibition on categorical exclusions “forces [them] to make an individualized assessment of every request

77. See 20 U.S.C. § 1681(a).

78. 45 C.F.R. § 92.4 (emphasis added); see *Franciscan All.*, 227 F. Supp. 3d at 671.

79. See 45 C.F.R. § 92.207(b); see also *Franciscan All.*, 227 F. Supp. 3d at 672.

80. *Franciscan All.*, 227 F. Supp. 3d at 670 & n.3, 673-74, 676; see Administrative Procedure Act, Pub. L. No. 79-404, § 10, 60 Stat. 237, 243-44 (1946) (codified as amended at 5 U.S.C. §§ 701-706 (2016)) (setting forth the Act’s provisions governing judicial review of agency action). The state plaintiffs in *Franciscan Alliance* were Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Texas, and Wisconsin. See 227 F. Supp. 3d at 670 n.3.

81. See *Franciscan All.*, 227 F. Supp. 3d at 671-72 (quoting 45 C.F.R. § 92.4).

82. See *id.* at 673.

83. See *id.* at 676, 691.

84. See *id.* at 670, 691.

85. *Id.* at 693.

for performance of” procedures that violate their religious beliefs, thus “operat[ing] so as to make the practice of . . . religious beliefs more expensive”⁸⁶ and “plac[ing] substantial pressure on [them] to perform and cover” procedures conflicting with their religious views.⁸⁷ As in *R.G. & G.R. Harris Funeral Homes*, the court in *Franciscan Alliance* expressed skepticism that the regulations furthered a compelling state interest—in this case, because the asserted “interest in ensuring that individuals have nondiscriminatory access to health care and health coverage” was not “one the government would be willing to pursue itself” by mandating coverage for gender transition procedures through Medicaid, Medicare, or the military’s health insurance program.⁸⁸ But as in *R.G. & G.R. Harris Funeral Homes*, the *Franciscan Alliance* court set that question aside and instead reached its decision on least-restrictive-means grounds.⁸⁹ Several less restrictive means were available to the government, the court said, including identifying providers who would willingly provide the procedures and paying for coverage from those providers.⁹⁰

3. A trend toward interpreting RFRA broadly

The similarities in reasoning in these two opinions suggest a trend toward interpreting RFRA broadly in the nondiscrimination context, in a way that will frequently if not always require an accommodation. Of course, two district court opinions do not necessarily constitute a sea change in the law. But the fact that the two courts followed similar tracks despite the very different postures and facts of the cases indicates at least the potential for more and higher courts to continue interpreting RFRA expansively in the wake of *Hobby Lobby*.⁹¹

Two notable elements in the courts’ reasoning point to this possibility. The first is the permissive reading both courts give to RFRA’s substantial burden prong. In each case, the court found that this prong was satisfied not because religious parties were forced to *engage* in conduct that conflicted with their religious beliefs but merely because they were required to *facilitate* it—in *R.G. & G.R. Harris Funeral Homes*, by the requirement to “*permit* one of the Funeral

86. See *id.* at 692 (last alteration in original) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014)).

87. See *id.*

88. See *id.* at 692-93 (quoting Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,380 (May 18, 2016)).

89. See *id.* at 693.

90. *Id.*

91. See Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 176 (2015) (“*Hobby Lobby* dramatically expanded the strength and reach of RFRA . . .”).

Home's biologically-male-born funeral directors to wear the skirt-suit uniform for female directors while at work,"⁹² and in *Franciscan Alliance*, by the requirement to "make an individualized assessment" of, and potentially a referral for, patients' requests for medical procedures the providers believed to be "immoral . . . in every circumstance."⁹³

Although only one of them cites it for this proposition,⁹⁴ both courts appear to have taken their lead on this issue from the Supreme Court's reasoning in *Hobby Lobby*, as well as from follow-on cases concerning contraception coverage.⁹⁵ In *Hobby Lobby*, the Court refused to assess whether providing employees with health insurance covering birth control was sufficiently connected to the act forbidden by plaintiffs' religion—destruction of an embryo—to constitute a substantial burden.⁹⁶ Rather, the Court said, a court's sole duty is to determine whether the belief that behavior "lies on the forbidden side of the line" is honestly held.⁹⁷ Exactly how far this duty of deference extends is unclear. But the district court decisions discussed here indicate that courts may take it as a signal to find a substantial burden on religious practice whenever a party can characterize a requirement as "enabling or facilitating"⁹⁸ behavior that conflicts with its religious views.

The second notable element is the district courts' aggressive reading of RFRA's least-restrictive-means requirement. Of course, the requirement that the government demonstrate it has chosen the least restrictive means of

92. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 856 (E.D. Mich. 2016)(emphasis added), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016).

93. 227 F. Supp. 3d at 692.

94. See *R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. 3d at 856 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014)).

95. See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (per curiam) (enjoining the government from enforcing the contraceptive coverage requirement against a religious institution that had notified the government that it met the requirements for a religious exemption—thus enabling the government to "facilitate the provision of full contraceptive coverage"—but had declined to complete the government-prescribed form or notify its insurers); *id.* at 2809, 2812 (Sotomayor, J., dissenting) (noting that the religious institution had objected to filing a form to notify its insurer of its religious objection to providing contraceptive coverage because it believed that doing so would facilitate the provision of contraception, "mak[ing] it complicit in grave moral evil" (quoting Emergency Application for Injunction Pending Appellate Review at 11, *Wheaton Coll.*, 134 S. Ct. 2806 (No. 13A1284))); see also *Zubik v. Burwell*, 136 S. Ct. 1557, 1559-60 (2016) (per curiam) (vacating and remanding RFRA cases involving similar objections to those at issue in *Wheaton College* in order to give the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise" without compromising women's contraceptive coverage).

96. See 134 S. Ct. at 2777-78.

97. *Id.* at 2779.

98. *Id.* at 2778.

achieving its objective has always been recognized as a stringent one.⁹⁹ But what is particularly striking in these cases is that the district courts were willing to rely on a hypothesized provision of services by the government as a less restrictive means of advancing the interest underlying nondiscrimination laws. In *Franciscan Alliance*, the court found that the government's requirement of nondiscriminatory medical treatment did not satisfy RFRA because the government could identify and pay for the care itself rather than requiring private parties to provide coverage and care through the market;¹⁰⁰ in *R.G. & G.R. Harris Funeral Homes*, the court found that the EEOC could have prevented gender identity discrimination by providing its own gender-neutral dress code rather than by requiring the religious employer to let its transgender employee comply with the female rules of its existing dress code.¹⁰¹

Here too, the lower courts seem to be taking their cue from *Hobby Lobby*.¹⁰² In *Hobby Lobby*, the government argued that direct government payment for contraceptive medication was not a cognizable less restrictive means under RFRA because RFRA "cannot be used to require creation of entirely new programs."¹⁰³ The Supreme Court rejected this argument.¹⁰⁴ Because the government itself could pay for contraceptive insurance coverage, the Court said, the requirement that employers provide that coverage was not the least restrictive means of advancing the governmental interest in access to contraception.¹⁰⁵

This reasoning made sense in the context of provision of services. The only way to ensure universal contraceptive coverage is for some actor to pay for it; once the *Hobby Lobby* Court established that the contraceptive mandate constituted a substantial burden on Hobby Lobby's religious exercise, the question was whether making employers pay was the least restrictive means of ensuring coverage.¹⁰⁶ But the district courts in *R.G & G.R. Harris Funeral Homes*

99. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

100. See *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).

101. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 861-62 (E.D. Mich. 2016), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016).

102. See *Gedicks*, *supra* note 91, at 162-63 (arguing that *Hobby Lobby*'s least-restrictive-means analysis depends on a hypothesized increase in government funding for contraception, even though that increase was not politically plausible).

103. See *Hobby Lobby*, 134 S. Ct. at 2781 (quoting Brief for the Petitioners at 15, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 173486).

104. *Id.*

105. *Id.* at 2780.

106. See *id.* at 2779-80.

and *Franciscan Alliance* attempted to follow the same logical chain in the very different context of nondiscrimination laws. To do so, they had to define the (assumed) compelling government interest narrowly. The purpose of Title VII was framed as “ensuring that [employees are] not subject to gender stereotypes in the workplace,”¹⁰⁷ and the purpose of the contested HHS rule interpreting the ACA’s nondiscrimination provisions as “expand[ing] access to transition and abortion procedures.”¹⁰⁸ These interests are ones that can be furthered by direct government action: proposing a new gender-neutral dress code or providing access to care directly. This framing sets aside any interest the government may have in compliance with nondiscrimination law as such—say, as a means to eliminate discrimination in society. If future courts follow this approach, modeling their reasoning on the benefit-oriented logic of *Hobby Lobby*, then arguments addressed to the broader societal benefits of nondiscrimination mandates may lose purchase.

Whether the interpretation given to *Hobby Lobby* by these district courts will be taken up across the judiciary remains to be seen. But their reasoning gives credence to the argument that “the *Hobby Lobby* moment” not only has substantial political implications for nondiscrimination mandates¹⁰⁹ but doctrinal ones as well.

C. Targeted Accommodations

Over and above the protections provided by general accommodations, legislatures also carve out protections for particular religious behavior. Unlike general accommodations, which exempt most or all religious actors and practices of any type from a specific class of regulations, targeted accommodations exempt a specific class of religious actors and practices from some or all regulations. Examples of targeted accommodations are as numerous and varied as burdens on religion. They include exemptions from the draft for conscientious objectors to war,¹¹⁰ prohibitions on adverse action against healthcare providers who refuse to perform abortions,¹¹¹ and exemptions in

107. See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 861-62 (E.D. Mich. 2016), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016).

108. See *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).

109. See Paul Horwitz, Comment, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 160, 172-76 (2014) (arguing that the political charge around *Hobby Lobby* stemmed in part from the perception that its holding would be used to license anti-LGBT discrimination).

110. See 50 U.S.C. § 3806(j) (2015) (exempting from selective service “any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form”).

111. See 42 U.S.C. § 238n(a) (2016).

less hot-button areas like slaughterhouse regulations.¹¹² They are efforts by the legislature to “relieve the believer—where it is possible to do so without sacrificing significant civic or social interests—from the conflicting claims of religion and society” in certain areas.¹¹³

Unsurprisingly, given the high potential for conflict between nondiscrimination laws and religious beliefs, targeted accommodations are a common counterpart to nondiscrimination mandates. Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of “race, color, religion, sex, or national origin,”¹¹⁴ contains an exemption for “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”¹¹⁵ The Fair Housing Act,¹¹⁶ which broadly prohibits discrimination in housing on the same grounds,¹¹⁷ includes a similar provision allowing religious organizations to prefer coreligionists in providing housing.¹¹⁸ Numerous other nondiscrimination laws contain similar exemptions for houses of worship and other religious organizations.¹¹⁹

Recent years have seen proposed targeted accommodations across the country, with a particular focus on LGBT nondiscrimination provisions. In the face of an ongoing movement to protect sexual orientation and gender identity, both Congress and a number of states took up measures to safeguard market participants’ religious beliefs that run counter to those protections. In Congress, this took the form of the proposed First Amendment Defense Act (FADA), which would prohibit the federal government from taking any adverse action, including denial of federal grants or contracts, against a person “wholly or partially on the basis that such person believes or acts in accordance

112. See 7 U.S.C. § 1906 (2016).

113. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 26 (1985).

114. 42 U.S.C. § 2000e-2(a).

115. *Id.* § 2000e-1(a).

116. Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619).

117. 42 U.S.C. § 3604 (prohibiting discrimination on the basis of “race, color, religion, sex, familial status, or national origin”).

118. *Id.* § 3607(a).

119. See, e.g., 20 U.S.C. § 1681(a)(3) (2016) (creating an exemption from Title IX for any “educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization”); 42 U.S.C. § 12187 (exempting “religious organizations or entities controlled by religious organizations, including places of worship,” from the Americans with Disabilities Act’s public accommodations provisions).

with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.”¹²⁰ The Trump Administration floated, but so far has not issued, an executive order purporting to provide similar protections to an even broader category of market participants.¹²¹ At the state level, over a dozen state legislatures have considered bills that protected some or all merchants from adverse government action if they refused to serve customers based on a religious or moral belief in traditional marriage or in the confinement of sexual relations to that marriage.¹²²

Only one such bill passed in 2016¹²³: Mississippi’s Protecting Freedom of

120. H.R. 2802, 114th Cong. § 3 (2015).

121. See Sarah Posner, *Leaked Draft of Trump’s Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, NATION (Feb. 1, 2017), <https://perma.cc/38BY-Z62K>. President Trump did issue a narrower order addressing only religious objections to the contraceptive coverage requirement and the tax consequences of religious organizations’ political speech. See Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017); see also Emma Green, *Why Trump’s Executive Order on Religious Liberty Left Many Conservatives Dissatisfied*, ATLANTIC (May 4, 2017), <https://perma.cc/ME4W-SP2N> (reporting conservatives’ and religious groups’ mixed reactions to the order).

122. See Memorandum from Public Rights/Private Conscience Project to Interested Parties, *supra* note 8, at 1-8; see also *Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, <https://perma.cc/4AUL-H7CH> (archived Oct. 10, 2017).

123. Three other targeted accommodations passed state legislatures in 2016, none of which singled out protected beliefs. Florida passed HB 43, protecting religious institutions and their ministers from being forced to solemnize or celebrate marriages that violate their religious beliefs. See Act of Mar. 10, 2016, ch. 2016-50, § 1, 2016 Fla. Laws 485, 485 (codified at FLA. STAT. § 761.061 (2017)). Kansas enacted SB 175, protecting religious student associations from adverse action if they exclude members who do not adhere to their religious beliefs. Act of Mar. 22, 2016, ch. 10, § 2, 2016 Kan. Sess. Laws 25, 25-26 (codified at KAN. STAT. ANN. § 60-5312 (2017)). And Tennessee passed SB 1556, providing:

No counselor or therapist providing counseling or therapy services shall be required to counsel or serve a client as to goals, outcomes, or behaviors that conflict with the sincerely held principles of the counselor or therapist; provided, that the counselor or therapist coordinates a referral of the client to another counselor or therapist who will provide the counseling or therapy.

Act of Apr. 11, 2016, ch. 926, § 1(a), 2016 Tenn. Pub. Acts 1328, 1328 (codified at TENN. CODE ANN. § 63-22-302(a) (2017)).

In 2017, South Dakota enacted SB 149 “to provide certain protections to faith-based or religious child-placement agencies.” See Act of Mar. 10, 2017, ch. 114, 2017 S.D. Sess. Laws 307 (codified at S.D. CODIFIED LAWS §§ 26-6-36 to -50 (2017)). The law protects any such agency from adverse government action based on a refusal “to provide any service that conflicts with, or provide any service under circumstances that conflict with[,] any sincerely-held religious belief or moral conviction of the child-placement agency that shall be contained in a written policy, statement of faith, or other document adhered to by a child-placement agency.” S.D. CODIFIED LAWS § 26-6-38. This law does not deal with marriage or sexual relations directly, but the adoption context and the require-

footnote continued on next page

Conscience from Government Discrimination Act,¹²⁴ commonly referred to as HB 1523.¹²⁵ HB 1523 lists three protected “religious beliefs or moral convictions”:

- (a) Marriage is or should be recognized as the union of one man and one woman;
- (b) Sexual relations are properly reserved to such a marriage; and
- (c) Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.¹²⁶

It then provides a number of specific protections for actions taken in accordance with any of those beliefs by specified parties.¹²⁷ Some of those protections are relatively familiar in the nondiscrimination context: Religious institutions, for example, are protected against adverse government action if they make employment decisions, discriminate in housing, limit foster care services, or decline to solemnize marriages on the basis of a protected belief.¹²⁸

HB 1523 also contains several provisions that are more unusual in the nondiscrimination context. It establishes a mechanism by which government employees responsible for issuing marriage licenses may recuse themselves and find a replacement on the grounds of a protected belief.¹²⁹ HB 1523 also protects several classes of private actors. It prohibits adverse government action against any person who “declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services” on the basis of a protected belief.¹³⁰ It gives the same protection to providers of an enumerated list of services, most of which bear some relation to weddings.¹³¹ And the law protects any person who “establishes sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to

ment of an official statement of faith both raise fascinating questions that should be considered in future work.

124. Ch. 334, 2016 Miss. Laws 427 (codified at MISS. CODE ANN. §§ 11-62-1 to -19 (2017)).

125. *See supra* note 13.

126. MISS. CODE ANN. § 11-62-3.

127. *See id.* § 11-62-5.

128. *See id.* § 11-62-5(1) to (2).

129. *See id.* § 11-62-5(8).

130. *See id.* § 11-62-5(4).

131. *See id.* § 11-62-5(5) (protecting providers of “[p]hotography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services” and of “[f]loral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related services, accommodations, facilities or goods”).

restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings" on the basis of a protected belief.¹³²

HB 1523, FADA, and many of the other proposed targeted accommodations involving LGBT issues share a feature that is apparently new in the context of nondiscrimination accommodations: a categorical exemption from compliance with nondiscrimination laws for private employers and businesses rather than for religious institutions. As noted above, such categorical exemptions from nondiscrimination mandates are common for religious institutions, broadly defined, and they exist for individuals outside the nondiscrimination context.¹³³ But their extension to private parties would significantly expand the ability of individuals and especially businesses to be excused from compliance with nondiscrimination laws on religious grounds.

It is notable as well that these accommodations are not attached to any nondiscrimination protection, unlike the religious accommodations in federal civil rights laws. Instead, they are prophylactic and perhaps aimed at protecting religious exercise from nondiscrimination mandates promulgated by a different political actor: federal contracting rules made by the President in the case of FADA¹³⁴ and municipal nondiscrimination ordinances in the case of state laws.¹³⁵

Most of these legislative proposals have not yet gone anywhere. Several bills similar to HB 1523 were vetoed or tabled,¹³⁶ and FADA has not yet been put to a vote in Congress.¹³⁷ Nonetheless, the wave of such legislation and the

132. See *id.* § 11-62-5(6).

133. See *supra* notes 110-19 and accompanying text.

134. See Exec. Order No. 13,672, 3 C.F.R. 282 (2015), reprinted in 42 U.S.C. § 2000e app. at 4625-26 (2016) (amending federal contracting requirements to prohibit discrimination in hiring by contractors on the basis of sexual orientation or gender identity).

135. See, e.g., JACKSON, MISS., CODE OF ORDINANCES § 86-302 (2017) ("The right of an otherwise qualified person to be free from discrimination because of that person's . . . sexual orientation[or] gender identity . . . is recognized as and declared to be a civil right.").

136. See Greg Bluestein, *Breaking: Nathan Deal Vetoed Georgia's "Religious Liberty" Bill*, ATLANTA J.-CONST. (Apr. 9, 2016), <https://perma.cc/Q8C6-Q32N> (reporting that Georgia's governor vetoed legislation that would have granted accommodations to faith-based organizations and enacted provisions mirroring RFRA); Dana Ferguson, *Panel Shelves Bill Protecting Conservative Views on Sex, Marriage*, ARGUS LEADER (Sioux Falls, S.D.) (Feb. 25, 2016, 3:42 PM CT), <https://perma.cc/Z6YU-5TVX> (reporting that the South Dakota Senate Judiciary Committee tabled a bill that would have "allow[ed] people or organizations to discriminate against same-sex couples, unmarried pregnant women or transgender people without jeopardizing state contracts or employment"); see also H.R. 757, 153d Gen. Assemb., 2d Sess. (Ga. 2016); H.R. 1107, 2016 Legis. Assemb., 91st Sess. (S.D. 2016).

137. See H.R. 2802: *First Amendment Defense Act*, CONGRESS.GOV, <https://perma.cc/7LJM-VVGL> (archived Oct. 10, 2017) (noting that FADA was referred to two committees but not voted on).

features these bills share indicate a trend in targeted religious protections. As LGBT advocates continue to push for protection from courts, agencies, and municipalities, legislatures may continue to respond with targeted categorical exemptions for religious believers in the marketplace.

II. A Reexamination of the “Third-Party Harm” Doctrine

The new wave in nondiscrimination accommodations calls for a new consideration of the Establishment Clause implications of those accommodations: a fleshed-out “law of church and market.”¹³⁸ So far, courts and scholars that have taken up that reconsideration have centered their thinking on the argument that both targeted and general nondiscrimination accommodations impose impermissible harm on third parties. While there appears to be a consensus among scholars opposed to nondiscrimination exceptions that third-party harm provides the normative and constitutional basis for their opposition, there is much less consensus as to why and how third-party harm matters. Some arguments are based on the claim that allowing members of minority groups to suffer harm for religious reasons sends an impermissible message of endorsement of that religious belief or impermissibly favors religious believers who hold that belief over those who do not.¹³⁹ Others point to the magnitude of the harm, claiming that the Establishment Clause limits accommodations to those that refrain from hurting others too severely.¹⁴⁰

138. Nathan B. Oman, *Essay, The Need for a Law of Church and Market*, 64 DUKE L.J. ONLINE 141, 160 (2015) (calling for scholars and courts to address how the law should structure the relationship between commerce and religion).

139. See Knauer, *supra* note 19, at 790 (“In short, religion marriage exemptions provide special treatment and absolution from the law for a particular religious viewpoint.”); Loewentheil, *supra* note 21, at 486 (“[T]he more the state accommodates free exercise claims that produce this kind of expressive norm, the more it codifies discrimination against nonbelievers.”).

140. See Alex J. Luchenitser, *A New Era of Inequality?: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL’Y REV. 63, 87 (2015) (“[T]he optimal answer [to *Hobby Lobby*] would be to amend RFRA to specifically exclude requests for exemptions that would impose nontrivial harms on third parties.”); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274, 290-91, 291 n.84 (2010) (“The proposed exemption [accommodating religious objections to facilitating same-sex marriages] avoids constitutional problems only if it is limited to circumstances in which a refusal of services does not cause substantial harm to those refused.”); Melling, *supra* note 22, at 189 (“Less discussed, yet essential to the conversation, are the harms resulting from accommodations: to those denied jobs, services, and benefits by virtue of an accommodation and to the underlying anti-discrimination goals.”); Tebbe, *supra* note 20, at 54 (“[S]ubstantial costs imposed on identifiable third parties because of religion accommodations do raise [constitutional] concerns, as the Court has repeatedly noted. Here, statutory exemptions for religious actors in marriage equality laws run up against this basic rule of constitutional law and the principle of political morality that it embodies.”).

In *Barber v. Bryant*, the Southern District of Mississippi relied on all of these theories to enjoin the operation of Mississippi's HB 1523.¹⁴¹ Because that court's opinion is the first in the country to set aside one of the new wave of nondiscrimination exemptions on Establishment Clause grounds, its reasoning is particularly deserving of attention. Although the Fifth Circuit subsequently reversed the district court's decision on standing grounds, it expressed no opinion about the merits.¹⁴² In the likely event that plaintiffs who do have standing bring a new challenge to the law, the *Barber* decision will provide a template. It will also do so for challenges to other laws that may be enacted in the future. Moreover, the case was a field test for recent academic debates over nondiscrimination accommodations; indeed, many of the scholars engaged in that debate weighed in as amici on appeal.¹⁴³ For that reason, this Part's structure tracks the structure of the court's opinion and discusses its reasoning along with the arguments made by scholars in academic contexts.

A. Do Targeted Nondiscrimination Accommodations Impermissibly Discriminate Among Religions?

The first constitutional argument against religious accommodations from nondiscrimination laws is that when those accommodations single out a belief for protection, they impermissibly favor that belief. Of course, this argument only applies to targeted accommodations; by definition, general accommodations that simply protect religious exercise as such do not discriminate among religions. The basis for this claim is the principle, expressed in *Larson v. Valente*, that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”¹⁴⁴ That principle can be expressed as parts one and two of the Supreme Court's three-part *Lemon* test—“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .”¹⁴⁵—or within the framework of Justice O'Connor's more

141. See 193 F. Supp. 3d 677, 688, 721-22 (S.D. Miss. 2016), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017), *petition for cert. filed*, No. 17-547 (U.S. Oct. 12, 2017); *see also* Protecting Freedom of Conscience from Government Discrimination Act, ch. 334, 2016 Miss. Laws 427 (codified at MISS. CODE ANN. §§ 11-62-1 to -19 (2017)); *supra* notes 124-32 and accompanying text. The court also enjoined the law on equal protection grounds. *Barber*, 193 F. Supp. 3d at 688.

142. See *Barber v. Bryant*, 860 F.3d 345, 350, 352 (5th Cir. 2017), *petition for cert. filed*, No. 17-547 (U.S. Oct. 12, 2017).

143. See Brief of Church-State Scholars as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance at 1, *Barber*, 860 F.3d 345 (Nos. 16-60477 & 16-60478), 2016 WL 7438560.

144. 456 U.S. 228, 244 (1982).

145. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The third part provides that “the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

parsimonious “endorsement” test, which asks whether a government action “was intended to endorse or had the effect of endorsing” religion.¹⁴⁶

Some participants in the nondiscrimination debate argue that religious exemptions violate this principle by singling out beliefs for protection. The district court’s opinion in *Barber* puts significant stress on the argument that “HB 1523 establishes an official preference for certain religious beliefs over others.”¹⁴⁷ In doing so, the opinion is in line with scholarship arguing that by selecting particular religious beliefs for protection—usually, the belief that marriage can only take place between one man and one woman—the state is not acting with a secular purpose, or it is at least sending a message of endorsement by providing “special treatment” for holders of those beliefs.¹⁴⁸

Of course, opposition to same-sex marriage, sex outside of marriage, or acknowledgement of transgender identity is not confined to any particular religion or group of religions, and beliefs on that subject are rarely uniform even within a denomination. But the *Barber* court brushes that objection aside, reasoning that in enumerating beliefs for protection, “the State has favored certain *doctrines*,” even if it has not favored whole denominations.¹⁴⁹ Indeed, the court says, the fact that there are intrafaith disputes on the issue aggravates the Establishment Clause violation because protecting certain beliefs “chooses sides in this internal debate.”¹⁵⁰

It is difficult to see how this argument can be adopted as a constitutional rule in the context of accommodations. When a state is in the business of setting up public displays,¹⁵¹ presenting views to students,¹⁵² or imposing

146. See *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O’Connor, J., concurring) (concluding that a statute providing special protections for Sabbath observers “has an impermissible effect because it conveys a message of endorsement of the Sabbath observance”).

147. See *Barber v. Bryant*, 193 F. Supp. 3d 677, 716 (S.D. Miss. 2016), *rev’d on other grounds*, 860 F.3d 345 (5th Cir. 2017), *petition for cert. filed*, No. 17-547 (U.S. Oct. 12, 2017).

148. See *Knauer*, *supra* note 19, at 792-94; see also *Tebbe*, *supra* note 20, at 52-53 (arguing that accommodations that “shift[] burdens onto third parties” result in “government favoritism” that “works constitutional harm”).

149. See 193 F. Supp. 3d at 718.

150. *Id.* at 718-19.

151. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 850, 881 (2005) (affirming a preliminary injunction against the display of the Ten Commandments in a courthouse on Establishment Clause grounds); *Lynch*, 465 U.S. at 671, 687 (majority opinion) (upholding the constitutionality of a town’s display of a crèche at Christmas).

152. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 581-82 (1987) (holding unconstitutional a statute requiring the teaching of creationism in public schools that also teach evolution); *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985) (holding unconstitutional a state law setting aside school time for prayer).

onerous reporting requirements,¹⁵³ it is quite clear how its actions could prefer religion in general or religious doctrines in particular in a way that tends toward unconstitutional establishment. But all targeted accommodations, by definition, protect certain beliefs and not others. The precise purpose of such accommodations is to “single out” a particularly burdened belief or practice for relief, and providing that relief is distinct from endorsement or favoritism. No reasonable observer would think that the federal government has endorsed the wearing of yarmulkes, even though Orthodox Jewish servicemen are exempted from the ordinary military dress code prohibiting headwear.¹⁵⁴ Nor would it make sense to say that such an exemption “chooses sides in” the “internal debate” within Judaism about whether wearing yarmulkes is religiously compulsory. A workable constitutional rule must take account of those concededly valid accommodations.¹⁵⁵

The Supreme Court has only found impermissible favoritism or endorsement in government accommodations when those accommodations conferred a substantial benefit denied to other parties. In *Estate of Thornton v. Caldor, Inc.*, the Court held that a Connecticut law that gave every employee in the state the right to a day off—and gave employees who celebrated a Sabbath an absolute right to have their day off on their Sabbath—was impermissibly nonneutral because it had “a primary effect that impermissibly advance[d] a particular religious practice.”¹⁵⁶ And in *Texas Monthly, Inc. v. Bullock*, the Court struck down a tax exemption for religious publications, with a plurality finding that the state had “place[d] its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.”¹⁵⁷ In both cases, the

153. See *Larson v. Valente*, 456 U.S. 228, 231-32, 253-55 (1982) (holding unconstitutional a statute imposing registration and reporting requirements on religious organizations that collected a certain portion of revenue from nonmembers because it “effect[ed] the selective legislative imposition of burdens and advantages upon particular denominations”).

154. See 10 U.S.C. § 774(a) (2016) (“[A] member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force.”).

155. Cf. *Cutter v. Wilkinson*, 544 U.S. 709, 714-15, 724 (2005) (noting, in the course of upholding RLUIPA’s provisions regarding institutionalized persons, that if the statute were held unconstitutional on its face, “all manner of religious accommodations would fall”).

156. 472 U.S. 703, 705 & n.2, 710-11 (1985); see also *id.* at 711 (O’Connor, J., concurring) (“The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.”).

157. 489 U.S. 1, 5, 9, 15, 25 (1989) (plurality opinion).

government was not only lifting a burden but also conferring a valuable benefit. A guaranteed weekend day off or a lucrative tax exemption is the sort of benefit that might induce people to adopt a religious practice, in good faith or otherwise; therein lies the favoritism.¹⁵⁸

But nondiscrimination is not like that. A nondiscrimination exemption does not confer anything of pecuniary value. While there are doubtless people who wish to discriminate against certain customers or employees and would value the opportunity to do so, it is unlikely that anyone would *adopt* discriminatory beliefs or practices as a result of an exemption allowing them to do so.

B. Do Nondiscrimination Accommodations Impose an Impermissible Degree of Harm on Third Parties?

The second constitutional argument against religious accommodations from nondiscrimination laws is that because they license invidious discrimination, they impose an impermissible degree of harm on third parties who do not share the protected religious belief. This position relies on clear language in two Supreme Court decisions that came twenty years apart: *Caldor* in 1985¹⁵⁹ and *Cutter v. Wilkinson* in 2005.¹⁶⁰ *Caldor*, discussed above,¹⁶¹ struck down a Connecticut law mandating that Sabbath observers be guaranteed their Sabbath off from work.¹⁶² The Supreme Court, along with its language about favoritism, noted that the law took “no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath” and thus had “a primary effect that impermissibly advances a particular religious practice.”¹⁶³ This holding has long been taken to mean that religious accommodations that somehow overburden third parties run afoul of the Establishment Clause.¹⁶⁴

The Supreme Court appeared to endorse that proposition explicitly in *Cutter*, in the course of upholding section 3 of RLUIPA—its institutionalized-persons provision—against a facial challenge.¹⁶⁵ RLUIPA was not invalid under *Caldor*, the Court said, because “[p]roperly applying RLUIPA, courts must take

158. See McConnell, *supra* note 113, at 35-37.

159. 472 U.S. 703.

160. 544 U.S. 709.

161. See *supra* note 156 and accompanying text.

162. 472 U.S. at 706, 710-11.

163. *Id.* at 709-10.

164. See, e.g., Tebbe, *supra* note 20, at 52-53 (“[Caldor] gives the principle against burden shifting [to the disadvantage of third parties] the force of law.”).

165. 544 U.S. at 720.

adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”¹⁶⁶ Although the Court did not put it in exactly these terms, this statement could be read as holding, as a matter of constitutional avoidance, that courts must not interpret RLUIPA in a way that would impose severe burdens on third parties. That is certainly how scholars hostile to religious accommodations have interpreted it.¹⁶⁷ And Justice Kennedy’s concurrence in *Hobby Lobby*, without citation, sounded a similar note:

Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.¹⁶⁸

Some scholars took this to be a further reaffirmation of the “do no harm” principle because Kennedy and the four dissenting Justices discussed the principle of avoiding third-party burdens.¹⁶⁹ In striking down HB 1523, the district court in *Barber v. Bryant* agreed, characterizing *Caldor* and *Hobby Lobby* as embodying a “do no harm” principle.¹⁷⁰

The argument relying on these cases focuses on the straightforward parallel between nondiscrimination accommodations and the accommodation at issue in *Caldor*. In both cases, the accommodation is “absolute and unqualified.”¹⁷¹ And in both cases, there is the potential for real harm to be inflicted on third parties. If, for example, covered government employees

166. *Id.*

167. See, e.g., Gedicks & Van Tassell, *supra* note 21, at 358 (“*Caldor*’s invalidation of permissive accommodations that generate negative religious externalities was unanimously affirmed in the Court’s most recent permissive accommodation decision, *Cutter v. Wilkinson*.”).

168. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring).

169. See, e.g., Gedicks, *supra* note 91, at 175 (“If there is any silver lining to the cloud *Hobby Lobby* has cast over the liberty of employees to be free from paying for their bosses’ religion, it is that five Justices expressly recognized that RFRA does not authorize permissive religious exemptions that shift the costs of observing a religion from those who practice and believe it to those who do not.” (footnote omitted)); see also *Hobby Lobby*, 134 S. Ct. at 2786-87 (2014) (Kennedy, J., concurring); *id.* at 2801 (Ginsburg, J., dissenting) (“The Court ultimately acknowledges a critical point: RFRA’s application ‘must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’ No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.” (citation omitted) (quoting *id.* at 2781 n.37 (majority opinion))).

170. 193 F. Supp. 3d 677, 721 (S.D. Miss. 2016), *rev’d on other grounds*, 860 F.3d 345 (5th Cir. 2017), *petition for cert. filed*, No. 17-547 (U.S. Oct. 12, 2017).

171. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985); *Barber*, 193 F. Supp. 3d at 721.

exercise their right under HB 1523, it inconveniences their coworkers and “results in LGBT citizens being personally and immediately confronted with a denial of service.”¹⁷² The same potential for inconvenience and exposure to invidious discrimination applies in more or less every case of an exception to a nondiscrimination mandate. This argument has some normative and pragmatic appeal—how can religious believers force nonbelievers to bear the burden of their religious practice?—but it has two serious problems as a matter of jurisprudence, one from precedent and one from principle.

As a matter of precedent, it is difficult to square a rule against substantial third-party harm with a variety of religious accommodations that have been upheld. To take perhaps the most obvious example, a person “who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form” is exempted from compulsory military service.¹⁷³ This exemption is absolute and unqualified, and the consequence to third parties is potentially immense: Someone else may have to go to war in the conscientious objector’s place. Moreover, the draft exemption discriminates among beliefs. A sincere religious or moral objection to all war is entitled to an accommodation, but a person opposed only to some wars, like those that do not meet the Catholic Church’s catechism on just war, has no such entitlement.¹⁷⁴ In *Gillette v. United States*, the Supreme Court explicitly upheld that distinction under the Establishment Clause.¹⁷⁵

This inconsistency in the application of a “do no harm” theory of the Establishment Clause speaks to a more fundamental difficulty: A third-party harm theory does not identify, in a principled way, which exemptions tend toward an establishment of religion and which ones do not. If the danger the Establishment Clause is meant to protect against is the elevation of one religion over others (or none), then a theory of how the Establishment Clause works should capture government actions that in some way lead toward that elevation and should allow government actions that do not.

172. *Barber*, 193 F. Supp. 3d at 721-22.

173. 50 U.S.C. § 3806(j) (2015). While this exception has been interpreted by the Supreme Court to apply all “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war,” see *Welsh v. United States*, 398 U.S. 333, 344 (1970) (plurality opinion), the core protection for religious conscientious objectors remains. In any event, most assertedly unconstitutional targeted accommodations apply either to religious or moral beliefs. For example, HB 1523 protects actions taken in compliance with certain “sincerely held religious beliefs or moral convictions.” MISS. CODE ANN. § 11-62-3 (2017).

174. See *Gillette v. United States*, 401 U.S. 437, 440-41, 443 (1971); *id.* at 470-71 (Douglas, J., dissenting in No. 325) (explaining objections to particular wars rooted in the Catechism of the Catholic Church).

175. *Id.* at 460 (majority opinion).

A theory based on the weight of the burden an accommodation places on others does not make that distinction effectively. Why does a religious accommodation that has adverse effects on third parties tend toward the establishment of religion more than an equally capacious accommodation that does not have those effects? In both cases, the government's actions are equally responsive to the concerns of religious believers; indeed, they are identical. It is certainly *desirable* to accommodate religion in a way that does not harm others, as it is to minimize the costs of any policy. And that policy concern is heightened in the context of religious accommodation, where the stakes on both sides are often quite high. But the question is whether avoiding third-party harm is constitutionally compelled.

Looking at the marketplace context, where nondiscrimination laws and religious accommodations are usually at work, makes this theoretical difficulty's scope especially clear. In a market, the severity of the third-party harm imposed by an accommodation turns not only on the scope of that accommodation but also on independent market factors. Consider the "conscience clause" protection in federal law for doctors and healthcare facilities receiving federal funds that refuse to participate in "any sterilization procedure or abortion" when doing so is contrary to a "religious belief[] or moral conviction[]."¹⁷⁶ In a market with a plentiful supply of healthcare providers, this accommodation might not be particularly burdensome on third parties. Someone turned away by a particular doctor or hospital can simply go elsewhere and receive the treatment she needs. But in a market with a limited supply of healthcare providers, the burden imposed by the conscience clause could be much more severe. If a substantial proportion of doctors in a market refuse to provide abortion or sterilization and point to the exemption as justification, women might be forced to travel long distances, suffer extended waits and risk health complications, or pay a substantial premium to receive reproductive health services. That is certainly a substantial burden; if the government imposed such a burden directly, it would be an unconstitutional restriction on the right to an abortion.¹⁷⁷

That leads to a strange situation in which the exact same accommodation is constitutional in some applications and unconstitutional in others, *despite granting the same right to every believer*. Of course, some commentators see that situation as a desirable compromise, accommodating religion as much as possible without inconvenience.¹⁷⁸ But desirable or not, such a compromise

176. See 42 U.S.C. § 300a-7(b) (2016).

177. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016).

178. See, e.g., Nathan Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 714 (2017); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 77, 101-02 (Douglas Laycock et al. eds., 2008).

seems wholly incompatible with the Establishment Clause's purpose and text. If a law "respect[s] an establishment of religion,"¹⁷⁹ one would expect that tendency to manifest always and everywhere; doctrines like taxpayer standing for some violations of the Establishment Clause reflect this principle.¹⁸⁰ By contrast, a third-party harm theory of the Establishment Clause suggests that a statute might tend toward the establishment of religion in some parts of a jurisdiction and not others, or at some times and not others, based not on the content of the law but on the conditions in the area where the law is applied—even if those conditions were unknown to legislators.

Such a rule would call into question the constitutionality of every accommodation in some place or time. A statute that was constitutional when it was enacted might become unconstitutional if market conditions changed such that the law's accommodation became a more severe burden on third parties. Moreover, weighing the costs and benefits of a particular statute and balancing the interests of various affected parties is the quintessential task of a legislature.¹⁸¹ That is not to say that considering burdens is an invalid constitutional tool for courts; it undoubtedly is in many contexts, especially where the question is whether an individual right is being violated.¹⁸² But a burden-based analysis is aimed at the wrong question for Establishment Clause purposes. Focusing on burdens alone would run counter to the nation's long history of providing religious accommodations, like exemptions for military service, that do burden others quite severely.¹⁸³ And that history makes sense

179. U.S. CONST. amend. I.

180. See *Flast v. Cohen*, 392 U.S. 83, 85, 105-06 (1968) (acknowledging standing for any taxpayer to challenge a congressional appropriation that violates the Establishment Clause). Although *Flast* suggested that taxpayer standing would extend broadly to Establishment Clause challenges to "congressional action under the taxing and spending" power, *id.*, the Court has since characterized *Flast* as a "narrow exception to the general rule against taxpayer standing" that applies only to "governmental expenditures," see *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129-30, 141-42 (2011) (distinguishing between "tax credits and governmental expenditures" and holding that plaintiffs lacked standing as taxpayers to make an Establishment Clause challenge to a tax credit).

181. Cf. Tushnet, *supra* note 24, at 13-19 (conducting a "public choice" analysis of the competing interests legislatures weigh in enacting religious accommodations).

182. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.) (adopting the "undue burden" test to determine whether state action violates the constitutional right to abortion); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (applying a burden-weighting test to determine whether state action violates the constitutional right to equal voting).

183. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1806-08 (2006) (describing extensive religious exemptions at the time of the Founding). As Laycock explains, the "large secular benefit" of a conscription exemption "creates resentment; where the number of conscientious objectors is large, as in colonial Pennsylvania,

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because, standing alone, the burden an accommodation imposes on third parties is not sufficient to answer the ultimate question whether the accommodation tends toward establishing a dominant religion.

III. A New Establishment Clause Framework for Nondiscrimination Accommodations

If examining harm to third parties is insufficient to assess nondiscrimination accommodations under the Establishment Clause, how should it be done? In a political and legal climate where such accommodations may multiply rapidly, both through legislative enactments and judicial applications of RFRA, there is a need for Establishment Clause analysis that takes account of those accommodations' unique features. This Part lays out and attempts to justify such an analysis. I suggest that nondiscrimination protections can productively be thought of as governmental benefits accruing to protected parties; accommodations, in turn, allow religious actors to unilaterally prevent those protected parties from realizing those benefits. This reconceptualization renders nondiscrimination accommodations unconstitutional not based on the level of harm they inflict but rather because they delegate power over governmental benefits to individuals and institutions on the basis of their religious beliefs.

A. The Establishment Clause Forbids Granting Religious Actors the Discretion to Determine Who Gets Governmental Benefits

The appropriate starting point for analyzing nondiscrimination accommodations under the Establishment Clause is to distinguish between two different classes of accommodations: those that allow religious discretion in allocating government-imposed costs and those that allow religious discretion in allocating government-derived benefits. Accommodations in the former class have almost universally been considered constitutionally acceptable. In *Walz v. Tax Commission*, the Supreme Court held that the Establishment Clause does not prohibit government from providing tax exemptions for church property.¹⁸⁴ In *St. Martin Evangelical Lutheran Church v. South Dakota*, the Court had no difficulty construing a federal statute and its state analog to exempt religious institutions from unemployment taxes.¹⁸⁵ And in *United States v. Lee*, the Court implicitly blessed an exemption from social security taxes for self-

exemption concentrates the burdens of military service on others to an extent that is significant and not just theoretical." *Id.* at 1808.

184. See 397 U.S. 664, 666, 680 (1970).

185. See 451 U.S. 772, 780-81 (1981).

employed individuals who were religiously opposed to insurance.¹⁸⁶ Tax exemptions like these have the effect of permitting religious individuals or institutions to decide whether to pay a certain tax, thereby allowing them to eliminate a cost imposed on them by the government.

The interpretation of RFRA in *Hobby Lobby* fits this pattern. The Court in that case was willing to strike down an employer contraception mandate in part because the government could instead require insurance companies themselves to pay for contraception coverage.¹⁸⁷ Under that alternative, “the plaintiffs’ female employees would continue to receive contraceptive coverage without cost sharing for all [Food and Drug Administration (FDA)]-approved contraceptives, and they would continue to ‘face minimal logistical and administrative obstacles.’”¹⁸⁸ Of course, *Hobby Lobby* was not an Establishment Clause case, but it can be presumed that the Court would not apply RFRA in a way it believed was incompatible with the Establishment Clause.¹⁸⁹

In cases where accommodations have allowed religious discretion over who receives governmental benefits, by contrast, courts have been much more skeptical. In *Larkin v. Grendel’s Den, Inc.*, the Supreme Court held that a statute permitting churches to “veto” the issuance of liquor licenses to businesses within 500 feet of their premises violated the Establishment Clause.¹⁹⁰ In *Lee*, the Court refused to create a free exercise exemption for Amish employers (as opposed to self-employed Amish as discussed above¹⁹¹) because “[g]ranting an exemption from social security taxes to an employer” would “impose the employer’s religious faith on the employees” by denying them access to social security benefits.¹⁹² And in *Hobby Lobby*’s follow-on cases raising the question whether RFRA entitled religious nonprofits to an exemption even from notifying their insurers that they were opting out of the contraception mandate, the Court went out of its way—in the course of vacating and remanding the cases without reaching the merits—to note: “Nothing in this opinion, or in the opinions or orders of the courts below, is to affect the ability

186. See 455 U.S. 252, 261 (1982). As discussed in more detail below, the Court determined that in contradistinction to the statutory exemption for self-employed individuals, a social security tax exemption for employers of *others* was not required by the Religion Clauses and indeed might not be permissible. See *id.*; *infra* text accompanying notes 191-92.

187. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2780-82 (2014).

188. See *id.* at 2782 (quoting *id.* at 2802 (Ginsburg, J., dissenting)).

189. Cf. *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (indicating that if an accommodation under RLUIPA exceeded the bounds set by the Establishment Clause, “adjudication in as-applied challenges would be in order”).

190. 459 U.S. 116, 117, 122, 127 (1982).

191. See *supra* note 186 and accompanying text.

192. *United States v. Lee*, 455 U.S. 252, 261 (1982).

of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives."¹⁹³

This framing also makes sense of *Caldor*.¹⁹⁴ That case's "third-party harm" test has been criticized as inconsistent with case law and the purpose of the Religion Clauses.¹⁹⁵ If *Caldor* is considered through the lens of religious control over governmental benefits, however, the bases for those criticisms drop away. The harms at issue in *Caldor* arose in part from the fact that employees who celebrated the Sabbath had the ability to claim absolute priority for a day off, limiting the ability of other employees to enjoy their statutory entitlement.¹⁹⁶ The decision in *Caldor* can thus be justified not as a flat ban on third-party harm but rather on the narrower grounds that it allowed religious considerations to control in allocating a governmental benefit.

Grendel's Den addresses the allocation of benefits under the Establishment Clause at the most length, and its reasoning is particularly instructive.¹⁹⁷ The Court in *Grendel's Den* found that giving churches a "standardless" authority to veto liquor licenses for nearby businesses risked the use of that power for "explicitly religious goals"—for example, by "favoring liquor licenses for members of that congregation or adherents of that faith."¹⁹⁸ Even if churches did not exercise that authority, the Court said, the law still impermissibly advanced religion because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."¹⁹⁹ Moreover, the Court found that the statute impermissibly "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with

193. Zubik v. Burwell, 136 S. Ct. 1557, 1560-61 (2016) (per curiam) (quoting *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (per curiam)).

194. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

195. See, e.g., McConnell, *supra* note 113, at 54 ("[I]ncidental economic cost [is] not the sort of injury prevented by the Religion Clauses. . . . [V]irtually every form of accommodation to religion entails some cost—sometimes very substantial—on others.").

196. See *Caldor*, 472 U.S. at 709-10 ("In essence, the Connecticut statute imposes on employers *and employees* an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. . . . Moreover, there is no exception . . . when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." (emphasis added)).

197. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

198. *Id.* at 125.

199. *Id.* at 125-26.

significant economic and political implications.”²⁰⁰ The result was “a fusion of governmental and religious functions” barred by the Establishment Clause.²⁰¹

A broader version of the same principle was expressed by a plurality of the Court in *Board of Education of Kiryas Joel Village School District v. Grumet*. “[A] State may not delegate its civic authority to a group chosen according to a religious criterion.”²⁰² In that case, the Court struck down the creation of a school district precisely tracing the boundaries of a Satmar Hasidic community.²⁰³ Because the new school district was created with the intent and effect of empowering the Satmar community as such to control a public school district, the Court invalidated it.²⁰⁴ The plurality observed that “[a]uthority over public schools belongs to the State and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group.”²⁰⁵ It is notable that although *Kiryas Joel* stands for this broader principle, the actual nature of the power at issue was in fact control over a state benefit—namely, the provision of special education.²⁰⁶

If the cases above sketch a meaningful distinction between accommodations that give religious actors control over the allocation of costs and accommodations that give religious actors control over benefits, then there ought to be an underlying explanation that points toward a rule of decision. In part, the distinction can be explained by the difference between accommodations that permissibly facilitate religious belief by removing burdens and accommodations that impermissibly induce or coerce religious practices selected by the government.²⁰⁷ The power to relieve oneself or one’s church from taxes or mandates that run contrary to a religious belief has the obvious effect of facilitating the practice of that religious belief. The power to prevent benefits from flowing into the hands of someone else on religious grounds, meanwhile, could have the effect of punishing that person’s nonbelief or inducing that person to adopt one’s own beliefs, genuinely or not. But this explanation is insufficient. While having a guaranteed day off (likely on or near the weekend) is doubtless a desirable perk,²⁰⁸ access to a lucrative tax

200. *Id.* at 127.

201. See *id.* at 126-27 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).

202. 512 U.S. 687, 698 (1994) (plurality opinion).

203. *Id.* at 690, 702 (majority opinion).

204. See *id.* at 708-10.

205. *Id.* at 698 (plurality opinion).

206. See *id.* at 693-94 (majority opinion).

207. See McConnell, *supra* note 113, at 35.

208. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

exemption is too²⁰⁹ and has at least as much potential to induce someone to feign or adopt faith.

A fuller explanation of the distinction lies with Carl Esbeck's influential argument that the Establishment Clause should be viewed as a structural restraint on governmental power rather than as a protection for individual rights.²¹⁰ Esbeck persuasively argues that the structure of the Religion Clauses and the trajectory of Establishment Clause jurisprudence show that the Establishment Clause is best thought of as a jurisdictional limit on governmental power.²¹¹ This theory has the benefit of explaining why the Court's cases are concerned not simply with the magnitude of religious benefit or third-party harm but also with how those effects are brought about. Under a structural theory, government action may relieve burdens and allocate benefits to religion so long as the government does not meddle in religious affairs or give governmental power to religious actors.²¹² The question, from this perspective, is not whether a religious accommodation causes harm to others; rather, the question becomes whether an accommodation allows someone to *exercise governmental power over others* by virtue of her religion. It is a standard based on the exercise of power rather than on its effects. Applying that standard, it is clear why authorizing religious discretion to dictate the receipt or nonreceipt of individual governmental benefits violates the Establishment Clause—doing so delegates away a power properly exercised by the state.

B. Nondiscrimination Laws Confer a Governmental Benefit on Individuals

A rule against a religious chokepoint in the distribution of governmental benefits does not have immediately obvious significance for analyzing nondiscrimination laws. We are used to thinking of nondiscrimination mandates as a burden placed on a business or employer, not as a direct benefit provided to a consumer or employee. But from the perspective of a consumer or employee, nondiscrimination laws can be viewed not just as regulating a market but also as bestowing an individual governmental benefit: the option to do business without regard to an ascriptive characteristic.

209. Cf. Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 726–29 (2003) (arguing that the “parsonage” property tax exemption for ordained ministers’ homes violates the Establishment Clause because it “provides a great benefit to religion, to clergy and religious institutions, that no one else can claim”).

210. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 12 (1998).

211. See *id.* at 14–32.

212. See *id.* at 59.

Of course, the fact that nondiscrimination laws provide a benefit does not make them unique; virtually any government mandate is presumably imposed for the benefit it provides. But crucially, and distinctly from most mandates, the benefit provided by nondiscrimination laws to an individual can only be conferred by virtually universal compliance. The benefits of most mandates occur when the beneficiary of the mandate receives a good, a service, or money. The benefit of a contraception mandate, for example, is realized when female employees receive contraceptives when they need them. If a healthcare provider is exempted from such a mandate, the beneficiary is not necessarily denied access to the benefit so long as there is sufficient compliance in the market to ensure that contraception is provided.

The benefit conferred by a nondiscrimination mandate, by contrast, is the *option* to do business. The purpose of a nondiscrimination law is not merely to make sure that members of a certain persecuted group get appropriate goods, services, or employment. In some circumstances, marginalized groups may in fact be cut off from buying a particular product or working in a particular field, but in many other circumstances, a functioning market will adjust to compensate for the fact that those groups are not being served.²¹³ Even if the market can solve the problem of distributing goods and services and employment to members of minority groups, however, the work of nondiscrimination laws is not done.²¹⁴ Being turned away from a business inflicts harm on the individual. It signals to the consumer that she is not a full member of the community and imposes psychological pain that other consumers get to avoid.²¹⁵ It has long been recognized that “[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.”²¹⁶

Even on the level of “dollars and cents,” discrimination inflicts harm beyond simply cutting off access to goods and services. Being turned away from a business imposes transaction costs on the consumer and reduces choice,

213. See Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1290 (2014).

214. See Sepper, *supra* note 20, at 154-56 (explaining the value of nondiscrimination laws in protecting against dignitary harms and signaling inclusion of marginalized groups in the definition of citizenship); see also Koppelman, *supra* note 22, at 627 (“Canonically, [the purposes of nondiscrimination laws] are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.”).

215. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 840 (2004) (describing ways in which the mere potential for discrimination imposes stigma that makes members of racial minority groups less trustful in all interactions).

216. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

limiting the consumer's access to the benefits of market competition on factors like price and quality. The result is deadweight loss: The consumer has to buy a product at a higher price or a lower level of satisfaction than desired, even if she is not cut out of the market altogether. Being turned away by a potential employer reduces opportunities to work in a chosen field, with similar attendant deadweight loss, and can extend time out of work. And uncertainty as to whether service will be provided or an application considered imposes search costs upfront.²¹⁷ Consumers may need to spend more time doing market research to see whether they will be served, or applicants may need to send out more resumes to hedge against potentially discriminatory employers. These costs are not trivial.

A nondiscrimination mandate helps consumers and employees avoid these costs, but it does more than that: It provides the certainty, in advance, that they will not have to bear them. That certainty, itself, has value. In other words, it is of no use to say that a consumer who is turned away can get the same product across the street. The benefit conferred by the nondiscrimination law is *not having to cross the street*.²¹⁸ The ability to negotiate on price and quality with a merchant, or to receive full consideration from an employer, is itself a freestanding benefit with economic value. The value conferred can be thought of as analogous to the "right of first refusal" often included in contract terms. Such a right does not guarantee that the rightholder will be able to reach an agreement with his counterparty on price or other terms, but it does guarantee him a hearing on those terms. Indeed, scholars have analyzed nondiscrimination laws on similar grounds, suggesting that nondiscrimination can be thought of as a bargained-for benefit for economic purposes.²¹⁹ A nondiscrimination law similarly provides a valuable assurance to a buyer who might otherwise fear being turned away before negotiation begins.

C. Religious Accommodations from Nondiscrimination Laws Impermissibly Allow Religious Actors a Veto on Distribution of a Governmental Benefit

Viewed from this perspective, nondiscrimination laws distribute a governmental benefit to every buyer or job applicant. The harms of withholding that benefit provide a strong policy argument against religious

217. See Sepper, *supra* note 20, at 156.

218. See Singer, *supra* note 22, at 938 (arguing that the primary purpose of civil rights laws is to ensure that minorities can enter the "public world of the market" on nondiscriminatory terms (emphasis omitted)).

219. See John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1351 (1989).

accommodations from nondiscrimination laws.²²⁰ But treating nondiscrimination laws as conferring a benefit has constitutional as well as normative implications.

If nondiscrimination laws confer a governmental benefit consisting of the right to do business with a party, then exempting persons with certain religious beliefs from complying with nondiscrimination laws effectively delegates to them the unilateral power to withdraw that benefit. Consider Mississippi's HB 1523, which exempts from nondiscrimination laws providers of certain "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon or in a manner consistent with [an enumerated] sincerely held religious belief or moral conviction."²²¹ A same-sex couple in Jackson would ordinarily possess the right to walk into any flower shop and request services.²²² Mississippi's law does not by its own force deprive the hypothetical couple of that right. As a technical matter, it does not rescind the benefit conferred by the nondiscrimination ordinance any more than the Massachusetts statute at issue in *Grendel's Den* rescinded the right to apply for a liquor license. Rather, the Mississippi law conditions the *exercise* of the couple's right on the approval of the florist, in her religious discretion. At the moment the couple would ordinarily be able to realize the benefit conferred on them by law by commencing negotiations for flowers, the Mississippi law allows the florist to "veto" it on religious grounds by refusing to do business with them.

This raises the same concerns that supported the Court's decisions in *Grendel's Den* and *Kiryas Joel*. The authority to deny service under HB 1523 is based on "a religious criterion"²²³: holding a belief enumerated in the statute.²²⁴ Someone who holds such a belief has the same "standardless" power afforded to churches by the statute at issue in *Grendel's Den* and the same discretion to use it for "explicitly religious goals."²²⁵ It is not hard to imagine, for example, a businessperson who refuses to cater weddings for couples who have engaged in premarital sex unless they have demonstrated repentance by attending his church.

220. See Melling, *supra* note 22, at 178-79; Tebbe, *supra* note 20, at 30; Underkuffler, *supra* note 22, at 2088.

221. MISS. CODE ANN. § 11-62-5(5) (2017).

222. See JACKSON, MISS., CODE OF ORDINANCES § 86-302 (2017).

223. See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698 (1994) (plurality opinion).

224. See MISS. CODE ANN. § 11-62-3 (enumerating protected beliefs); *id.* § 11-62-5 (protecting denial of service "based upon or in a manner consistent with" an enumerated belief).

225. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982).

It is also quite possible that there is “significant symbolic benefit to religion in the minds of some by reason of the power conferred” by such a statute.²²⁶ The situation is not identical to *Grendel’s Den*, but the power to deny people benefits they would otherwise enjoy under a nondiscrimination law could certainly be viewed by an outside observer as affording the denier’s religious beliefs a special status. In some circumstances, that special status might rise to the level of a state endorsement of religion.²²⁷ But even in circumstances that fall short of outright endorsement, the prestige conferred by explicit state protection of a particular belief makes that belief seem favored in the eyes of the government and thus impermissibly advances religion.

Most importantly, however, the Mississippi law delegates power to persons with certain beliefs in a way that is functionally equivalent to “a fusion of governmental and religious functions.”²²⁸ When a state or one of its subdivisions enacts a nondiscrimination mandate, it has made a determination that its citizens are entitled to the ex ante certainty of being able to do business without regard to whatever characteristic is protected. But a religious accommodation introduces a second decisionmaker into the equation—the seller or employer—who can countmand the state’s initial decision by virtue of his religious beliefs. A buyer or employee worried about discrimination can therefore only seek the government’s protection through a two-step process: (1) the government must decide that there is a right to be free of discrimination based on a given characteristic; and (2) the seller or employer must decide whether his religion allows that right to be enforced. Even if the veto at the second step is rarely exercised, it is present in every transaction; and when exercised, it nullifies a governmental benefit.²²⁹ Having to convince not only

226. See *id.* at 125–26.

227. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (asking under the endorsement test “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of” religion (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment))).

228. See *Grendel’s Den*, 459 U.S. at 126 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)).

229. It is worth noting that because religious accommodations from nondiscrimination laws can be and have been enacted even where no relevant nondiscrimination law is in force throughout the enacting jurisdiction, there is not always a benefit to nullify in many parts of the jurisdiction. To put that in concrete terms, Mississippi’s HB 1523 did not meaningfully affect the rights of a gay couple in Biloxi, Mississippi because there has never been a statutory right to be free from discrimination on the basis of sexual orientation in Biloxi. At first glance, that might appear to produce an odd patchwork effect—under this test, is the same religious accommodation unacceptable in some parts of a jurisdiction but acceptable in others? The answer is no. Because the analysis here is structural, the relevant question is whether the government can empower religious actors to veto a nondiscrimination right, not whether a previously existing right is curtailed. If the liquor licensing provision at issue in *Grendel’s Den* had been operative in

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the government but also a religious actor that one is entitled to a benefit “substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body.”²³⁰ That is precisely the evil the Establishment Clause is meant to prevent.

D. Existing Case Law Does Not Foreclose Treating Nondiscrimination Rights as a Governmental Benefit for Establishment Clause Purposes

This argument bears some similarity to an argument made by the government in *Hobby Lobby* that ensuring access by citizens to their “statutory rights” constitutes a compelling interest for RFRA purposes.²³¹ The *Hobby Lobby* Court did not explicitly address the statutory rights argument because it resolved the case on RFRA’s least-restrictive-means prong, assuming without deciding that the ACA’s contraception mandate furthered a compelling state interest.²³² Indeed, *Hobby Lobby*’s holding was specifically premised on the fact that other payers—the government or insurance companies—were available, and thus that nobody would be deprived of benefits.²³³ So at the very least, *Hobby Lobby* does not foreclose the argument that religious discretion cannot be exercised to prevent the receipt of a governmental benefit. And because all three opinions in the case placed such emphasis on the continued flow of benefits, *Hobby Lobby* can even be read to suggest that allowing a party to interrupt that flow of benefits on religious grounds would raise constitutional problems.²³⁴

a dry county, it nonetheless would have been unconstitutional because the delegation of power itself is beyond the authority of the government, regardless whether the power is ever exercised. Likewise here. The fact that individual members of minority groups are no worse off might be a problem for standing, *see, e.g.*, *Barber v. Bryant*, 860 F.3d 345, 353-55 (5th Cir. 2017), *petition for cert. filed*, No. 17-547 (U.S. Oct. 12, 2017), but it would not affect the constitutional merits of the accommodation.

230. *See Grendel's Den*, 459 U.S. at 127.

231. *See Reply Brief for the Petitioners* at 12-13, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 985095; *see also Brief for the Petitioners* at 38-46, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 173486; *cf. Loewentheil, supra* note 21, at 465, 467-68, 501-02 (arguing that effects on “existing rights-holders”—the individuals meant to be protected by a particular statute—should be foregrounded when considering religious exemptions to that statute).

232. *See Hobby Lobby*, 134 S. Ct. at 2780.

233. *See id.* at 2782 (“The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs’ female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to ‘face minimal logistical and administrative obstacles,’ because their employers’ insurers would be responsible for providing information and coverage.” (footnote omitted) (citation omitted) (quoting *id.* at 2802 (Ginsburg, J., dissenting))).

234. *See id.; id.* at 2787 (Kennedy, J., concurring) (“As the Court explains, [an existing accommodation], designed precisely for this problem, might well suffice to distinguish
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There are two potentially salient distinctions between the sort of benefit at issue in *Grendel's Den* and nondiscrimination accommodations—one relatively trivial and one more significant—but neither precludes applying the logic of delegation to nondiscrimination exemptions. The trivial distinction is one of form: *Grendel's Den* concerned a “religious institution[]” exercising governmental power,²³⁵ whereas nondiscrimination accommodations are oriented toward any individuals or companies acting on the basis of religious beliefs. But as the *Kiryas Joel* plurality explained, it is not especially consequential which religious actor is infused with governmental power.²³⁶ The motivating principle in *Grendel's Den* is the “fusion of governmental and religious functions” in the distribution of a governmental benefit.²³⁷ If the Massachusetts law had given the power to block licenses to churchgoers rather than to churches, it would no less have subjected a government function to a religious veto.

The second and more important distinction is that nondiscrimination laws create not a “discretionary governmental power[]”²³⁸ to distribute benefits, but rather a mandatory one. In *Grendel's Den*, the Cambridge License Commission had the right to issue or not issue liquor licenses in its discretion, and the constitutional problem emerged from sharing that discretion with a religious decisionmaker.²³⁹ But no government body exercises discretion in administering a nondiscrimination benefit. The benefit is universal and mandatory. Every participant in the market is entitled not to have a transaction aborted on the basis of a protected characteristic, and every covered merchant or employer is required not to cut off a transaction. In an area without government discretion, it might be argued that providing some power to religious actors does not work any “fusion of governmental and religious functions.”²⁴⁰

the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.”); *id.* at 2801 (Ginsburg, J., dissenting) (“The Court ultimately acknowledges a critical point: RFRA’s application ‘must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’ No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.” (citation omitted) (quoting *id.* at 2781 n.37 (majority opinion))).

235. 459 U.S. at 127.

236. See Bd. of Educ. of *Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 698 (1994) (plurality opinion) (“It is, first, not dispositive that the recipients of state power in these cases are a group of religious individuals united by common doctrine, not the group’s leaders or officers.”).

237. See 459 U.S. at 126 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)).

238. See *id.* at 127.

239. See *id.* at 117-18, 127.

240. *Id.* at 126 (quoting *Abington Twp.*, 374 U.S. at 222).

Caldor is instructive on why this distinction is not dispositive. In *Caldor*, state law provided a universal benefit: All employees in Connecticut were entitled to a minimum of one day off each week.²⁴¹ The Court nevertheless found that the accommodation for religious employees, giving them the unilateral power to choose not to work on their Sabbath, violated the Establishment Clause.²⁴² This makes sense because the accommodation had the effect of limiting other employees' receipt of the benefit of state law based on the religious dictates of their coworkers.²⁴³ Whether or not the *government* has discretion over the distribution of a benefit, the interposition of *religious* discretion into the process offends the Establishment Clause.

One final doctrinal objection that might be made to the rule proposed here is that churches and other religious organizations are explicitly exempt from most civil rights laws, categorically in the case of employment of ministers²⁴⁴ and to a substantial extent for the employment of workers at nonprofit religious institutions.²⁴⁵ The Supreme Court has definitively affirmed the constitutionality of those exemptions.²⁴⁶ If the Establishment Clause does not prohibit allowing religious organizations to deny their employees the benefit of nondiscrimination laws, how can it prohibit giving the same power to individuals? The answer is that nondiscrimination exemptions for religious bodies effectuate the purposes of the Free Exercise Clause and of the Establishment Clause itself. That is explicitly the logic of the ministerial exception.²⁴⁷ It is also the best explanation of the Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, which upheld Title VII's exemption for religious organizations from its prohibition against religiously based discrimination, at least as applied

241. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 705 n.2 (1985).

242. See *id.* at 710-11.

243. See *id.* at 709-10.

244. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-90 (2012) ("[T]here is a ministerial exception [to employment discrimination laws] grounded in the Religion Clauses of the First Amendment").

245. See *supra* notes 114-19 and accompanying text.

246. See *Hosanna-Tabor*, 565 U.S. at 188-90 (holding that the ministerial exception is constitutionally required); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329, 339 (1987) (upholding, at least "as applied to the nonprofit activities of religious employers," Title VII's exemption for religious organizations from its prohibition against religiously based discrimination in employment).

247. See *Hosanna-Tabor*, 565 U.S. at 188-89; see also *id.* at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.").

to nonprofit activities.²⁴⁸ The Court explained in *Amos* that the accommodation was permissible “to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”²⁴⁹ Justice Brennan’s concurrence was even clearer. Citing cases where the Court held that the Religion Clauses forbid it from adjudicating internal church governance disputes,²⁵⁰ Justice Brennan explained that he and Justice Marshall concurred in the judgment because “we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.”²⁵¹

That concern for a religious community’s constitutional right to define its mission and its borders is not nearly as strong in the case of discrimination by individuals or business corporations. Of course, the government has no more power to define appropriate religious tenets for an individual or corporation than it does for a church, and requiring an individual or corporation to forgo discrimination may well burden that party’s sincere religious beliefs. But the balance struck by the Religion Clauses, based on their history, purpose, and interpretation by the Supreme Court, is different for a private party. The constitutional need to avoid interference and entanglement is at its height when religious organizations’ operations are at issue; the need is simply less weighty for individual religious practice.²⁵² For that reason, an Establishment Clause analysis of religious accommodations for individuals must proceed along a separate track from accommodations for religious institutions.

248. See 483 U.S. at 329, 339.

249. *Id.* at 335.

250. See *id.* at 341-42 (Brennan, J., concurring in the judgment) (citing Serb. E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976); and Kedroff v. Saint Nicholas Cathedral of the Russ. Orthodox Church in N. Am., 344 U.S. 94 (1952)).

251. *Id.* at 342-43.

252. See *id.* at 340 (“These cases present a confrontation between the rights of religious organizations and those of individuals.”); *id.* at 342 (“Determining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself. Solicitude for a church’s ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.”); see also *Hosanna-Tabor*, 565 U.S. at 190, 710 (distinguishing regulation of an individual’s “outward physical acts” from “government interference with an internal church decision that affects the faith and mission of the church itself” and emphasizing “the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission”).

E. Treating Nondiscrimination Rights as Governmental Benefits Would Invalidate Many Nondiscrimination Accommodations but Leave Most Other Accommodations Intact

This leaves us with a narrow black-letter rule: Religious accommodations violate the Establishment Clause when they allow an individual to exercise religious discretion to deny another individual access to a governmental benefit, including the benefits flowing from a nondiscrimination mandate. Such a rule would affect both targeted and general accommodations. Targeted accommodations conferring an absolute immunity from otherwise applicable penalties for refusal of service on the basis of particular religious beliefs, like the private merchant provisions of Mississippi's HB 1523 or the federal FADA, would be disfavored and likely unconstitutional. General accommodations like RFRA would tend to be interpreted as not applying to nondiscrimination laws as a matter of constitutional avoidance.²⁵³ In the usual case, this would be accomplished by treating nondiscrimination mandates as the least restrictive means of advancing the compelling governmental interest in increasing social equality and protecting members of minority groups.

This rule is narrow, and to the extent it works a change in the law, its effect would mostly be confined to nondiscrimination accommodations. The rule does not simply constitute special pleading for nondiscrimination laws, however. One can imagine other scenarios in which religious accommodations could be asserted to prevent others from realizing a governmental benefit. It is not totally outlandish to imagine, for example, a landlord who asserts some religious basis to refuse to accept vouchers from the Section 8 Housing Choice Voucher Program²⁵⁴ in a jurisdiction where accepting them is ordinarily required by law;²⁵⁵ this proposed rule would prevent an accommodation from

253. For a thoroughly reasoned opinion demonstrating how this might work, see *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *appeal dismissed for lack of jurisdiction sub nom. Sports & Health Club, Inc. v. Minnesota ex rel. Gomez-Bethke*, 478 U.S. 1015 (1986). *McClure* analyzed an exemption sought under the Free Exercise Clause prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). See *McClure*, 370 N.W.2d at 851. Because RFRA adopted the pre-*Smith* test as a statutory rule, *McClure* provides a useful model for courts considering accommodations sought under RFRA.

254. See 42 U.S.C. § 1437f(o) (2016) (establishing a housing voucher program for low-income families). The program's popular name, *see, e.g., Housing Choice Voucher Program (Section 8)*, BENEFITS.GOV, <https://perma.cc/E5UD-TMWW> (archived Nov. 5, 2017), is derived from its original enactment. See Housing and Community Development Act of 1974, Pub. L. No. 93-983, sec. 201(a), § 8, 88 Stat. 633, 662-66 (codified as amended at 42 U.S.C. § 1437f).

255. *See, e.g., D.C. CODE § 42-2851.06(c) (2017)* ("The owner of a housing accommodation shall not refuse to rent a dwelling unit to a person because the person will provide his or her rental payment, in whole or in part, through a section 8 voucher."); N.Y.C., N.Y., ADMIN. CODE. §§ 8-102(25), -107(5) (2017) (prohibiting discrimination in housing

footnote continued on next page

being granted in that case. But accommodations that do not implicate an individual's ability to realize a governmental benefit, like abortion conscience clauses,²⁵⁶ would be left intact under this rule. And accommodations for religious organizations would continue to operate as laws effectuating the protective purpose of the Religion Clauses.

My hope is that this rule and these results are more consistent with existing case law and more protective of religious freedom than other, broader grounds that have been urged to invalidate religious exemptions from nondiscrimination laws. If this rule is not necessarily compelled by precedent, it is at least consonant with it. And I would suggest that such a rule is deeply desirable because it would further the vital structural role of the Establishment Clause, helping to ensure that the stakes of political debate do not include the possibility of exclusion from the public sphere on religious grounds.

Conclusion: A Rule Protecting Pluralism

The theory put forward above is premised on a structural approach to the Establishment Clause—one that posits that the Clause places certain religious matters outside of the government's jurisdiction altogether. The insight underlying the structural approach is that the history, structure, and function of the Establishment Clause suggest that the Clause is meant to protect against government overreach that harms society at large rather than to protect only

accommodations on the basis of "any lawful source of income" and defining "lawful source of income" to include "income derived from . . . housing assistance including section 8 vouchers"; SEATTLE, WASH., MUN. CODE § 14.08.040(F) (2017) (prohibiting landlords from "determining tenant eligibility" using "income screening criteria (such as an income to rent ratio)" that fail to reduce the rent used in the calculation by the amount of "[a]ny payment from a Section 8 or other subsidy program that reduces the amount of rent for which the tenant is responsible").

256. Unlike a nondiscrimination mandate or section 8 voucher, abortion services are not provided or guaranteed as an affirmative governmental benefit, at least at the federal level. Quite the contrary, federal appropriations routinely prohibit expending funds on abortion. *See, e.g.*, Financial Services and General Government Appropriations Act of 2016, Pub. L. No. 114-113, div. E, § 613, 129 Stat. 2242, 2467 ("No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions."); *cf.* 42 U.S.C. § 18023(b)(1) (providing that abortion services are not "essential health benefits" under the ACA). Access to abortion is a constitutional right, but under current Supreme Court precedent, that right does not encompass any obligation by the government to fund abortion services, much less a guarantee of abortion services from any given qualified professional. *See* *Harris v. McRae*, 448 U.S. 297, 316-17 (1980). Because the government does not purport to ensure that a person is entitled to an abortion from any provider, giving healthcare providers the ability to decline to perform an abortion on the basis of their religious beliefs (or for any other reason) is not tantamount to giving them authority to withhold a governmental benefit.

individual conscience as such.²⁵⁷ That view is not uncontested,²⁵⁸ but it has been quite influential.²⁵⁹ From a structural perspective, the Establishment Clause is aimed at two societal evils in particular: It serves “to avoid governmental interactions with religion that cause either a fracturing of the body politic (*the civitas*) along religious lines, or an undermining of the integrity of religion (*religare*) or religious organizations (*the ekklesia*).”²⁶⁰ These twin touchstones—preventing both fracturing of civil society along religious lines and cooptation of religious institutions by secular authority—serve the ultimate purpose of the Religion Clauses to safeguard pluralism in the United States.²⁶¹

A reading of the Establishment Clause that disallows religious accommodations from nondiscrimination mandates for private actors, on the ground that such accommodations constitute religious exercise of a properly governmental power, furthers the values embodied in a structural theory of the Establishment Clause. A structural theory posits that the Establishment Clause should be interpreted to prevent the government from acting in a way that is likely to fracture society along religious lines.²⁶² The relevant question in the nondiscrimination context, then, is whether providing an accommodation poses an impermissible risk of such fracturing.

There is reason to believe it does because such an accommodation allows merchants to exclude members of minority groups from the common life of the nation on religious grounds. Markets, both in goods and services and in

257. See Esbeck, *supra* note 210, at 13-14.

258. See, e.g., Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1921 (2013) (arguing that religious organizations' autonomy is protected from government interference not by courts' structural “adjudicative incompetence” to resolve issues touching on church governance, but instead by church members' implied consent to giving the church primary authority over their religious lives); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168 (1992) (“A better understanding of the ideal of the Religion Clauses, both normatively and historically, is that they guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state . . . whether that hindrance is for or against religion.”).

259. See, e.g., Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 264 (2009) (“I think there is force to . . . [Esbeck’s argument] that some of these religious decisions are simply beyond the jurisdiction of government.”); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 120-121 (2009) (“Although the Free Exercise Clause has a rights-bearing function, the Religion Clauses are primarily jurisdictional, limiting government to the secular and temporal, and foreclosing government from exercising authority over the spiritual domain.” (footnotes omitted) (citing Esbeck, *supra* note 210)).

260. Esbeck, *supra* note 210, at 13 (footnotes omitted).

261. See *id.* at 94-96.

262. See *id.* at 94-95.

employment, are not governmental institutions, but they are clearly civic ones.²⁶³ Excluding someone from market access, therefore, excludes her from a civic institution with a vital political and social role. And the mere possibility of discrimination sharply limits the ability of members of minority groups to participate in the market.²⁶⁴ This was the concern of Justice Goldberg in *Heart of Atlanta Motel, Inc. v. United States*, where he explained that nondiscrimination laws are meant to prevent the “humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.”²⁶⁵ Thus, denying a person service or employment because of who he is causes a fracturing of society. Doing so on the basis of religious doctrine causes a religious fracturing. A structural view of the Establishment Clause, then, should be wary of allowing private parties to engage in such religiously motivated exclusions.

The end result of that exclusion is increased homogenization of the market and of society and a decline in the pluralism the Establishment Clause is meant to protect. Thoughtful and earnest scholars have drawn attention to the need for markets to be a site of “gentle” interaction across tribal lines.²⁶⁶ Nathan Oman suggests that markets should be structured to foster a “blasé attitude toward commerce,” meaning that participants engage in the market as disinterested and apolitical actors to the extent possible, in order to foster cooperation in a society with religious, ethnic, and other divides.²⁶⁷ John Inazu has emphasized the need to “maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life,” in order to create a social discourse that reflects “confident pluralism.”²⁶⁸ I agree that these goals are vitally important, and I would even suggest that the reading of the Establishment Clause that best advances them is the preferable one. But the scholars who advocate these

263. See Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 193-204 (2012) (describing the role of markets as political and virtue-inculcating institutions).

264. Cf. Lenhardt, *supra* note 215, at 840 (describing ways in which the mere potential for discrimination imposes stigma that makes members of racial minority groups less trustful in all interactions); Sepper, *supra* note 20, at 163 (suggesting that a market that permits discrimination might mean that “[g]roups disfavored by their religion, race, or sex (among other categories) also might have to settle for a market niche in lieu of full and equal participation in the market”).

265. 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

266. See Oman, *supra* note 178, at 733.

267. See *id.* at 710-14.

268. Inazu, *supra* note 18, at 592.

attitudes in the market and in our discourse assume that nondiscrimination mandates are corrosive to the pluralistic norms they support.²⁶⁹

That assumption is incorrect. Discourse can indeed be hampered and homogenized by government action.²⁷⁰ But there are two government actions to consider: the nondiscrimination mandate and the religious accommodation. From a structural view of the Establishment Clause, both the conferral of the right to do business without discrimination and the conferral of the right to refuse business for religious reasons are salient because both implicate the collective interests of the “*civitas*” and “*religare*.²⁷¹

The power to deny access to markets ultimately poses a greater threat to those interests. The “blasé attitude toward commerce” Oman suggests is vital to markets’ civic value²⁷² cannot be cultivated if every transaction, or even some predesignated subset of transactions, has the potential to become an exercise of religious power to reinforce the exclusion of a precariously situated minority. Instead of being a place where people can meet and develop apolitical bonds on equal terms, a market that allows for religious exclusions becomes a site of contestation and mistrust. Every wedding cake purchase becomes a political statement. Similarly, Inazu’s vision of a “confident pluralism” in which “dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life”²⁷³ is impossible when a potential outcome of that dialogue is exclusion from market access on religious grounds. It is very difficult to assume the good faith of an interlocutor when he reserves the power to invoke the force of law to declare you “unacceptable as a member of the public.”²⁷⁴ When that power stems from religion, the result is a closing off of discourse across faith communities.

I do not wish to discount the painful effects of enforcing a nondiscrimination mandate against individuals with deep religious convictions about serving

269. See *id.* at 602-03 (acknowledging that “the objection rooted in equality and antidiscrimination norms gains a great deal of rhetorical traction when it is linked to racial discrimination in the Jim Crow South” but nonetheless arguing that antidiscrimination rules should not be enforced against religious objectors except as applied to race because “[t]he pervasive impediments to equal citizenship for African Americans have not been matched by any other recent episode in American history”); Oman, *supra* note 178, at 696 (“Aggressive antidiscrimination laws may be necessary to ensure meaningful access to the market, but where instances of religious discrimination are uncommon, there is no compelling justification for punishing idiosyncratic religious behavior.”).

270. See Inazu, *supra* note 18, at 592-93.

271. See Esbeck, *supra* note 210, at 13.

272. See Oman, *supra* note 178, at 714.

273. See Inazu, *supra* note 18, at 592.

274. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

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same-sex couples or employing transgender workers. Hopefully, instances of such enforcement will be infrequent as markets largely sort themselves through specialization and interpersonal communication to avoid both refusals of service and subsequent lawsuits. But the question is not whether religious conflicts between sellers and buyers or employers and employees are desirable; they are inevitable in a pluralistic society. Rather, the question is: When such conflicts arise, which side should be allowed to invoke the force of law? The answer that prevents religious fracturing and allows for pluralistic discourse is that government should avoid supporting parties who seek to exclude participants from the market on religious grounds and should instead support parties who risk exclusion from the market—the victims of religious discrimination, not the perpetrators. A constitutional rule providing that answer is one that will ensure confident pluralism's endurance in the face of ineradicable difference.