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# Free Exercise by Moonlight

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## ABSTRACT

How is the current condition of religious free exercise, and religious accommodation in specific, best understood? What is the relationship of the two most important free exercise cases of the past half-century, *Employment Division v. Smith* and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*? This essay explores four possible answers to these questions.

1. *Smith* and *Hosanna-Tabor* are the twin suns of religious accommodation under the Constitution. They are distinctively powerful approaches.
2. *Hosanna-Tabor's* approach to constitutional free exercise is now more powerful than *Smith's*. *Smith* has been eclipsed.
3. *Hosanna-Tabor* has shown itself to be feeble. It has been eclipsed by *Smith*.
4. *Smith* augured the waning of religious accommodation, which proceeds apace. *Hosanna-Tabor* does little to change that.

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In describing these possibilities, the essay considers the cases themselves, various doctrinal developments—focusing on subsequent Supreme Court cases as well as lower court decisions interpreting *Hosanna-Tabor*—and the broader political and social context in which claims for religious accommodation are now received. It concludes that though each possibility has persuasive points—perhaps with the exception of the second—the last is most accurate.

*Smith's* approach to free exercise continues to control for constitutional purposes and is, for more general political purposes, more entrenched than ever. Its admonition about fabulously remote threats of anarchy in a world where each "conscience is a law unto itself" has ironically become more apt as a warning against the multiplying number of secular interests argued to be legally cognizable than against religious accommodation run amok. There is no clearer manifestation of these developments than the recent emergence of theories maintaining that new dignitary and other third party harms resulting from religious accommodation ought to defeat religious freedom claims. These theories reflect the swollen ambit of state authority and defend surprising understandings of the limits of religious accommodation—understandings that pose grave threats to the American political tradition of providing generous religious exemptions from general laws. The ministerial exception simply represents the refracted glow of constitutional protection in the gathering gloom. It is free exercise by moonlight.

## INTRODUCTION

It is the evening of religious accommodation. Religious exemptions from general laws, if not yet abominated outright, are more controversial and divisive than at any time in modern memory. The agitated rancor that continues to follow the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* might obscure that it has been twenty-five years since the Court last defined the scope and limits of the Free Exercise Clause.[1] That largely undisturbed decision—*Employment Division v. Smith*[2]—held that exemptions from neutral and generally applicable laws on the basis of religious conscience are never constitutionally required, no matter how

1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103, 107 (2013).

2. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488. Three years later, the Court clarified its approach to free exercise but the basic doctrinal terms in which religious accommodation is evaluated did not change. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

grave the burden to the religious individual or group, and no matter how insignificant the state's interest in enforcing the law.

Some scholars have debated *Smith's* holding as a matter of constitutional history[3] and doctrinal development.[4] Others have pointed out that in practice, and as applied by lower courts, *Smith's* rule and rhetoric sometimes sound more absolute than they actually are.[5] But there was more motivating the *Smith* Court than interpretive or doctrinal fidelity. A particular political psychology underlies *Smith*: a stubborn optimism about the American people's capacity to reach charitable, generous, and sensible religious accommodations without the safety net of judicial review,[6] a genuine trust in democratic wisdom and accountability.[7] "Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word," wrote Justice Scalia, almost in exhortation, "so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[8] The passage with broad political support of the Religious Freedom Restoration Act, its state analogues, and by then with less support, the Religious Land Use and Institutionalized Persons Act,[9] followed by decisions in a handful

3. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947 (1992); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1153 (1990); Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1119–20 (2008).

4. *See* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 68–85 (2006); Richard W. Garnett, *The Political (and Other) Safeguards of Federalism*, 32 CARDOZO L. REV. 1815, 1817 (2011); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 853 (1992).

5. Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2056–57 (2011); *see* MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 147–66 (2013).

6. *See Smith*, 494 U.S. at 890.

7. *Cf.* Letter from James Madison to Congress (June 8, 1789), *in* 2 THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 49, 50 (Neil H. Cogan ed., 2d ed. 2015) ("In our government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least controul [sic] . . . .").

8. *See Smith*, 494 U.S. at 890.

9. Already by 2000, and in light of the failure of the Religious Liberty Protection Act in 1999, the political conditions had changed from 1993. *See* James M. Oleske, Jr., *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75, 89 (2015) (reviewing ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL

of cases, seemed at first blush to validate the Court's confidence. But that appraisal may have been shortsighted and too quick—the serendipity of a small sampling of cases in which the religious claimants were perceived not to threaten other more essential, secular ideological and political aims, sexual equalities and autonomies of various kinds foremost among them. The price of religious accommodation has been cheap enough to bear.[10]

But beards are not birth control,[11] and in little more than two decades since the passage of these laws, popular support for religious accommodation, though still strong, is weakening.[12] The low esteem of academics is far more palpable.[13] Many of these laws likely would not pass today, and

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SECULARISM (2013)), http://cdn.harvardlawreview.org/wp-content/uploads/2015/01/vol_128_Oleske.pdf [https://perma.cc/5VDR-V4TY].

10. Statutory claims for religious accommodation by isolated, socially and politically powerless individuals (prisoners and members of tiny, exotic cults) have won the unanimous approbation of the Supreme Court. *See* Holt v. Hobbs, 135 S. Ct. 853, 867 (2015); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006); Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (holding that 42 U.S.C. § 2000cc-1, which protects the religious exercise of institutionalized persons, qualifies as a permissible accommodation that is not barred by the Establishment Clause). This is, of course, to the Court's credit. But the absence of conflict with any significant secular political interests (particularly interests implicating sexual equality and autonomy) in these cases renders it difficult to evaluate the depth of the Court's commitment to religious accommodation.

11. See, for example, the House and Senate bills proposing to render Religious Freedom Restoration Act (RFRA) categorically inapplicable to religious objections to the paid provision of birth control. S. 2578, 113th Cong. (2014); H.R. 5051, 113th Cong. (2014). To my knowledge, no congressional bill was introduced in response to the Court's decision in *Holt v. Hobbs*.

12. *See, e.g.*, Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 155 (2014) ("Once a fairly 'uncontested' issue that remained in the 'background of public attention,' religious accommodation has become a 'contested' issue occupying the forefront of public debate. The change has been sudden, remarkable, and unsettling."); *Do You Want a Religious Freedom Law in Your State?*, RASMUSSEN REP. (Apr. 1, 2015), http://www.rasmussenreports.com/public_content/politics/general_politics/march_2015/do_you_want_a_religious_freedom_law_in_your_state [https://perma.cc/R4YK-WKR9].

13. Several legal academics regularly and enthusiastically oppose the efforts of states to craft RFRAs with precisely the same scope of the earlier statutes. Letter from Ira C. Lupu et al., to Nathan Deal, Governor of Ga. (Jan. 21, 2015), http://www.georgiaunites.org/wp-content/uploads/2015/01/Georgia-Religious-Freedom-Letter.pdf [https://perma.cc/2J8E-J7MH] (opposing draft of H.B. 29).

Examples of hostility to religious accommodation in the academic literature are legion. *See, e.g.*, Professor Elizabeth Sepper's perhaps ironically titled, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 24–27 (2014).

I have argued that the consensus has long been *against* granting religious exemptions from generally applicable laws to commercial entities and to for-profit corporations in particular. Instead, our consensus favors equal citizenship of individuals and, as a result, limited rights for powerful commercial actors. . . .

. . . .

certainly not with the kind of overwhelming bipartisan backing they had in the past. Though their repeal is not yet imminent, the repeal or significant alteration of ordinary law—even of a "putative super-statute"[14]—is always a real possibility when it loses the approval of popular majorities. The accommodation-unfriendly posture of *Smith* has become less an expression of judicial restraint in the service of democratic self-governance, and more a blunt political ambition in the service of equality as the master value of our time.[15]

Lost in all the statutory hubbub is the additional concern that the Free Exercise Clause has fallen into desuetude. There have been very few Supreme Court cases after *Smith* involving the constitutional free exercise of religion. Even these have been either mere elaborations of *Smith*[16] or cases in which the Free Exercise Clause played the role of superfluous extra in an Establishment Clause, free speech, or expressive association movie.[17] The vanishing of constitutional free exercise does not necessarily

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. . . We understand that whereas individuals (and perhaps churches) occupy one end of the religious-accommodation spectrum, commercial businesses—for-profit, secular corporations in particular—stand at the other.

*Id.* Professor Sepper's assurances that individuals "and perhaps churches" still do enjoy some rights of religious accommodation notwithstanding, her suggestion that "our consensus" elevates secular egalitarian ideals over religious accommodation on all other occasions of conflict does represent the views of an increasingly clamorous academic body.

14. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230 (2001); Horwitz, *supra* note 12, at 166 (raising the possibility that RFRA is a "super-statute").

15. *See* Steven D. Smith, *Equality, Religion, and Nihilism* 1–2 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 14-169, 2014), http://ssrn.com/abstract=2516400 [https://perma.cc/28GM-ERQW]. Moreover, any argument that the Religious Land Use and Institutionalized Persons Act (RLUIPA) violates principles of federalism has been largely abandoned. Concerns about federalism were not to be seen in *Holt v. Hobbs*. *See Holt*, 135 S. Ct. 853. Yet, is it so implausible to imagine that future, religion-unfriendly federal legislators might pass a law commanding states not to accommodate any religious claims in prison or land use disputes short of violating the Free Exercise Clause? Thanks to Bruce Ledewitz for provoking this thought.

16. *See* Locke v. Davey, 540 U.S. 712, 725 (2004) (holding that a state's intentional exclusion of devotional degrees from a scholarship fund available to all other degree programs did not represent the sort of "discrimination" or "animus" toward religion prohibited by the Free Exercise Clause under *Smith*); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (offering an exposition of the nature of general laws and the targeting of specific religions for unfavorable treatment).

17. *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661, 669 (2010); Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton, 536 U.S. 150, 168 (2002); Mitchell v. Helms, 530 U.S. 793, 868 (2000) (Souter, J., dissenting) ("Because the First Amendment also bars any prohibition of individual free exercise of religion, and because religious

mean that religious accommodation is moribund.[18] Nobody would say that voting rights are in danger because they are generally enforced through the Voting Rights Act rather than the Fourteenth or Fifteenth Amendments. But constitutional protection for religious accommodation gave to religious freedom something of security and permanence: the security of an additional stratum of evaluation in the judiciary;[19] and the permanence that attends laws that cannot be changed by the whims of popular majorities.[20]

In 2012, however, perhaps something changed. The ailing body of constitutional free exercise may have been revived that year by *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[21] in which the Supreme Court found that a "ministerial exception" to federal anti-discrimination laws foreclosed a claim of retaliation by an ordained teacher at a Lutheran elementary school.[22] That exception, the Court held unanimously, was grounded in the Constitution and represented a limitation on state power to interfere with the autonomy of religious institutions. Though the Court's ruling was narrow, acknowledging the existence of the ministerial exception and finding it applicable to the particular facts in the case, and to nothing more,[23] it is possible that *Hosanna-Tabor* represents a

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organizations cannot be isolated from the basic government functions that create the civil environment, it is as much necessary as it is difficult to draw lines between forbidden aid and lawful benefit.").

18. There have been some constitutional free exercise developments in the lower courts. *See generally* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001). One fairly recent case decided by the Montana Supreme Court presented a plausible challenge to the meaning of general applicability, but the Supreme Court denied certiorari. *See* Big Sky Colony, Inc. v. Mont. Dep't Labor & Indus., 2012 MT 320, 291 P.3d 1231, *cert. denied*, 134 S. Ct. 59 (2013).

19. True, constitutional security for religious accommodation does not necessarily guarantee favorable outcomes for religious claimants, as the period prior to 1990 demonstrates. But a regime in which judicial review remains a possibility at least provides an opportunity, even when unfulfilled, for a set of legal actors to correct any grievous errors that the people might make as to accommodations.

20. As will become plain, this critique of *Smith* is not at all intended as an argument for reversing it at this point. Under present socio-cultural conditions, it is probable that *Smith*'s reversal now would have at best a marginal impact on claims for religious accommodation.

21. 132 S. Ct. 694 (2012).

22. *Id.* at 710.

23. *See id.*

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.

*Id.*

new phase in the doctrinal and socio-cultural development[24] of constitutional free exercise. In the fours years since its decision, perhaps *Hosanna-Tabor* has even begun to destabilize the parsimonious *Smith* rule for religious accommodations.

How, indeed, is the current condition of religious free exercise, and religious accommodation in specific, best understood? What is the relationship of *Smith* and *Hosanna-Tabor*? Both because of *Hosanna-Tabor's* youth and the perpetually changing quality of doctrine, there are no definitive answers to these questions. But this essay explores four possibilities in the sections that follow:

1. *Smith* and *Hosanna-Tabor* are the twin suns of religious accommodation under the Constitution. They are distinctively powerful approaches.
2. *Hosanna-Tabor's* approach to constitutional free exercise is now more powerful than *Smith's*. *Smith* has been eclipsed.
3. *Hosanna-Tabor* has shown itself to be feeble. It has been eclipsed by *Smith*.
4. *Smith* augured the waning of religious accommodation, which proceeds apace. *Hosanna-Tabor* does little to change that.

These are not the only possibilities, but they do span a relatively wide range of responses to the question of the current state of religious free exercise under the Constitution. In describing and evaluating these possibilities, the essay considers the principal cases themselves, various doctrinal developments—focusing on subsequent Supreme Court cases as well as lower court decisions interpreting *Hosanna-Tabor*—and the broader political and social context in which claims for religious accommodation are now received. It concludes that though each possibility has persuasive points—perhaps with the exception of the second—the last is most accurate.

*Smith*'s approach to free exercise continues to control for constitutional purposes and is, for more general political purposes, more entrenched than ever. Its admonition about fabulously remote threats of anarchy[25] in a world where each "conscience is a law unto itself"[26] has ironically become more apt as a warning against the expanding number of secular interests argued to be legally cognizable than against religious accommodation run amok. There is no clearer manifestation of these developments than the

24. New as a matter of fairly recent American legal history. The roots of the ministerial exception extend back, as the Supreme Court noted, many hundreds of years. *See id.* at 702; *see also* Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 828–31 (2012) (presenting the historical roots of the ministerial exception).

25. Emp't Div. v. Smith, 494 U.S. 872, 888 (1990).

26. *Id.* at 890.

recent emergence of theories maintaining that new dignitary and other harms to third parties resulting from religious accommodation ought to defeat religious freedom claims. These theories reflect the swollen ambit of state authority and defend surprising understandings of the limits of religious accommodation—understandings that pose grave threats to the American political tradition of providing generous religious exemptions from general laws. The ministerial exception simply represents the refracted glow of constitutional protection in the gathering gloom. It is free exercise by moonlight.

## I. TWIN SUNS

The Constitution never requires religious accommodations from neutral laws of general application.[27] And yet the government may not encroach on the autonomy of religious institutions, such as religious schools, by imposing its nondiscrimination laws on them when it comes to the selection and retention of ministers.[28] To the extent that religious institutions are thereby being exempted from compliance with generally applicable nondiscrimination laws, it does seem that these two approaches to religious accommodation exist in mutual tension. Is the tension illusory?

One way to resolve it—with ambiguous support from the Court's opinion—is to describe *Hosanna-Tabor* as exclusively an Establishment Clause case, or the Free Exercise Clause feature of it as unnecessary or superfluous. Indeed, as Professor Michael Helfand has shown, several courts before *Hosanna-Tabor* had relied heavily, if not solely, on the Establishment Clause to ground the ministerial exception.[29] The Supreme Court was equivocal about which religion clause was its root. At several points in the opinion, the Court indicates that both Clauses are independently sufficient bases for the ministerial exception.[30] At other points, the opinion

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27. *Id.* at 881.

28. *Hosanna-Tabor*, 132 S. Ct. at 710.

29. Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1915–18 (2013).

30. *Hosanna-Tabor*, 132 S. Ct. at 702, 706.

> The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have said that these two Clauses "often exert conflicting pressures," . . . and that there can be "internal tension . . . between the Establishment Clause and the Free Exercise Clause," . . . . Not so here. Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.
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> . . . .
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> . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which

suggests that an amalgam of both Clauses grounds it. In its statement of the issue, for example, the Court asked "whether the Establishment *and* Free Exercise Clauses of the First Amendment" protected the plaintiff church.[31] Both this way of putting the question presented and the Court's subsequent discussion of the historical function of the Clauses—"[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own"—might imply that both Clauses were working in tandem.[32] The case for the necessity of the Free Exercise Clause is also strengthened by the Court's heavy reliance on its *church autonomy* line of cases, in which free exercise justifications often figure prominently.[33]

It is certainly proper to describe the ministerial exception as grounded independently in the Establishment Clause. Yet whether necessary or sufficient, the Free Exercise Clause does represent a primary constitutional basis for the ministerial exception in *Hosanna-Tabor*. Without the free exercise component, an important feature of the ministerial exception—the freedom of religious institutions as independent rights-holders to select their spiritual leaders, quite apart from entanglement concerns—disappears. Many subsequent cases interpreting *Hosanna-Tabor* have either noted that the ministerial exception is rooted in both Clauses[34] or have raised only the Free Exercise Clause.[35] The strategy of describing the ministerial

> individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

*Id.* (alteration in original) (citations omitted) (quoting Cutter v. Wilkinson, 544 U.S. 709, 719 (2005); Tilton v. Richardson, 403 U.S. 672, 677 (1971)).

31. *Id.* at 699 (emphasis added).

32. *Id.* at 699, 703.

33. *E.g.*, *id.* at 704–05 ("[T]he Court recognized that the '[f]reedom to select the clergy, where no improper methods of choice are proven,' is 'part of the free exercise of religion' protected by the First Amendment against government interference." (second alteration in original) (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952))).

34. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 172–73 (5th Cir. 2012); Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668, 672 (N.D. Ill. 2012).

35. *See, e.g.*, Doe v. Corp. of the Catholic Bishop of Yakima, 957 F. Supp. 2d 1225, 1229 (E.D. Wash. 2013); Winbery v. La. Coll., 2013-339, p. 9 (La. App. 3 Cir. 11/6/13); 124 So. 3d 1212, 1218.

exception as exclusively an Establishment Clause doctrine is therefore unpersuasive.[36]

Another way in which the tension between the two cases might be reconciled is to distinguish the type of religious accommodation at issue in each of them. If persuasively disaggregated, each approach to accommodation might continue to operate independently powerfully in its respective sphere of influence. The Supreme Court opted for this strategy in *Hosanna-Tabor*:

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[37]

On this reading, *Hosanna-Tabor*, like *Smith*, *is* a case about religious accommodation from a neutral and generally applicable law, but the distinctions drawn by the Court between *Smith* and *Hosanna-Tabor* have come in for some heated criticism.[38] Not entirely without reason. The "outward physical acts" justification does not make much sense: hiring and firing a church employee is just as physical or "outward" an act as ingesting peyote.[39] And ingesting peyote—or other "physical acts" of individuals—might under certain circumstances constitute an "internal church decision that affects the faith and mission of the church itself": for example, it might be the doctrinally prescribed method by which prospective members of the religion, or ministers themselves, are initiated.

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36. *See* McConnell, *supra* note 24, at 824 ("Looking solely at Supreme Court precedent, however, the Establishment Clause would appear to be an unlikely avenue for upholding a religious exemption from the antidiscrimination laws."). Supreme Court precedent aside, however, the concept of disestablishment does seem germane to the issue of government regulation of, for example, clergy selection.

37. *Hosanna-Tabor*, 132 S. Ct. at 707 ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma." (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990))).

38. Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951, 954–57 (2012); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 992–95 (2013); Mark Strasser, *Making the Anomalous Even More Anomalous: On* Hosanna-Tabor, *the Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL'Y & L. 400, 444–45 (2013). *See also* McConnell, *supra* note 24, at 835.

39. The decision in *Smith* used the "physical acts" language merely to distinguish the type of religious free exercise that would only protect belief and profession. *Smith*, 494 U.S. at 877 ("the 'exercise of religion' [protects] not only belief and profession but the performance of (or abstention from) physical acts . . . . [E]ngaged in for religious reasons . . . .").

In an elegant article, Professor Christopher Lund develops a more persuasive account of the distinctive sorts of religious exemption in the two cases based on the principles of "implied consent" and "insider/outsider" status.[40] Lund argues that the key difference rests on the type of party bringing the claim as either a member of the religious institution who has at least by implication consented to its rules or a non-member who has not:

> Consent binds those who consent. And it binds those who bring derivative claims. Consent here being of a constitutional nature, it bars the government from acting on behalf of those who consent. But it does not bar outsiders to the church, and it does not bar the government from acting on behalf of those outsiders.[41]

The ministerial exception is thus triggered by a kind of self-imposed exemption on the part of the employee from the potential benefit of general laws, in the way that assumption of risk might operate in tort law.[42] Or, in Lund's vivid metaphor, when two participants consent to fight, they cannot later sue one another in tort for battery.[43] The theory of implied consent can reconcile, Lund believes, the *Smith* and *Hosanna-Tabor* rules. It can sustain the twin suns of free exercise.

Theories of implied consent have found other able defenders in recent law and religion controversies. Professor Michael Helfand, for example, articulates a similar view to justify a religious institution's authority to deny the cost-free provision of contraceptive coverage to its employees in the face of a neutral, generally applicable law requiring its provision:

> [I]nstead of excluding institutions that provide services to non-members or to corporations that turn a profit, courts should demand that institutions be granted an exemption from the contraception mandate so long as the facts and circumstances surrounding the employment environment provide sufficient reason to presume that employees understood the unique religious aims of their employer. In such circumstances, employees should be presumed to have impliedly consent[ed] to the authority of the religious institution to make rules and resolve disputes that promote unique religious objectives such as faith and salvation.[44]

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40. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014).

41. *Id.* at 1194.

42. *See id.* at 1200.

43. *Id.* at 1194 n.67.

44. Michael A. Helfand, *What Is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 411 (2013) [hereinafter Helfand, *Implied Consent*]; *see also* Helfand, *supra* note 29, at 1915, 1923.

Both Lund and Helfand locate the constitutional root of their respective approaches in *Watson v. Jones*,[45] a Reconstruction-era property dispute between the main body of the Presbyterian Church in the United States and a dissenting body within it. Both claim that the shift of focus from the nature of the employer to the obligations assumed by or consensually imposed upon the employee is a theoretical advance.[46] And both are motivated by a deeply voluntarist conception of religious authority and religious freedom. As Helfand puts it: "At their core, religious institutions derive their authority from the consent of their members."[47]

Interesting as these implied consent theories are, they present several problems that raise doubts about their stability, and by extension about the strength of *Hosanna-Tabor* by comparison with *Smith*. The first problem concerns the revocability of consent. One central assumption in their accounts is that consent must be irrevocable in the situations they discuss: once the employee consents (impliedly) to the religious authority of the institution, that (implied) consent cannot later be withdrawn.[48] If it could, then the institution's exemption—ministerial or otherwise—would cease to apply at the time the employee began to dissent. At that point, the government could move ahead on behalf of the dissenting employee, who now enjoyed "outsider" status. The ministerial exception or the institution's ability to resist the force of neutral and generally applicable laws ought to be ineffectual at that point. Implied consent ought therefore to be essentially irrevocable consent in the ministerial exception context.

And yet Helfand has argued that implied consent is revocable: "[w]here the relationship between the individual and the community has been severed, there can no longer be a claim of implied consent and therefore no claim of church autonomy."[49] Quite apart from the complexities of ascertaining withdrawal of implied consent, however, this resolution greatly compromises and weakens the reach of the ministerial exception. The effect of consent's withdrawal varies across legal disciplines. In some areas, such as criminal and tort law, even express consent may be

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45. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

46. Helfand, *Implied Consent*, *supra* note 44, at 410. Lund is more qualified, but he does take a voluntarist view of religious affiliation and commitment. *See* Lund, *supra* note 40, at 1203 ("An important aspect of church autonomy is how every insider has the right to leave, the right to become an outsider. Maybe this is part of the church autonomy principle itself; maybe it describes the limits of church autonomy.").

47. Helfand, *Implied Consent*, *supra* note 44, at 417.

48. Thanks to Bill Galston for putting the strongest version of the non-revocability position to me.

49. Helfand, *Religion's Footnote*, *supra* note 29, at 1939–40 (citing Douglas Laycock, *Towards a General Theory of Religion Clauses: The Case of Church Labor Relations and the Right to Autonomy*, COLUM. L. REV. 1317, 1406 (1981)).

withdrawn.[50] To recur to Lund's intentional tort metaphor, though two parties may consent to fight each other, consent is generally revocable, and the effective revocation of either party may result in the liability of the other.[51] Yet in other areas, such as contract law—seemingly a better analogue for the types of relationships implicating the ministerial exception—consent to the contract is not generally revocable, at least not without the payment of damages for breach.[52]

Second, the theories' voluntarist foundation assumes a contested model of church authority that in some, and perhaps many, cases may not apply. If religious institutions derive their authority from their individual members' consent, then the withdrawal of that consent *should* deprive the institutions of that same authority, at least as to the withdrawing individual. An exclusive focus on the voluntarist quality of religious association weakens the overall case for institutional exemption and exacerbates the thorny inquiry—acknowledged by Lund—concerning insider or outsider status: everything depends on that distinction alone.[53] Implied consent theories

50. This is certainly true in the law of rape, increasingly including post-penetration withdrawal of consent. *See In re* John Z., 60 P.3d 183, 186 (Cal. 2003) (quoting CAL. PENAL CODE § 261(a)(2) (West 2003)); *see also* Lund, *supra* note 40, at 1202–03 ("But if the principle is that people should get to do what they want behind closed doors without government interference, adult men and women cannot sue each other for injuries arising out of sexual acts to which they both freely consented . . . . The same is true for religion.").

51. *See* RESTATEMENT (SECOND) OF TORTS § 892A(5) (AM. LAW. INST. 1979) ("Upon termination of consent its effectiveness is terminated, except as it may have become irrevocable by contract or otherwise, or except as its terms may include, expressly or by implication, a privilege to continue to act.").

It is possible that the ministerial exception creates a "privilege to continue to act" on the part of the religious institution by implication even after the withdrawal of implied consent by the employee. But there are several difficulties even here. The comment on section 5 gives the example of situations in which no notice has been given of withdrawal of consent or where the other party requires time to withdraw himself, as in the withdrawal of consent to be on private property before liability for trespass. None of these examples contemplates an indefinite privilege of one party to continue to behave as if consent had never been revoked by the other party. More importantly, the very basis of these theories of implied consent is the individual, voluntaristic basis of religious authority. As discussed below, that view sits rather uneasily with the position that consent may never be revoked.

52. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 235(2) cmt. b (AM. LAW INST. 1981) ("Non-performance of a duty when performance is due is a breach whether the duty is imposed by a promise stated in the agreement or by a term supplied by the court . . . .").

53. Lund, *supra* note 40, at 1195 ("It will be difficult to tell when exactly the government acts on behalf of insiders and when it acts on behalf of outsiders.").

depend upon certain language in *Watson v. Jones*,[54] and it is true that some of the church autonomy decisions rest on the idea that members of religious institutions voluntarily join them and are therefore bound to accept institutional decisions to which they might otherwise object. Yet it should not be overlooked that the principal function of the religious entity at issue in *Watson*, whose governing body was elected by the congregation, was to represent the wishes of the congregation.[55] *Watson* is thus particularly amenable to the sort of voluntarist theology of religious authority favored by implied consent theorists.[56]

But this does not mean that religious institutions whose authority is not derived from the elective preferences of individual members, or from the representational function that they perform—there are several that fit this bill—enjoy no ministerial exception or are disabled from resisting government mandates. That is, the implied consent of individual church congregants is not a precondition of the church's capacity to invoke the ministerial exception or to lodge a statutory objection to government mandates that violate its religious commitments. And the state need not adopt a theology of implied consent with respect to religious institutional authority to maintain a ministerial exception. Take the case of excommunication, a decision by a religious institution to expel, shun, or censure a member who may still consent to the church's authority. After excommunication, the member's implied, or even express, consent to the church's authority no longer binds that member to the institution; yet the institution may nevertheless invoke the ministerial exception in response to legal claims by the excommunicated party—assuming ministerial standing. And cases after *Watson* have emphasized the authority of religious institutions, qua institutions, freely to settle on doctrine, select leaders and clerical hierarchs, or resist objectionable government mandates, without depending on a theory of implied consent as to church membership and authority.[57] In one of the most recent, the

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54. *See* Watson v. Jones , 80 U.S. (13 Wall.) 679, 729 (1871) ("All who unite themselves to such a [religious] body do so with an implied consent to this government, and are bound to submit to it.").

55. *Id.* at 681–82 (stating that both the "Church Session" and the Church trustees were elected by the congregation they represented).

56. *See* Helfand, *supra* note 29, at 1933–34 (describing members of religious institutions as "grant[ing]" them authority).

57. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) ("[C]ivil courts [must] defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976); then comparing *Watson*, 80 U.S. at 733–34)).

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a

Sixth Circuit held that the ministerial exception "is a structural limitation imposed on the government by the Religion Clauses, one that can never be waived."[58] That holding sits uncomfortably with the view that the authority of religious institutions is founded exclusively on the consent of individual members.

Third, what counts as "implied consent"—and its revocation—is not clear. This is less a question about the boundaries of insider or outsider status[59] than a puzzle about what Lund describes as the "fiction" of implied consent. Consent is a multipurpose concept that cuts across many different legal disciplines: it is a doctrine that "does many things,"[60] and it would be helpful to know precisely what it is doing here. At the beginning of his classic critique of the concept of consent in modern liberal states, Professor Don Herzog asks several questions about consent about which it would be useful to hear more from implied consent theorists laboring in the religious exemption vineyards:

> When do we need to consent? Should there be special ceremonies of initiation? Or does consent need to be constantly renewed? Do we need to find affirmative acts? Or is the failure to dissent enough? Where—in what social spaces—should we require consent? . . .
>
> Just what does consenting bind us to? . . . Can the people revoke their trust? Or are they stuck? What if ten years ago, I took a vow of poverty for the rest of my life, a vow I now regret: can I shrug and forget about it? . . . What if others

church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

*Serbian E. Orthodox Diocese*, 426 U.S. at 709 (citing Md. & Va. Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367, 369–70 (Brennan, J., concurring) (1970)); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (noting a "spirit of freedom for religious organizations").

*See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). *Hobby Lobby* was, of course, not about a church, but there is nothing in the Court's decision which limits the capacity of the religious organization to resist the government's contraception mandate solely predicated on a finding that the employees impliedly consented to being bound by the organization's religious convictions—though such implied consent might and probably should be a relevant factor in the RFRA compelling interest analysis.

58. Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 836 (6th Cir. 2015).

59. Lund discusses these boundary questions thoroughly. *See* Lund, *supra* note 40, at 1188, 1203–04.

60. *See* Samuel L. Bray, *On Doctrines That Do Many Things*, 18 GREEN BAG 2d 141 (2015).

> have altered their plans in light of my vow and expect that I will continue to uphold it?[61]

Such questions are more pressing for theories of implied consent than for consent proper, because theories of implied consent are less precise about the contours of consent.[62] In what sense, for example, do female employees of a business organization with a religious mission consent by implication to their employer's capacity to resist a mandate requiring the cost-free provision of contraceptive products to them that was not yet in existence when they became employees? Assuming that such precise consent is not needed, at what level of abstraction does implied consent operate, and how deeply are courts permitted to inquire to ascertain its existence? And if implied consent truly is a "fiction," might we instead be better off arguing about the merits of the religious exemption at issue than "going through the circumlocutions of hypothetical consent"?[63]

The point of this extended aside on implied consent as a basis for the ministerial exception and accommodations more broadly is certainly not to debunk it, as there are many persuasive features of the theory. Theological voluntarism does represent an important part of the backdrop of religious freedom in America, and it can justify at least some of what ought to occur in ministerial exception cases.[64] We do not demand that people go to church; they are free to go if they wish, and not to go if they do not. But it is one thing to say that people consent to join religious institutions, and another to say that they consent to decisions made by those religious institutions once they have joined.[65] An institution, as Herzog puts it, is something like "a Pandora's box, though not ordinarily one with invisible or unknown contents, of policies and practices. If you choose to open the box, does it follow that you've chosen each and every one of its contents?"[66] At any rate, questions about the contours and limits of implied consent, and particularly about its claim that religious institutions derive their

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61. DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 3 (1989).

62. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 312 (1986) ("The enforcement of informal commitments where evidence of legally binding intentions is more obscure, however, has plagued contract law for centuries. In such agreements courts must infer assent to be legally bound from the circumstances or "considerations" or "causa" that induced the parties' actions.").

63. HERZOG, *supra* note 61, at 4.

64. I have argued that a religious institution's compliance with its own stated procedures ought to be a factor in determining the application of the ministerial exception. *See* DEGIROLAMI, *supra* note 5, at 183–87. That limitation might be justified in part on the basis that prospective employees of the religious organization can thereby ascertain the rules that obtain before agreeing to join it.

65. *See* HERZOG, *supra* note 61, at 231 ("Dan can choose to enter a monastery, but once there his actions will be dictated by its hallowed rules.").

66. *Id.*

authority solely based on the consent of the individuals who choose to join them—and are deprived of authority whenever such individuals leave them—suggest that at least in contested cases there may be some slippage toward the firmer and more ordinary case of religious exemption subject to the *Smith* approach. *Smith* will continue to predominate.

Another reconciling strategy might be that cases like *Hosanna-Tabor* concerning the ministerial exception actually *are not* about religious accommodation at all since an accommodation assumes the existence of a general power of the state to govern within the particular sphere at issue, but instead represent a jurisdictional line of demarcation. Professor Gregory Kalscheur, for example, has argued that the ministerial exception is a jurisdictional acknowledgment of the "penultimacy of the state."[67] Likewise, Professor Rick Garnett and John Robinson argue that the ministerial exception is best understood as a doctrine of the limits of "jurisdictional competence" of the civil authority to decide religious questions.[68] All of these readings emphasize the disestablishmentarian features of the ministerial exception—the ways in which the ministerial exception represents a kind of revivified separation of church and state.[69] For Garnett, the ministerial exception is better justified as a manifestation of the separation of powers or a federalism of civil and ecclesial authority than as a case of accommodation: "'the fears of power and the hopes for freedom' that have long animated and shaped our constitutional experiment require careful,

67. Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 91 (2008) (citing Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 867, 923 (2000); then comparing Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 77 (2003)); *see also* 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, 122–23 (2009) (discussing the ministerial exception as a doctrine of "adjudicative disability").

68. Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2011–2012 CATO SUP. CT. REV. 307, 328–39.

69. *See also* Alan Hurst, Hosanna-Tabor *and the Exaggerated Decline of Separationism*, 1, 4, 44 (Mar. 7, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230022 [https://perma.cc/XUA3-584W] ("[Scholars] have perceived the Court's turn from separationism to be more complete and more dramatic than has actually been the case.").

vigilant attention to the distinction, division, and separation among authorities."[70]

At least on one reading, however, the *Hosanna-Tabor* Court seemingly cast doubt on the jurisdictional interpretation of the ministerial exception in a well-remarked footnote: "We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether '[t]he court has power to hear the case."[71] It is certainly possible to interpret this footnote as merely distinguishing between a court's obligation to dismiss a case as exceeding its subject matter jurisdiction and its obligation to dismiss it for failure to state a claim on which relief can be granted. Yet the "fact-intensive status"[72] of the ministerial exception after *Hosanna-Tabor* is another indication that the Court thinks it more properly characterized as a species of accommodation—in which interest-balancing is often the rule—than as an Establishment Clause creature—in which interest-balancing is typically forbidden.[73] And if the ministerial exception is indeed an "exception," it seems natural to suppose that it is "excepted"—or exempted—from a neutral, generally applicable law.

A final possibility is simply not to reconcile the cases: to acknowledge the tension between them, and to concede that the contexts in which they apply overlap, yet nevertheless to maintain that each remains as powerful as the other. They are simply rival approaches, neither of which has yet proved the stronger and neither of which is likely to be rejected. Perhaps

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70. Richard W. Garnett, *"Things That are Not Caesar's": The Story of* Kedroff v. St. Nicholas Cathedral, *in* FIRST AMENDMENT STORIES 171, 171–74 (2011) (Richard W. Garnett & Andrew Koppelman eds., 2011) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 590 (1952)).

71. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 n.4 (2012) (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010)). For further discussion of this footnote, *see* Helfand, *supra* note 29, at 1919 ("Indeed, footnote four could not be squared with the view that courts lack the competence to resolve religious disputes."); Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289 (2012).

72. Lund, *supra* note 40, at 1191; *see also* DEGIROLAMI, *supra* note 5, at 178–86 (discussing the particularist quality of the ministerial exception inquiry). It is true that jurisdictional arguments still may be made as part of the balancing calculus and that, as Garnett and Robinson say, footnote four seems only to reject a kind of "decisional" incompetence in the courts. Garnett & Robinson, *supra* note 68, at 328–29. But *Hosanna-Tabor's* footnote four significantly weakened a strong jurisdictional reading emphasizing the separate sovereignties of church and state.

73. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247, 1251 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007)). For similar observations, see Lund, *supra* note 40, at 1189 (recognizing that *Hosanna-Tabor* reflects an interest-balancing approach).

we will muddle along with both for a time. There are areas of law that stumble about blindly in this way, with multiple ill-conceived tests applied simultaneously in increasingly unpredictable and confounding ways.[74] But not forever. *Hosanna-Tabor* may augur doctrinal changes for the Free Exercise Clause, but if it does, at some point fairly quickly these will run up against the *Smith* rule. When they do, there may be some jurisprudential settling, but we are unlikely to remain for long with equally influential, yet distinct, approaches to free exercise applicable to the same subject matter.

## II. *SMITH* IN ECLIPSE

A second possibility is that in the few years since its decision, *Hosanna-Tabor's* scope has become significantly greater, so much so that it is positioned to eclipse *Smith* as the dominant approach to religious accommodation under the Free Exercise Clause. Though it is true that *Hosanna-Tabor* has been extended by some lower courts—and also true that some lower courts were moving in *Hosanna-Tabor's* direction even before the decision—this is the least persuasive characterization of the four.

There are a few bits of evidence in its favor, however. *Hosanna-Tabor* does seem at certain points to separate the religious freedom of institutions from the religious freedom of individuals and treat them as distinct matters.[75] It talks of the Court's "special solicitude" for the rights of religious organizations, without remarking on any similar solicitude for individuals.[76] The Seventh Circuit has characterized *Hosanna-Tabor* as concerning "the autonomy of the church,"[77] and one rarely hears about "the autonomy of the individual" from the Court in its discussion of religious freedom—though one does in other contexts. These judicial statements do seem unequivocally to reject the view that institutional religious freedom is merely derivative of or parasitic on individual religious freedom, as well as the even more extreme position that institutional religious autonomy is

74. The Supreme Court's Establishment Clause jurisprudence comes leaping to mind. For criticism, see Marc O. DeGirolami, *Bloating the Constitution: Equality and the U.S. Establishment Clause*, *in* THE SOCIAL EQUALITY OF RELIGION OR BELIEF (Alan Carling ed., 2016).

75. *See Hosanna-Tabor*, 132 S. Ct. at 707.

76. *Id*. at 706.

77. Korte v. Sebelius, 735 F.3d 654, 677 (7th Cir. 2013).

an outright fallacy.[78] If this distinction finds doctrinal traction —and is considerably amplified—it conceivably might threaten *Smith*, as more claimants might find ways to couch their legal claims in institutional rather than individual terms.[79]

*Smith*, moreover, was a 5-4 decision, while *Hosanna-Tabor* was unanimous.[80] To the extent that either is in danger of eclipse, the Court's voting pattern might suggest greater staying power in the latter. The Supreme Court in Chief Justice Roberts's tenure has achieved either unanimity or a 5-4 split—largely tracking ideological division—in every law and religion decision it has considered.[81] There was nothing particularly controversial or contentious for any member of the Court about *Hosanna-Tabor*; indeed, the *Hosanna-Tabor* concurrences argued for even broader ministerial exception coverage than discussed by the majority. That unity of purpose and perspective was not at all present in *Smith* at the time it was decided.

Furthermore, a few cases arguably have extended *Hosanna-Tabor* somewhat beyond its narrow scope. A recent case, for example, held that

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78. *See, e.g.*, Caroline Mala Corbin, *Above the Law?: The Constitutionality of the Ministerial Exception from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1988–89 (2007) (calling institutional religious freedom a "secondary right"); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007). The circumstances in which church autonomy might be breached are, of course, to be distinguished from the question whether the doctrine exists at all.

79. *See, e.g.*, State v. Crank, 468 S.W.3d 15, 27 (Tenn. 2015) (holding that Tennessee's statutory "spiritual treatment exemption" to the state's child abuse and neglect laws applies not to individual religious believers but only "to members of religious bodies which, like the Church of Christian Science, are established institutions with doctrines or customs that authorize healers within the church to perform spiritual treatment via prayer in lieu of medical care"). Of course, *Crank* is a state statutory decision dependent on findings of legislative intent and has no constitutional application.

The success of this strategy may depend in part on the future of institutional religion in the United States more broadly. At the moment, other contrary developments—such as the rise of the "nones" as a religious legal category—seem more prominent. *See* Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* 1 (European Univ. Inst., Working Paper No. RSCAS 2014/19, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399470 [https://perma.cc/E62Q-HSM4].

80. *See* Lund, *supra* note 40, at 1193 (describing *Hosanna-Tabor*, not *Smith*, as the "fixed star" of free exercise).

81. For discussion of the significance of the Roberts Court's voting patterns in this area, see Marc O. DeGirolami, *Constitutional Contraction: Religion and the Roberts Court*, 26 STAN. L. & POL'Y REV. 385 (2015). Professor Ronald Collins has noted a similar voting pattern in the Roberts Court's speech cases. *See* Ronald K.L. Collins, *Exceptional Freedom—the Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409 (2012–2013); *see, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 710 (2012) (Thomas, J., concurring) ("I write separately to note that . . . the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister.").

a religious organization that is neither a church nor affiliated with a church may nevertheless be a religious institution for purposes of the ministerial exception, and that the ministerial exception is not waivable by a religious institution.[82] Massachusetts' state high court has extended ministerial exception coverage in the case of a non-ordained employee who taught religion at a Jewish school.[83] Several other cases have held that tort and contract claims of various kinds fall within the ambit of the ministerial exception.[84] And, as Professor Lund has shown, some courts had already been moving in *Hosanna-Tabor's* direction, or beyond it, before the Court rendered its decision.[85]

Yet to describe *Smith* as at all overshadowed, let alone eclipsed, by these developments would be unpersuasive. While *Smith* was a 5-4 decision in 1990, the Supreme Court has shown itself to be fully committed to the *Smith* rule. No member of the *Hobby Lobby* Court, for example, was inclined to raise the possibility that the federal government's contraception mandate was not a rule of general application and therefore merited strict scrutiny even under *Smith*, even though that issue had been raised by some of the parties.[86] The dissenting Justices in *Hobby Lobby* went further, arguing

82. Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829 (6th Cir. 2015).

83. *See* Temple Emmanuel v. Mass. Comm'n Against Discrimination, 975 N.E.2d 433 (Mass. 2012).

84. *See, e.g.*, Ginyard v. Church of God in Christ Ky. First Jurisdiction, Inc., 6 F. Supp. 3d 725, 729 (W.D. Ky. 2014) ("[R]egardless of how the Plaintiff's claims are labeled, their resolution would require this Court to enter into areas implicating religious freedom."); Kavanagh v. Zwilling, 997 F. Supp. 2d 241, 254 (S.D.N.Y. 2014) (extending the ministerial exception to defamation claims); Purdum v. Purdum, 301 P.3d 718, 727 (Kan. Ct. App. 2013) (same); Fisher v. Archdiocese of Cincinnati, 2014-Ohio-944, 6 N.E.3d 1254, at ¶ 34 (1st Dist.) (extending *Hosanna-Tabor* to claims of promissory estoppel and intentional infliction of emotional distress because they were "inextricably entangled" with employment discrimination claim); Smith v. White, 2014-Ohio-130, 7 N.E.3d 552, at ¶ 66 (2d Dist.) (barring various tort claims on the basis of the ministerial exception); Reese v. Gen. Assembly of Faith Cumberland Presbyterian Church in Am., 425 S.W.3d 625, 629 (Tex. App. 2014) ("extend[ing] the crux of *Hosanna-Tabor*" to include contract and tort claims); Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357, 363–67 (Wash. 2012) (extending *Hosanna-Tabor* to reach tort claims of negligent retention and supervision); DeBruin v. St. Patrick Congregation, 2012 WI 94, ¶ 30, 343 Wis. 2d 83, 816 N.W.2d 878 (extending *Hosanna-Tabor* to breach of contract actions brought by ministerial employees).

85. *See* Lund, *supra* note 40, at 1211–20 (describing the ways in which courts have evaluated various kinds of tort claims in relation to free exercise values).

86. The Court declined to reach the constitutional claims raised by plaintiffs Conestoga Wood and the Hahns. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014). That decision can be justified as a matter of constitutional avoidance, but it is

for an absolutely exception-less interpretation and expansion of *Smith* that *Smith* itself does not warrant.[87] No Justice in *Hosanna-Tabor* took issue with the *Smith* approach to individual free exercise—not even Justice Alito, who as a circuit court judge on a few occasions read *Smith* reticently to find it inapplicable based on the individualized assessment exception that the *Smith* Court seemed to carve out of its rule.[88]

The narrowness of *Hosanna-Tabor's* scope has become plain as well. Three years ago, Professor Michael McConnell wondered, "what implications does *Hosanna-Tabor* have for the current controversy over the federal government's decision to require religious employers that provide health insurance for their employees to include contraceptive services . . . free of cost?"[89] The answer, after *Hobby Lobby* and related cases concerning the "accommodation" conferred by the federal government to objecting non-profit religious entities, is: none at all. At least part of the reason is that litigants may not have pressed for the application of *Hosanna-Tabor* to this context, notwithstanding the open-ended quality of the Supreme Court's view both of the boundaries of ministerial status and of the type of organization that could be eligible to claim the ministerial exception. As the D.C. Circuit Court of Appeals recently put it in one of these cases, "The Court's reasoning in *Hosanna–Tabor* does not extend beyond ecclesiastical employment matters."[90] Many cases concerning the contraception mandate have not discussed *Hosanna-Tabor* or the ministerial exception, and those that have discussed it uniformly have found it inapplicable.[91] The

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nevertheless notable that no Justice in the majority voiced any reservation at all about the *Smith* approach.

87. The *Hobby Lobby* dissent observed: "Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court's decision in *Employment Div.* [*v. Smith*]." *Id.* at 2790 (Ginsburg, J., dissenting) (footnote omitted) (citation omitted). As I have explained elsewhere, an interpretation of *Smith* as "foreclos[ing]" any free exercise inquiry in cases like *Hobby Lobby* is erroneous. *See* DEGIROLAMI, *supra* note 5, at 147–66; Marc DeGirolami, *The Bishops Statement on Religious Freedom and Widespread Misunderstanding of the State of Free Exercise*, MIRROR OF JUST. (Apr. 14, 2012), http://mirrorofjustice.blogs.com/mirrorofjustice/2012/04/the-bishops-statement-on-religious-freedom-and-widespread-misunderstanding-of-the-state-of-free-exer.html [https://perma.cc/H4YL-MCQX].

88. *See* Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

89. McConnell, *supra* note 24, at 835.

90. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 274 (D.C. Cir. 2014), *cert. granted*, 136 S. Ct. 446 (U.S. Nov. 6, 2015) (No. 14-1453).

91. *See, e.g.*, Priests for Life v. U.S. Dep't of Health & Human Servs, 7 F. Supp. 3d 88, 105 (D.D.C. 2013), *aff'd in part, rev'd in part*, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, 136 S. Ct. 446 (U.S. Nov. 6, 2015) (No. 14-1453) ("This Court agrees with the vast majority of courts which have considered the issue and found that the contraceptive services regulations are neutral and generally applicable, and accordingly have rejected Free Exercise Clause challenges.").

dominance of the various statutory frameworks—federal and state RFRAs and RLUIPA—as the primary legal vehicles through which accommodations are evaluated further highlights the limited impact of *Hosanna-Tabor*.[92] But as a general doctrinal approach to constitutional free exercise, *Smith* is in no danger of being eclipsed by *Hosanna-Tabor*.[93]

## III. *HOSANNA-TABOR* IN ECLIPSE

In fact, in light of *Hosanna-Tabor's* relatively minor influence on constitutional free exercise and religious accommodation specifically, one might instead wonder whether *it* is the case that has been—or is likely to be—eclipsed. The deliberately minimalist, cautious, and fact-bound style in which it was written[94]—indeed, the very fact that it was narrow enough to generate a 9-0 vote—has made it possible for some lower courts to limit its application.

In addition to the ministerial exception's failure to influence any feature of the contraception mandate litigation,[95] some courts have stringently demanded evidence of the presence of nearly all of the factors examined by the *Hosanna-Tabor* Court in determining whether an employee qualifies as ministerial, the claims and beliefs of the religious institution about the employee's ministerial status notwithstanding.[96] Other courts have confined the language in *Hosanna-Tabor* referring to the ministerial exception as applicable to "religiously affiliated institutions" to reach only churches, or institutions intimately associated with churches, thereby excluding hospitals, universities, and other religious charities.[97] And still others have

92. *See* Korte v. Sebelius, 735 F.3d 654, 677–78 (7th Cir. 2013) (church autonomy cases have nothing to do with RFRA exemptions). The ministerial exception has likewise been found irrelevant in controversies over religious exemptions from state anti-discrimination laws. *See, e.g.*, Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶67, 309 P.3d 53.

93. *See* McConnell, *supra* note 24, at 823.

94. *See* DEGIROLAMI, *supra* note 5, at 178–79; *supra* note 90.

95. *See supra* note 91.

96. *See, e.g.*, Herx v. Diocese of Ft. Wayne-South Bend, 48 F. Supp. 3d 1168, 1176–77 (N.D. Ind. 2014) (rejecting Catholic school's description of a teacher as a minister in a sex and disability discrimination suit notwithstanding her own acknowledgment that the school expected her to serve as a Christian role model); Dias v. Archdiocese of Cincinnati, No. 1:11–CV–00251, 2012 WL 1068165, at *5 (S.D. Ohio Mar. 29, 2012) (declining to extend *Hosanna-Tabor* on the basis of defense that all teachers were expected to be Catholic role models).

97. *See, e.g.*, Penn v. N.Y. Methodist Hosp., No. 11-CV-9137(NSR), 2013 WL 5477600, at *9 (S.D.N.Y. Sept. 30, 2013) (concluding that a hospital which at one time was affiliated with the United Methodist Church was not a "religiously affiliated entity"

held that concededly ministerial employees asserting anything other than employment discrimination claims are not prevented from proceeding by the ministerial exception.[98]

Several courts have simply held that *Hosanna-Tabor* applies when they are faced with more or less the same factual circumstances present in *Hosanna-Tabor*—essentially limiting it to its facts—or otherwise recognized as within the ministerial exception before *Hosanna-Tabor*.[99] Indeed, it might be that by issuing such a narrow and fact-specific opinion, *Hosanna-Tabor* has actually shrunk the scope of the ministerial exception by comparison with what was previously available in at least some federal circuits and states. Some of these, for example, had adopted broader or more categorical views than appear in the *Hosanna-Tabor* majority opinion—and that are more closely echoed in Justice Thomas's concurrence[100] about a religious institution's autonomy rights under the ministerial exception.[101]

And yet it would misdescribe matters to call *Hosanna-Tabor* and the ministerial exception more broadly as having been overpowered or even weakened in any significant way by the *Smith* framework or any other doctrine of permissive religious accommodation. The ministerial exception remains powerful within its narrow sphere of application. And just as *Hosanna-Tabor* may have narrowed the scope of the ministerial exception

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under *Hosanna-Tabor*); Winbery v. La. Coll., 2013-339, p. 8 (La. App. 3 Cir. 11/6/13); 124 So. 3d 1212, 1217 (declining to extend *Hosanna-Tabor* to a college whose board of trustees was elected by the Louisiana Baptist Convention because college was not a church).

98. *See, e.g.*, Doe v. Corp. of the Catholic Bishop of Yakima, 957 F. Supp. 2d 1225, 1232 (E.D. Wash. 2013) (describing *Hosanna-Tabor's* holding as "sharply circumscribed," and holding that ministerial exception did not bar state negligence and intentional infliction of emotional distress claims); Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau, 49 A.3d 812, 817 (D.C. 2012) (holding, without discussion of *Hosanna-Tabor*, that ordained minister could proceed with breach of contract action against church notwithstanding ministerial exception); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 615 (Ky. 2014) (holding that though a theology professor was a ministerial employee of a seminary, his breach of contract action was not barred by the ministerial exception).

99. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 172–73 (5th Cir. 2012) (holding that *Hosanna-Tabor* bars a suit by a former music director against a church claiming that he was fired in violation of the ADA and ADEA). A Seventh Circuit decision before *Hosanna-Tabor* had held essentially the same thing in an age discrimination suit by a church organist. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1036 (7th Cir. 2006); *see also* Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668, 673 (N.D. Ill. 2012) (finding *Hosanna-Tabor* applicable because "each of the factors that the Supreme Court considered in *Hosanna-Tabor* are present here.").

100. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710–11 (2012) (Thomas, J., concurring).

101. *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 299 (4th Cir. 2004) (ministerial exception shielded institution from claims by a Kosher supervisor); Pardue v. Ctr. City Consortium Sch., Inc., 875 A.2d 669, 699 (D.C. 2005) (ministerial exception shielded parochial school from claims by its former headmaster).

in some cases and for some jurisdictions, it may have broadened it in others.[102] As discussed above, the scope of the ministerial exception has been extended by several courts beyond the facts of *Hosanna-Tabor*.[103] And as to its own particular sphere of influence, *Hosanna-Tabor* is in no danger of being overruled. The fact that the general reach of the ministerial exception after *Hosanna-Tabor* remains highly limited with respect to the full panoply of religious accommodation controversies—which are in any case governed primarily by various statutory frameworks—does not mean that *Hosanna-Tabor* has been eclipsed.

## IV. THE WANING OF RELIGIOUS ACCOMMODATION

The previous three sections might be summarized as follows: *Smith* remains the primary constitutional vehicle for evaluating free exercise claims, even though the multiple statutory frameworks, state and federal, have largely rendered the *Smith* approach a secondary matter in adjudicating religious accommodation cases. The ministerial exception is just that—an exception to the core constitutional rule of accommodation, with little to no effect on statutory religious exemption cases outside its narrow reach. *Hosanna-Tabor* has been limited or extended in a few subsequent cases but, by and large, remains ineffectual as a full-fledged alternative to religious accommodation under the Constitution.

While this is a plausible description, it misses something about the wider context in which requests for religious accommodation are now received and evaluated. Opponents of religious accommodation have long viewed them as sanctioning unfairly advantageous and unequal treatment by the state, and the state frequently has agreed when the accommodation involved matters of great weight to it—conscription into military service for the defense of the Republic, for example.[104] By contrast, when the

102. *See, e.g.*, Griffin, *supra* note 38, at 1019. *See generally* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010). *See also* Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006) ("[W]e join seven of our sister circuits in adopting the [ministerial] exception and hold that it applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions.").

103. Lund, *supra* note 40, at 1190–93, 1220–21 (explaining the ministerial exception as a legal exception that bars ministers from bringing "employment related" claims against churches). *See supra* notes 82–84.

104. *See generally* Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005). Quakers were not compelled to fight, but they were not exempted either:

nature of the government interest was less grave—as, for example, in the case of the exemption of Quakers from the taking of oaths in the early Republic—religious accommodation could proceed notwithstanding claims of unequal treatment or the potential for injury to broader civic interests.[105]

The different treatment of these kinds of cases in the early American experience gestures toward an additional reason for the growing unpopularity of religious accommodation. The modern expansion of the reach of the state has resulted in a concomitant increase in the kinds of recognition, and validation, that it can now confer. As the ambit of state authority has expanded, the ways in which people may be negatively affected, or harmed, by a state-sanctioned religious accommodation have likewise expanded. Religious accommodations are now said, for example, to implicate injuries to the "dignity" of those who oppose them, the implication of which is that the state's authority includes the power to confer individual dignity as a self-standing civic good. People want to be dignified by the state,[106] their self-worth to be accorded official validation, and they perceive state-countenanced indignities meant for the protection of religious freedom as real injuries demanding state remediation.

Yet offenses to dignity are only the most extreme example of the overall expansion of government interests.[107] For we are now at some considerable distance from *Smith's* dystopian warnings about the threat of anarchy or

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they were required to pay an expensive "equivalent." *See id.* at 1625–26. *See also* Gillette v. United States, 401 U.S. 437, 459 (1971) ("Other fields of legal obligation aside, it is undoubted that the nature of conscription, much less war itself, requires the personal desires and perhaps the dissenting views of those who must serve to be subordinated in some degree to the pursuit of public purposes.").

105. *See* DEGIROLAMI, *supra* note 5, at 154–55. The government interest in oath-swearing was nevertheless substantial as a means of maintaining the integrity of official legal processes.

106. For acute analysis of the dignitarian turn in the gay rights context, *see* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 263, 282 (2014) ("*Windsor* is a pivotal moment in the metamorphosis of the legal homosexual. The legal homosexual, at least in states where same-sex marriage is legally recognized, is portrayed as a *morally dignified person*.").

107. A well argued, but similarly sweeping, expansion of the ambit of the state's interests holds that the government can regulate expression that violates norms of "full and equal citizenship" and results in associated harm. *See generally* Nelson S. Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013). As a corollary to his argument that the government is prohibited from endorsing any view that "abridges full and equal citizenship in a free society," Professor Tebbe writes: "Translated into political morality, government nonendorsement would mean that the limits identified in this Article should function as the only restrictions on government's power to endorse ideas. Within those limits, government should be free to favor or disfavor a wide range of views, even if they are comprehensive." *Id.* at 699–700. Needless to say, there are numerous religious doctrines and beliefs that are likely to violate a categorical norm of political liberalism of this type. *Id.* at 662 n.56.

governmental impotence that would result from overgenerous religious accommodations. In a society in which the government assumes an increasingly large role in the life of the citizenry, more injuries are transformed into legally—and perhaps even constitutionally—cognizable rights. The number and type of state interests that qualify as compelling swell to match the new dignitarian and other harms caused by religious and other accommodations. And the protection of rights becomes a zero sum game, as every win for religious accommodation is a legally cognizable, but unvindicated, loss for somebody else.

There is no clearer manifestation of this development than the recent emergence of the so-called "third-party-harms" theory of the Establishment Clause in response to claims for religious accommodation in the *Hobby Lobby* litigation.[108] The core of the theory is that permissive religious accommodations that impose "material" or "significant" "burdens on identifiable third parties" violate the Establishment Clause. Before describing it in greater detail, however, it is worth noting the genesis of the theory: the federal government's decision to intervene in an area that it had never touched before. The catalyst for an assertion of third party harms as independent grounds for an Establishment Clause claim in *Hobby Lobby* was the government's assumption of power to mandate the cost-free provision of contraceptive coverage by private employers. Once it did that, the non-receipt of cost-free contraceptive coverage by anybody who desired it could be restyled by the theory's exponents as the deprivation of an "entitlement"[109] and the shifting of a "burden" to a third party. That burden was generated by the enlargement of the government's powers and the distension of its interests. Likewise, resistance to the government's newly assumed powers on the basis of conflict with preexisting rights of

108. The theory is elaborated (though with different titles and slightly different formulations), among other places, in Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); 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 (2014); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015); Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), http:// balkin.blogspot.com/ 2013/12/hobby-lobby-and-establishment-clause.html [https://perma.cc/MCE7-CJCA].

109. Gedicks & Koppelman, *supra* note 108, at 59 ("Common sense tells us that a RFRA exemption of Hobby Lobby from the Mandate deprives employees of a valuable legal entitlement.").

religious freedom in RFRA and similar laws could now be caricatured as retrogressively libertarian, trading implicitly on the fanciful metaphor of lawless "anarchy" prophesied in *Smith*.[110]

The third-party-harms theory is implausible as a doctrinal matter.[111] It depends heavily on *Estate of Thornton v. Caldor*, a pre-RFRA case that involved an "absolute" legislative exemption for employees from working on their chosen Sabbath day.[112] A Presbyterian sued Caldor under the statute after the company dismissed him from a management position because he would not work on Sundays. Because the law took no account of the secular interests of third parties (the employers), and gave individuals an absolute right not to work on the Sabbath day of their choice, the law was found to violate the Establishment Clause. The "unyielding weighting in favor of Sabbath observers" resulted in what the Court held was an "absolute and unqualified burden" on employers—a burden so severe that it would actually "compel" non-believers—as well as those with different religious beliefs[113]— to act in the name of religion.[114]

The theory's defenders misread *Caldor* to authorize a doctrinally superfluous Establishment Clause claim on behalf of third parties who are

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110. *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015). It should be clear that I am not claiming that the federal government is without constitutional or other legal authority to create new entitlements (provided, of course, that they do not conflict with other laws, including those that protect religious freedom). My claim is instead descriptive: the expansion of those secular interests deemed "compelling" by the government increasingly will run up against existing legal protections for religious accommodation in laws like RFRA.

111. I have explained these views elsewhere. *See, e.g.*, Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUST. (Dec. 5, 2013), http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html [https://perma.cc/8WN9-SZZ6]; *see also* Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby & Conestoga, et al., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 356639.

112. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 704–06, 708–11 (1984).

113. This important feature of *Caldor* is emphasized in Nathan S. Chapman, State Action, the Establishment Clause, and Distributions of Liberty (unpublished manuscript) (on file with author).

114. *Caldor*, 472 U.S. at 709–10. The extremity of the burden in *Caldor* is helpfully illustrated in 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 338, 344 (2008).

> If a business, such as a school, operated only five days a week, it would have to grant an employee one of those days off if that was his Sabbath. . . .
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> . . . .
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> Given the absolute privilege it provided, the Connecticut law held invalid in *Estate of Thornton* could well have encouraged people to join religious groups that worship on the day they would want off.

*Id.* In Greenawalt's example, the statute's "unyielding weighting" in favor of accommodation might even force the school to close down.

"significantly burdened" by any religious accommodation, which, they claim, could be brought alongside an identical claim by the government in defense of its law as part of the compelling interest statutory inquiry.[115] Whatever "significant burdens" on third parties might be for the theory's defenders—more on this below—they do not seem to be at all the same as the "absolute and unqualified burdens" described in *Caldor*. But the larger doctrinal issue is that the Supreme Court later held in *Cutter v. Wilkinson* that the statutes—whether RFRA or RLUIPA—"properly appli[ed]"[116] already account for the interests of third parties as part of the compelling interest component of the strict scrutiny test.[117] Compelling state interests include third party interests within the statutory calculus. Indeed, one might simply say that compelling state interests *just exactly are* third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties? The third-party-harms theory simply gives exemption opponents another bite at the apple.[118] No subsequent case—and, indeed, no individual Justice on the current Court—has authorized a duplicative third party Establishment Clause claim[119] outside the statutory framework.[120]

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115. *See, e.g.*, Gedicks & Koppelman, *supra* note 108, at 54 (discussing the "shifting" of "significant costs on others"); Tebbe, Schragger & Schwartzman, *supra* note 108.

116. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005). *Cutter* concerned a facial challenge to RLUIPA, which the Court unanimously rejected, but there is no difference between RFRA and RLUIPA for these purposes.

117. *See* Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 46 (2014) ("It seems very unlikely that an accommodation that is required by RFRA would implicate the *Caldor* Court's concern about the 'unyielding weighting' of religious objectors' concerns over other (public and private) interests.").

118. *See* Amicus Brief of Constitutional Law Scholars, *supra* note 111, at 19 ("RFRA . . . already takes into account the government's interest in protecting third parties").

119. In fact, it is not clear how a third party could actually bring such a claim. The Establishment Clause applies against the government. If the government resists granting a religious accommodation—as in *Hobby Lobby*—how could a third party sue the government alleging that an accommodation would violate the Establishment Clause? Or would the third party need to wait until the accommodation was held by a court to be required by RFRA or RLUIPA, and only then bring an action alleging that though the accommodation is mandated by RFRA or RLUIPA, it nevertheless violates the Establishment Clause? Or instead would the third party need to intervene in an ongoing RFRA or RLUIPA litigation to assert its Establishment Clause interest (but against whom?), an interest that the government was already asserting in defense of its law?

120. The *Hobby Lobby* Court rejected the claim that religious accommodations are problematic so long as the government program at issue confers a benefit on a third party. . In doing so, it

More important than the doctrinal mistakes on which the theory rests, however, are the philosophical commitments it reflects. The issue is the nature of a legally cognizable harm to third parties resulting from a permissive religious accommodation, and the kind of harm that should defeat—as a constitutional matter or otherwise— such an accommodation. Defenders of the theory have not always been clear about precisely which types of harms to third parties—other than deprivations of cost-free contraception—rise to the level of significance. Harms come in many forms, after all—physical, emotional, financial, symbolic, and so on. If the standard truly is as open-ended as significance or materiality, then it is difficult to see why, for example, financial harms alone would be cognizable: some symbolic harms might well be more significant or material than some financial harms, and vice versa. But it should be plain that as the threshold of significance decreases, the reach of the theory, the number of cognizable third party harms, and the threat to permissive religious accommodation, all increase. Moreover, as the government assumes to itself greater power to mandate the conferral of benefits, the deprivation of those benefits as a consequence of a religious accommodation becomes more amenable to classification as a significant or material harm.

The issue of symbolic or dignitarian harm is particularly problematic. If perceived affronts or injuries to one's personal dignity constitute a significant or material harm to a third party, then it is difficult to see how many permissive religious accommodations could survive. Laws reflect morally and politically charged messages. Whether the subject is education, public health, drugs, sexuality, commerce, prisons, insurance, the environment, or the military, laws embody particular moral convictions and impose, even if tacitly, particular moral views on those subject to them. Religious accommodations are decisions by the government to permit limited dissent from these moral messages. In accommodating religious objectors, the state might—though it need not—be perceived not merely to authorize limited disagreement with the law, but to countenance disrespect for the moral views underlying it or even for the moral dignity of those who are its intended beneficiaries. But if the state comes to have powerful legal

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stated that putative burdens on third parties resulting from religious accommodations are evaluated through the statutory compelling interest/least restrictive means mechanism, not through an extraneous Establishment Clause claim. *Id.*

Justice Ginsburg has come the closest to endorsing the third-party harms theory in her two-sentence concurring opinion, joined by Justice Sotomayor, in *Holt v. Hobbs*: "Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. On that understanding, I join the Court's opinion." 135 S. Ct. 853, 867 (Ginsburg, J., concurring) (citations omitted). Not even she, however, makes any mention of the Establishment Clause as a basis for differentiating the cases.

interests in remedying symbolic or dignitarian offenses, then that may well render many permissive religious accommodations illegal.

In a recent article in the Yale Law Journal, Professors Douglas NeJaime and Reva Siegel argue that accommodations based on claims of "complicity" in the religiously objectionable acts of third parties impose "special" "material and dignitary burdens" on those third parties.[121] NeJaime and Siegel purport to distinguish the type of claim for religious accommodation in *Hobby Lobby*—and several other contemporary conflicts concerning sexual equality and autonomy—from the claims for religious accommodation that preceded it, inasmuch as they believe there to be distinctions of "form" and "social logic" between accommodations grounded in claims of complicity with sinful behavior and other varieties of accommodation. The formal distinction is that complicity-based claims for accommodation focus on the sinful behavior of third parties, while other sorts of claims for religious accommodation do not.[122] So, for example, a Muslim inmate's requested exemption from a prison's no-beard policy does not implicate claims of complicity in other people's sinful behavior;[123] neither does the request for exemption for one's children from compulsory schooling laws;[124] but a religious organization's claim for accommodation from a government mandate requiring the cost-free provision of contraceptive coverage to its employees focuses on the employees' sinful behavior. The orientation of complicity-based accommodation claims toward third parties is said to impose unique or "distinctive" "material and dignitary harms" on those third parties that are absent in other cases of religious accommodation.[125] The "social logic" of complicity-based claims for accommodation is also said to be distinct, inasmuch as these sorts of claims are frequently "entangled in long-running 'culture war' conflicts about laws that break from traditional morality."[126]

NeJaime and Siegel's argument about formal differences among various types of religious accommodations is correct: not all requests for religious accommodation take the form of a claim concerning complicity. The Native Americans in *Smith*, for example, were seeking an accommodation

121. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2566 (2015).
122. *Id.* at 2519.
123. *Id.* at 2524 (citing *Holt*, 135 S. Ct. 853).
124. *Id.* at 2526–27 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).
125. *Id.* at 2566.
126. *Id.* at 2526, 2542.

from drug laws in order to engage in a practice that they believed was religiously required, not arguing that failure to accommodate them would render them complicit in evil or sinful conduct. But the authors' claim that complicity-based religious accommodations were generally unheard of in the First Amendment religious freedom canon before *Hobby Lobby* is incorrect. Claims of complicity with evil or sin as a basis for religious accommodation are hardly unique to the post-*Hobby Lobby* period, and are present even in some of the cases that the NeJaime and Siegel raise. When the Amish parents in *Wisconsin v. Yoder* objected on behalf of their children to the state's compulsory school attendance laws, it is true that the Court "conceptualized the interests of the Amish children as aligned with their parents, such that the accommodation benefited, rather than potentially harmed, the children themselves."[127] But this does not mean that the objection in *Yoder* did not concern complicity. The Amish parents were claiming that forcing their children to attend school implicated them, and their children, in—demanded that they acquiesce and participate in—a way of life with third parties to which they strongly objected on religious grounds:

> [R]espondents believed, in accordance with the tenets of Old Order Amish communities generally that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that, by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.[128]

The Amish were seeking an exemption for their children from participating in conduct, in which other children participated, precisely because by participating in that conduct they would be implicated in the salvation-threatening behavior of other third parties—the children who did attend school, as well as the parents, teachers, administrators, and others committed to public schooling.[129] Arguments from complicity, here as in criminal law, focus on objectionable conduct, not objectionable people[130]: "Co-

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127. *Id.* at 2526.

128. *Yoder*, 406 U.S. at 209.

129. For further discussion, see Marc O. DeGirolami, *No Tears for Creon*, 15 LEGAL THEORY 245, 251–58 (2009).

130. It is the accomplice's state of mind *with respect to the principal's commission of the offense*, not with respect to anything about the principal himself, that triggers accomplice liability. For example, A is B's accomplice if he supplies B with a gun with the intention that B kill C. The mens rea of accomplice liability relates to A's mental state with respect to the result—a killing—not with respect to anything about the character of the person doing the killing (B). B's acts become A's acts; B's character does not become A's character. *See, e.g.*, Commonwealth v. Murphy, 844 A.2d 1228, 1236 (Pa. 2006). So, too, in the religious exemption context: the objection is to the conduct of the third party, not to the character of the third party. It is not necessary, therefore, that the Amish (for

operation . . . is concurrence with another in a sinful *act*. This might be done by acting with another in sin . . . or by being the occasion of the sin of another."[131]

Claims of conscientious objection to participation in military service or related activities frequently are even clearer cases of arguments grounded in complicity. In *Thomas v. Review Board*, for example, the claimant's request for religious accommodation also was based on an objection dependent on the concept—if not the precise language—of complicity: "Thomas admitted before the referee that he would not object to working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank. . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience."[132] By contrast, working on tank turrets, Thomas believed, *would* render him a "direct party to"—that is, someone who aided or assisted[133]—those third parties who contributed to the war effort, soldiers, for example, an effort to which Thomas objected in religious conscience. NeJaime and Siegel purport to distinguish *Thomas* on the ground that Thomas did not "single out a particular group of citizens as sinning."[134] That is false: Thomas did single out those citizens to whom weaponry

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example) be concerned for the souls of non-Amish others in order to be implicated in complicity with the acts of non-Amish others.

131. 1 HENRY DAVIS, S.J., MORAL AND PASTORAL THEOLOGY: HUMAN ACTS, LAW, SIN, VIRTUE 341 (L. W. Geddes, S.J. ed., 8th ed. 1959) (emphasis added).

132. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

133. The actus reus required for complicity in criminal law is generally minimal: any words or behavior that *could have* aided or influenced the principal actor are sufficient. *See* Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 359 (1985). There is academic debate about the precise quality of an accomplice's mens rea. *See* Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 468–83 (2013) (discussing various possibilities). As applied to the religious exemption context, the claim is that aiding even in minimal ways evinces a religiously objectionable intent to engage in the conduct of the third-party principals. *See* Brief of 67 Catholic Theologians and Ethicists as Amici Curiae in Support of Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp. at 2, Nos. 13-354 & 13-356), 2014 WL 316716.

The Catholic theological tradition, in common with related Christian traditions, has well-developed concepts used to assess whether a believer may "cooperate in"—*i.e.*, facilitate or assist—the religiously objectionable action of another person. Several objective criteria, commonly invoked by the Catholic theological tradition, determine whether such cooperation would cause the believer to share in moral responsibility for that action. *Id.*

134. NeJaime & Siegel, *supra* note 121, at 2526 n.45.

would be shipped and who would use it in ways to which he objected in conscience.[135] But it is also irrelevant. NeJaime and Siegel's repeated emphasis on the characterological or moral association of the accomplice with the third party represents a persistent confusion in their account.[136] The singling out of the morality or the character traits of third parties makes no difference, since the conduct, not the character, of the third party is what matters for complicity-based claims. Even if Thomas had not singled out specific people, therefore, the form of such religious accommodations is perfectly familiar. It is a claim that one's participation in a practice or an activity will assist third parties in the prosecution or consummation of that activity, and that this assistance implicates the believer in violations of religious conscience.[137]

NeJaime and Siegel also claim that a complicity-based religious accommodation is distinctive because it "does not entail costs borne by society as a whole"[138] but that these costs are instead borne entirely by discrete third parties. Similarly, Professor Frederick Gedicks claims that the harms to third parties are unique in cases like *Hobby Lobby* because such costs are not "fully distributed through all society—or a very large

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135. *Thomas*, 450 U.S. at 715.

136. *See, e.g.*, NeJaime & Siegel, *supra* note 121, at 2519 (emphasizing the accomplice's "relationship to the third party"); *id.* at 2527 ("Because complicity-based conscience claims are oriented toward third parties who do not share the claimant's beliefs about the conduct in question, their accommodation has potential material and dignitary implications for those the claimants condemn."); *id.* at 2542–43 (observing that complicity-based claims can have social effects on the prospects for "traditional morality").

137. Several other religious accommodation cases reflect precisely a concern about implication in and contribution to the sinful conduct of others. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 695–96 (1986) (noting that claimant's objection to obtaining a Social Security number was grounded in the belief that participation in the system would defile his daughter's "spiritual purity" and that uses of the number by others "over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power."); United States v. Lee, 455 U.S. 252, 255 (1982) (noting a Biblical basis for the Amish claimant's belief that participation in the Social Security system was "sinful" because it reflected a failure to provide for one's elderly family members); Gillette v. United States, 401 U.S. 437, 440–41 (1971).

> In line with religious counseling and numerous religious texts, Negre, a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between 'just' and 'unjust' wars, and to forswear participation in the latter. His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience . . . .

*Id.* It is true that *Bowen* and *Lee* were decided against the claimants, but they nevertheless involved complicity-based arguments.

138. NeJaime & Siegel, *supra* note 121, at 2542.

segment of it."[139] But that, too, has nothing uniquely to do with the form of such accommodations or with anything special about the religious objection in cases like *Hobby Lobby*. Conscientious objections to military conscription based on claims of complicity in the evil of war—which create massive burdens on non-objecting third parties, as evidenced by various third parties' adamant resistance to them in the Early Republic[140] —generally are borne by society as a whole." That does not make the objections any less about complicity or any more conceptually problematic than other accommodations. Conversely, other sorts of accommodations may impose serious costs on identifiable third parties—rather than on society as a whole—and yet have nothing to do with complicity, for example, testimonial privileges for clergy-penitent communications.[141]

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139. *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, 173 (2015).

140. Hamburger, *supra* note 104, at 1612, 1623, 1630, 1631. Here again, I disagree with Professor Gedicks and Ms. Van Tassell, who claim that the Establishment Clause forbids those accommodations that affect "private ordering"—that is, those which might induce people to act in ways that they would not otherwise act, but for the religious accommodation. Gedicks & Van Tassell, *supra* note 108, at 366. Against the objection that such a rule would almost surely render all conscientious objection religious accommodations unconstitutional, Gedicks and Van Tassell write that

> [I]t is difficult to imagine that permissive exemption of religious pacifists from the draft would be a factor in the decision of nonpacifists to comply with or evade the draft [because] . . . many ordinary activities involve risks of death that people undertake without a thought, like driving a car (being hit by a drunk or otherwise reckless driver) and traveling by air (plane crashes). The risk of harm is so remote that people simply do not consider it in deciding whether to drive or to fly.

*Id.* at 367 & n.114.

With all due respect, analogies comparing the risk of driving a car or flying in a plane with the risk of going to war are not convincing and demonstrate the folly of adopting "private ordering" Establishment Clause limits on permissive legislative accommodations. *See Gillette*, 401 U.S. at 459–60.

> The fear of the National Advisory Commission on Selective Service, apparently, is that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict.

*Id.*

141. *See, e.g.*, Mockaitis v. Harcleroad, 104 F.3d 1522, 1532–33 (9th Cir. 1997) ("All fifty states have enacted statutes 'granting some form of testimonial privilege to clergy-communicant communications. Neither scholars nor courts question the legitimacy of the privilege, and attorneys rarely litigate the issue.'" (quoting *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1556 (1985))).

Decisions about cost allocation in the face of a legally cognizable religious objection are the government's, not the claimant's. In *Hobby Lobby*, it was the federal government's decision, not Hobby Lobby's, not to allocate the cost of contraception coverage to "society as a whole," through the mechanism of taxation, for example, but instead to impose it on private religious objectors.[142] The fact that Hobby Lobby was adjudged to have a valid claim for exemption under RFRA does not mean that anything in the nature of its objection had the necessary effect of imposing the costs of its objection on third parties; it had that effect only because of the scheme selected by the government. The new "baseline," one in which the government assumed to itself new regulatory powers in areas formerly not deemed to be within its superintendence, was set and controlled by the government.[143] There is therefore nothing unusual or novel about the form of a religious accommodation dependent on the idea of complicity, whether as a matter of the nature of the third party burden or the allocation of accommodation's costs.

NeJaime and Siegel's arguments about the distinctive "social logic" of complicity-based claims are weaker still. The claim here is that requests for religious accommodation based on complicity in the sin of third parties have served as a rallying cry in the mobilization and empowerment of conservative causes—specifically in the contexts of abortion and contraception—and as a result they may impose peculiar kinds of harms on third parties. These sociological observations about political mobilization may or may not be true, and they may or may not be unique to the sorts of controversies that

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142. Gedicks labels this argument "disingenuous" because he speculates that it might be expensive for the government to fund the mandate itself and because it is "not politically viable" for it to do so. Gedicks, *supra* note 139, at 157–62. If the quantity of money needed for the government to fund the mandate is indeed as great as Gedicks believes, then that is all fodder for the compelling interest or least restrictive means analysis and does not transfer responsibility for the burden on third parties to the religious claimant. As for the political viability of government funding, and Gedicks's protest that "political conservatives" would surely stymie any such plans, this sort of political bellyaching has little to do with the least restrictive means analysis: if every speculative grumble about the political infeasibility of less restrictive means were legally operative, there would be nothing left of the least restrictive means component of the test. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

143. *See* Garnett, *supra* note 117, at 46–47.

> The argument that an exemption for Hobby Lobby and other employers would violate the Establishment Clause takes as the relevant starting point, or baseline, the requirement that employers provide employees with no-cost-sharing contraception coverage and employees entitlement to that coverage. But, surely Congress could depart from that asserted baseline by undoing the contraception-coverage rules in their entirety without violating the Establishment Clause.

*Id.* (footnote omitted).

interest the authors.[144] But why this should be relevant to the conceptual distinctiveness of a class of religious accommodations, rather than simply to the political contentiousness that some religious accommodations tend to excite, is a mystery. One can stipulate that the requested accommodation in *Hobby Lobby* was more controversial in certain political and cultural circles than the accommodation in, say, *Holt v. Hobbs*, but by itself, that distinction tells us little more than that religious accommodation since the passage of RFRA and RLUIPA has been easy enough to tolerate so long as it did not implicate certain specific secular concerns. Claims about the "social logic" of accommodation illustrate more about the authors' own ideological investments than anything singular about the structure of complicity-based accommodation claims.

Indeed, it becomes apparent that one of NeJaime and Siegel's particular concerns is with the ways in which *any* religious accommodation—complicity-based or otherwise—can generate "dignitary" harms to third parties, and specifically to the dignity of those who disagree with what the authors describe as "traditional morality" about various sexual issues.[145] A leading antidiscrimination scholar has likewise noted that the prevention of harms to "dignity" and the stigmatization of discrimination are two of

144. Demands for exemption from military service based on religious conscientious objection during the Vietnam War—viewed in the context of all of the associated political and cultural apparatus of dissent, for example, the burning of draft cards, anti-war marches, the involvement of Students for a Democratic Society and similar organizations in teach-ins and other forms of protest, during that period—were motivated by claims of complicity and were not especially associated with conservative political causes.

145. I focus in this paper on the authors' claims about dignitarian harm, but their other arguments about the unique "material" harms that complicity-based religious objections necessarily impose on third parties are not well supported. They argue, for example, that complicity-based religious objections have the special consequence of denying "health services" of various types to third parties. As already explained, however, there is nothing logically compelled in the complicity-based objection in *Hobby Lobby* that would have such an effect. Furthermore, to prove such a claim, one would need data about the availability of and access to contraception, or the availability of information about obtaining contraception, to those of Hobby Lobby's, and similarly objecting organizations', employees that desired it after the decision. But NeJaime and Siegel do not provide such data. Instead, they speculate that "in more conservative, religious, and rural parts of the country, complicity-based refusals have the capacity to construct separate, localized legal orders." NeJaime & Siegel, *supra* note 121, at 2574. I take it that such developments would be of concern even if they did not occur in "conservative, religious, and rural" locations, if there were evidence that they were occurring.

the three "canonical" functions of antidiscrimination laws generally.[146] Religious accommodations, it is said, have the power to "stigmatize and demean" those who disagree with the religious claimant's dissenting position on these matters, even when such objections are "not stated explicitly."[147] The feeling of being "judged" by those who raise religious objections to certain conduct, and the indignity of knowing that the state has countenanced that judgment by permitting a religious accommodation, may themselves be independent harms.[148]

Though NeJaime and Siegel do not discuss it, the ministerial exception no less than the accommodation at issue in *Hobby Lobby* has the capacity to "stigmatize and demean" third parties by injuring their dignity.[149] Surely Cheryl Perich, the fired teacher in *Hosanna-Tabor*, did feel "judged" and "stigmatized" by the members of the religious institution that rescinded her ministerial position, demanded her resignation, opined insultingly that "she might pass out and scare the children" because of her diagnosed narcolepsy, and finally terminated her employment after her period of illness.[150] One could go much further: heretics since time immemorial are likely to have felt "judged" and "stigmatized" by their exclusion from the orthodox fold. There the heretic stood; he could do no other; yet where he stood was utterly deplored by the faithful.

Just as surely, religious objectors themselves feel "judged" and "stigmatized" by a society that increasingly cannot or will not tolerate their moral views—a society that finds such views unintelligible, retrograde, hateful, or all three. They, too, must endure dignitary hurt. Yet these significant injuries to human dignity are also not raised by NeJaime, Siegel, or virtually any other scholar of antidiscrimination. They have been noted, however, by Justice Kennedy: "In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition

146. *See* Andrew M. Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Laws*, 88 S. CAL. L. REV. 619, 627 (2015) ("Antidiscrimination law has multiple purposes. Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.").

147. NeJaime & Siegel, *supra* note 121, at 2576–77.

148. *Id.* at 2577.

149. Indeed, there is an interesting question whether those who support these dignitary theories might use them to limit the scope of the ministerial exception. To the extent that the ministerial exception is grounded in the Establishment Clause, this could be considered an example of the Clause cannibalizing itself. Thanks to Chip Lupu for elucidating this point.

150. *See* Brief for Respondent at 11, Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 3380507.

shaped by their religious precepts."[151] There are indeed harms—as it were, "significant" and "material" harms—that cases concerning accommodation for religious free exercise impose on people, however a court rules. Such tragic losses are often the rule in conflicts implicating religious freedom.[152] And yet many of these claims, including those connected with the ministerial exception, have nothing to do with complicity. Nevertheless, NeJaime and Siegel conclude that government must be cognizant of the "message" that it is sending when it chooses to accommodate religion lest it "sanction" harms to the individual dignity of those whom the law benefits.[153]

Here the authors' claims, and the real threat they pose to religious accommodation, ring true. The government's vindication of third-party dignitary harms has the potential to destroy religious accommodation. The core function of religious accommodations, again, is to authorize limited, but sometimes socially powerful and politically controversial, dissent from the law's moral messages. There is an important difference between dissent from a law's moral message and the denigration or vilification of the law's intended beneficiaries. "Hate the sin, love the sinner," is the Christian aphorism sometimes used to express this distinction,[154] but it has proved elusive and generally unpersuasive, or worse, to those whose dignity is felt to be injured by claims for religious accommodations.[155] A government that assumes the power to confer dignity on individuals may also subject itself to legal claims by individuals whose dignity has been harmed as the deprivation of an entitlement. And there is reason to worry that the legal conferral of dignity is expanding, as the Supreme Court increasingly justifies its constitutional jurisprudence based on ever-thickening concepts of human dignity.[156] Lurking just beneath these dignitarian clashes are

151. Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751, 2785 (Kennedy, J., concurring); NeJaime & Siegel, *supra* note 121, at 2566, 2574.

152. I describe some of these at length in DEGIROLAMI, *supra* note 5. To be clear, injuries to individual dignity, real though they may be, are not themselves bases for legal (let alone constitutional) claims.

153. NeJaime & Siegel, *supra* note 121, at 2586.

154. For further discussion, see STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 139–66 (2014).

155. *See, e.g., id.*; NeJaime and Siegel, *supra* note 121, at 2576–77 ("Gays and lesbians perceive objections to same-sex marriage as status-based judgments.").

156. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its

bottomless mysteries concerning the foundations of human nature—religion or sex? Higher duty or worldly satisfaction?—that, one may anxiously hope, neither the Supreme Court nor any other government institution will ever assume the power to resolve.[157]

The government's vindication of dignitarian harms has never *by itself* been the basis for defeating a civil right, such as a right to religious accommodation, let alone for invoking the Establishment Clause. Government recognition and conferral of individual dignity is neither an independent constitutional nor statutory right. But the confluence of various factors—the expanding scope of the government's authority in the lives of the citizenry, particularly when it comes to the eradication of discrimination; the increasing numbers of claims that religious accommodations impose harms on third parties, including dignitarian harms, powerful enough to trump religious freedom; and the general decline in broad social and political investment in the right of religious freedom[158]—will conspire further to weaken the case for religious accommodation in the years to come. "Claims for religious exceptionalism," as Professor John Inazu has put it, "are unlikely to prevail against growing cultural resistance to the free exercise right."[159] Whether other First Amendment rights arguably facing less cultural resistance than free exercise—rights of speech, association, or perhaps even assembly—can fill the void remains to be seen.[160] The ministerial

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essence."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1993) (plurality op.) (holding that the Fourteenth Amendment protects "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"). Justice Kennedy has been particularly avid to constitutionalize dignitarian protections, even in relatively unlikely places such as the doctrine of state sovereign immunity. *See* Alden v. Maine, 527 U.S. 706, 709 (1999). Arguments from human dignity have a comparatively long history in the Court's interpretation of the Eighth Amendment. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

157. This is admittedly a hope that may lack foundation. *See Casey*, 505 U.S. at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

158. John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 508–10 (2014).

159. *Id.* at 531.

160. Inazu argues that they can. *See id.* at 531–34; *see also* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012) ("[T]he more plausible historical and jurisprudential interpretation locates the antecedents of constitutional association at least as much in the right of assembly as in the right of speech.") He may be right that, for various socio-cultural reasons, there is currently greater social investment—and greater legal potential—in these other rights than in free exercise. Still, the expansion of the government's interests in vindicating secular harms as a matter of right, and particularly those harms involving sexual equality and autonomy, may with time encroach upon other

exception established in *Hosanna-Tabor* and elaborated in a few cases since will continue to illuminate its own small corner of free exercise territory. But it can do nothing to reverse these developments.

## CONCLUSION

Perhaps this is all too bleak. After all, Americans still cherish the freedom to exercise religion, even as that freedom may clash with new civil rights, such as the right to same-sex marriage, as well as the suite of federal, state, and local antidiscrimination laws that speckle the country. A recent Associated Press poll, for example, found both that a majority of respondents supported a right to same-sex marriage and that a larger majority believes that there should be strong exemption laws in place for those who might have religious objections.[161] Some laws protecting religious freedom continue to pass[162] and existing laws have not been repealed. The Supreme Court has applied RFRA twice and RLUIPA once, all three times siding with the religious claimant,[163] and none of those outcomes has been altered by Congress.

All of this is true, but none of it accounts for the considerable changes afoot. The fact that religious accommodation in these and other contexts has become so controversial and contested—the very fact that the desirability of religious accommodation has become a question worth asking about in popular polls, and that public opinion as well as the colossus of corporate muscle against it is sizable and growing—is some evidence both of the decline in popular commitment to the right of free exercise and the likelihood

established rights such as speech and association, just as they have on free exercise. On this question, see Marc O. DeGirolami, *The First Amendment and the Problem of Freedom* (unpublished manuscript) (on file with author).

161. *See* Emily Swanson & Brady McCombs, *AP-GfK Poll: Support of Gay Marriage Comes with Caveats*, AP GFK (Feb. 5, 2015), http://ap-gfkpoll.com/featured/findings-from-our-latest-poll-13 [https://perma.cc/9FWR-5BB3].

162. See, for example, the recent "compromise" bill in Utah. Antidiscrimination and Religious Freedom Amendments, S.B. 296, 61st Leg., 2015 Gen. Sess. (Utah 2015), http://le.utah.gov/~2015/bills/static/SB0296.html [https://perma.cc/7CBC-JMDH]. Utah is highly unusual, however, with respect to the strength of religious concerns in the state's political life. And it remains to be seen how this compromise—and others like it—survives the Supreme Court's decision that the Constitution protects a fundamental right to same-sex marriage. *See* Obergefell v. Hodges, 135 S. Ct. 2071 (2015).

163. Holt v. Hobbs, 135 S. Ct. 853, 859 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2751, 2759, 2785 (2014); Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 419, 423 (2006).

that the clashes between religious free exercise and the relentlessly expanding body of antidiscrimination norms will increase. There is now enormous resistance to passing new laws that protect religious freedom in much the same way that RFRA does, and tangible rage against those that do pass.[164] There are now calls to revoke the tax-exempt status of any religious institution that does not embrace same-sex marriage.[165] As the scope of antidiscrimination law grows, possibly even to include the state's vindication of self-standing harms to individual dignity generated by religious accommodation, *Smith's* fervid warning about a world in which "each conscience is a law unto itself" becomes more fitting as a description of religious accommodation enchained than unleashed.[166] For now, the ministerial exception seems to have escaped these larger and far more powerful trends. But *Hosanna-Tabor* is just one narrowly drafted decision, and only a doctrinal toddler. Time will tell whether it will last.

164. In response to the explosive backlash generated by a recent religious freedom bill in Indiana, the New York Times noted acidly that defenders of "so-called religious freedom laws" are increasingly being successfully resisted by antidiscrimination advocates. Michael Barbaro & Erik Eckhold, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), http://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html [https://perma.cc/KV5J-EQJ7].

165. Mark Oppenheimer, *Now's the Time To End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/ [https://perma.cc/AML9-8E8Y].

166. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).