

**NEUTRALITY, ACCOMMODATION, AND
CONSCIENCE CLAUSE LEGISLATION**

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I. INTRODUCTION

The United States Supreme Court upheld state and federal accommodations of religious liberty in several cases so extending such protections need not offend federal constitutional guarantees. Yet, statutes allegedly designed to protect religious liberty have been struck down as violations of the Establishment Clause, so a claim that protecting religious freedom is the goal of legislation will not immunize it from close scrutiny and invalidation.¹ While the Court has never clearly articulated a principle to

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1. Wallace v. Jaffree, 472 U.S. 38 (1985).

determine which religious accommodations pass constitutional muster, it has offered factors that will be considered in the analysis.²

Various states enacted or are considering conscience clause legislation that is allegedly designed to protect religious liberty.³ Many of these statutes are constitutionally suspect in light of both establishment and equal protection guarantees because they privilege certain religious beliefs and impose burdens on politically unpopular groups.⁴ While religious accommodation jurisprudence does not always follow a clear path, these statutes cannot pass muster in light of the current jurisprudence.

Part II of this Article discusses when accommodation is permissible in light of free exercise and establishment guarantees. Part III discusses recently proposed or enacted conscience clause legislation and some of the constitutional difficulties that this type of legislation poses. The article concludes that while the Court has not clearly established which religious accommodations will pass constitutional muster, some of the recent conscience clause legislation is paradigmatic of what federal guarantees prohibit.

II. ACCOMMODATIONS

The Religion Clauses preclude the State from favoring or disfavoring religion.⁵ Neutrality is sometimes difficult for states to maintain,⁶ especially because in many cases there is no agreement about which position is neutral.⁷ The Supreme Court has issued a series of decisions that provide the contours

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see also* *Van Orden v. Perry*, 545 U.S. 677 (2005).

3. Claire Marshal, *The Spread of Conscience Clause Legislation*, 39 HUMAN RTS. MAG. (2013).

4. Melissa Duvall, *Pharmacy Conscience Clause Statutes: Constitutional Religious "Accommodations" or Unconstitutional "Substantial Burdens" on Women?*, 55 AM. U. L. REV. 1485 (2006).

5. *Ctr. for Inquiry v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014).

6. *See* Haran C. Rashes, *Try, Try, Try Again: The Kiryas Joel Village School District and the Separation of Shul, School, and State*, 29 U. TOL. L. REV. 485, 495 (1998) ("[I]n evaluating church-state interaction, the Court has emphasized that the federal and state governments should maintain a position of neutrality.").

7. *Cf.* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 635 n.36 (2003) ("Neutrality, like other words in religion-clause jurisprudence, is a word whose very definition is endlessly contested.").

of Religion Clause guarantees, although these decisions provide less guidance than desired.⁸

A. The Religion Clauses

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁹ These constitutional protections are incorporated against the states through the Fourteenth Amendment,¹⁰ which means that both state and federal governments must respect establishment and free exercise guarantees.¹¹

The proper way to reconcile the establishment and free exercise guarantees is elusive,¹² and the Court has frequently noted the tension between the two clauses.¹³ States may and sometimes must accommodate

8. See Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1979-80) (“[T]he Court’s separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause.”).

9. See U.S. CONST. amend. I.

10. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”).

11. Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L. J. 19, 21 (2006) (“[S]tates, like the federal government, may make ‘no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”) (citing U.S. CONST. amend. I).

12. Ralph D. Mawdsley, *Invalidating the Religious Freedom Restoration Act: Implications for Religious Liberty*, 123 ED. L. REP. 431, 431 (1998) (“Determining the meaning of religious liberty has been an elusive matter, in large part because courts have had two clauses in the First Amendment, free exercise of religion and establishment of religion, to interpret.”).

13. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (“These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension.”); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (“But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses.”) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (“Our decisions under the Establishment Clause reflect the ‘internal tension in the First Amendment

religious beliefs and practices,¹⁴ although there are limits on the degree to which states may give special preferences to religion without running afoul of constitutional guarantees.¹⁵ While the Court has not made clear where that line is to be drawn, it has issued a series of holdings to help demarcate the conditions under which accommodations will not violate constitutional guarantees.¹⁶

B. The Establishment Clause

In *Everson v. Board of Education*,¹⁷ the Court examined whether Establishment Clause guarantees were violated when parents were reimbursed for parochial school transportation costs.¹⁸ The Court invoked

between the Establishment Clause and the Free Exercise Clause.”); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (“Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause.”); *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 668 (1970) (“The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. . . . The considerable internal inconsistency in the opinions of the Court derives from . . . sweeping utterances on aspects of these clauses.”). *See also* *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting) (“The Court correctly acknowledges that there is a “tension” between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution.”); *Sherbert v. Verner*, 374 U.S. 398, 414 (1963) (Stewart, J., concurring in the result) (“[T]here are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court’s insensitive and sterile construction of the Establishment Clause.”).

14. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (discussing “the required and the permissible accommodations between state and church”).

15. *See* Matthew D. Krueger, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179, 1197 (2005) (“If a state cannot show it acted to eliminate a threat to religious exercise, a court will likely conclude the accommodation constitutes an impermissible endorsement of religion.”).

16. Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L. J. 1147, 1149 (1987) (“The Supreme Court has recognized a zone of accommodations of religion that are permitted by the establishment clause, though not required by the free exercise clause, but it has failed to articulate the relationship between the two clauses and thus to demarcate clearly this zone.”).

17. *Everson*, 330 U.S. 1 (1947).

18. *Id.* at 3 (“The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus

Thomas Jefferson’s separation metaphor: “[T]he clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”¹⁹ After implying that the Constitution’s Establishment Clause guarantees are rather robust, the Court cautioned that it had to “be careful not [to] inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.”²⁰ The Court then upheld the program, rejecting “that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.”²¹ In justifying its holding that the Constitution did not preclude New Jersey from reimbursing parents for transportation costs to parochial schools, the Court explained that “the [First] Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”²²

Some commentators have discussed whether *Everson* is compatible with the wall of separation metaphor put forward in the opinion²³—while talking

transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools.”)

19. *Id.* at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

20. *Id.*

21. *Id.* at 17.

22. *Id.* at 18.

23. Eric R. Claeys, *Justice Scalia and the Religion Clauses: A Comment on Professor Epps*, 21 WASH. U. J. L. & POL’Y 349, 358 (2006) (“[T]he post-New Deal Court has been inconsistent in how it has embraced these claims about ‘divisiveness’ and the ‘wall of separation.’”); March D. Coleman, *The Angel Tree Project*, 58 U. PITT. L. REV. 475, 481 (1997) (“While it has become apparent that neither Jefferson’s ‘wall of separation’ nor the *Lemon* test has proven to be capable of providing a consistent, effective guide through Establishment Clause inquiries, their failures have at least shed light on the paradoxical nature of the Establishment Clause.”); David R. Dow, *Religion in Public Life: A Dilemma for Democracy*, by Ronald F. Thiemann, Georgetown University Press 1996. Pp. 186. Paper. \$13.26. ISBN: 0-878-40610-7., 16 J. L. & RELIGION 877, 880 (2001) (“Thiemann insists that ever since the Supreme Court adopted the wall of separation metaphor in *Everson v. Board of Education*, its religion clause jurisprudence has been inconsistent and incoherent.”); Matthew E. Feinberg, *And the Ban Plays on . . . for Now: Why Courts Must Consider Religion in Marriage Equality Cases*, 10. U. MD. L. J. RACE, RELIGION, GENDER & CLASS 221, 231 (2010) (“For the next twenty-five years,

about a wall of separation, the Court nonetheless upholds funding that would help children receive a sectarian education.²⁴ In any event, *Everson* is frequently cited as establishing the wall of separation between church and state.²⁵ A separate question is whether the test put forward in *Lemon v.*

Establishment Clause decisions were fairly consistent as the Court tailored its rulings to fit within the wall of separation created in *Everson*.”); Patrick M. Garry & John P. Garry, *The Establishment Clause and the Making of A New Secularism: A Review Essay on Church, State and the Crisis in American Secularism by Bruce Ledewitz*, 51 DUQ. L. REV. 251, 253-54 (2013) (“[W]hile citing *Everson v. Board of Education* and *Lemon v. Kurtzman*—cases in which the Court discusses the Establishment Clause as erecting a high and impregnable wall of separation between church and state—Ledewitz admits that those decisions failed to provide any consistent or coherent Establishment Clause doctrine.”) (citing Bruce Ledewitz, *Church, State and the Crisis in American Secularism* 2 (2011)); Paul L. Hicks, *The Wall Crumbles: A Look at the Establishment Clause* *Rosenberger v. Rector & Visitors of the University of Virginia*, 98 W. VA. L. REV. 363, 367 (1995) (“Although the Supreme Court decided all of these cases while presumably applying the ‘wall of separation’ principle, the results are not consistent with the strict separationist view.”); Jeffrey W. Stiltner, *Rethinking the Wall of Separation: Zobrest v. Catalina Foothills School District—Is This the End of Lemon?*, 23 CAP. U. L. REV. 823, 860 (1994) (“Since *Everson v. Board of Education of Ewing Township*, the Court has attempted to remain true to the principles of neutrality and separation. There is nothing wrong with having separation of church and state based on the metaphor of a ‘wall of separation,’ however; ‘in order to make the Founder’s vision compatible with the structure and needs of modern society, the wall has to have a few doors in it.’”) (quoting Stephen L. Carter, *The Culture of Disbelief* 109 (1993)).

24. See Alan M. Hurst, *The Very Old New Separationism*, 2015 B.Y.U. L. REV. 1, 6 (2015) (“In *Everson* itself, the Court declared in emphatic tones that it “could not approve the slightest breach” in the wall of separation, while refusing in the same paragraph to strike down a subsidy for parochial students’ bus fares.”); Mark Strasser, *Repudiating Everson: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 572 (2009) (“While speaking in rather absolute terms, the *Everson* Court nonetheless found that the reimbursement at issue did not violate constitutional guarantees.”).

25. See Erwin Chemerinsky, *A Fixture on A Changing Court: Justice Stevens and the Establishment Clause*, 106 NW. U. L. REV. 587, 598 (2012) (“[W]hen the Court held in *Everson v. Board of Education* that the Establishment Clause applied to the states, all nine Justices expressed belief in the idea of a strict separation of church and state and the wall of separation articulated by Thomas Jefferson.”); Brian S. Gwyn, *Adopting A Respectful Posture Toward Teacher Religious Expression: An Establishment Clause Analysis of North Carolina’s Respect for Student Prayer and Religious Activity Law*, 13 FIRST AMEND. L. REV. 426, 430 (2015) (“[I]n *Everson v. Board of Education of Ewing Township*, the Supreme Court declared that the constitution requires a ‘wall of separation’ between church and state.”); Benjamin

*Kurtzman*²⁶ was an application of *Everson*'s wall of separation approach, *Everson*'s neutrality approach, or some new approach incorporating those or perhaps other elements.²⁷

In *Lemon v. Kurtzman*, the Court offered a three-part test to determine whether a state practice violated establishment clause guarantees: (1) "the

Justice, *The Originalist Case Against Vouchers: The First Amendment, Religion, and American Public Education*, 26 STAN. L. & POL'Y REV. 437, 442 (2015) ("In *Everson*, history provided the rationale for a ruling that claimed the existence of a high wall of separation between church and state."); Sarah Nirenberg, *The Resurgence of Secularism: Hostility Towards Religion in the United States and France*, 5 WASH. U. JURIS. REV. 131, 145 (2012) ("There remains no historical foundation for the idea that the Framers intended to formulate a strict wall of separation between church and state governments that was authorized in *Everson*.").

26. *Lemon*, 403 U.S. 602 (1971).

27. Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 171 (1987) ("Lemon is, no doubt, a faithful elaboration on the rationale (if not the holding) of *Everson*, the starting point of modern religion clause analysis: the end to be sought is the Jeffersonian ideal of a 'wall of separation.'"); Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 4 (2005) ("The *Lemon* test arose out of the 'wall of separation' metaphor articulated in *Everson v. Board of Education*."). *But see* Kelly S. Terry, *Shifting Out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. PUB. INT. L. J. 67, 78 (2008) ("[A]fter *Lemon*, neutrality was no longer paramount, and the wall of separation was neither high nor impregnable."); Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1182 (2004) ("The *Lemon* test evolved out of the *Everson* 'wall of separation.'"); Susie V. Inskeep, *Zobrest v. Catalina Foothills School District: The Establishment Clause, Government Aid, and Religious Liberty*, 1994 UTAH L. REV. 1219, 1241 (1994) ("The *Lemon* test is based on *Everson*'s separationist ideal and the Jeffersonian idealistic 'wall of separation.'"); Joe Nagel, *Agostini v. Felton: Separating from Separation of Church and State to Allow School Choice*, 29 U. TOL. L. REV. 581, 609-10 (1998) ("The 'wall of separation' metaphor first advocated in *Everson* and implemented under *Lemon* resulted in a makeshift analysis under which very small distinctions were the basis for deciding whether aid was permitted under the Establishment Clause."); Laura Zwicker, *The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined*, 66 IND. L. J. 773, 796 (1991) ("*Lemon* did not question *Everson*'s creation of a 'wall of separation' between church and state. ... In fact, the wall of separation is incorporated into the *Lemon* test through its third prong.").

statute must have a secular legislative purpose;”²⁸ (2) “its principal or primary effect must be one that neither advances nor inhibits religion,”²⁹ and (3) “the statute must not foster ‘an excessive government entanglement with religion.’”³⁰ The third prong has been incorporated into the second prong, at least in the context of school funding.³¹

The failure to meet any one of the prongs suffices to establish the unconstitutionality of the practice at issue.³² However, the application of *Lemon* has been far from consistent,³³ and the *Lemon* test has frequently been criticized by members of the Court.³⁴ Justice Scalia likened it to “some ghoul

28. *Lemon*, 403 U.S. at 612.

29. *Id.* (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

30. *Id.* at 613 (citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

31. *See Agostini v. Felton*, 521 U.S. 203, 233 (1997) (“[I]t is simplest to recognize why entanglement is significant and treat it—as the Court did in *Walz*—as an aspect of the inquiry into a statute’s effect.”); *Mitchell v. Helms*, 530 U.S. 793, 807 (2000) (plurality opinion) (“[I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors.”); *see also* Kristopher L. Caudle, “*True Private Choice*” or a “*Hobson’s Choice?*” *Re-Thinking Zelman v. Simmons-Harris in North Carolina’s Opportunity Scholarship Program*, 13 FIRST AMEND. L. REV. 377, 391 (2015) (“[T]he *Agostini* Court modified the *Lemon* test, collapsing the ‘excessive entanglement’ prong into a broader determination of a government program’s general ‘effect’ on the advancement of religion.”); Brian C. Nadler, *Jurisprudential Juxtapositions: Resolving Establishment Clause Issues after Town of Greece, N.Y. v. Galloway*, 50 GONZ. L. REV. 75, 82 (2015) (“The Supreme Court, in *Agostini v. Felton*, combined the effect and entanglement prongs of the *Lemon* test so that only the purpose and effect prongs remained.”).

32. Jun Xiang, *The Confusion of Fusion: Inconsistent Application of the Establishment Clause Non-delegation Rule in State Courts*, 113 COLUM. L. REV. 777, 782 (2013) (“The *Lemon* test requires that a law meet all three prongs to be constitutional, and courts have struck down laws based on failure to meet just one of the prongs.”); Joshua D. Zarrow, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U.L. REV. 477, 502 n. 174 (1986) (“[F]ailure to meet any prong of the *Lemon* test is constitutionally fatal.”).

33. Amy J. Alexander, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application*, 3 PHOENIX L. REV. 641, 642 (2010) (“The inconsistent application of the *Lemon* test presents difficulties in cases concerning the placement of religious objects in public locations.”); Barry P. McDonald, *Getting Beyond Religion As Science: “Unstifling” Worldview Formation in American Public Education*, 66 WASH. & LEE L. REV. 587, 655 n. 323 (2009) (discussing the “inconsistent application of the *Lemon* test by members of the Court”).

34. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J. dissenting) (discussing “the oft-criticized test of *Lemon v. Kurtzman*, 403 U.S.

in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”³⁵ Justice Scalia’s announcement of its death notwithstanding, the *Lemon* test is still used to determine the constitutionality of state practices implicating establishment guarantees.³⁶

In *McCreary County v. American Civil Liberties Union of Kentucky*,³⁷ the Court struck down Ten Commandments displays in courthouses³⁸ as violating Establishment Clause guarantees because they violated the *Lemon*

602 (1971)); *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) (“[T]he ‘entanglement’ prong of the *Lemon* test has been much criticized over the years.”) (citing *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O’Connor, J., dissenting); Ashley M. Bell, “*God Save This Honorable Court: How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*,” 50 AM. U. L. REV. 1273, 1289 (2001) (“[T]he *Lemon* test is often criticized in both the concurring and dissenting opinions.”); William A. Glaser, *Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause*, 38 PEPP. L. REV. 1053, 1058 (2011) (“The *Lemon* test has been heavily criticized by courts and commentators.”); Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J. L. & PUB. POL’Y 1, 10 (2002) (discussing “*Lemon v. Kurtzman*, a decision that articulates a much-criticized though still-employed tripartite analysis (the *Lemon* test) for cases arising under the Establishment Clause”).

35. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

36. Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1966 (2001) (“The *Lemon* test has been frequently criticized, but it remains one of the primary analytic lenses through which the Court considers Establishment Clause claims.”).

37. 545 U.S. 844 (2005).

38. *Id.* at 851 (“In the summer of 1999, petitioners *McCreary County* and *Pulaski County, Kentucky* (hereinafter *Counties*), put up in their respective courthouses large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus.”).

purpose prong.³⁹ Along with its *Lemon* analysis,⁴⁰ the Court also emphasized the importance of “governmental neutrality between religion and religion, and between religion and nonreligion,”⁴¹ explaining that the Government is not neutral when its purpose is to support religion.⁴² “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”⁴³ Such a non-neutral position will have predictable negative effects. “By showing a purpose to favor religion, the government ‘sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members’”⁴⁴ The Establishment Clause prohibits the State from making individuals feel like insiders or outsiders on the basis of religion.⁴⁵

This neutrality view helps explain other Establishment Clause cases. At issue in *Widmar v. Vincent*⁴⁶ was a University of Missouri Kansas City policy precluding a student group from using university facilities for discussion and

39. See *id.* at 870 (“[T]he display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.”); *id.* at 874 (“We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.”).

40. See *id.* at 864. *But cf.* *Van Orden v. Perry*, 545 U.S. 677 (2005). *Van Orden* involved the constitutionality of a “display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds.” See *id.* at 681. In upholding the constitutionality of the display, the *Van Orden* Court noted: “Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.” *Id.* at 686.

41. *McCreary Cty.*, 545 U.S. at 860 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

42. *Id.*

43. *Id.*

44. *Id.* (citing *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-10 (2000)).

45. See Kyle Langvardt, *The Lawless Rule of the Norm in the Government Religious Speech Cases*, 20 WASH. & LEE J. C.R. & SOC. JUST. 405, 419 (2014) (“[E]ndorsements of religion violate the Establishment Clause’s prohibition against ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”) (citing *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)).

46. 454 U.S. 263 (1981).

prayer.⁴⁷ In striking down the limitation, the Court emphasized that the benefits at issue were enjoyed by a whole host of religious and non-religious groups.⁴⁸ The *Widmar* analysis was used in several other cases to assure that religious speech would not be excluded from school settings.⁴⁹

Establishment Clause guarantees are not designed to prevent anyone from ever feeling offended.⁵⁰ So, too, those guarantees need not be violated merely because a statute promotes divisiveness among differing groups.⁵¹ Nonetheless, there are some guiding principles, for example, the Government should not make some religious groups feel like insiders and others outsiders⁵² Further, Government likely offends constitutional guarantees when using religion itself as the basis upon which lines should be drawn.⁵³ Justice Kennedy explained that “[t]he danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.”⁵⁴

47. *Id.* at 269 (“Here the UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.”).

48. *Id.* at 274 (“[T]he forum is available to a broad class of nonreligious as well as religious speakers . . . The provision of benefits to so broad a spectrum of groups is an important index of secular effect.”).

49. *See, e.g., Lamb's Chapel*, 508 U.S. at 395 (“As in *Widmar*, 454 U.S. at 271–72, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).”); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990) (“We think the logic of *Widmar* applies with equal force to the Equal Access Act.”).

50. *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (“We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive.”).

51. *Id.* at 587–88 (“Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases.”).

52. *Id.* at 599 (Blackmun, J., concurring.) (“Government may neither promote nor affiliate itself with any religious doctrine or organization.”). *But see McCreary Cty.*, 545 U.S. at 893 (Scalia, J., dissenting) (“With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”).

53. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment) (“[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion.”).

54. *Id.* (Kennedy, J., concurring in the judgment).

In *Santa Fe Independent School District v. Doe*,⁵⁵ the Court noted “the myriad, subtle ways in which Establishment Clause values can be eroded.”⁵⁶ The mere fact that the Government claims to have a secular purpose will not establish that the Government has such a purpose, even if the Government is entitled to some deference with respect to its stated goals.⁵⁷ “When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to ‘distinguis[h] a sham secular purpose from a sincere one.’”⁵⁸ When the State puts its stamp of approval on a particular religious message in effect telling adherents that they are favored and nonadherents that they are disfavored members of the community, then the State violates Establishment Clause guarantees.⁵⁹ The very passage of certain laws “has the purpose and perception of government establishment of religion.”⁶⁰

When the State endorses a particular religious message, it violates establishment guarantees by promoting a particular religious message over others⁶¹ and by creating religious insiders and outsiders.⁶² The Establishment Clause does not prevent the State from adopting laws promoting secular benefits merely because those laws are also in accord with religious teaching, e.g., laws prohibiting murder or theft.⁶³ But those laws are justifiable because

55. 530 U.S. 290 (2000).

56. *Id.* at 314 (citing *Lynch*, 465 U.S. at 694 (O’Connor, J., concurring)).

57. *Id.* at 308 (citing *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in the judgment)).

58. *Id.* (citing *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring in the judgment)).

59. *See id.* at 309-10 (“[S]ponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”) (citing *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

60. *Id.* at 314.

61. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (“A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by . . . advancement of a particular religious belief.”) (citing *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

62. *See supra* notes 38-39 and accompanying text.

63. David A. Toy, *The Pledge: The Constitutionality of an American Icon*, 34 J. L. & EDUC 25, 37 (2005) (“Secular reasons justify some laws that correspond to the religious doctrine of some denominations, and it is for secular reasons—and not religious reasons—that a large amount of conduct is prohibited, including laws that outlaw murder, theft, and fraud.”).

of their secular benefits, not because they are in accord with particular religious views. Adopting policies to promote religion rather than to promote secular benefits violates Establishment Clause neutrality guarantees.⁶⁴

While the Court has used a variety of tests when performing its Establishment Clause analysis,⁶⁵ the requirement of neutrality has been quite influential.⁶⁶ However, because there are many interpretations of what

64. Edward Rubin, *Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause*, 63 VAND. L. REV. 763, 811 (2010) (“The Establishment Clause is best read as prohibiting the state from favoring the doctrines of one religion over competing views, unless the prohibition has a secular basis independent of religious doctrine.”).

65. Bruce Friedrich, *Ritual Slaughter in the "Ritual Bubble": Restoring the Wall of Separation Between Church and State*, 17 VT. J. ENVTL. L. 222, 234 (2015) (“There are a variety of tests against which courts measure Establishment Clause challenges.”).

66. See Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1551 (2010) (“Neutrality has been the justification for Establishment Clause tests that emphasize separation of religion and government tests that favor accommodation.”); Julie Madison Angus, *Life without Lemon: The Status of Establishment Clause Jurisprudence after Rosenberger v. University of Virginia*, 1 ILL. U. L. REV. 123, 133 (1996) (“[I]n 1994 the Supreme Court ended the modern Establishment Clause reign of confusion, not by revitalizing the ailing *Lemon* test, but by ‘pursu[ing] a course of ‘neutrality’ toward religion.”) (citing *Board of Educ. v. Grumet*, 512 U.S. 687, 696 (1994)); Rebecca G. Rees, *"If We Recant, Would We Qualify?": Exclusion of Religious Providers from State Social Service Voucher Programs*, 56 WASH. & LEE L. REV. 1291, 1333 (1999) (“[E]ach prong of the *Lemon* test promotes an aspect of neutrality. . . . [B]y forbidding the government either to endorse or to disfavor religion, the endorsement test also creates a balance that preserves neutrality.”); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 514 (1998) (“[T]he Court has long mentioned governmental neutrality toward religion as an abstract, deep principle underlying both religion clauses.”); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 504 (1991) (“[T]he neutrality test of the establishment clause forbids government from imparting special benefits to religion and the church.”); Philip N. Yannella, *The Death-Knell for the Lemon Test? Assessing the Constitutionality of the Charitable Choice Act of 2001*, 11 TEMP. POL. & C.R. L. REV. 181, 182 (2001) (“[T]he neutrality doctrine has emerged as the primary sub-test of an Establishment Clause violation.”).

neutrality is or requires,⁶⁷ differing justices using the neutrality standard reach very different conclusions about the constitutionality of a particular practice.⁶⁸ This division over neutrality is also evidenced in free exercise jurisprudence,⁶⁹ where neutrality also plays an important role.⁷⁰

C. Free Exercise

Free exercise guarantees cover two distinct areas: belief and action.⁷¹ While precluded from mandating particular religious beliefs,⁷² the

67. *Mitchell v. Helms*, 530 U.S. 793, 878 (2000) (Souter, J., dissenting) (“‘Neutrality’ has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it.”); *see also* *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment) (“[I]t is sometimes difficult to determine when a legal rule is ‘neutral.’”).

68. *Compare* *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (upholding the constitutionality of federal aid to religious schools because the aid was given neutrally, i.e., to non-religious schools as well) *with id.* at 913 (Souter, J., dissenting) (“[I]n rejecting the principle of no aid to a school’s religious mission the plurality is attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion.”).

69. *See* Craig W. Mandell, *Tough Pill to Swallow: Whether Catholic Institutions Are Obligated under Title VII to Cover Their Employees’ Prescription Contraceptives*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 199, 220 (2008) (discussing how “differing notions of neutrality are at the heart of the tension that surrounds free exercise jurisprudence”).

70. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* 512 U. S. 696 (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion.”) (citing *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93 (1973)).

71. Richard B. Collins, *Too Strict?*, 13 FIRST AMEND. L. REV. 1, 8 (2014) (“Modern law on religious freedom is customarily dated from the Supreme Court’s 1940 decision in *Cantwell v. Connecticut*, which held that the Free Exercise Clause protects actions as well as beliefs and restricts state governments under the incorporation doctrine.”); J. David Holcomb, *Religion in Public Life: The “Pfefferian Inversion” Reconsidered*, 25 J.L. & RELIGION 57, 79 (2010) (“[T]he Free Exercise Clause was intended to protect action as well as belief.”).

72. *See* *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such.”) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

Government can regulate actions which are religiously motivated.⁷³ In a series of cases, the Court suggests the conditions under which the state may or must permit individuals to act in accord with religious beliefs.

1. Sabbath Duties

At issue in *Sherbert v. Verner*⁷⁴ was whether Adell Sherbert was wrongly denied unemployment benefits when she was unable to retain or find work because of her refusal to work on Saturday for religious reasons.⁷⁵ The state decided that her refusal to work on her Sabbath was not “good cause,”⁷⁶ which meant that her request for benefits should be denied.⁷⁷

The Supreme Court began its analysis by noting that the State is sometimes permitted to take actions that have adverse impacts on religious practices. “[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for ‘even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.’”⁷⁸ The Court previously upheld such restrictions where the “conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.”⁷⁹ Yet, the Court’s description of the conditions under which it upheld such restrictions impliedly overstates the burden that the state must bear to withstand a constitutional challenge, because it was not at all clear

73. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (“[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare.”).

74. 374 U.S. 398 (1963).

75. *Id.* at 399 (“Appellant . . . was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith . . . [S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work.”).

76. *See id.* at 401.

77. *Id.* (“The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant’s restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept ‘suitable work when offered.’”).

78. *Id.* at 403 (citing *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961)).

79. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145 (1878)).

that there was a substantial threat of anything in all of the cases in which free exercise interests were overridden.⁸⁰

Consider *Braunfeld v. Brown* in which the Court examined the constitutionality of Pennsylvania's Sunday-closing law.⁸¹ The individuals challenging the law were Orthodox Jews, who closed their retail establishments from sundown on Friday to sundown on Saturday as a matter of religious duty.⁸² Before this law came into effect, the appellants made up for some of the lost sales due to their not being open on Saturday by opening on Sundays.⁸³ Being forced to close for the entire weekend would hurt their businesses, and one individual, Abraham Braunfeld, testified that the Sunday-closing law might force him to close his store.⁸⁴

The *Braunfeld* appellants argued that the Pennsylvania law violated free exercise guarantees.⁸⁵ The law forced them to make a difficult choice, because the statute "either compel[led] appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or . . . put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath."⁸⁶ Unpersuaded that this forced choice was constitutionally prohibited, the Court reasoned that "the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."⁸⁷ Yet, such a construction of free exercise guarantees would make them inapplicable unless a statute

80. See *infra* notes 76-88 and accompanying text.

81. *Braunfeld v. Brown*, 366 U.S. 599, 600 (1961) ("This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.").

82. *Id.* at 601 ("Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.").

83. *Id.* ("[A]ppellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday.").

84. *Id.* ("Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment.").

85. *Id.* at 601-02 ("Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion.").

86. *Id.* at 602.

87. *Id.* at 605.

criminalized religious conduct, which would severely limit the reach of those guarantees.⁸⁸

Recognizing that several states “cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday,”⁸⁹ the *Braunfeld* Court admitted that “this may well be the wiser solution to the problem.”⁹⁰ But the Court held that the Constitution did not require states to make that accommodation,⁹¹ notwithstanding that the states who had made such an exception had not suffered ill effects from doing so.⁹² While *Sherbert* and *Braunfeld* involved differing laws, the *Braunfeld* language and reasoning suggested that a free exercise challenge to the South Carolina law would not be successful.⁹³

Just as the *Braunfeld* Court noted that the retailers were forced by Pennsylvania law to make a difficult choice,⁹⁴ the *Sherbert* Court explained the bind in which the state had placed someone like Sherbert.⁹⁵ Basically, she was forced “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”⁹⁶ This time, however, the Court held that the state could not impose this forced choice.⁹⁷

88. *See id.*

89. *Id.* at 608.

90. *Id.*

91. *Id.* at 609 (“[W]e cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.”).

92. *Id.* at 614-15 (Brennan, J., concurring and dissenting) (“It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania’s.”).

93. *Cf. Sherbert v. Verner*, 374 U.S. 398, 423 (1963) (Harlan, J., dissenting) (discussing “the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant’s religion”).

94. *See Braunfeld*, 366 U.S. at 600.

95. *See id.* at 608.

96. *Sherbert*, 374 U.S. at 404.

97. *See id.* at 406 (“The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina’s general statutory scheme necessarily effects.”); *see also Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 146 (1987) (“Florida’s refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment.”); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981) (stating individual could not be denied

The Court offered a few reasons that the South Carolina policy was constitutionally offensive, including that South Carolina seemed to be favoring certain religious groups over others—“South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which . . . infringes the Sabbatarian's religious liberty.”⁹⁸ The Court rejected that its own holding “foster[ed] the ‘establishment’ of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences.”⁹⁹ Further, requiring that the Sabbatarian receive benefits would not impose burdens on other individuals—“the recognition of the appellant’s right to unemployment benefits under the state statute [does not] serve to abridge any other person’s religious liberties.”¹⁰⁰

Some Court members believed *Sherbert* and *Braunfeld* were incompatible,¹⁰¹ although the cases were distinguishable in that *Sherbert* involved government benefits while *Braunfeld* did not.¹⁰² Further, the *Braunfeld* Court apparently feared that permitting the retailers to open on Sunday would give them a competitive advantage, because so many other retailers would be closed.¹⁰³ The Court has manifested a greater willingness

unemployment benefits for refusing to produce armaments, which would have been contrary to his religious beliefs); *id.* at 718 (stating individual could not be denied unemployment benefits for his sincere religious refusal to work on Sunday, notwithstanding his not belonging to any particular sect).

98. *Sherbert*, 374 U.S. at 406.

99. *Id.* at 409.

100. *Id.*

101. *See id.* at 417 (Stewart, J., concurring in the result) (“I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*.”); *id.* at 421 (Harlan, J., dissenting) (“[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, 366 U.S. 599, which held that it did not offend the ‘Free Exercise’ Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday.”). Justice Harlan’s dissent was joined by Justice White. *See id.* at 418.

102. *Cf. Emp’t Div. v. Smith*, 485 U.S. 660, 670 (1988) (“On three separate occasions, however, we have held that an employee who is required to choose between fidelity to religious belief and cessation of work may not be denied unemployment compensation because he or she is faithful to the tenets of his or her church.”).

103. *Braunfeld*, 366 U.S. at 608-09 (“To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day.”).

to require free exercise exemptions where other individuals would not be forced to shoulder the burdens created as a result of the free exercise exemption.¹⁰⁴

2. Amish Practices

In *Wisconsin v. Yoder*,¹⁰⁵ the Supreme Court examined whether a Wisconsin law requiring that children attend school through age 16¹⁰⁶ had to exempt certain groups as a matter of free exercise.¹⁰⁷ The respondents were Amish who 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 . . . also endanger their own salvation and that of their children.”¹⁰⁸ The parents argued that high schools “emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students.”¹⁰⁹ In contrast, “Amish society emphasizes informal learning-through-doing; a life of ‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.”¹¹⁰

Expert testimony suggested that forced high school attendance “could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the

104. *See infra* notes 209-16 and accompanying text (discussing *Thornton*). *Cf.* *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) (noting that “accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief”).

105. 406 U.S. 205 (1972).

106. *Id.* at 207 (“Wisconsin’s compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade.”)

107. *Id.* (“[W]e granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents’ convictions for violating the State’s compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment.”).

108. *Id.* at 209.

109. *Id.* at 211.

110. *Id.*

destruction of the Old Order Amish church community as it exists in the United States today.”¹¹¹ The sincerity of the religious beliefs was not in question.¹¹² Rather, Wisconsin claimed to have a compelling interest in requiring all children to attend school through age 16.¹¹³ The *Yoder* Court “searchingly examine[d] the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.”¹¹⁴

While accepting¹¹⁵ the state’s contentions “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence . . . [and that] education prepares individuals to be self-reliant and self-sufficient participants in society,”¹¹⁶ the Court was also persuaded “that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.”¹¹⁷ Further, the Amish had long established themselves as productive and contributing members of society. “[T]he Amish community has been a highly successful social unit within our society, even if apart from the conventional ‘mainstream.’ Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.”¹¹⁸ Indeed, the Court went out of its way to note that “Congress itself recognized their self-sufficiency by

111. *Id.* at 212.

112. *See id.* at 216 (“[T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”).

113. *Id.* at 219 (“Its position is that the State’s interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice.”).

114. *Id.* at 221.

115. *Id.* (“We accept these propositions.”).

116. *Id.* (“Some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence . . . [and that] education prepares individuals to be self-reliant and self-sufficient participants in society.”).

117. *Id.* at 222.

118. *Id.*

authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.”¹¹⁹

Yet, a separate issue involved children who might eventually choose to leave the Amish way of life. The state worried that the children might not be prepared to enter into society.¹²⁰ But there was no “showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings.”¹²¹

Although sensitive to the possibility that free exercise exemptions could give rise to Establishment Clause concerns,¹²² the Court rejected that sensitivity to those concerns counseled against recognizing an exception in appropriate cases.¹²³ The Court held that free exercise guarantees required that an exemption be granted.¹²⁴

Yet, the Court has not always been so solicitous of Amish values. In *United States v. Lee*, the Court considered “whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds.”¹²⁵ The *Yoder* Court referred to Congress’s exempting the Amish from paying taxes under certain conditions,¹²⁶ but neglected to mention that only the self-employed were exempted from paying social security taxes.¹²⁷

119. *Id.*

120. *Id.* at 224 (“The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life.”).

121. *Id.*

122. *Id.* at 220-21 (“The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause.”).

123. *Id.* at 221 (“[B]ut that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.”).

124. *Id.* at 234 (“[W]e hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”).

125. *United States v. Lee*, 455 U.S. 252, 254 (1982).

126. *See Yoder*, 406 U.S. at 222.

127. *See Lee*, 455 U.S. at 256 (“The exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees.”).

Edwin Lee, a member of the Old Order Amish, employed other Amish on his farm and in his carpentry shop.¹²⁸ The Court understood that “both payment and receipt of social security benefits is forbidden by the Amish faith,”¹²⁹ because “the Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.”¹³⁰ However, “[n]ot all burdens on religion are unconstitutional,”¹³¹ because “[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”¹³²

The *Lee* Court discussed the difficulties that the tax system would face “if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”¹³³ But undermining the tax system would be disastrous. “Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.”¹³⁴ Although the Court suggested that Congress chose the only feasible accommodation,¹³⁵ the Court was wrong about that, as evidenced by Congress’s subsequent amendment of the exemption to apply to employment situations similar to *Lee*’s.¹³⁶

128. *Id.* at 254 (“[A]ppellee employed several other Amish to work on his farm and in his carpentry shop.”).

129. *Id.* at 257.

130. *Id.*

131. *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

132. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

133. *Lee*, 455 U.S. at 260.

134. *Id.*

135. *Lee*, 455 U.S. at 260 (“Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system.”). *Cf.* Michelle O’Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does It “Restore” in the Federal Tax Context?*, 36 ARIZ. ST. L.J. 321, 337 (2004) (“The Court’s holding was not based on any evidence concerning the feasibility of the taxpayer’s requested accommodation.”).

136. *See* William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403, 442 (2000) (“Congress later enacted a general exemption for employers and employees opposed to participation in social security on religious grounds.”).

3. Draft Exemptions

In a series of cases, the Court examined who would qualify for conscientious objector status. In *United States v. Seeger*,¹³⁷ the Court examined whether an individual who could not truthfully affirm that he believed in God¹³⁸ nonetheless qualified for “exempt[ion] from combatant training and service in the armed forces of the United States [because he was among] those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.”¹³⁹ The sincerity of Seeger’s views was not in question.¹⁴⁰

The conscientious exemption was challenged “under the First Amendment’s Establishment and Free Exercise Clauses . . . [because]: (1) The section does not exempt nonreligious conscientious objectors; and (2) it discriminates between different forms of religious expression in violation of the Due Process Clause of the Fifth Amendment.”¹⁴¹ The Court rejected that the section privileged some religions over others, noting that Congress meant “to embrace all religions and to exclude essentially political, sociological, or philosophical views.”¹⁴² By interpreting congressional intent to be inclusive of many religious views, the *Seeger* Court seemed to be addressing why the statute did not discriminate among religions, but not whether Congress preferred religion over nonreligion. However, the latter point was being addressed implicitly because the test for whether beliefs counted as “religious” was “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”¹⁴³ Precisely because sincere and meaningful beliefs can play very important

137. 380 U.S. 163 (1965).

138. *Id.* at 166 (“[H]e declared that he was conscientiously opposed to participation in war in any form by reason of his ‘religious’ belief; that he preferred to leave the question as to his belief in a Supreme Being open, ‘rather than answer ‘yes’ or ‘no.’”).

139. *Id.* at 164-65.

140. *Id.* at 166-67 (“His belief was found to be sincere, honest, and made in good faith.”).

141. *Id.* at 165.

142. *Id.*

143. *Id.* at 166.

roles in an individual's life whether or not they are religiously based,¹⁴⁴ the Court was also addressing why the provision was neutral between religion and nonreligion,¹⁴⁵ although the Court did not make that point explicitly.

Part of the explanation for the Court's focus on Congress's openness to many religions, rather than on whether Congress was preferring religion over nonreligion,¹⁴⁶ may have been due to the fact that "[n]o party claim[ed] to be an atheist or attack[ed] the statute on this ground."¹⁴⁷ The *Seeger* Court may have believed that it did not need to address the difference "between theistic and atheistic beliefs"¹⁴⁸ and, further, may have believed that the difference between theism and atheism did not capture the difference between religious and nonreligious views.¹⁴⁹

An additional part of the explanation is that the distinction doing much of the work in *Seeger* was not the difference between theism and atheism, but the difference between religious views and those that had been adopted "on the basis of essentially political, sociological or economic considerations that war is wrong."¹⁵⁰ The latter views did not qualify for the exemption, at least in part, because "[t]hese judgments have historically been reserved for the Government."¹⁵¹

Yet, the point was not merely that the Government makes policy judgments, but also that such judgments tend not to play the same role in the formation of an individual's self-identity as religious beliefs can.¹⁵² The Court noted that Congress wanted to "exclude[] those whose opposition to war stems from a 'merely personal moral code,'"¹⁵³ by which Congress meant to exclude those for whom the code was "not only personal"¹⁵⁴ but also was

144. Cf. John H. Calvert, *Kitzmiller's Error: Defining "Religion" Exclusively Rather Than Inclusively*, 3 LIBERTY U. L. REV. 213, 277 (2009) ("As explained by *Seeger* and *Welsh*, 'religious beliefs' relate to matters of 'ultimate concern,' not the mundane.").

145. *See Seeger*, 380 U.S. at 173.

146. *See id.* at 166.

147. *Id.* at 173.

148. *Id.*

149. Cf. *Allegheny*, 492 U.S. at 610 ("A secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.").

150. *Seeger*, 380 U.S. at 173.

151. *Id.*

152. Cf. William P. Marshall, *Religion As Ideas: Religion As Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 395 (1996) (discussing "religion's role in the promotion of self-identity").

153. *Seeger*, 380 U.S. at 173.

154. *Id.* at 186.

“the sole basis for the registrant's belief”¹⁵⁵ and was “in no way related to a Supreme Being.”¹⁵⁶ The Court’s explication of what was related to a Supreme Being involved the role that the beliefs played in the individual’s life.¹⁵⁷ That test makes the relevant criterion not about religion versus nonreligion, but about basic beliefs playing a very important role in an individual’s life and identity versus other kinds of beliefs playing a less central role.¹⁵⁸

*Welsh v. United States*¹⁵⁹ provides further support that the relevant consideration is the role played by the beliefs in the individual’s life. Welsh claimed to be a conscientious objector even though he denied that his views were religious.¹⁶⁰ The Government argued that he did not qualify as a conscientious objector, instead contending that his views were not religious but instead “essentially political, sociological, or philosophical views or a merely personal moral code.”¹⁶¹ But the Court reasoned that the registrants who did not qualify for the exemption “are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.”¹⁶² Because Welsh’s nonreligious beliefs played the role in his life that religious beliefs might play in someone else’s life, “Welsh was clearly entitled to a conscientious objector exemption.”¹⁶³

One additional case helps clarify the Court’s conscientious objector jurisprudence. At issue in *Gillette v. United States*¹⁶⁴ was whether individuals who strenuously objected to participating in a particular war should be afforded conscientious objector status. Guy Gillette argued that he had a “duty to abstain from any involvement in a war seen as unjust.”¹⁶⁵ His

155. *Id.*

156. *Id.*

157. *See* Marshall, *supra* note 152 and accompanying text.

158. *Cf.* Sarah Soifer, *Vegan Discrimination: An Emerging and Difficult Dilemma*, 36 LOY. L.A. L. REV. 1709, 1726 (2003) (discussing “the *Seeger* court's approach to the religion inquiry which forecloses inquiry into the content of the individual's beliefs, and instead looks at the function of those beliefs in the life of the adherent.”).

159. 398 U.S. 333 (1970).

160. *Id.* at 341 (“Welsh was far more insistent and explicit than *Seeger* in denying that his views were religious.”).

161. *Id.* at 342.

162. *Id.* at 342-43.

163. *Id.* at 343.

164. 401 U.S. 437 (1971).

165. *Id.* at 439.

understanding of his duty was “‘based on a humanist approach to religion,’ and his personal decision concerning military service was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence.”¹⁶⁶ Louis Negre, a devout Catholic,¹⁶⁷ argued that he had a “duty as a faithful Catholic to discriminate between ‘just’ and ‘unjust’ wars, and to forswear participation in the latter.”¹⁶⁸

The challenge by Gillette and Negre to the Military Selective Service Act of 1967¹⁶⁹ involved two different issues: (1) whether Congress intended to afford conscientious objector status to individuals with a sincere conscientious objection to serving in a particular war even if that individual did not object to serving in all wars,¹⁷⁰ and (2) assuming that Congress intended to exempt only those objecting to participating in all wars, whether such a statute violated constitutional guarantees provided by the Religion Clauses.¹⁷¹ Congress appreciated “the hopelessness of converting a sincere conscientious objector into an effective fighting man,”¹⁷² and the difficult choice faced by individuals who had to choose between following their principles and following the law.¹⁷³ Both of those considerations militated in favor of exempting those with a sincere deep objection to a particular war.¹⁷⁴ However, neither the language nor the legislative history of the statute supported that interpretation of the provision.¹⁷⁵ There were additional countervailing considerations that caused Congress to limit the exemption to

166. *Id.*

167. *See id.* at 440-41.

168. *Id.* at 441.

169. 50 U.S.C. App. § 456(j) (1964 ed., Supp. V).

170. *Gillette*, 401 U.S. at 441 (“Each petitioner claims a nonconstitutional right to be relieved of the duty of military service in virtue of his conscientious scruples.”).

171. *Id.* at 448 (“Both petitioners argue that § 6[j], construed to cover only objectors to all war, violates the religious clauses of the First Amendment.”).

172. *Id.* at 453 (citing *Welsh v. United States*, 398 U.S. 333, 369 (White, J., dissenting)).

173. *See id.* (“[T]he legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war.”).

174. *Id.* (“Naturally the considerations just mentioned are affirmative in character, going to support the existence of an exemption rather than its restriction specifically to persons who object to all war.”).

175. *See id.* at 446 (noting that the petitioners found “little comfort in the wording or the legislative history of § 6(j)”).

those who objected to participating in all wars and not to those objecting to participating in a particular war.¹⁷⁶

A different issue was whether Congress's refusal to accord an exemption to those with a sincere objection to a particular war violated constitutional guarantees.¹⁷⁷ The Court focused on whether the statute impermissibly distinguished among religions,¹⁷⁸ beginning its analysis by describing "the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion."¹⁷⁹ But Government was remaining neutral because there were secular reasons to limit the exemption to those who objected to all wars—there were costs associated with exempting any person with a sincere objection to a particular war¹⁸⁰ that Congress was entitled to take into account.¹⁸¹

The plaintiffs argued that limiting the exemption to those who objected to all wars violated both establishment and free exercise guarantees.¹⁸² The Court focused on the former, because "the gist of the constitutional complaint is that § 6(j) impermissibly discriminates among types of religious belief and affiliation."¹⁸³ Further, the Court believed that its establishment analysis showed that free exercise guarantees had also not been violated,¹⁸⁴ although

176. *Id.* at 447 ("Congress intended to exempt persons who oppose participating in all war. ... [P]ersons who object solely to participation in a particular war are not within the purview of the exempting section.").

177. *Id.* at 448 ("Both petitioners argue that § 6(j), construed to cover only objectors to all war, violates the religious clauses of the First Amendment.").

178. *Id.* at 449 ("[T]he gist of the constitutional complaint is that § 6(j) impermissibly discriminates among types of religious belief and affiliation.").

179. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)).

180. *Id.* at 455 ("Apart from the Government's need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining 'who serves when not all serve.'").

181. *Id.* ("But there are countervailing considerations, which are also the concern of Congress.").

182. *See id.* at 448 ("Petitioners contend that Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature."); *see also id.* at 449 (discussing "petitioners' other contention, that § 6(j) is a law respecting the establishment of religion").

183. *Id.* at 449.

184. *Id.* at 461 ("[O]ur analysis of § 6(j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under the

the Court recognized that the tests for constitutionality under the Religion Clauses did not mirror one another.¹⁸⁵

The plaintiffs argued that by limiting the exemption to those who objected to all wars, the statute “works a de facto discrimination among religions.”¹⁸⁶ This was so “because some religious faiths themselves distinguish between personal participation in ‘just’ and in ‘unjust’ wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths. . . cannot object to all wars consistently with what is regarded as the true imperative of conscience.”¹⁸⁷ There was no claim that the Government was intentionally targeting particular religions,¹⁸⁸ although that did not end the analysis because “the Establishment Clause forbids subtle departures from neutrality, ‘religious gerrymanders,’ as well as obvious abuses.”¹⁸⁹

The *Gillette* Court emphasized that “the constitutional value at issue is ‘neutrality,’”¹⁹⁰ and that “when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact.”¹⁹¹ But the Government’s interest in fairness and its need for manpower were thought sufficiently important secular reasons to justify the limitation of the exemption,¹⁹² which was why the Court accepted that the Government was not attempting to favor one religion over another and instead was being neutral.

Free Exercise Clause the impact of the conscription laws on those who object to particular wars.”).

185. *See id.* (“[O]ur holding that § 6(j) comports with the Establishment Clause does not automatically settle the present issue. For despite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own.”) (citing *Abington School District v. Schempp*, 374 U.S. 203, 222-23 (1963)).

186. *Id.* at 451-52.

187. *Gillette*, 401 U.S. at 452.

188. *Cf. id.* (discussing “this contention of de facto religious discrimination”).

189. *Id.* (citing *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

190. *Id.* at 450.

191. *Id.* (citing *Abington School District v. Schempp*, 374 U.S. 203, 222).

192. *See id.* at 455 (“Apart from the Government’s need for manpower, perhaps the central interest involved in the administration of conscription laws is the interest in maintaining a fair system for determining ‘who serves when not all serve.’”) (discussing part of the title of *The Report of the National Advisory Commission on Selective Service* (1967)).

4. Play in the Joints

The Court has long wrestled with the proper way to characterize the degree to which the State can accommodate religion. *Walz v. Tax Commission*¹⁹³ involved a taxpayer who sought to enjoin the granting of “property tax exemptions to religious organizations for religious properties used solely for religious worship.”¹⁹⁴ The taxpayer argued that he in effect was being forced to indirectly subsidize those religious institutions.¹⁹⁵

The Court explained that it “has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”¹⁹⁶ The Constitution does “not tolerate either governmentally established religion or governmental interference with religion.”¹⁹⁷ Within those parameters, however, “there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”¹⁹⁸ The Court understood that its “play in the joints” approach did not offer determinate answers and did not constitute a consistent system with respect to what is permissible and what is not.¹⁹⁹

This “play in the joints” approach requires the Court to examine “whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.”²⁰⁰ However, the basis of this approach is that the State is accorded some leeway—the “limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”²⁰¹

193. 397 U.S. 664 (1970).

194. *Id.* at 666.

195. *Id.* at 667 (“The essence of appellant’s contention was that the New York City Tax Commission’s grant of an exemption to church property indirectly requires the appellant to make a contribution to religious bodies.”).

196. *Id.* at 668-69.

197. *Id.* at 669.

198. *Id.*

199. *Id.* (“The course of constitutional neutrality in this area cannot be an absolutely straight line . . .”).

200. *Id.* See also *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (“[T]he Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.”).

201. *Walz*, 397 U.S. at 673.

While free exercise guarantees *require* the state not to interfere with certain religious practices, the *Walz* Court noted that the State is permitted, but not required, to accommodate an even greater range of religious practices.²⁰² But that greater range of permissible accommodations is not without limit. In his separate *Walz* opinion, Justice Harlan worried about possible abuse of the leeway to accommodate religion, cautioning that the “Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.”²⁰³ In “any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.”²⁰⁴ Where the benefit enjoyed by the religious institution is one enjoyed by a variety of non-religious institutions as well, there is less of a basis to fear that the statutorily created preference is simply a boon to religion.²⁰⁵

Justice Harlan noted that in the case at hand the New York law provided tax exemptions to “a class of nontaxable entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of ‘good works’ by performing certain social services in the community that might otherwise have to be assumed by government.”²⁰⁶ He further noted that the granted exemption “would appear not to omit any organization that could be reasonably thought to contribute to that goal,”²⁰⁷ emphasizing the importance of including non-religious organizations within those who might qualify for the exemption. Harlan further explained,

As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.²⁰⁸

202. *Id.* See also *Hobbie*, 480 U.S. at 144-45 (“[T]he government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”).

203. *Walz*, 397 U.S. at 696 (Harlan, J., concurring).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 697.

208. *Id.*

Where the preferences are weighted towards the religious, however, constitutional guarantees might come into play.

*Estate of Thornton v. Caldor, Inc.*²⁰⁹ provides an example of government overreach in protecting free exercise. At issue was a Connecticut statute guaranteeing that individuals would not have to work on their Sabbath²¹⁰ While understanding why the State might want to assure that individuals would not have to work on that day, the Court noted that “the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.”²¹¹ Further, as Justice O’Connor noted in her concurrence, “[a]ll employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor.”²¹² She then elaborated on the difficulty involved in solely focusing on those who might object to working on the Sabbath: “Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief.”²¹³ A reasonable observer would have a predictable reaction to the statute: “The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.”²¹⁴ The Court held that “the Connecticut statute, which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the Establishment Clause of the First Amendment.”²¹⁵ Were the statute less absolute and were

209. 472 U.S. 703 (1985).

210. *Id.* at 708 (“The Connecticut statute challenged here guarantees every employee, who ‘states that a particular day of the week is observed as his Sabbath,’ the right not to work on his chosen day.”) (citing CONN. GEN. STAT. § 53-303e(b) (1985)).

211. *Id.* at 709.

212. *Id.* at 711 (O’Connor, J., concurring).

213. *Id.* (O’Connor, J., concurring).

214. *Id.* at 711 (O’Connor, J., concurring). Justice O’Connor was willing to announce what the reasonable observer would think on other occasions as well. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 349 (1987) (O’Connor, J., concurring) (“[I]n my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”).

215. *Thornton*, 472 U.S. at 710-11; *See also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977)

it not focused on a particular belief and practice, it at least would not have been subject to the criticism that it was picking out a particular belief for favorable treatment.²¹⁶

So, too, in *Texas Monthly, Inc. v. Bullock*,²¹⁷ the Court considered a statute “exempt[ing] from its sales tax ‘[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.’”²¹⁸ In striking down the law,²¹⁹ the plurality explained that “the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally.”²²⁰ The Establishment Clause does not prevent the State from incidentally affording benefits to religious groups.²²¹ “The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur.”²²² But an important difference between statutes granting benefits to religious groups in particular and statutes incidentally

By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

216. *Thornton*, 472 U.S. at 712 (O'Connor J., concurring)

Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

217. 489 U.S. 1 (1989).

218. *Id.* at 5 (citing TEX. TAX CODE ANN. § 151.312 (1982)).

219. *Id.* at 25 (“We conclude that Texas' sales tax exemption for religious publications violates the First Amendment, as made applicable to the States by the Fourteenth Amendment.”).

220. *Id.* at 8.

221. *See e.g., id.* at 10-11.

222. *Id.* at 10 (citing *Mueller v. Allen*, 463 U.S. 388, 393 (1983)).

affording benefits to religious groups is that in the latter “the benefits derived by religious organizations flow[] to a large number of nonreligious groups as well.”²²³

In *Employment Division v. Smith*,²²⁴ the Court examined whether two individuals, Alfred Smith and Galen Black, could be denied unemployment compensation after being fired for the sacramental use of peyote.²²⁵ The Court emphasized that ingestion of peyote was illegal in Oregon²²⁶ and suggested that *Sherbert* among other cases might have been decided differently if the behavior at issue had been in violation of law.²²⁷ The Court rejected that free exercise guarantees required that unemployment benefits be awarded in this case, reasoning that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²²⁸ In addition, the *Smith* Court rejected that strict scrutiny was triggered simply because the State was limiting the free exercise of religion.²²⁹

223. *Id.* at 11.

224. 494 U.S. 872, 874 (1990).

225. *Id.* at 874 (“This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.”).

226. *Id.* at 876 (“Oregon does prohibit the religious use of peyote.”).

227. *Id.* (“As we observed in *Smith I*, however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical.”); *Emp’t Div. v. Smith (Smith I)*, 485 U.S. 660, 671 (1988). (“The results we reached in *Sherbert*, *Thomas*, and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct.”).

228. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment)).

229. *Smith*, 494 U.S. at 882-83 (“Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *See id.* at 402-403”); *id.* at 885 (“We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government’s ability to enforce generally

Neutrality has played an important role in both establishment and free exercise jurisprudence.²³⁰ While the Court has not made sufficiently clear what constitutes neutrality under establishment and free exercise guarantees,²³¹ what has already been said makes clear that current attempts to impose unequal burdens on the basis of orientation will not pass constitutional muster.

applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

230. William C. Athanas, *Constitutional Law—Crossing the Line Between Accommodation and Establishment—Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994), 29 SUFFOLK U. L. REV. 1163, 1165 (1995) (“Implicit in both the Establishment and Free Exercise Clauses of the Constitution lies the notion that government must pursue a policy of neutrality toward religion.”); Mark W. Cordes, *Religion As Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 SW. L. REV. 235, 245 (2008) (“[T]he Rehnquist Court made neutrality the primary component of First Amendment protection of religious rights, using it as a benchmark in analyzing free speech, free exercise and Establishment Clause issues.”); F.F. Philip Manns, Jr., *Finding the “Free Play” Between the Free Exercise and Establishment Clauses*, 71 TENN. L. REV. 657, 660 (2004) (“[G]overnmental neutrality toward religion had been the principle from which both the Free Exercise Clause and Establishment Clauses were interpreted.”); Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 339 (2006) (“The Establishment Clause and Free Exercise jurisprudence of the Court appears to be converging on a standard of neutrality.”); Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 571 (1994) (“Free exercise doctrine is now like Establishment Clause doctrine . . . in its embrace of the ideal of neutrality.”); Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696, 698 (1979) (“The principle of neutrality is relevant to a proper application of both the free exercise and the establishment clauses.”).

231. Cf. Terri Day & Leticia Diaz, *The Affordable Care Act and Religious Freedom: The Next Battleground*, 11 GEO. J.L. & PUB. POL’Y 63, 93 (2013) (“‘Neutrality’ is central to the understanding of the Establishment Clause; however, the Free Exercise Clause, if demanding accommodations to or exemptions from neutral laws, can be in conflict with the idea of neutrality.”); R. George Wright, *Can We Make Sense of “Neutrality” in the Religion Clause Cases?: Seven Rescue Attempts and A Viable Alternative*, 65 SMU L. REV. 877, 880 (2012) (“The frequency and importance of references to neutrality and related ideas in Free Exercise and Establishment Clause jurisprudence does not show, however, that ‘neutrality’ is typically used in any genuinely coherent, workable, and reasonably persuasive sense.”).

III. CONSCIENCE CLAUSE LEGISLATION TARGETING SAME-SEX MARRIAGE

Several states considered or passed legislation affording immunity to individuals or organizations that refuse to provide certain services to same-sex couples and their families. After the Supreme Court struck down same-sex marriage bans in *Obergefell v. Hodges*,²³² proposals affording immunity to those refusing to support same-sex marriages have increased.²³³ While varying with respect to the breadth of the conferred immunities, the states have been rather consistent with respect to the identity of those people who would bear the brunt of the service refusal. However, privileging certain religious views over others to impose burdens on the basis of sexual orientation or gender identity simply does not pass muster under federal constitutional guarantees.

A. State Conscience Clause Legislation

Recently, several states considered or passed legislation offering immunity for different kinds of actions directed at same-sex couples and their families.²³⁴ While differing about the range of actions to be afforded

232. 135 S. Ct. 2584 (2015).

233. Cf. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2559-60 (2015) (“[C]onscience clauses secured in the abortion domain have become an aspiration for same-sex marriage opponents.”).

234. See e.g., ACLU, *Anti-LGBT Religious Refusals Legislation Across the Country: 2015 Bill*, <http://www.aclu.org/anti-lgbt-religious-refusals-legislation-across-country-2015-bills> (for bills introduced in 2015 focused on providing religious exemptions for actions directed at LGBT individuals); ACLU, *Legislation Affecting LGBT Rights Across the Country*, <http://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country> (for current bills directed at LGBT populations, including religious exemption bills); ACLU, *Past Anti-LGBT Religious Exemption Legislation Across the Country*, <http://www.aclu.org/other/past-anti-lgbt-religious-exemption-legislation-across-country> (for bills introduced in 2016 focused on providing religious exemptions for actions directed at LGBT individuals); ACLU, *Anti-LGBT Religious Refusals Legislation Across the Country: 2015 Bill*, <http://www.aclu.org/anti-lgbt-religious-refusals-legislation-across-country-2015-bills> (for bills introduced in 2015 focused on providing religious exemptions for actions directed at LGBT individuals); ACLU, *Legislation Affecting LGBT Rights Across the Country*, <http://www.aclu.org/other/legislation-affecting-lgbt->

immunity, states have been relatively uniform with respect to the types of families put at risk by these statutes allegedly protecting religious liberty.

A few states considered bills protecting individuals who believe that marriage “is and should be recognized as the union of one man and one woman,”²³⁵ that sexual relations should only take place in such a marriage,²³⁶ and that sex is “objectively determined by anatomy and genetics by time of birth.”²³⁷ These bills would preclude the respective states from taking any of a variety of adverse actions²³⁸ “against a person, wholly or partially on the basis that such person believes, speaks, or acts in accordance with . . . [those] sincerely held religious belief[s] or moral conviction[s].”²³⁹

It is unclear whether statutes affording exemptions on the basis of an individual’s religious beliefs or moral convictions are only seeking to exempt *religious* beliefs and convictions or, instead, are seeking to protect *strongly held* beliefs and convictions.²⁴⁰ Either way, these statutes likely run afoul of establishment or equal protection guarantees when imposing burdens on a particular minority to promote particular religious beliefs.²⁴¹

Some of these bills do not contain a requirement that the actions of conscience take place in the context of a marriage or wedding ceremony. Rather, these beliefs might be used to justify a whole range of actions if those actions could be justified, at least in part, by appealing to these sincerely held beliefs. For example, these bills would presumably afford immunity to an individual who refused to offer family counseling to an unmarried same-sex

rights-across-country (for current bills directed at LGBT populations, including religious exemption bills).

235. H.B. 2752 § 4(1)(a), 2016 Leg., Reg. Sess. (Wash. 2016). *See also* H.B. 2181 § 2(a)(1), 28th Leg., 2016 Reg. Sess. (Haw. 2016).

236. H.B. 2752 § 4(1)(b), 2016 Leg., Reg. Sess. (Wash. 2016). *See also* H.B. 2181 § 2(a)(2), 28th Leg., 2016 Reg. Sess. (Haw. 2016).

237. H.B. 2752 § 4(1)(c), 2016 Leg., Reg. Sess. (Wash. 2016). *See also* H.B. 2181 § 2(a)(3), 28th Leg., 2016 Reg. Sess. (Haw. 2016).

238. *See* H.B. 2752 § 4(2)(a)-(e), 2016 Leg., Reg. Sess. (Wash. 2016). *See also* H.B. 2181 § 2(b)(1)-(7), 28th Leg., 2016 Reg. Sess. (Haw. 2016).

239. H.B. 2752 § 4(1), 2016 Leg., Reg. Sess. (Wash. 2016). *See also* H.B. 2181 § 2(a)(1), 28th Leg., 2016 Reg. Sess. (Haw. 2016).

240. CCH, HR COMPLIANCE ¶ 36940, 2016 WL 430888 (2016) (“[P]urely ‘moral and ethical beliefs’ can be considered religious, so long as they are held with strength of religious convictions.”).

241. Establishment guarantees would still be implicated if the purpose behind the statute was to promote religion. *See* *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (“If the law was enacted for the purpose of endorsing religion, ‘no consideration of the second or third criteria [of Lemon] is necessary.’”) (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

couple or, perhaps, to a gender-non-conforming individual in need of counseling services.²⁴²

Other bills are more limited in scope, immunizing individuals or businesses who for religious reasons refuse to provide any goods or services associated with a same-sex marriage.²⁴³ However, these bills with more limited scope do not afford an exemption so that individuals or businesses will be free to refuse service to anyone whose marriage offends their sincerely held religious beliefs, e.g., a marriage between individuals of different races, religions, generations, nationalities, etc.²⁴⁴ Instead, the bill focuses on one type of marriage and only immunizes those who wish to deny services to individuals who wish to celebrate those marriages in particular.

242. See, e.g., Juliana Keeping, *Lawyers for Dismissed EMU Student Who Wouldn't Counsel Gay Client Vow to Carry Fight to Supreme Court if Necessary*, ANN ARBOR NEWS (Aug. 1, 2010), <http://www.annarbor.com/news/lawyers-for-eastern-michigan-university-student-booted-from-counseling-program-say-appeal-is-imminent/> (“Monday, a federal court upheld the school’s decision to kick Christian graduate student Julea Ward out of its counseling program after she refused to affirm a gay client’s relationship during a practicum.”); William McGuinness, *Tennessee Counseling Bill Would Let Student Psychologists Reject Gay Clients Without Punishment*, HUFF. POST (Mar. 13, 2013), [http://www.huffingtonpost.com/2013/03/13/tennessee-counseling-bill_n_2867493.](http://www.huffingtonpost.com/2013/03/13/tennessee-counseling-bill_n_2867493.html)

html (“A bill proposed in Tennessee would let psychological counselors refuse to treat gay, lesbian, bisexual and transgender clients, prompting the Raw Story to run the headline: ‘Tennessee bill allows Christian counselors to reject suicidal LGBT students.’”).

243. 2015 Ohio House Bill No. 296 (proposing to amend Ohio Revised Code Sec. 4112.024 to include “No business shall be required to participate in a ceremony creating a marriage union between two persons of the same sex if participation in the ceremony violates the business’s right of conscience or freedom of religion. No business that exercises rights under this section shall be subject to civil or criminal liability.”).

244. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1022 (2015) (discussing “prejudicial laws such as those permitting photographers to assert free speech claims against being forced to photograph same sex, interracial, or interreligious marriages See generally Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FLA. COASTAL L. REV. 135, 145 (2010) (noting that officials “might have religious qualms about helping any number of couples marry, such as interracial, interreligious, or intergenerational couples.”).

The point here is not to advocate for a law immunizing refusals to provide service to individuals if that refusal is backed by sincerely held beliefs. Such a proposal would include biased individuals and would permit them to indulge their prejudices, and might lead to greater balkanization in this country.²⁴⁵ But allowing individuals to refuse service to members of the LGBT community and their families would allow biased individuals to indulge whatever prejudices were held against that group,²⁴⁶ which can hardly be considered good public policy.²⁴⁷ Further, privileging anti-LGBT attitudes because of religious beliefs would put the state in the position of protecting certain religious beliefs (anti-LGBT beliefs) over other religious beliefs (e.g., which involve hostility towards other groups).

Suppose, for example, that members of a particular religious group sincerely wish to have no association with a variety of individuals based on their sexual orientation, race, or religion.²⁴⁸ When the State permits shunning on one of these religious bases but not others, it sends a message. But the message is not of religious liberty but, instead, agreement or sympathy with one view and not the others.²⁴⁹

245. Cf. A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 314 (2015) (discussing “the increased polarization in American politics in our time”).

246. It may be more difficult than might be thought to determine which individuals attitudes are based on prejudice rather than principle. Cf. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 688 (2010) (“How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb? If a hypothetical Male–Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?”).

247. See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1129 (2002) (“Indulging popular prejudices is not a legitimate governmental goal.”).

248. Cf. Steven Goldberg, *Cutter and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403, 1413 (2006) (discussing white supremacist religions).

249. Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805, 189 L. Ed. 2d 675 (2014) (“[A]pproving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause was designed to preclude.’”) (citing *Lee*, 455 U.S. at 263 n. 2 (Stevens, J., concurring)).

B. Mississippi Law

Mississippi has enacted the Protecting Freedom of Conscience from Government Discrimination Act.²⁵⁰ This law includes a variety of provisions protecting individuals who wish to impose burdens on members of the LGBTQ community. Like some of the other proposed bills,²⁵¹ this law protects individuals who believe any of the following: (1) marriage is or should be between one man and one woman, (2) sexual relations should only be in the context of such marriages, and (3) sex is objectively determined in light of certain criteria at birth.²⁵²

An individual could decline to provide counseling to an individual based on the protected beliefs—an LGBT individual in need of psychological help could be denied that help, and the state could not impose any sanctions for failing to provide that counseling.²⁵³ A presumably unintended consequence of this law would seem to be that a counselor with certain convictions could deny counseling to a rape victim if that victim was not the rapist's spouse, although the correct interpretation of the statute will have to be offered by the Mississippi courts.²⁵⁴

250. See Brandiilnye Irvin, *We Need to Exorcise Mississippi's Hateful Ghosts*, ADVOCATE (Apr. 11, 2016), <http://www.advocate.com/commentary/2016/4/11/praying-mississippi-will-learn-its-past/> (“Last Tuesday, Gov. Phil Bryant signed House Bill 1523 into law.”).

251. See *supra* notes 234-39 and accompanying text.

252. HB 1523 § 2 (“The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.”).

253. See HB 1523 § (3)(4) (“The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person . . . declines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 2 of this act.”).

254. See Stuart Buck & Mark L. Rienzi, *Federal Courts, Over breadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 427 (2002) (“[S]tate courts are the only authoritative interpreters of state law.”).

A state employee who disparages same-sex relationships on or off the job will have certain protections,²⁵⁵ although the statute nowhere suggests similar protections for state employees who disparage other types of marriages or who extol same-sex relationships. But this means that Mississippi is affording individuals immunity based on their viewpoint. Even were Establishment Clause guarantees not implicated, the First Amendment requires courts to view such statutes with a jaundiced eye, because “[v]iewpoint discrimination is censorship in its purest form.”²⁵⁶ Such discrimination “requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue.”²⁵⁷ The state as *regulator* is not permitted to promote a particular viewpoint in this way.²⁵⁸

C. Equal Protection

The bills and statutes allegedly protecting conscience do not permit anyone objecting to a particular marriage based on sincerely held convictions to opt out of providing services for the married couple.²⁵⁹ Rather, they target one kind of marriage that will be subject to refusals of service.²⁶⁰ Presumably,

255. See HB 1523 §7.

256. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)).

257. *Id.* at 430 (citing *Schacht v. United States*, 398 U.S. 58, 63 (1970)).

258. Elizabeth E. Gordon, *University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy Doctrines*, 1991 U. CHI. LEGAL F. 393, 401 (1991) (“Under the forum doctrine, the state's actions as regulator of public speech in a public forum are subject to a standard of ‘absolute neutrality.’”); Jillian Lenson, *Litigation Primer Attacking State “No Promo Homo” Laws: Why “Don’t Say Gay” Is Not O.K.*, 24 TUL. J.L. & SEXUALITY 145, 155 (2015) (noting this is “the exact type of ‘regulation of speech because of disagreement with the message it conveys’ that the Court has deemed unacceptable in light of the First Amendment’s promise”).

259. *Cf.* Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1022 (2015).

260. *Cf.* Andrew C. Stevens, *By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage*, 63 EMORY L.J. 979, 1009 (2014) (“The most apt remedy to this problem is the one already enacted in almost every state that has recognized same-sex marriage: a state statutory exemption protecting the right of religious officials to refuse to solemnize marriages against their conscience.”). *But cf.* James M. Oleske, Jr., “State Inaction,” *Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 37 (2016) (discussing the lack of statutes protecting those objecting “to provid[ing]

were individuals permitted to refuse service more generally, there might be many couples and families put at a disadvantage.²⁶¹

*Romer v. Evans*²⁶² involved a Colorado constitutional amendment adopted by referendum that precluded state and local actors from affording antidiscrimination protections on the basis of sexual orientation.²⁶³ When striking down the legislation, the Court noted that the “amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.”²⁶⁴ The Court explained that the “amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy.”²⁶⁵ One of the unusual aspect of the amendment was its picking out orientation alone as the basis for the disability.²⁶⁶ The amendment was characterized as “at once too narrow and too broad”²⁶⁷ because it “identifie[d] persons by a single trait”²⁶⁸ and then denied a range of protections.²⁶⁹ The liberty of conscience legislation considered here might permit members of the LGBT community and their families to be denied a whole range of services in a variety of circumstances, which seems to “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”²⁷⁰

equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals”).

261. Mark Strasser, *On Same-Sex Marriage and Matters of Conscience*, 17 WM. & MARY J. WOMEN & L. 1, 33 (2010) (“[W]ere there an open-ended exemption so that individuals could refuse to perform marriages contrary to conscience, many kinds of couples might have their hopes of marriage initially thwarted.”).

262. 517 U.S. 620 (1996).

263. *See id.* at 624. (“Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”)

264. *Id.* at 627.

265. *Id.* at 631.

266. *Id.* at 633 (“The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”).

267. *Id.*

268. *Id.*

269. *See id.*

270. *Id.* at 634.

IV. CONCLUSION

Recently, several states considered or passed conscience clause legislation immunizing individuals who, because of their sincere beliefs, refuse to provide various services to members of the LGBT community. Such legislation is constitutionally suspect for several reasons. First, it seems designed to privilege certain religious beliefs over others, implicating establishment concerns. Second, these religious exemptions impose burdens on others, and the Court has manifested its lack of willingness to find such accommodations constitutionally permissible. Third, these provisions target an unpopular minority, which makes them suspect on equal protection grounds even if the establishment objections can be overcome.

While those promoting conscience clause legislation claim that its purpose is to promote religious liberty, the targeting that such legislation often involves undercuts the plausibility of that claim. Yet, even were the legislation not targeted, it would still be problematic because it privileges certain religious beliefs over others and imposes the burdens associated with the exemption upon non-believers. Further, immunizing of discrimination against members of marginalized groups in public accommodations promotes social polarization, a result that runs counter to everyone's interests.