

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

AIMEE MADDONNA,

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*

Defendants.

Civil Docket No. 6:19-cv-448-TMC

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
FEDERAL DEFENDANTS' MOTION TO DISMISS**

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NATURE OF THE CASE

Plaintiff Aimee Maddonna, along with her family, sought to volunteer with children in South Carolina's foster-care system. But when she reached out to Miracle Hill Ministries—a child-placement agency licensed by the State of South Carolina and funded partly by federal grants—she was rejected because her family is Catholic, and Miracle Hill makes foster-care placements solely with, and provides government-funded foster-care services solely to, evangelical Christians. Just like the State, the Federal Defendants—the U.S. Department of Health and Human Services, Secretary Azar, HHS's Administration for Children and Families, and the Deputy Assistant Secretary in charge of that subagency—acknowledge that Miracle Hill imposes religious tests on prospective foster parents and volunteers. But HHS nevertheless argues that its decision to fund this discriminatory provision of governmental services is not reviewable by this Court, and that even if its actions were reviewable, it is not legally responsible for the discrimination. HHS is wrong on both counts.

HHS provides funding to Miracle Hill and other South Carolina child-placement agencies. Upon learning that Miracle Hill discriminates in the provision of governmental services in violation of HHS regulations, HHS not only failed to enforce its antidiscrimination regulations against either Miracle Hill or South Carolina—which receives the federal funds from HHS and distributes them to Miracle Hill—but also issued a classwide exemption from those regulations for *all* South Carolina child-placement agencies, opening the door for continued discrimination bought and paid for with federal funds.

HHS's actions are reviewable by this Court through the Administrative Procedure Act because agencies do not have unfettered discretion to violate the Constitution or to abdicate their enforcement responsibilities through sweeping exemptions. And HHS has violated, and continues to violate, the straightforward mandates of the Establishment Clause: It has done so by funding

religious discrimination in the provision of governmental services. And it has done so by exempting child-placement agencies from generally applicable antidiscrimination requirements in the name of accommodating those agencies' religious beliefs when the antidiscrimination requirements do not impose a substantial burden on the agencies' religious exercise and the exemption granted imposes harms on third parties. HHS has likewise violated, and continues to violate, Plaintiff's equal protection and due process rights. The motion to dismiss should therefore be denied.

CONCISE STATEMENT OF FACTS

In the Complaint, Mrs. Maddonna has stated her desire to volunteer with children in foster care and become a foster parent; the discrimination that she met from Miracle Hill Ministries; Miracle Hill's exclusive recruitment of evangelical Christians; and the State's ongoing licensing and funding (with both state and federal funds) of child-placement agencies that impose religious tests on prospective volunteers and foster parents. She explained all of that again in her opposition to the State's motion to dismiss. *See* Doc. 20 at 2–7. Mrs. Maddonna now, therefore, details only the additional facts alleged in the Complaint that concern most directly how HHS funds religious discrimination and exempts child-placement agencies from compliance with HHS's antidiscrimination requirements.

Under Title IV-E of the Social Security Act, HHS provides federal funding to South Carolina to support its foster-care system. Compl. ¶ 60. The federal funding passes through the State and on to the child-placement agencies with which the State contracts to provide its foster-care services. *Id.*

Receipt and therefore also disbursement of federal taxpayer funds is contingent on the State's ensuring that its child-placement agencies comply with federal law. *Id.* ¶ 61. Since 2015, HHS has required that all its contracts include an antidiscrimination clause providing that “no

person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as . . . religion.” *Id.* ¶ 62 (quoting 48 C.F.R. § 352.237-74). And since 2017, HHS regulations have prohibited recipients of federal funds from discriminating on the basis of religion (among other things) in the provision of federally funded services. *Id.* ¶¶ 63–66; 45 C.F.R. § 75.300(c). Because these antidiscrimination requirements pass through to subrecipients of federal funds, the child-placement agencies with which South Carolina contracts are bound by these requirements just as the State itself is. *See* Compl. ¶ 67; 45 C.F.R. § 75.101(b)(1). HHS regulations further specify that religious organizations are eligible to receive HHS funding if they comply, just like nonreligious organizations must, with all applicable regulations. *See* Compl. ¶ 68; 45 C.F.R. § 87.3.

Miracle Hill offers government-funded child-placement services exclusively to members of its preferred faith: evangelical Christianity. *See* Compl. ¶¶ 69–74; Doc. 20 at 4–6. Hence, when Mrs. Maddonna, whose family is Catholic, contacted Miracle Hill so that she and her family could volunteer through the agency with the hope of fostering a child, Miracle Hill rejected her expressly because of her faith. *See* Compl. ¶¶ 35–42. Because Miracle Hill discriminates on the basis of religion when deciding who is eligible to volunteer with and become foster parents to children in the State’s care—that is, because Miracle Hill discriminates when carrying out a federally funded program—Miracle Hill violates HHS’s prohibition against religious discrimination.

In February 2018, South Carolina Governor Henry McMaster wrote to Defendant Steven Wagner, then-Acting Assistant Secretary for HHS’s Administration for Children and Families, requesting that HHS categorically exempt the state’s faith-based child-placement agencies from HHS’s antidiscrimination regulations and waive the penalties for noncompliance—namely the withholding or clawback of federal dollars. *Id.* ¶ 83. In January 2019, HHS granted that exemption.

Id. ¶ 92. Although the exemption letter makes special reference to Miracle Hill, HHS granted a classwide exemption from the religious-antidiscrimination requirements of 45 C.F.R. § 75.300(c) for *all* South Carolina child-placement agencies that receive taxpayer funds. *Id.* ¶¶ 92–93. HHS asserted that the federal antidiscrimination requirements substantially burden South Carolina child-placement agencies’ religious beliefs in violation of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.*, and that requiring compliance with antidiscrimination requirements would be difficult for South Carolina’s foster-care program. Doc. 29-2 at 3–4.

Accordingly, HHS continues to direct federal taxpayer dollars to child-placement agencies in South Carolina that impose religious tests on prospective volunteers and foster parents, as does the agency that turned away the Maddonnas for being Catholic. As a direct result of HHS’s categorical, prospective exemption, families like the Maddonnas will continue to be turned away from federally funded governmental services solely because they practice a disfavored faith. Further, by permitting child-placement agencies to exclude foster parents and volunteers who are not evangelical Christians, HHS’s decision allows many otherwise-qualified persons to be wholly removed from consideration for these critical roles. And as explained in the Complaint and Plaintiff’s response to the State’s motions to dismiss (*see* Doc. 20 at 7), HHS’s action denies children the opportunity to be raised in accordance with their own faith or the religious preferences of their biological parents if the children or parents are Catholic, Jewish, Muslim, or any other faith that does not match that of the agency responsible for placing them with foster parents.

In tandem with the State, HHS has continued to fund and sanction religious discrimination in the provision of governmental services, at great cost to those, like Mrs. Maddonna, who would use such services—and to the detriment of the children who are deprived of the loving homes that the Maddonnas and other families like them would offer.

ARGUMENT

On motions to dismiss for failure to state a claim, the Court accepts as true the well-pleaded facts in the Complaint and views the facts in the light most favorable to the plaintiff, drawing all reasonable inferences in her favor. *See, e.g., Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017); *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). A complaint need only “contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction may be granted “only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (alteration in original) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990)). The Complaint meets these standards.

I. MRS. MADDONNA HAS PROPERLY PLEADED STANDING TO CHALLENGE HHS’S FUNDING AND SANCTIONING OF RELIGIOUS DISCRIMINATION IN THE PROVISION OF GOVERNMENTAL SERVICES.

To establish standing, a plaintiff need allege only (1) an “injury in fact” that is (2) “fairly . . . trace[able]” to defendants’ actions and is (3) “redress[able] by a favorable decision” of the court. *Lujan*, 504 U.S. at 560–61. Mrs. Maddonna has alleged that she was injured by Miracle Hill’s religious discrimination against her in the provision of a federally funded governmental service, that the injury is fairly traceable to HHS because it knowingly funded the ongoing discrimination, and that the injury is redressable by an order from this Court prohibiting HHS from

providing federal funds to entities that use those funds to provide governmental services on a discriminatory basis.

HHS does not contest that Mrs. Maddonna has suffered an injury in fact. Nor could it. Mrs. Maddonna has properly pleaded a cognizable injury—namely, that when she sought out federally funded governmental services, she was turned away because she is Catholic. Compl. ¶¶ 37–42.

Instead, HHS argues that Mrs. Maddonna’s injury is not fairly traceable to it or redressable by this Court. HHS suggests that the harm that Mrs. Maddonna suffered begins and ends with Miracle Hill (which is not a party to this lawsuit). And it contends that only Miracle Hill—or Miracle Hill and the State—could provide the relief sought. In so arguing, HHS simply ignores its own conduct—that is, its knowing funding of Miracle Hill’s religious discrimination and its creation of a classwide exemption from generally applicable antidiscrimination regulations in order to authorize federally funded religious discrimination to continue. HHS is responsible, and culpable, for its own conduct, which an injunction against it would redress. Its attempts to distance itself from the religious discrimination perpetrated against Mrs. Maddonna thus cannot be squared with its own acts to preserve and further that discrimination.

A. Fair Traceability.

Federal standing doctrine’s traceability requirement imposes a “but for” causal connection between the harm that Mrs. Maddonna experienced and HHS’s actions. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 74–75 (1978). As Mrs. Maddonna alleged in the Complaint, HHS funds the child-placement activities of private agencies in South Carolina through grants to the State. And when HHS learned that Miracle Hill uses religious criteria to discriminate against prospective volunteers and foster parents, in violation of HHS’s antidiscrimination regulations, it broadly exempted all child-placement agencies in South Carolina from complying with those regulations, thus authorizing and allowing those entities to continue to discriminate in

the provision of federally funded social services. Compl. ¶¶ 82–93. Hence, not only did HHS not act to stop the flow of federal dollars to a governmental program being operated on a discriminatory basis, but it knowingly took affirmative steps to ensure that the federally funded discrimination could continue unabated. Because the harm that Mrs. Maddonna experienced was the use, by a government-service provider, of federal tax dollars to perpetrate religious discrimination against her, these allegations are more than sufficient to show that her injury is fairly traceable to HHS.

HHS contends, as the State has, that it was Miracle Hill, not any of the Defendants here, that set the religious test that bars Catholics like Mrs. Maddonna, and hence that the independent actions of Miracle Hill break the causal connection to Mrs. Maddonna’s injury. Doc. 29-1 at 10–14. And, it contends, it was Miracle Hill, not HHS, that ultimately denied Mrs. Maddonna the opportunity to receive the federally funded child-placement services that she sought. *Id.* But fair traceability does not mean that a challenged official action is “the sole or even immediate cause of the injury.” *Sierra Club v. U.S. Dep’t of Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (citing *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)) (rejecting government’s argument that it was not directly responsible for path of privately built pipeline because, but for agency’s grant of right-of-way, pipeline “could not have been authorized in its currently proposed form”). “To establish traceability, [the plaintiff] must show that the challenged action is ‘in part responsible for frustrating’” a plaintiff’s exercise of her rights. *Id.* at 283 (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013)). A defendant’s actions need not be “the very last step in the chain of causation.” *Bennett*, 520 U.S. at 169.

Mrs. Maddonna’s harm was suffering religious discrimination in the provision of a governmental service that is bought and paid for with federal and state dollars. Miracle Hill delivers child-placement services on behalf of the State using money that HHS decided to provide

even after learning that Miracle Hill would deliver the services in a discriminatory manner. Indeed, HHS expressly authorized that government-funded discrimination, thus “enabl[ing] and virtually ensur[ing]” the harms that Mrs. Maddonna experienced and continues to experience. *Sierra Club*, 899 F.3d at 283. The traceability requirement is thus fully satisfied.

HHS’s reliance on *Doe v. Obama*, 631 F.3d 157 (4th Cir. 2011), and *Allen v. Wright*, 468 U.S. 737 (1984), is misplaced. In *Doe*, a putative class of frozen embryos lacked standing to challenge an executive order removing certain limitations on stem-cell research because it was the decisions of the embryos’ biological parents who donated the embryos for research, rather than the executive order, that caused the alleged injury. 631 F.3d at 160–61. And in *Allen*, the plaintiffs’ reduced ability to attend an integrated school was not fairly traceable to the government’s failure to withhold tax-exempt status from discriminatory private schools because it was purely speculative whether a loss of tax-exempt status would have motivated the schools to amend their enrollment policies or whether it would have encouraged parents to send their children to integrated public schools. 468 U.S. at 758.

These cases stand for the proposition that an injury is not fairly traceable to the government when the injury was perpetrated by a third party and a change in governmental policy either would not have caused different behavior by that third party or it is purely speculative whether the third party’s behavior would have changed. In *Doe*, for instance, a change in the executive order would not have affected the embryos’ biological parents’ decision to donate the embryos. And in *Allen*, the Court could only speculate on the effect that changing the schools’ tax-exempt status would have had on the families attending the schools and the schools themselves. Here, by contrast, Miracle Hill could not continue to provide federally funded services in a discriminatory fashion if HHS did not grant the federal funds while exempting Miracle Hill from compliance with federal antidiscrimination regulations. Miracle Hill could, of course, perform privately funded activities

however it might wish. But the injury alleged here—suffering religious discrimination in a *federally funded program*—simply could not occur but for HHS’s disbursement and authorization of the use of the federal funds in that way.

HHS contends also that causation is defeated because HHS imposed a limited condition on entities that avail themselves of the exemption: Exempted entities must refer any prospective foster parent whom they turn away on religious grounds to another agency, provided that making a referral does not also violate their religious beliefs. *See* Doc. 29-1 at 6; Doc. 29-2 at 4. Not only does the caveat to this “condition” itself license agencies to turn away families without a referral, but even receiving a referral would not fully remedy the injury here. For the injury is being turned away by a government-funded child-placement agency that delivers governmental services. Being told, “we don’t serve your kind, but you can go someplace else,” does not erase that injury, much less remedy it, and hence it has no bearing on the standing analysis. Mrs. Maddonna need not allege that she sought services elsewhere or that she was absolutely barred from volunteering or fostering with any agency whatever. It is enough to allege, as she has, that because of Defendants’ actions, she was denied access to governmental programs or services on the same terms as persons of a different religion. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”); *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (recognizing standing to raise Establishment Clause challenge based on stigmatic harm inflicted by state action). The possibility that some other government-funded agency might allow Catholics to be foster parents does nothing to temper the stigmatic and dignitary harms of being turned away by Miracle Hill.

B. Redressability.

This Court has ample authority to remedy the injuries here through the requested declaratory and injunctive relief. Redressability is satisfied if “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable [judicial] decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). A plaintiff need not establish that a favorable decision will relieve *every* injury suffered. See *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). It is enough that the relief sought would “abat[e] current violations and prevent[] future ones” (*Friends of the Earth*, 528 U.S. at 187), or that an injury could be “reduced to some extent” by the Court (*Massachusetts*, 549 U.S. at 526).

HHS argues that Mrs. Maddonna’s injury is not redressable because the Court cannot require Miracle Hill to accept Mrs. Maddonna as a volunteer or foster parent, and that even if the Court ordered HHS to enforce the antidiscrimination regulations, Miracle Hill might cease contracting to perform child-placement services rather than provide the services on a nondiscriminatory basis. Doc. 29-1 at 14–15. But Mrs. Maddonna is not seeking an order requiring Miracle Hill (or anyone else) to accept her as a volunteer or foster parent. Her injury is discrimination on the basis of religion in the provision of government-funded, government-authorized foster-care services; and the remedy sought is that HHS be enjoined from funding and creating exemptions for child-placement agencies that discriminate when operating governmental programs. If the injunction is granted, every private entity that serves as a licensed child-placement agency will be required to provide government-funded services in a nondiscriminatory fashion. Whether Miracle Hill then elects to operate a government-funded program on those terms or prefers instead to provide private charitable services on a religiously restrictive basis, Mrs.

Maddonna will no longer be turned away from a government-funded program solely because she is Catholic—thus fully redressing her injury.

HHS also argues that Mrs. Maddonna’s injury is not redressable because whatever relief the Court imposes as to HHS will not necessarily cause the State to cease funding and licensing Miracle Hill. *Id.* To be sure, Mrs. Maddonna’s injury was caused by *both* the State and HHS. And it is true that HHS cannot control the State’s licensing determinations or expenditure of *state* funds. But enjoining the federal funding would fully remedy the harm caused by that federal funding—i.e., the harm inflicted by HHS. And in all events, Mrs. Maddonna has named both the Federal and the State Defendants in this action; she is challenging both causes of her injury; and the requested relief would fully redress that injury. The redressability requirement is satisfied. *WildEarth Guardians v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) (citing *Massachusetts*, 549 U.S. at 525–26) (“[T]he mere existence of multiple causes of an injury does not defeat redressability”); *Judd*, 718 F.3d at 315–16 (recognizing that “the concept of concurrent causation” applies to standing). Were HHS’s argument correct, any injury caused by multiple actors would be unredressable, because each defendant could always argue that a codefendant might not abide by the court-ordered relief. That cannot be.¹

¹ As explained in her response to the State’s motions to dismiss, Doc. 20 at 15 n.5, Mrs. Maddonna does not rely on taxpayer standing to bring her claims. Mrs. Maddonna’s standing here is direct: She alleges that she was harmed by personally experiencing government-funded policies and practices that disfavor and disadvantage her because she is Catholic. Standing to challenge the imposition of regulatory requirements that are more onerous for certain faiths than others is direct for those who are affected by the requirements. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S.125, 145 (2011) (“[I]f a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury.”); *see also, e.g., Larson*, 456 U.S. at 239–41. Having tax dollars used to fund religious discrimination against her is a cognizable direct injury to Mrs. Maddonna, regardless of whether it might also be a taxpayer injury.

II. HHS’S DECISION TO EXEMPT CHILD-PLACEMENT AGENCIES FROM ANTIDISCRIMINATION REGULATIONS IS NOT COMMITTED TO AGENCY DISCRETION, AND MRS. MADDONNA’S APA CLAIMS ARE REVIEWABLE.

Mrs. Maddonna alleges that HHS’s classwide exemption of South Carolina’s child-placement agencies from HHS’s antidiscrimination regulations—whereby HHS continues to fund the agencies despite their discriminating in the provision of child-placement services—violates the Administrative Procedure Act because the exemption is arbitrary, capricious, an abuse of discretion, and not in accordance with law (*see* 5 U.S.C. § 706(2)(A)) and because it is contrary to constitutional rights (*see id.* § 706(2)(B)). Compl. ¶¶ 118, 120.

HHS contends that the exemption is an individual enforcement determination, akin to a prosecutor’s decision about whether to indict, and thus judicial review is foreclosed by *Heckler v. Chaney*, 470 U.S. 821 (1985). *See* Doc. 29-1 at 18–22. But the exemption here is not an individual, retrospective enforcement determination based on the specific facts and circumstances of the violation. Rather, it is a classwide, prospective policy governing the activities of all current and future South Carolina child-placement agencies by directing that HHS’s own antidiscrimination regulation does not and will not apply to any of them. Hence, the exemption is not the sort of agency nonenforcement determination that *Heckler* leaves to agency discretion. And even if the exemption were of the sort contemplated by *Heckler*, which it isn’t, *Heckler* does not bar judicial review when, as here, a plaintiff alleges that the challenged agency action violates the Constitution. Whatever *Heckler*’s reach, it does not bar the Court from reviewing Mrs. Maddonna’s claims that the exemption and the ongoing federal funding of religious discrimination, which the exemption allows to continue unabated, are unconstitutional and therefore also violate § 706(2)(B).

A. The exemption is not an individual enforcement decision subject to nonreviewability under *Heckler v. Chaney*.

Generally speaking, agency action is subject to judicial review. *See Elecs. of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985). Agency action is nonreviewable only if it

is precluded by statute (5 U.S.C. § 701(a)(1)) or “committed to agency discretion by law” (*id.* § 701(a)(2)), the instances of which are “rare” (*Elecs. of N.C.*, 774 F.2d at 1267). *Heckler* held that an agency’s decision “not to prosecute or enforce, whether through civil or criminal process,” in an individual case is presumptively immune from judicial review under § 701(a)(2). 470 U.S. at 831. An agency’s decision not to take enforcement action in a specific instance against a particular entity that it regulates is akin to a prosecutor’s decision not to indict, and is “regarded as the special province of the Executive Branch.” *Id.* at 832.

The *Heckler* rule is a narrow one. The *Heckler* Court did not hold that an agency has absolute discretion to refuse to enforce all violations of the kind that it might decline to enforce in a particular case; and the Court did not permit agencies to authorize violations of the law prospectively and permanently. Rather, *Heckler* made clear that “Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.” *Id.* at 833. Nor, importantly, did the Court address reviewability of an agency decision to “‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam) (agency’s wholesale failure to enforce Title VI of the Civil Rights Act of 1964 through desegregation of public schools was not committed to agency discretion)); *see also, e.g., N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745 (7th Cir. 1986) (“[W]e do not think that the Commission can essentially abandon its regulatory function . . . under the guise of unreviewable agency inaction.”). Indeed, Justice Brennan wrote separately in *Heckler* to underscore the narrowness of the decision, further explaining that the Court was not addressing whether nonenforcement decisions might evade judicial review when “(1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct”; “(2) an agency engages in a pattern of nonenforcement of clear statutory language”; “(3) an agency has refused to enforce a regulation

lawfully promulgated and still in effect”; or “(4) a nonenforcement decision violates constitutional rights.” 470 U.S. at 839 (Brennan, J., concurring); *see also infra* Section II.B.

In keeping with these limitations, and the logic of the prosecutorial-discretion analogy underlying them, the courts have drawn a line between “*single-shot* non-enforcement decision[s]” like the one in *Heckler*, which are presumptively immune from judicial review, and an “agency’s statement of a *general enforcement policy*,” which is reviewable. *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (emphases in original) (citations omitted). Whereas individual enforcement decisions involve “the sort of mingled assessments of fact, policy, and law” that are “peculiarly within the agency’s expertise and discretion,” general enforcement policies “are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings.” *Id.* at 677. Only the former are presumptively nonreviewable. *Id.* at 676–77.

Courts and scholars alike have concluded that grants and denials of regulatory exemptions of the sort at issue here are unlike the case-by-case retrospective enforcement decisions protected from review by *Heckler*, and instead are reviewable agency action. Although both enforcement discretion and regulatory exemptions involve decisions by governmental officials “not to apply the literal terms of the law,” exemptions “are more like the royal grant of permission in that they are formal, written, affirmative agency actions.” Sean D. Croston, *An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure*, 64 ADMIN. L. REV. 295, 297 (2012) (internal quotations omitted). Given the “broad manner” in which regulatory exemptions may be used, therefore, they “are generally subject to judicial review” under the APA. *Id.* (citing *Honeywell Int’l v. Nuclear Regulatory Comm’n*, 628 F.3d 568, 578 (D.C. Cir. 2010) (reviewing challenge to agency denial of exemption under APA’s arbitrary-and-capricious standard); *Yetman v. Garvey*, 261 F.3d 664, 669 (7th Cir. 2001) (reviewing Federal Aviation

Administration’s decision to deny exemptions to rule requiring pilots to be younger than sixty)). In short, “[t]he granting of an exemption from statutory requirements is not an area of agency discretion traditionally unreviewable.” *Beno v. Shalala*, 30 F.3d 1057, 1067 (9th Cir. 1994) (internal quotations omitted).

The agency action here is a written, classwide exemption that extends to all current and future South Carolina child-placement agencies, prospectively granting license not to comply with HHS’s antidiscrimination regulations. *See* Compl. ¶¶ 92–93. It is not a case-specific determination, based on individualized assessment of all the facts and consideration of the case’s strengths and the agency’s enforcement priorities. *See Sierra Club v. Larson*, 882 F.2d 128, 130–133 (4th Cir. 1989). Rather, it is a general declaration that a whole swath of regulated entities no longer need follow the agency’s general rules. It is, in short, the creation of new policy through exemption rather than rulemaking, and is thus reviewable.

HHS insists that *Sierra Club v. Larson*, 882 F.2d at 128, is “on all fours here.” Doc. 29-1 at 20–21. It is mistaken. *Larson* involved a regulatory scheme under which the Federal Highway Administration could take enforcement action—including withholding federal funding—against states that it determined were not maintaining “effective control” over outdoor advertising as contemplated by the Highway Beautification Act. *See* 882 F.2d at 129. The Fourth Circuit held under *Heckler* that the agency’s decision not to withhold funds from South Carolina was nonreviewable. *Id.* at 132. HHS correctly notes that, as in *Larson*, a federal agency here has determined to distribute federal funds where there are violations of the terms of the grant. *See* Doc. 29-1 at 21. But HHS ignores two core features of *Larson* that underscore why the nonenforcement determination there falls squarely under *Heckler*’s nonreviewability doctrine while the exemption here does not.

First, *Larson* concerned an individual nonenforcement decision with respect to a single regulated entity (the State of South Carolina). *See* 882 F.2d at 129–30. Here, by contrast, South Carolina may have been the entity to request the exemption, but the exemption itself covers not just a single actor that has fallen short in complying with federal regulations, but an entire class of regulated entities—namely, all current and future child-placement agencies in South Carolina.

Second, and more importantly, the nonenforcement determination in *Larson* was an agency decision not to impose a financial penalty on South Carolina for past noncompliance in light of the State’s current actions. *See id.* at 130, 132–33. Nowhere in *Larson* does it suggest that the government’s leniency toward South Carolina was an invitation for the State to continue disregarding statutory requirements. Quite the contrary: The individualized determination not to withhold highway funding was based in part on the fact that the government was “satisfied with actions already taken or planned courses of action by South Carolina . . . in assuring compliance with federal requirements for outdoor advertising.” *Id.* at 130 (internal quotations omitted). That is, the federal agency determined that it need not impose a financial penalty on South Carolina because South Carolina was already making adequate progress toward complying with federal requirements, thus fulfilling statutory objectives and satisfying federal policy objectives.

Here, by contrast, HHS did not just decline to impose a financial penalty on a particular recipient or subrecipient of federal funds for violating HHS regulations, nor has it determined that a penalty is unnecessary to achieve regulatory objectives given the steps toward full compliance already being undertaken. Instead, HHS affirmatively, prospectively, and categorically exempted *all* faith-based entities in South Carolina from *ever* having to comply with a federal regulation, while allowing them to continue receiving federal funds. The exemption here, in other words, changed HHS policy. Far from dictating that the exemption be deemed an individual, discretionary enforcement decision, *Larson* demonstrates why categorical, prospective exemptions from

compliance like the one here are reviewable while individual, retrospective nonenforcement decisions are not.

B. Even if the exemption were an enforcement decision, *Heckler* does not bar review of agency action that is unconstitutional.

Even if the Court were to hold that the challenged exemption here is a nonenforcement decision within the meaning of *Heckler*, *Heckler* still would not bar review of Mrs. Maddonna's claims that HHS's actions are unconstitutional and thus also violate 5 U.S.C. § 706(2)(B).

Heckler did not address whether the presumption of nonreviewability might apply to agency action or inaction that is alleged to violate the Constitution. 470 U.S. at 838. But the Court did take pains to point out that “[n]o colorable claim [has been] made . . . that the agency’s refusal to institute proceedings violated any constitutional rights of respondents.” *Id.* And Justice Brennan further underscored that the Court’s holding did not address the scope of reviewability where, among other scenarios, “a nonenforcement decision violates constitutional rights.” *Id.* at 839 (Brennan, J., concurring). For as he explained: “It may be presumed that Congress does not intend administrative agencies . . . to ignore clear jurisdictional, regulatory, statutory, or constitutional commands” *Id.* (Brennan, J., concurring). In other words, unless Congress says otherwise, which it has not done here, agency action should be reviewable for unconstitutionality.²

The Fourth Circuit has adopted this reading of *Heckler*. *See Elecs. of N.C.*, 774 F.2d at 1267. Specifically, the court of appeals explained that “‘agency action [which] is committed to agency discretion by law’ is not completely shielded from judicial review.” *Id.* (alteration in

² As one scholar has pointed out, that agency nonenforcement determinations are reviewable when the agencies’ actions are alleged to be unconstitutional is consistent with the outcome of a case decided the day before *Heckler*, in which the Supreme Court held that criminal prosecutors’ discretion to prosecute is cabined by constitutional constraints. *See* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 676 & n.131 (1985) (citing *Wayte v. United States*, 470 U.S. 598 (1985)). HHS’s reading of *Heckler* thus cannot be squared with the Court’s contemporaneous holding in *Wayte*.

original). “[C]ourts may review agency actions for certain types of errors that fall within the APA’s Section 701(a)(2) exception to judicial review. For example, an agency decision that violates a statutory or constitutional command . . . is not immune from judicial review” even when a “lawful exercise” of that agency decision would be immune. *Id.* The court explained that this limitation on nonreviewability is also consistent with earlier precedent setting the bounds of agency discretion. *See id.* (quoting *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981) (“[E]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.”)); *see also, e.g., WWHT, Inc. v. FCC*, 656 F.2d 807, 815 n.15 (D.C. Cir. 1981) (“In no event would a finding of nonreviewability on the ground that an action is committed to agency discretion preclude judicial review when constitutional violations have been alleged.”).

In short, when colorable claims of unconstitutionality are made, agency action is reviewable. *See also, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (declining to construe federal statute to preclude former CIA employee from bringing constitutional claims related to his firing, noting that this outcome “avoid[s] the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim” (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))); *Reg’l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 461 n.3 (4th Cir. 1999) (identifying constitutional claims as among the class of “exceptional cases” identified by the Supreme Court “where judicial review of agency action would always be available, even if Congress did not specifically authorize it (through the APA or otherwise) or actually precluded it explicitly, or at least . . . where the presumption in favor of judicial review is particularly strong”); *Collins Music Co. v. United States*, 21 F.3d 1330, 1336–37 (4th Cir. 1994) (analyzing action taken by Internal Revenue Service for compliance with procedural-due-process requirements before concluding that, because plaintiff’s

constitutional claim was not colorable, *Heckler's* presumption against reviewability applied); *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (“We think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General’s authority to settle litigation for its government clients stops at the walls of illegality.”).³

Mrs. Maddonna alleges that HHS’s actions violate the Constitution. Hence, the Court has authority to review her claims that the exemption and the ongoing federal funding of religious discrimination, which the exemption allows to continue unabated, are unconstitutional and hence also violate 5 U.S.C. § 706(2)(B).

III. MRS. MADDONNA HAS STATED A CLAIM UNDER THE ESTABLISHMENT CLAUSE.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244. Government must remain “neutral[] between religion and religion, and between religion and nonreligion.” *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Hence, government “may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion).

A. The Establishment Clause tests.

The Supreme Court has imposed multiple tests to determine the metes and bounds of the Establishment Clause—including the *Lemon* test, the endorsement test, the coercion test, and the

³ This principle also disposes of the core problem on which the doctrine of nonreviewability is premised: that courts cannot review agency action when there is no judicially manageable standard on which to base their review, i.e., when there is “no law to apply” (see *Larson*, 882 F.2d at 131, 132). The Constitution provides the applicable legal standard. See *Nat’l Fed’n of Fed. Workers v. Weinberger*, 818 F.2d 935, 941 n.11 (D.D.C. 1987) (“Here, there is clearly ‘law to apply’—the Constitution.”); Sunstein, *supra*, at 676 (“If agency inaction is based on constitutionally impermissible factors . . . there is ‘law to apply.’”).

Larson test. Failure to satisfy any one is an Establishment Clause violation. *See, e.g., Mellen v. Bunting*, 327 F.3d 355, 370–71 (4th Cir. 2003).

1. *Lemon*: Governmental action violates the Establishment Clause if (1) its primary purpose is religious rather than secular; (2) it has the principal effect of advancing or inhibiting religion; or (3) it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *see also Mellen*, 327 F.3d at 372–75. The test is disjunctive: Failure to satisfy any one part is a constitutional violation. *See Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999).

Purpose is determined from the standpoint of an “objective observer” who is familiar with the facts and circumstances surrounding the official action. *McCreary Cty.*, 545 U.S. at 862–64. The secular purpose must “be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 864. The pertinent question is not whether the state has “any” secular purpose, but whether there is an actual secular purpose that is the “preeminent” or “primary” one. *Id.* at 864, 865 n.13 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 590, 594 (1987)).

Effect is determined “irrespective of government’s actual purpose,” by considering whether an objective observer, aware of all the facts and circumstances, would perceive that “the principal effect of [the challenged] government action . . . suggest[s] government preference for a particular religious view or for religion in general.” *Mellen*, 327 F.3d at 374 (internal quotations omitted).

And excessive entanglement occurs when, for example, the state “delegate[s] a governmental power to religious institutions” such that religious tenets may be applied in exercising governmental authority. *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123, 125–26 (1982); *accord Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696–97 (1994).

2. Endorsement: In this Circuit, the endorsement test is a framework for determining impermissible religious effect. *Wood v. Arnold*, 915 F.3d 308, 316 (4th Cir. 2019), *petition for cert. filed*, No. 18-1438 (U.S. May 13, 2019). The test “asks whether a reasonable, informed observer would conclude that government . . . has endorsed a particular religion or religion generally.” *Id.* Governmental action impermissibly endorses religion if it 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.’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

3. Coercion: The bare-minimum guarantee of the Establishment Clause is that “government may not coerce anyone to support or participate in religion or its exercise.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992). “[T]he type of coercion that violates the Establishment Clause need not involve . . . the forcible subjection of a person to religious exercises or the conditioning of relief from punishment on attendance at church services.” *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). Rather, “subtle coercive pressure” is sufficient, especially when exerted against children. *See Lee*, 505 U.S. at 592. For government and those it funds “may no more use social pressure to enforce orthodoxy than [they] may use more direct means.” *Id.* at 594.

4. *Larson*: Because “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,” denominational preferences are subject to strict scrutiny under *Larson v. Valente*. 456 U.S. at 244, 246. They are presumptively invalid and cannot stand unless the state conclusively establishes that it has a compelling governmental interest in preferring or disfavoring a faith or denomination, and that its actions are narrowly tailored to serve that compelling interest.

B. Mrs. Maddonna has adequately alleged Establishment Clause violations.

Under every test, Mrs. Maddonna has adequately alleged that HHS violated the Establishment Clause. Because the tests and pertinent facts are overlapping, we analyze them together.

1. *HHS impermissibly acted with a religious purpose and effect.*

Like the State, HHS has actively facilitated Miracle Hill's religious discrimination by funding that discrimination and by exempting Miracle Hill (and all other South Carolina child-placement agencies) from the HHS antidiscrimination regulations.

a. HHS asserts two secular purposes for the exemption. *See* Doc. 29-1 at 27–29. Neither is availing.

First, it contends that it granted the exemption to ensure the continued availability of child-placement agencies in South Carolina to “serve the welfare of children” in the foster-care system. *Id.* at 28. But were HHS in fact acting to serve these children, that is, to aid the children's placement in loving homes, it would not have actively enabled agencies throughout the state to turn away otherwise-qualified families like the Maddonnas simply for practicing a disfavored faith. Far from helping foster-care children, HHS has diminished the number of available foster families and thus reduced foster-care placements.

Moreover, Mrs. Maddonna does not ask that religious entities be categorically enjoined from receiving federal or state funds; and a judgment in her favor would not bar religious entities from serving as child-placement agencies, as long as they followed the law by refraining from discriminating on the basis of religion when performing that governmental service. Nor does it follow that requiring child-placement agencies to adhere to antidiscrimination laws will cause all (or any) faith-based agencies to stop working with foster children; and on a motion to dismiss the Court should not accept as fact HHS's speculations to the contrary. *See id.* at 1–2.

Second, HHS contends that it granted the exemption to comply with the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a). *See* Doc. 29-1 at 28. But no federal statute may require what the Constitution forbids. *See* U.S. Const. art. VI (Supremacy Clause); *Santa Fe*, 530 U.S. at 302 (“[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.” (quoting *Lee*, 505 U.S. at 587)). And to survive Establishment Clause scrutiny, any accommodation granted under RFRA (1) “must lift ‘an identifiable [government-imposed] burden on the exercise of religion’” (*Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989) (quoting *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring))), and (2) must not unduly burden nonbeneficiaries (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). For the reasons explained in Section III.B.3, *infra*, the exemption here does neither. It thus impermissibly “creates an incentive or inducement (in the strong form, a compulsion) to adopt [the favored religious] practice or conviction” (Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992)), and thereby “implicitly endors[es] a particular religious belief” (*Hobbie v Unemp’t Appeals Comm’n*, 480 U.S. 136, 145 n.11 (1987)), in violation of the Establishment Clause. And because as a matter of law RFRA cannot require what HHS has done, supposed efforts to comply with it are not a valid secular purpose here.

b. HHS’s actions likewise lack a predominantly secular effect and instead impermissibly endorse religion by communicating that they privilege Miracle Hill’s religious beliefs over Mrs. Maddonna’s and all others. By permitting subrecipients to discriminate on the basis of religion in deciding whom they will serve, HHS sends the message that those who do not subscribe to Miracle Hill’s religious views are outsiders not deserving of equal treatment or equal opportunity to participate in the governmental program. And the perception of religious endorsement is not

tempered, contrary to HHS’s suggestion, by the fact that any religious group—not just evangelical Christians—could discriminate with impunity under the exemption. *See* Doc. 29-1 at 28–29. For the exemption will always burden those prospective foster parents who are denied service based on their religion, and thus it always carries a message of disfavor to some. And in all events, the religious exemption broadcasts the impermissible message that the government prefers religion over nonreligion. *Mellen*, 327 F.3d at 374.

2. *HHS impermissibly funds and supports private foster-care agencies’ discriminatory practices.*

The Establishment Clause also requires that governmental benefits be allocated “on the basis of neutral, secular criteria,” and that the recipients of those benefits not be defined “by reference to religion.” *Agostini v. Felton*, 521 U.S. 203, 231, 234 (1997). Funding or providing support to institutions that use public money “for religious purposes” or “to advance . . . religious objectives” violates the Establishment Clause. *Mitchell v. Helms*, 530 U.S. 793, 844, 857 (2000) (controlling opinion of O’Connor, J.); *see Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001) (recognizing Justice O’Connor’s *Mitchell* concurrence as controlling, and holding that “actual diversion of government aid to religious purposes is prohibited”). Thus, the Establishment Clause prohibits private entities that receive governmental funding from discriminating based on religious criteria when determining whom they will serve. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 614–15, 621 (1988); *Bradfield v. Roberts*, 175 U.S. 291, 298–99 (1899).

HHS supports South Carolina child-placement agencies with federal taxpayer funds. Agencies like Miracle Hill then use that public money to fund and advance sectarian religious objectives by offering government-funded public services solely to persons of a favored faith. By granting the challenged exemption, HHS has cleared the way for Miracle Hill to continue using

taxpayer dollars to further religious objectives, including religious indoctrination of children entrusted to its care by the State, in clear violation of Establishment Clause requirements.

HHS suggests that it is shielded from liability arising from the use of its funds because the money passes through the State before reaching the child-placement agencies. Doc. 29-1 at 25–26. That fact is of no moment. The Constitution straightforwardly mandates that government cannot and must not fund religious discrimination—not directly, and not through an intermediary that delivers a government-funded service. *See, e.g., Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007) (prison program requiring participants to meet religious test to enroll held unconstitutional); *see also Bowen*, 487 U.S. at 620–21 (remanding for district court to consider whether grantees were “us[ing] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith”); *Mitchell*, 530 U.S. at 840 (controlling opinion of O’Connor, J.) (“[A]ctual diversion of secular government aid to religious indoctrination . . . is constitutionally impermissible.”). Here, HHS knows that federal tax dollars are being used by subrecipients to further sectarian objectives, both because it has expressly authorized such, and because it knows that South Carolina has done the same. There is no hiding behind the State’s actions, especially because the Federal and State Defendants are acting in partnership.

3. *HHS impermissibly granted a religious exemption that burdens third parties and that does not lift a substantial government-imposed burden on religious exercise.*

Though government may in some circumstances accommodate religious institutions by exempting them from generally applicable legal requirements, “accommodation is not a principle without limits.” *Kiryas Joel*, 512 U.S. at 706. To be constitutional, religious accommodations must satisfy two requirements: (1) they must lift substantial, government-imposed burdens on the exercise of religion; and (2) they must not impose undue burdens on third parties. *Allegheny*, 492

US. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring)); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). For if the government has not imposed a substantial burden on religious exercise to begin with, an exemption from a generally applicable law is an unconstitutional religious preference. *Texas Monthly*, 489 U.S. at 15 (plurality opinion) (sales-tax exemption for religious periodicals held impermissible); *Caldor*, 472 U.S. at 709–10 (statute granting Sabbath observers absolute right not to work on their Sabbath, without extending similar right to nonreligious employees, held impermissible). And if in purporting to accommodate some people's religious exercise the state imposes costs or burdens on others, it unconstitutionally favors the religion of those being benefited over the religious beliefs, rights, and interests of nonbeneficiaries. *Cutter*, 544 U.S. at 722; *Texas Monthly*, 489 U.S. at 15, 18 n.8 (plurality opinion). Neither requirement is met here, so the Establishment Clause is not satisfied.

a. Exempting child-placement agencies from adhering to generally applicable antidiscrimination regulations does not alleviate an “exceptional government-created burden[] on private religious exercise,” *Cutter*, 544 U.S. at 720, because antidiscrimination requirements impose no such burden.

Whether religious exercise is substantially burdened by a religiously neutral, generally applicable law (such as federal and state antidiscrimination requirements) is a legal question decided by the courts. See *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Thus, whether or not conducting a governmental program funded by the state and federal governments could constitute Miracle Hill's religious exercise, it would be up to this Court to determine whether that exercise was substantially burdened. Here, it is not.

As a matter of law, it is insufficient that Miracle Hill may be acting on a religious motivation. See *Allegheny*, 492 U.S. at 613 n.59. Religious exercise is not substantially burdened by neutral, generally applicable legal requirements unless those requirements forbid a regulated

entity “to engage in conduct proscribed by [its] religious beliefs, []or . . . force[it] to abstain from any action which [its] religion mandates that [it] take.” *Goodall ex rel. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995); *accord, e.g., Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

Though Miracle Hill may choose to provide services because of its religious beliefs, there is no basis here to conclude that it is *required* by its faith to contract with the state to provide child-placement services. Rather, that is just “one of a multitude of means” (*Henderson*, 253 F.3d at 16–17 (ban on vending on National Mall did not substantially burden religious exercise of plaintiffs who sought to sell T-shirts with religious messages, in part because ban was “at most a restriction on one of a multitude of means” of fulfilling their mission “to spread the gospel by ‘all available means’”)) by which Miracle Hill might (and does) engage in its ministry. *See generally How We Help*, MIRACLE HILL MINISTRIES, <https://bit.ly/2UngKkN>. Hence, the exemption from the nondiscrimination requirement cannot “reasonably be seen as removing a significant [government]-imposed deterrent to the free exercise of religion” but instead impermissibly “conve[ys] a message of endorsement to slighted members of the community” (*Texas Monthly*, 489 U.S. at 15 (plurality opinion) (internal quotations omitted)), thus amounting to an unconstitutional governmental preference for Miracle Hill’s religion.

Relatedly, while Miracle Hill may be entitled to limit itself to serving only members of its own faith when performing privately funded charitable activities, “the fact that a person has a constitutional right . . . does not necessarily impose upon the government an obligation to subsidize that right.” *Goodall*, 60 F.3d at 172. “[I]f a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013). Not having one’s religious mission funded with

taxpayer dollars as one carries out a governmental program is, at most, “a relatively minor burden,” *Locke v. Davey*, 540 U.S. 712, 725 (2004), if it is any burden at all. Hence, Miracle Hill and others like it are ineligible for a religious accommodation here.

b. The Establishment Clause also bars religious exemptions from neutral, generally applicable laws if the exemptions would shift costs, harms, or other burdens to nonbeneficiaries. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 729 n.37 (2014) (“Nor do we hold . . . that . . . corporations have free rein to take steps that impose ‘disadvantages . . . on others’ or that require ‘the general public [to] pick up the tab.’”); *Cutter*, 544 U.S. at 722. Thus, in *Caldor*, the Supreme Court invalidated a religious accommodation for employees who are Sabbath observers, in part because it imposed “substantial economic burdens” on employers and “significant burdens on other employees.” 472 U.S. at 710. And in *Texas Monthly*, the Supreme Court invalidated a sales-tax exemption for religious periodicals because it “burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications.” 489 U.S. at 18 n.8 (plurality opinion). *See generally Kiryas Joel*, 512 U.S. at 706–07 (limitations on religious exemptions are necessary to honor “neutrality as among religions”).

By categorically exempting all South Carolina child-placement agencies from HHS’s neutral, generally applicable antidiscrimination requirements, HHS permits and affirmatively enables Miracle Hill to discriminate against non-evangelical Christians when providing child-placement services, to the detriment of prospective foster parents of all other faiths, including Mrs. Maddonna. Authorizing Miracle Hill to turn away Catholics, Jews, Muslims, atheists, and others of whom Miracle Hill does not approve impermissibly harms would-be foster parents who are of the “wrong religion” because it prevents them from participating in a governmental program and being considered for foster-care licenses on the same footing as members of the religion to which

HHS has afforded preferred status. The harms to children in the foster-care system are even more devastating: With so critical a shortage of foster parents in South Carolina, every otherwise-qualified foster family that is turned away for being of the wrong faith means one less home—one less loving family—for children in need.

4. *HHS impermissibly authorizes the use of federal funds for religious coercion and proselytization.*

Because the Establishment Clause bars government from “coerc[ing] anyone to support or participate in religion or its exercise,” it also bars government from funding private institutions that use those funds to “coerce worship or prayer.” *DeStefano*, 247 F.3d at 411–12 (internal quotation marks omitted). “What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990). For “a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (internal quotations omitted).

Here, Miracle Hill not only rejects potential foster parents for not being evangelical Christians, but it expressly requires all foster parents with whom it does work—i.e., those whom it deems religiously acceptable—to promote Miracle Hill’s favored religious views to the children placed with them. *See, e.g.*, Compl. ¶ 74. While Miracle Hill is free to evangelize through its privately funded charitable work, it is not free to promote, proselytize, or coerce religion or religious activities in the administration of a government-funded program. And HHS runs afoul of the Establishment Clause merely by failing to ensure that federal funds are not put to such purposes—much less by actively and expressly enabling the federally funded discrimination to continue by granting the exemption.

5. *HHS impermissibly affords a denominational preference.*

Finally, when government favors or disfavors a particular religious denomination, its action is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining Establishment Clause jurisprudence and extending it to Free Exercise Clause); *Koenick*, 190 F.3d at 264 (strict scrutiny applies under Establishment Clause when government has “facially discriminate[d] between religious denominations or between religion and non-religion”).

HHS here runs afoul of this prohibition in at least two respects. First, by allowing Miracle Hill and agencies like it to violate HHS’s antidiscrimination regulations, HHS has preferred Miracle Hill’s faith, evangelical Christianity, over all other faiths. And second, because government cannot accomplish through private actors what it is forbidden to do directly, Miracle Hill’s express preference for evangelical Christians in the performance of a federally funded program constitutes a denominational preference by the government. Thus, HHS must show a compelling governmental interest in preferring evangelical Christians over all other faiths, as well as narrow tailoring of its actions to serve only that compelling interest. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015); *Larson*, 456 U.S. at 247. Yet the only motivating interests that HHS asserts for having granted the exemption and for continuing to fund Miracle Hill are (1) preserving the existing system of child-placement agencies to ensure the welfare of children in foster care and (2) complying with the requirements of RFRA. And as already explained in Section III.B.1, neither purported interest is legitimate, much less compelling.

C. The state-action doctrine offers no excuse for HHS’s unconstitutional conduct.

As just explained, HHS has violated the Establishment Clause by furnishing taxpayer dollars to child-placement agencies that impose religious tests on those seeking governmental services, by categorically exempting all such agencies from complying with HHS’s own

antidiscrimination requirements, and by granting the challenged exemption despite there being no substantial burden on any child-placement agency's religious exercise. HHS nevertheless contends that because Miracle Hill is not a state actor, the government is not liable for Miracle Hill's discriminatory provision of services. *See* Doc. 29-1 at 22–25. But whether or not Miracle Hill is a state actor is beside the point when the alleged constitutional violation is that the government is unconstitutionally funding forbidden discrimination. And in all events, HHS misapplies the state-action doctrine to foster care. Its arguments should be rejected.

First of all, a “nominally private entity” may be a state actor and thus subject to liability for constitutional violations when “it has been delegated a public function by the [s]tate.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001). Thus, if South Carolina child-placement agencies are state actors in administering the State's program to provide for and place children in the State's care, Miracle Hill is subject to liability under the Establishment Clause. But the Court need not reach that question. While HHS suggests that the Court must find that Miracle Hill is a state actor before liability can attach to it, that is unnecessary because Mrs. Maddonna seeks to hold HHS liable for its own actions: funding child-placement agencies that discriminate in the provision of governmental services and granting an exemption from its antidiscrimination requirements.

The bulk of the case law to which HHS points concerns whether private entities named as defendants are state actors that are themselves subject to liability for constitutional violations. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (defendant private insurer was not state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839–43 (1982) (defendant private school was not state actor); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358–59 (1974) (defendant private utility corporation was not state actor). Those cases have no bearing here. Beyond that, HHS relies heavily on *Blum v. Yaretsky*, 457 U.S. 991 (1982), in which the Court held that Medicaid patients

could not bring a due-process challenge against the government over the manner in which they had been transferred and discharged from their nursing homes. 457 U.S. at 1003, 1005. Importantly, the plaintiffs were challenging only the propriety of the transfer and discharge determinations—that was the “gravamen of the complaint.” *Id.* at 1003. And those determinations were made by medical personnel alone, based on the patients’ medical indications. Plaintiffs were not challenging any “particular state regulations or procedures.” *Id.*

Here, by contrast, the thrust of Mrs. Maddonna’s complaint is *not* any purely private decision by Miracle Hill to turn her away. Rather, it is the concerted action by federal and state authorities to fund, license, and clear the regulatory hurdles that would ordinarily bar religious discrimination in the provision of government-funded child-placement services. The question is whether HHS (and the State) violated the Establishment Clause, not whether Miracle Hill did. HHS’s own funding and regulatory determinations are unmistakably and unequivocally governmental actions. Whether Miracle Hill is also a state actor is beside the point.

And even if the Court were to consider whether Miracle Hill is a state actor, which it need not do, HHS is wrong in contending (Doc. 29-1 at 23–24 (citing *Milburn v. Anne Arundel Cty. Dep’t of Soc. Servs.*, 871 F.2d 474 (4th Cir. 1989))) that the Fourth Circuit has resolved whether the state-action doctrine precludes “foster-care-related claims.” In *Milburn*, the court held that the plaintiff could not bring constitutional claims under § 1983 against his foster parents, whom he alleged had abused him, because foster parents are not state actors. *Id.* at 479. Individual foster parents are hardly the same as the State’s child-placement agencies for purposes of state-action analysis. And at least three circuits that have considered the issue have in fact concluded that private institutions that contract with or are otherwise authorized by states to care for or place children with foster parents *are* state actors. See *Brent v. Wayne Cty. Dep’t of Human Servs.*, 901

F.3d 656, 676–77 (6th Cir. 2018); *Taylor v. First Wyo. Bank, N.A.*, 707 F.2d 388, 390 (9th Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 822 n.4 (2d Cir. 1977).

IV. MRS. MADDONNA HAS STATED A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause mandates that government treat alike “all persons similarly situated.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When government treats people differently based on a suspect classification such as religion, its actions are subject to strict scrutiny. *See Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (recognizing religion as suspect classification)). As Justice O’Connor put it, “the Religion Clauses . . . and the Equal Protection Clause as applied to religion[] all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.” *Kiryas Joel*, 512 U.S. at 715 (O’Connor, J., concurring in part and concurring the judgment). For the same reasons that HHS’s exemption of child-placement agencies from complying with antidiscrimination requirements and their continued funding of the discriminatory provision of governmental services cannot survive Establishment Clause scrutiny, so too do these actions trigger, and fail, strict scrutiny under the Equal Protection Clause.

Relying on standing principles, HHS asserts that equal-protection claims based on stigmatic harm require that the plaintiff be personally subjected to the harm, i.e., personally denied equal treatment on the basis of membership in a protected class. Doc. 29-1 at 30. They argue that Mrs. Maddonna has not experienced any such denial of equal treatment at HHS’s hands and that the religious exemption that HHS issued to Governor McMaster “certainly” does not qualify. *Id.* HHS is mistaken.

Once again, “[a]ctivities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons

engaged in such activity.” See *Nat’l Black Police Ass’n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983). “A State’s constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.” *Norwood*, 413 U.S. at 467. Thus, just as funding entities that use public dollars to discriminate in providing a governmental service violates the Establishment Clause, so too does it violate equal protection. See *Brown v. Califano*, 627 F.2d 1221, 1235 (D.C. Cir. 1980) (“The Constitution’s prohibition against governmental support of . . . invidious discrimination is too obvious and well-established to require elaboration . . .”).

As described above, Mrs. Maddonna was turned away from governmental foster-care services based on her religion, and that denial of service was bought and paid for by HHS. The discriminatory treatment that Mrs. Maddonna faced firsthand is no less attributable to HHS because it was carried out by a subrecipient of federal funds rather than by an HHS employee.

V. MRS. MADDONNA HAS STATED A CLAIM UNDER THE DUE PROCESS CLAUSE.

The Due Process Clause protects individuals’ fundamental rights against unjustified governmental intrusion. See *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). When government burdens a fundamental right, its action is subject to strict scrutiny. See *id.* at 720. The right to be free from governmental disfavor toward one’s religious denomination is a fundamental right. See *id.* (explaining that the “liberty” protected by the Due Process Clause includes “the specific freedoms protected by the Bill of Rights”); *Larson*, 456 U.S. at 244 (explaining Establishment Clause right). HHS contravenes that fundamental right by funding agencies that impose religious tests when providing governmental services, and thus its actions are subject to strict scrutiny that cannot be survived.

Like its state counterpart, HHS misunderstands the nature of the right asserted (*see* Doc. 29-1 at 32–33), perhaps unaware that religious-discrimination claims were historically brought as

substantive-due-process claims before the Religion Clauses were incorporated against the states. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (fundamental liberty interest under Due Process Clause implicated by official religious discrimination). HHS contends that religious-discrimination claims must “rise or fall” on the standards applicable to claims brought under the First Amendment. Doc. 29-1 at 32–33. Mrs. Maddonna does not disagree insofar as *Larson*’s strict-scrutiny requirement is “the guide for analyzing these claims” (*Albright v. Oliver*, 510 U.S. 266, 281 (1994)), whether one considers this case through a due-process or Establishment Clause lens. Hence, though the due-process claim may be duplicative, it is not an improper attempt to find greater protection in the Fourteenth Amendment than in the First.

CONCLUSION

The motion to dismiss should be denied.

/s/ Aaron J. Kozloski
Aaron K. Kozloski (D.S.C. Bar No. 9510)

Attachment 1

pursuant to Local Civ. Rule 7.05(C)(2)

**Sean D. Croston, *An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure*,
64 ADMIN. L. REV. 295 (2012)**

RECENT DEVELOPMENTS

AN IMPORTANT MEMBER OF THE FAMILY: THE ROLE OF REGULATORY EXEMPTIONS IN ADMINISTRATIVE PROCEDURE

SEAN D. CROSTON*

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Sound administrative procedure contemplates waivers, or exceptions The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard. This combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility [T]he waiver procedure . . . is not necessarily a step-child, but may be an important member of the family of administrative procedures, one that helps the family stay together.¹

INTRODUCTION

An unusual administrative procedure has been in the news lately: regulatory exemptions (sometimes also referred to as “exceptions,” “waivers,” “variances,” or “adjustments”). For example, in January 2011, the *Washington Post* featured a front-page story that highlighted how Massey Energy “had mastered the art of the regulatory waiver” to “legally circumvent federal mining laws.”² Likewise, after a Congressional Research Service report detailed how federal agencies “waived a number of regulatory requirements” in the wake of Hurricane Katrina,³ Chairman Paul R. Verkuil of the Administrative Conference of the United States testified before Congress in 2010, recognizing the potential abuse of “agency authorities and procedures for issuing waivers” during such situations.⁴ He then raised some key, unanswered questions about the little-known nature of regulatory exemptions: “What process is required for waivers? . . . Are granting and denying waivers and exemptions rulemaking or adjudication, and what should follow” from that classification?⁵ This Recent Development explores the curious nature of regulatory exemptions and attempts to answer the Chairman’s questions.

1. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

2. Kimberly Kindy, *Longtime Tug of War on Mine Safety*, WASH. POST, Jan. 4, 2011, at A1.

3. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RS22253, REGULATORY WAIVERS AND EXTENSIONS PURSUANT TO HURRICANE KATRINA, at CRS-1 (2005).

4. *Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 57 (2010) (statement of Paul R. Verkuil, Chairman, Administrative Conference of the United States).

5. *Id.*

I. WHAT IS THE BASIC IDEA BEHIND EXEMPTIONS?

Any child who has ever received special permission to stay up past his or her normal bedtime to finish watching the Super Bowl, the end of a movie, election results, or some other important event on television understands the basic concept of a regulatory exemption. Occasionally, the governing authority, in this case the parents, will grant an exception from the normal rule that would otherwise control the situation.

While parents undoubtedly possessed this power throughout history, governmental exemption authority can be traced back at least as far as “the royal dispensation power of early English law,” which “allowed the king largely unbounded freedom to grant individual subjects permission to disobey a law.”⁶ This authority continues in the modern administrative state, where regulated parties can request exemptions from legal requirements.

A. *What Is the Difference Between Exemptions and Enforcement Discretion?*

Exemption authority is similar to “enforcement discretion” or “prosecutorial discretion,” which describe an agency’s decision not to enforce its regulations in particular situations. Both enforcement discretion and exemptions involve “decisions by governmental officials not to apply the literal terms of the law in an instance where the rights of a private party are affected.”⁷ But exemptions are more like the royal grant of permission in that they are formal, written, affirmative agency actions. An exemption can also potentially “encompass[] procedural and substantive rules as well as decisions outside the enforcement process.”⁸ Presumably because of the broad manner in which they may be used, exemptions are generally subject to judicial review, albeit under the relatively lenient standards of the Administrative Procedure Act (APA).⁹

Enforcement discretion, on the other hand, encompasses more passive, informal (often unannounced), unilateral agency decisions not to enforce

6. Jeffery M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938, 940 n.8 (1984).

7. *Id.* at 940 n.9.

8. *Id.*

9. Several courts have applied the deferential arbitrary and capricious standard in this context. *See, e.g.*, *Honeywell Int’l, Inc. v. Nuclear Regulatory Comm’n*, 628 F.3d 568, 578 (D.C. Cir. 2010) (applying this deferential standard to petitioner’s challenge to agency denial of exemption); *Yetman v. Garvey*, 261 F.3d 664, 669 (7th Cir. 2001); *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 200 (8th Cir. 1986); *Rombough v. FAA*, 594 F.2d 893, 895–97 (2d Cir. 1979).

existing regulations against private parties that are or could be violating them. Going back to the example of a child's bedtime, parents would exercise enforcement discretion by passively standing back and saying nothing when the child stays up past the normal bedtime. In the federal agency arena, this discretion has a more limited scope and an uncertain duration, as agency officials could change their minds at any moment and decide that the balancing of factors favors taking the delayed enforcement action.

Presumably for these reasons, along with the traditional prosecutorial discretion over law enforcement matters and the difficulty of evaluating an agency's priorities, chances of success, and available resources, the Supreme Court determined that an agency's exercise of enforcement discretion is, unlike its grant of exemptions, generally unreviewable by the courts.¹⁰ Potential exceptions to the unreviewability doctrine remain, however, for those situations where the "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"¹¹ or where an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."¹²

B. *What Are the Bases for Exemptions?*

Some statutes provide explicit authority for exemptions,¹³ but many others do not. Likewise, some regulations provide explicit authority for exemptions from the rules,¹⁴ while other regulations do not.

Regardless of specific provisions in statutes and regulations, the Supreme Court has said that "an agency's authority to proceed in a complex area [of] regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."¹⁵ In fact, in one early case, the U.S. Court of Appeals for the D.C. Circuit suggested that agencies not only *may* but *must* provide exemptions from general rules in special circumstances.¹⁶ A few

10. See *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985).

11. *Id.* at 833.

12. *Id.* at 833 n.4.

13. See, e.g., 30 U.S.C. § 811(c) (2006) (allowing for modification of any mandatory mining safety standard after a petition, investigation, and hearing).

14. See, e.g., 10 C.F.R. § 50.12 (2011) (giving the Nuclear Regulatory Commission (NRC) power to grant exemptions upon its own initiative or following a petition).

15. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972).

16. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. [Some cases warrant] serious consideration of meritorious

more recent opinions, however, have implicitly disagreed with this earlier approach.¹⁷

While the Supreme Court later noted that Congress may explicitly restrain agencies from granting exemptions,¹⁸ lower courts affirmed that generally, “limited grounds for the creation of exemptions are inherent in the administrative process,” and agencies may use “‘equitable’ discretion’ . . . to afford case-by-case treatment—taking into account circumstances peculiar to individual parties in the application of a general rule . . . or even in appropriate cases to grant dispensation from the rule’s operation.”¹⁹ The courts have noted agencies’ need for “flexibility,” and recognize that exemptions “enhance[] the effective operation of the administrative process.”²⁰

II. HOW DO EXEMPTIONS WORK UNDER THE ADMINISTRATIVE PROCEDURE ACT?

The APA defines and governs federal agency action. Therefore, the APA is the natural starting point in determining the nature of regulatory exemptions. Under the APA, an exemption is a form of “relief,”²¹ which is a type of final “agency action.”²² Thus, an agency’s decision on an exemption is reviewable in court.²³

But what *kind* of final action is it? As the Department of Justice recognized shortly after the APA’s enactment, “the entire Act is based upon a dichotomy between rule making and adjudication.”²⁴ The APA defines “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret,

applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties.”).

17. *See, e.g.*, *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001) (holding that agencies have discretion to adopt inflexible no-exemption policies if they have good reasons for doing so); *Starr v. FAA*, 589 F.2d 307, 312 (7th Cir. 1979) (an agency’s “no-exemption policy” is not necessarily unreasonable, and may be quite beneficial).

18. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977).

19. *Ala. Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979); *see also* *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 870 (8th Cir. 1991) (holding that “discretionary exemption mechanism[s] . . . are inherent in the administrative process” (citing *Ala. Power Co.*, 636 F.2d at 357)).

20. *Ala. Power Co.*, 636 F.2d at 357.

21. 5 U.S.C. § 551(11).

22. *Id.* § 551(13).

23. *See id.* §§ 701–706.

24. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL].

or prescribe law or policy.”²⁵ The APA then defines “adjudication” as the “agency process for the formulation of an order.”²⁶ An “order” is defined as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”²⁷

In addition, “licensing” is the “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.”²⁸ Finally, a “license” is “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”²⁹

It is thus clear that a statutory exemption is a license. But what is a statutory exemption? One federal district court interpreted this provision in passing to mean that where a statute explicitly grants an agency the power to issue exemptions from its requirements in specific cases, those exemptions are statutory exemptions falling under the APA’s definition of a license.³⁰ But no other federal judge has addressed the question, and it remains unsettled. Setting that odd construct aside, the APA definition’s limitation to statutory exemptions does not clarify the wide category of regulatory exemptions—those exemptions granted by agencies exercising their inherent authority to make exceptions to general regulations. They are the focus of this Recent Development.

On the one hand, a regulatory exemption could be “an agency statement” of “particular applicability and future effect”; i.e., a rule.³¹ But on the other hand, it could also be a “form of permission”; i.e., a license.³² Or an exemption could be some other form of order.³³

While some agencies published exemptions in the *Federal Register* between 1994 and 2011, the vast majority of exemptions were placed in the “Notices” section of the *Register*.³⁴ The Notices section is limited by

25. 5 U.S.C. § 551(4).

26. *Id.* § 551(7).

27. *Id.* § 551(6).

28. *Id.* § 551(9).

29. *Id.* § 551(8).

30. *Nuclear Data, Inc. v. Atomic Energy Comm’n*, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

31. *See supra* notes 24–25 and accompanying text.

32. *See supra* notes 28–29 and accompanying text.

33. *See supra* notes 26–27 and accompanying text.

34. A February 9, 2012, search at the Government Printing Office’s online Federal Digital Systems database for all *Federal Register* “Actions” whose title included “exemption” showed 3,653 entries as “Notices” and only 37 “Rules and Regulations” or “Proposed Rules” entries, plus 342 “Unknown” entries. *See FDsys Advanced Search*, U.S. GOVT

regulation to “miscellaneous” documents and “information of public interest” not covered by the two “Rules” sections.³⁵ But the Rules sections, in turn, are limited to items that, if issued, “would have *general* applicability and legal effect.”³⁶ Moreover, the Office of the Federal Register itself advises that agencies place licenses along with any “orders or decisions affecting named parties” in the Notices section of the *Register*.³⁷ Thus, exemptions issued as an order, license, or rule of *particular* applicability would all belong in the Notices section, and the *Federal Register* provides little assistance in distinguishing between them.

Administrative law experts, including the late Professor Kenneth Culp Davis, have also been stumped by the peculiar question of how to classify regulatory exemptions:

The same function may come within the Act’s definition of rule making and also within the Act’s definition of licensing. The disposition of an application to the [Department of Labor’s] Wage and Hour Division for an exemption from wage and hour requirements is a rule, because it implements wage fixing for the future, and at the same time it is a license, which the Act defines as “any agency permit, . . . approval, . . . or other form of permission.”³⁸

Thus, an agency might refer to its regulatory exemptions as rules or it might wish to call them adjudicatory orders. While the Supreme Court long ago held that agencies are generally free to choose either rulemaking or adjudication to make policy,³⁹ the agency’s choice of labeling is not particularly helpful. The D.C. Circuit noted, “We doubt whether the [agency’s] wrapping its finding in the mantle of an order can make it an order . . . and the label placed by the agency on its action is normally not conclusive.”⁴⁰ Similarly, where an order is labeled as a final rule, this “may

PRINTING OFFICE, <http://www.gpo.gov/fdsys/search/advanced/advsearchpage.action> (select “Federal Register” from Available Collections and “Add” it as the Selected Collection, then click “Add more search criteria” from the drop-down “Search in” menu; select “Action” and search for “exemption”) (last visited Feb. 9, 2012).

35. 1 C.F.R. § 5.9(d) (2011).

36. *Id.* § 5.9(b)–(c) (2011) (emphasis added).

37. See NAT’L ARCHIVES & RECORDS ADMIN., OFFICE OF THE FED. REGISTER, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK § 3.1 (1998), <http://www.archives.gov/federal-register/write/handbook/ddh.pdf>.

38. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958) (alterations in original).

39. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (discussing how agencies must employ flexibility in assessing each case on its own and deciding if rulemaking or adjudication is the proper avenue).

40. *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 647 (D.C. Cir. 1998) (citing *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942)).

reveal something about the care taken in writing headings . . . but does not alter the clearly adjudicatory nature of the Order itself.”⁴¹

III. WHY DO WE CARE?

In the child’s case, how do we classify the permission to stay up late? Is it just like any other day-to-day parental directive (analogous to an informal adjudicatory order)? Is it better seen as a special, one-time-only permission to ignore the normal bedtime rule (a license)? Or do we understand it as, in effect, a new bedtime, at least in limited circumstances, allowing the child to ignore the normal bedtime whenever a special program is on (a rule)?

Perhaps the distinction does not matter in a child’s case. But it can make a difference in the modern administrative state. One year after the APA’s passage, the Department of Justice recognized that it “prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.”⁴²

For example, agencies must publish notice and take comments before finalizing rulemaking,⁴³ while informal adjudication can be a much less formal process. Though substantially pared down, informal rulemaking can be even more procedurally fastidious than informal adjudication.⁴⁴ Rulemaking is also “typically open to any interested member of the public,” while potential intervenors in adjudicatory proceedings must often demonstrate some form of standing before they can participate.⁴⁵

On the other hand, rulemaking is a legislative process, during which an agency, like Congress,

may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rule-making decisions.⁴⁶

The nature of judicial review of an agency’s decision on an exemption may also depend on its characterization as rulemaking or adjudication. For instance, the federal courts of appeal have exclusive jurisdiction only over

41. *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999).

42. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 12.

43. Administrative Procedure Act (APA), 5 U.S.C. § 553(b)–(c) (2006).

44. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review* “On the Record”, 10 ADMIN. L.J. AM. U. 179, 205 (1996).

45. *Goodman*, 182 F.3d at 994 (citing 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.7 (3d ed. 1994)).

46. *Flying Tiger Line, Inc. v. Boyd*, 244 F. Supp. 889, 892 (D.D.C. 1965).

certain “final orders” of some agencies.⁴⁷ Thus, in a recent case, the Second Circuit held that it lacked jurisdiction over a challenge to an exemption issued by the Nuclear Regulatory Commission (NRC).⁴⁸ Therefore, it can make a difference whether regulatory exemptions are rules, orders, licenses, or something else under the APA.

The proper classification of regulatory exemptions also matters because it gives guidance to agencies in drafting rules. For example, if regulatory exemptions are classified as separate, particularized rules that must go through the notice-and-comment process, then agencies may need to be even more careful in how they word their regulations. More specific standards could lead to a need for more exemptions to counter unforeseen circumstances, while broader, more generic standards could obviate this problem.

IV. ARE EXEMPTIONS “RULES”?

As noted previously, the APA definition of adjudication is “largely a residual one”⁴⁹—agency action other than rulemaking. “Thus, in determining whether a particular agency function is rule making or adjudication, the first rule of construction is to determine whether it falls within the more affirmative and specific definition of ‘rule’ in [the APA]; if not, it is adjudication.”⁵⁰

The eminent Professor Davis is not the only scholar who has suggested that an exemption may be a rule. For example, a recent treatise agreed that the “creation of an exception or waiver of a requirement may itself be a rule, as it has prospective effect to a group of regulated persons.”⁵¹ Testimony in a fairly recent congressional hearing also addressed the subject of “waivers from existing statutes and regulations,” asking, “Is it rulemaking or adjudication?”⁵² The question remains unsettled.

47. See 28 U.S.C. § 2342 (2006) (giving the courts of appeals exclusive jurisdiction over orders issued by the Federal Communications Commission, the NRC, and the Secretary of Agriculture). *But see* Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 345–47 (1st Cir. 2004) (holding that, in light of 42 U.S.C. § 2239(a)(1)(A) & (b)(1) and the Supreme Court’s decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), “final orders” also encompass some final NRC rules).

48. See *Brodsky v. NRC*, 578 F.3d 175, 182 (2d Cir. 2009).

49. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 13.

50. Robert W. Ginnane, “Rule Making,” “Adjudication,” and Exemptions Under the *Administrative Procedure Act*, 95 U. PA. L. REV. 621, 623 (1947).

51. JAMES T. O’REILLY, ADMINISTRATIVE RULEMAKING § 12:9 (2d ed. 2011).

52. *Administrative Law, Process and Procedure Project: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 71 (2005) (statement of Jeffrey S. Lubbers, Fellow in Law and Government Program, American University Washington College of Law).

The debate focuses on the term *particular applicability* in the APA definition of a rule,⁵³ which was added to the APA definition of rule late in the process of drafting the APA.⁵⁴ As a footnote in a committee report explained, the phrase was added “in order to avoid controversy and assure coverage of rule making addressed to named persons,” and thus, “the definition of ‘rule’ ended up with the entire emphasis on ‘future effect.’”⁵⁵

Although unstated, the particular applicability language could also apply beyond rules addressed to named *persons* to include rules directed at very narrow, specific (or particular) events, companies, or facilities.⁵⁶ In this sense, “the issuance of a waiver or an exception simply represents . . . promulgation of a rule applicable to a category of one entity.”⁵⁷ On the other hand, a rule can probably “be considered to be of ‘general applicability’ even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased.”⁵⁸

While some would argue that an agency proceeding focused on a named person or facility seems more in line with the common understanding of adjudication, such proceedings can also be characterized and conducted as rulemaking. As described by the U.S. Court of Appeals for the First Circuit, “what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation.”⁵⁹ Likewise, the number of parties involved “is not conclusive on the question” of whether a proceeding is rulemaking or adjudication.⁶⁰ “Just as a class action can encompass the claims of a large group of plaintiffs without thereby becoming a legislative proceeding, an adjudication can affect a large group of individuals without becoming a rulemaking.”⁶¹

53. 5 U.S.C. § 551(4) (2006).

54. See Ginnane, *supra* note 50, at 626–27 (discussing the decision to change the language of the definition of *rule*).

55. *Id.* at 626 (citing H.R. REP. NO. 79-1980, at 49 (1946)).

56. See, e.g., 10 C.F.R. § 63.1 (2011) (stating that the NRC’s rules at 10 C.F.R. Part 63 apply only to the Department of Energy’s application to construct and operate a high-level radioactive waste repository at Yucca Mountain, Nevada).

57. SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 161 (2003).

58. Statement of the Administrative Conference on ABA Resolution No.1 Proposing to Amend the Definition of “Rule” in the Administrative Procedure Act, 1 C.F.R. § 310.3(a) (1975) (“Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant.”).

59. *Law Motor Freight, Inc. v. Civil Aeronautics Bd.*, 364 F.2d 139, 143 n.4 (1st Cir. 1966) (citing *DAVIS, supra* note 38, § 5.02).

60. *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973).

61. *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (citing *NLRB v. Bell*

Admittedly, courts and scholars have struggled with the “particular applicability” language in the APA’s definition of *rule*.⁶² For example, then-Professor Antonin Scalia disparagingly remarked that “it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard.”⁶³ Most commentators therefore focus on other distinctions between rules and adjudications.

The House Committee on the Judiciary attempted to summarize the difference as follows: “‘Rules’ formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities,” while “licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance.”⁶⁴

Representative Francis Walter was Chairman of the House Committee on the Judiciary during the drafting of the APA. He also attempted to explain the difference between adjudication and rulemaking, stating that rules “in form or effect are like the statutes of the Congress,” while adjudications are “those familiar situations in which an officer or agency determines the particular case just as, in other fields of law, the courts determine cases.”⁶⁵ The Supreme Court likewise noted a “distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate . . . particular cases.”⁶⁶

But this conception of administrative rulemaking as a procedure used to determine policy questions while adjudication decides individual cases is not rooted in the text of the APA and has not always withstood Supreme Court scrutiny. One year later, the Court clarified that agencies are “not precluded from announcing new principles in an adjudicative proceeding.”⁶⁷ In an earlier case, the Court also announced, “Adjudicated cases may . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases.”⁶⁸

Aerospace Co., 416 U.S. 267, 292 (1974)).

62. See Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule”*, 56 ADMIN. L. REV. 1077, 1078–79 (2004) (noting how some have focused on “future use” language with regard to the use of “particular applicability” and this has caused confusion).

63. Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

64. H.R. REP. NO. 79-1980, at 20 (1946).

65. 92 CONG. REC. 5648 (1946) (statement of Rep. Walter).

66. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973).

67. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

68. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969).

Attorney General (and later Supreme Court Justice) Tom Clark attempted to clarify the difference between rulemaking and adjudication by explaining

Proceedings are classed as rule making under [the APA] . . . because they involve subject matter demanding judgments based on technical knowledge and experience. . . . In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged⁶⁹

Adjudications are more “concerned with the determination of past and present rights and liabilities,” such as “a decision as to whether past conduct was unlawful,” or a “determination of a person’s right to benefits under existing law.”⁷⁰ In such proceedings, parties often fiercely dispute issues of fact.⁷¹ Finally, an early scholar, also a member of the Assistant Solicitor General’s office, remarked, “In rule making, disciplinary or accusatory elements are absent,” and “the purpose of the proceeding” is “to determine future policy.”⁷²

These early opinions indicate that rules were intended to pronounce future rights, based on policy decisions and broad technical knowledge and experience. Adjudications were meant to be more individualized, fact-based proceedings, determining past or present rights. Still, as the House Committee on the Judiciary admitted, licenses also prescribe future rights, so there is some potential overlap between rules and certain orders, particularly licenses. Exemptions tend to be individualized, fact-specific proceedings that focus on future rights. So perhaps exemptions can be *either* rulemaking or adjudication.

Although the plain text of the APA’s definition section does not provide a compelling answer, one can look deeper into the statute for guidance. For example, the definition of *rulemaking* describes loosened publication requirements for “a substantive rule which grants or recognizes an exemption or relieves a restriction.”⁷³ Further, the Attorney General stated that substantive rules are those “rules, other than organizational or procedural” that are “issued by an agency pursuant to statutory authority and which implement the statute Such rules have the force and effect of law.”⁷⁴ Thus, substantive rules, as opposed to interpretive rules, have

69. SEN. REP. NO. 79-752, at 39 (1945) (statement of Tom C. Clar, Att’y Gen., appendix).

70. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 14–15.

71. *Id.* at 15.

72. Ginnane, *supra* note 50, at 630.

73. APA, 5 U.S.C. § 553(d)(1) (2006).

74. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 30 n.3. The Manual also contrasts substantive rules with “interpretative rules” that “advise the public of the agency’s

binding legal effect.⁷⁵ Any exemption would be an action with legal effect, allowing the recipient not to comply with particular regulatory requirements.

Considering its definition of rule and the above-noted loose publication requirement, the APA clearly implies that an agency may grant an exemption through a rulemaking. The Attorney General also stated that there may be rules “granting or recognizing [an] exemption.”⁷⁶ A contemporary scholar stated that the publication section referred to “an agency ‘rule’ which results in permitting or authorizing a person to do something which he would otherwise be prohibited from doing by a statute or by some other rule,”⁷⁷ indicating that the APA drafters’ definition of an exemption was likely quite similar to the current understanding.

Federal courts have also concluded that agencies may grant exemptions through rulemaking. For example, in *Hou Ching Chow v. Attorney General*,⁷⁸ the court held that a rule granted an exemption under the publication subsection.⁷⁹ In *Capitol Airways, Inc. v. Civil Aeronautics Board*,⁸⁰ the D.C. Circuit recognized agencies’ authority to issue “blanket exemptions” from existing regulations through rulemaking.⁸¹ The Civil Aeronautics Board even promulgated rules for granting exemptions that said, “Proceedings for the issuance of exemptions by regulation shall remain subject to the provisions governing rule making.”⁸²

The cases and provisions show that some exemptions may be and have been granted through rulemaking. Current regulations also include some exemptions issued by rule, such as broad exemptions from the NRC’s otherwise-applicable fee rules for regulated entities.⁸³

By contrast, many exemptions are granted outside of rulemaking. For example, the NRC found that where existing regulations explicitly authorized exemptions, any exemptions granted pursuant to that scheme were not new, particularized rulemakings, but were rather part of the

construction of the statutes and rules which it administers,” and “statements of policy” that “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Id.*

75. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

76. ATTORNEY GENERAL’S MANUAL, *supra* note 24, at 35–36.

77. Ginnane, *supra* note 50, at 634.

78. 362 F. Supp. 1288 (D.D.C. 1973).

79. *Id.* at 1292.

80. 292 F.2d 755 (D.C. Cir. 1961).

81. *Id.* at 757–58.

82. See 14 C.F.R. § 302.400 (1964).

83. 10 C.F.R. §§ 170.11(a) (2010).

existing regulatory scheme.⁸⁴ In another case, the Eighth Circuit held that an agency's issuance of a minor exemption from regulatory requirements was explicitly not an exercise of rulemaking authority.⁸⁵

The minor exemption language ties back to the special circumstances terminology used by the Supreme Court when it authorized regulatory exemptions.⁸⁶ Perhaps an agency that issues numerous exemptions from its regulations, absent special circumstances, may be engaging in rulemaking or at the least risking a suit alleging that it has unlawfully “consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”⁸⁷

As the NRC noted, generally “regulatory policy . . . is developed through the rulemaking process without expecting a need for large numbers of exemptions,” and it would “exercise its discretion to limit exemptions in any particular area if the ‘exceptions’ to the rule threaten to erode the rule itself.”⁸⁸ Exemptions should be based on a “need for *unusual* relief from a rule due to a situation not contemplated when that rule was promulgated.”⁸⁹ Limited numbers of exemptions issued in unusual circumstances should not require rulemaking.

In some cases, however, large numbers of “exemptions can serve as warning signals that a particular rule may need to be revised” through rulemaking.⁹⁰ While “[t]he grant of limited exemptions to a limited number of [applicants] . . . does not pose any special problems,” the “repeated issuance of a large number of exemptions which, considered

84. See *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, 51 N.R.C. 90, 97 n.8 (2000) (“Both the provision authorizing the exemption and the regulation from which the exemption has been granted are part of the same regulatory scheme . . . referred to in the facility license and which [the licensee and exemption applicant] continues to have a duty to follow. Thus, the license and the regulations anticipate exemptions—which may be granted without amending the license or modifying the regulations.”).

85. *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 872 (8th Cir. 1991) (citing *W. Neb. Res. Council v. EPA*, 793 F.2d 194, 199–200 (8th Cir. 1986)).

86. See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972).

87. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). But see *Block v. SEC*, 50 F.3d 1078, 1084 (D.C. Cir. 1995) (suggesting that an agency's decision to grant exemptions from regulations rather than take enforcement actions in response to noncompliance is not an abdication of responsibility where interested parties may submit written comments advising the agency to deny exemption requests, and where the agency has recently denied at least one exemption request).

88. *Specific Exemptions; Clarification of Standards*, 50 Fed. Reg. 50,764, 50,765 (Dec. 12, 1985) (codified at 10 C.F.R. pt. 50).

89. U.S. Dep't of Energy (*Clinch River Breeder Reactor Plant*), 17 N.R.C. 1, 4 (1983) (emphasis added).

90. *Specific Exemptions; Clarification of Standards*, 50 Fed. Reg. at 50,765.

together, represent a fundamental alteration of the conceptual nature of the licensing basis, to more than a limited number of plants essentially constitutes a generic change to the regulatory requirements.”⁹¹ These “generic changes should be adopted through rulemaking, rather than the case-by-case approach inherent in the regulatory approach embodied in the issuance of exemptions.”⁹² Likewise, “the granting of a large number of exemptions to a single plant, should not be so extensive that the validity of the original license is called into question.”⁹³

In at least one case, a federal court has found that excessive use of exemptions amounts to rulemaking; in *Delta Air Lines*, the court confronted a situation where the Federal Aviation Administration granted about 35% of between 800 and 900 yearly applications for an exemption from a specific set of regulatory requirements.⁹⁴ The court reasoned, “Under 5 U.S.C. § 553(b), any proposed change in the Regulations must be published in the Federal Register so that the public can be given the opportunity to comment on the proposed change.”⁹⁵ The court warned that agencies may not attempt to “effectively amend[] the Regulations by issuing *pro forma* exemptions.”⁹⁶ Likewise, the D.C. Circuit recognized a difference between issuing targeted individual exemptions through adjudicatory orders and blanket exemptions from existing regulations through rulemaking.⁹⁷ In the latter cases, where an agency issues numerous, permanent, or unusually broad exemptions, it crosses the line into rulemaking.

Scholars have agreed that problems arise when exemptions are used to devise law or policy instead of simply creating an exception to existing law.⁹⁸ In these cases, “the rule making process is subverted by ad hoc agency decisions.”⁹⁹ After all, “The Administrative Procedure Act was adopted to provide . . . that administrative policies affecting individual

91. U.S. NUCLEAR REGULATORY COMM’N, SECY-98-300, OPTIONS FOR RISK-INFORMED REVISIONS TO 10 CFR PART 50, at 7 (1998), <http://pbadupws.nrc.gov/docs/ML9928/ML992870048.pdf>.

92. *Id.*

93. *Id.*

94. *Delta Air Lines, Inc. v. United States*, 490 F. Supp. 907, 912–13 (N.D. Ga. 1980).

95. *Id.* at 919.

96. *Id.*

97. *Capitol Airways, Inc. v. Civil Aeronautics Bd.*, 292 F.2d 755, 758 (D.C. Cir. 1961).

98. See, e.g., Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 320–21 n.186 (citing, *inter alia*, William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103).

99. *Id.* (quoting *Department of Energy Gasoline Allocation Program: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 153–54 (1980) (statement of William T. Mayton, Professor, Emory University)).

rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.”¹⁰⁰ Thus, scholars have suggested that when agencies issue “exceptions . . . to a class or to a large number of applicants for more than an experimental period of time (for example, six months),”¹⁰¹ or need to grant “substantial or numerous”¹⁰² exemptions, they should use rulemaking.

In other words, if a child is allowed to stay up late past bedtime on most nights, it is not a special permission anymore—it is a new bedtime. In these cases, where the exemption has swallowed the rule, the “parent” agency should announce the new bedtime as a new rule rather than simply granting permission each night.

V. ARE EXEMPTIONS “LICENSES”?

Although some large or frequently granted exemptions are best classified as rules, this does not necessarily mean that more infrequent exemptions must be characterized the same way. The APA generally divides agency action into rulemaking or adjudication, so presumably these other exemptions are issued through some form of adjudication. In a recent report forwarded to Congress, the Chair of the American Bar Association’s Governmental Affairs Office assumed without discussion that “[a]n agency’s grant of exemption from a rule to a particular person would be an adjudication.”¹⁰³ But what type of adjudication would it be?

Following Professor Davis’s suggestion,¹⁰⁴ perhaps these exemptions are licenses, a special type of adjudication under the APA. Recall that a license is “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”¹⁰⁵

Many exemptions are similar to licenses in that they are case-specific and allow the recipient to do something it could not have done without the

100. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

101. *Aman*, *supra* note 98, at 322.

102. *See Sellers*, *supra* note 6, at 945 (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (holding that “rules of general application” should be generated through rulemaking and not adjudication)).

103. *The 60th Anniversary of the Administrative Procedure Act; Where Do We Go from Here: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 23 (2006) (report of the American Bar Association (ABA) that accompanied Recommendation 114, adopted by the ABA House of Delegates on Feb. 14, 2005).

104. *See DAVIS*, *supra* note 38, § 5.02 (noting that exemptions defy classification and may resemble rulemaking or licensing).

105. 5 U.S.C. § 551(8) (2006).

exemption. In that sense, they are an agency-granted “form of permission.”¹⁰⁶ In fact, as noted previously, at least one court held that where an exemption is granted pursuant to a specific statutory authority, it is always a statutory exemption falling under the definition of a license.¹⁰⁷ And courts have also held that limited exemptions are “not consistent with the concept of a ‘rule’” when they are subject to conditions and do not change “the agency’s substantive interpretation or implementation” of its implementing statutes.¹⁰⁸

There do not seem to be any reported cases where a court classified a standard regulatory exemption as a license, however. To the contrary, several courts have rejected the argument that exemptions are licenses. In one early case, for example the D.C. Circuit rejected an exemption applicant’s request for a licensing hearing on the grounds that the exemption was not a license.¹⁰⁹ Likewise, the Ninth Circuit contrasted an “exemption proceeding,” where “a hearing is not always required,” with a “licensing proceeding.”¹¹⁰

Perhaps “the grant of a license is a broader form of permission” than that granted by an exemption.¹¹¹ While licenses and exemptions generally say that specified conduct is lawful, laws and regulations also arguably spell out permissible conduct. On the other hand, licenses inform their recipients that specified conduct is presumptively lawful under the existing regulatory structure, while exemptions tell their recipients that their conduct is acceptable but would likely violate existing general rules and regulations.

But if many regulatory exemptions are not licenses, what exactly *are* they?

VI. ARE EXEMPTIONS SIMPLY INFORMAL ADJUDICATORY “ORDERS”?

While on some level it makes intuitive sense to classify exemptions as licenses or site-specific, particular rules, the modern administrative state has largely adopted another approach. “Most agencies grant or deny exceptions by using either formal or informal adjudicatory procedures.”¹¹²

106. *Id.*

107. *Nuclear Data, Inc. v. Atomic Energy Comm’n*, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

108. *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1033 (D.C. Cir. 2007).

109. *Cook Cleland Catalina Airways, Inc. v. Civil Aeronautics Bd.*, 195 F.2d 206, 207 (D.C. Cir. 1952).

110. *Island Airlines, Inc. v. Civil Aeronautics Bd.*, 363 F.2d 120, 124 (9th Cir. 1966).

111. *Kelley v. Selin*, 42 F.3d 1501, 1518 (6th Cir. 1995) (comparing licenses to NRC design certifications for reactors, “a narrower procedure that approves designs in theory”).

112. *Aman*, *supra* note 98, at 321.

For example, one district court stated that where an agency's decision to issue an exemption "rest[s] on considerations peculiar to each individual case," the agency's "action in deciding whether to waive its [requirements] is more in the nature of an adjudication than of rule-making."¹¹³

The APA allows for two distinct types of adjudication—informal and formal.¹¹⁴ As described by the Attorney General, informal adjudications "constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."¹¹⁵ In fact, informal action has been estimated to encompass over 90% of agency activities.¹¹⁶ On the other hand, formal adjudications, which follow hearing-specific procedures set forth in the APA, only take place when "required by statute,"¹¹⁷ and when exemptions are discussed in statute, these statutory exemptions are licenses under the APA. Therefore, standard regulatory exemptions do not need to "be adjudicated 'after opportunity for agency hearing'"¹¹⁸ and are issued through informal procedures. The result of informal adjudications is a simple order,¹¹⁹ which is not as specific a device as a license.

The Ninth Circuit hinted at this outcome when it stated that a hearing is not always required in an exemption proceeding.¹²⁰ The Seventh Circuit agreed that an exemption proceeding is an example of an informal situation where normally no hearing is required.¹²¹ In these informal exemption cases, an agency is not required to "carry out extensive waiver

113. *Nuclear Data, Inc. v. Atomic Energy Comm'n*, 344 F. Supp. 719, 723 (N.D. Ill. 1972); *see also* *Keller Commc'ns, Inc. v. FCC*, 130 F.3d 1073, 1076–77 (D.C. Cir. 1997); *Int'l Union v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 964 (D.C. Cir. 1990) (stating that agency's exercise of power to "exempt mines from . . . interim [safety] standards" was an example of "case-by-case adjudication"); *Basic Media, Ltd. v. FCC*, 559 F.2d 830, 833 (D.C. Cir. 1977) (finding that where there are "particular cases of hardship," agencies may make individual dispensations or grant exceptions through case-by-case adjudication); *Turro v. FCC*, 859 F.2d 1498, 1499–1500 (D.C. Cir. 1988) (noting only two uses of exemptions).

114. 5 U.S.C. § 554(a) (2006).

115. U.S. DEP'T OF JUSTICE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 35 (1941).

116. Warner W. Gardner, *The Informal Actions of the Federal Government*, 26 AM. U. L. REV. 799, 799 (1977).

117. 5 U.S.C. § 554(a).

118. *E. Airlines v. Civil Aeronautics Bd.*, 185 F.2d 426, 428 (D.C. Cir. 1950), *vacated as moot*, 341 U.S. 901 (1951) (per curiam).

119. *See Rombough v. FAA*, 594 F.2d 893, 895 n.4, 896 (2d Cir. 1979) (an agency's decision on an exemption is a final agency order because it "imposes an obligation, denies a right, or fixes some legal relationship" (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112–13 (1948))).

120. *Island Airlines, Inc. v. Civil Aeronautics Bd.*, 3 63 F.2d 120, 124 (9th Cir. 1966).

121. *Starr v. FAA*, 589 F.2d 307, 311 (7th Cir. 1978).

proceedings.”¹²² In the absence of these more extensive procedures, agencies normally decide regulatory exemptions in “*ad hoc* waiver proceeding[s].”¹²³ Some scholars have also agreed that “[t]he quasi-judicial requirements of ‘formal adjudication’ . . . generally do not apply to exceptions processes.”¹²⁴

Interestingly, when Congress added the Congressional Review Act¹²⁵ to Title 5 of the United States Code in 1996, its definition of rule,¹²⁶ for the purposes of that Act, incorporated most of the APA’s definition, excluding rules of particular applicability. But more importantly, the Act’s sponsors published a “detailed explanation and a legislative history,”¹²⁷ and one sentence near the end of that explanation indicated a belief that particularized rules were different from other agency actions outside the Act’s definition of *rule*.¹²⁸ The latter category included, separately, licenses and exemptions.¹²⁹ Although it did not directly interpret the APA, this brief statement of Congressional intent is additional evidence that regulatory exemptions could be considered something other than rules or licenses under the APA. The only remaining category is simple adjudicatory orders.

CONCLUSION: IT IS THE AGENCY’S CHOICE?

Shortly after its passage, Justice Robert Jackson noted that the APA “contains many compromises and generalities and, no doubt, some ambiguities.”¹³⁰ Unfortunately, ever since the Act’s passage, the status of regulatory exemptions was one of those ambiguities.

As noted previously, the APA’s definition of an adjudicatory order is a residual one, covering agency action other than rulemaking.¹³¹ Applying this definition, agency functions should therefore generally be considered rulemaking if they fall within that broad category and adjudication only if they are not rulemaking.¹³² And regulatory exemptions do seem to fit the APA’s definition of *rules* when that definition’s somewhat nebulous

122. *Indus. Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970).

123. *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988).

124. *Sellers*, *supra* note 6, at 941 n.12.

125. *See* 5 U.S.C. §§ 801–808 (2006).

126. *Id.* § 804(3).

127. 142 CONG. REC. S3683 (daily ed. Apr. 18, 1996) (statement of Sen. Nickles).

128. *Id.* at S3687.

129. *Id.*

130. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950).

131. *See supra* notes 24 & 27 and accompanying text.

132. *See supra* note 50 and accompanying text.

particular applicability criterion is taken seriously¹³³ But even when that term is ignored, as Justice Scalia advised, exemptions may still be classified as rules when a significant number are issued so that they take on the spirit of rulemaking.¹³⁴

On the other hand, Justice Hugo Black explained that

so long as the matter involved can be dealt with in a way satisfying the definition of either ‘rule making’ or ‘adjudication’ under the Administrative Procedure Act, that Act . . . should be read as conferring upon the [agency] the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication.¹³⁵

Although regulatory exemptions may be classified as rules, they can and have also been issued as adjudicatory orders. And in accordance with “bedrock administrative law,” agencies can exercise “informed discretion” in choosing whether to resolve matters through rulemaking or adjudication.¹³⁶ According to the Supreme Court, agencies are allowed to choose whether to engage in rulemaking or adjudication.¹³⁷

Thus, agencies are not precluded from exercising informed discretion and choosing to issue particularized exemptions through rulemaking. But most agencies issue regulatory exemptions by orders issued through the informal adjudication process rather than as rules following the APA rulemaking process. These adjudications are not procedurally distinct from many other routine federal agency decisions.

This fact would not surprise most parents, who would not consider special decisions on their child’s bedtime to be any different from the other general supervisory decisions they make each day. But to the extent that agencies issue broad and numerous regulatory exemptions, or parents constantly make special exceptions to their children’s normal bedtime, they creep closer to effectively exempting the old rules and times out of existence and making new rules. Thus, federal agencies should make these de facto rule changes using the regular notice-and-comment rulemaking process.

133. See *supra* note 25 and accompanying text.

134. See *supra* note 63 and accompanying text.

135. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 772 (1969) (Black, J., concurring).

136. *Nat’l Cable & Telcomms. Ass’n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

137. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292–94 (1974).

Attachment 2

pursuant to Local Civ. Rule 7.05(C)(2)

**Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*,
52 U. CHI. L. REV. 653 (1985)**

Reviewing Agency Inaction After *Heckler v. Chaney*

Cass R. Sunstein†

Of the many innovations in modern administrative law, the recognition of a private right to initiate administrative action may be the most important. In the last twenty years, courts have made substantial inroads on principles of prosecutorial discretion, which have traditionally shielded agency inaction from judicial review.¹ For example, courts have required agencies to promulgate rules,² to issue regulatory standards,³ and to undertake enforcement activity.⁴ These rulings are part of a more general movement in public-law doctrine, which has abandoned the traditional focus on private autonomy in favor of an effort to ensure the identification and implementation of the values set out in the governing statute.⁵

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¹ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (dictum) (discussing NLRB's "unreviewable discretion" to refuse to institute an unfair labor practice complaint); *United Elec. Contractors Ass'n v. Ordman*, 366 F.2d 776 (2d Cir. 1966) (same), *cert. denied*, 385 U.S. 1026 (1967); *Pendleton v. Trans Union Sys. Corp.*, 430 F. Supp. 95, 97-98 (E.D. Pa. 1977) (denying mandamus to compel FTC enforcement action on grounds of executive discretion). The unavailability of review stemmed also from restrictive standing doctrines that limited review to those with a "legal interest." See *infra* notes 84-101 and accompanying text.

² See *Community Nutrition Inst. v. Young*, 757 F.2d 354, 361-62 (D.C. Cir. 1985) (requiring FDA to establish aflatoxin tolerances through rulemaking); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (judicial review of denial of rulemaking petition available absent clear and convincing evidence of contrary legislative intent).

³ See *Sierra Club v. Ruckelshaus*, 61 AD. L. REP. 2D (P & F) 65, 70 (N.D. Cal. Dec. 11, 1984) (holding Administrator of EPA in civil contempt for failing to make findings or issue standards for radionuclides); *Public Citizen Health Research Group v. Auchter*, 554 F. Supp. 242, 251 (D.D.C.) (ordering OSHA to issue emergency standard for ethylene oxide exposure), *aff'd*, 702 F.2d 1150 (D.C. Cir. 1983).

⁴ See *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981) (holding mandamus available to require Secretary of Defense to enforce Davis-Bacon Act against contractors); *Adams v. Richardson*, 480 F.2d 1159, 1162-63 (D.C. Cir. 1973) (ordering enforcement program to secure HEW enforcement of Title VI); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097-98 (D.C. Cir. 1970) (holding decision not to cancel registration of DDT reviewable despite permissive statutory language).

⁵ See JOSEPH VINING, *LEGAL IDENTITY* 52 (1978) (discussing conception of the judicial

The Supreme Court itself has had little occasion to evaluate this trend. In *Dunlop v. Bachowski*,⁶ decided a decade ago, the Court held that the decision of the Secretary of Labor not to file suit to set aside a union election was subject to judicial review, but the most difficult issue raised by the case was disposed of in an obscure footnote.⁷ It was thus not until its recent decision in *Heckler v. Chaney*⁸ that the Court set out some general conclusions on the reviewability of agency inaction. Those conclusions prompted a vigorous separate opinion from Justice Marshall, who expressed concern that the Court had created a "presumption of unreviewability"⁹ that endangered "a firmly entrenched" body of law providing judicial review of agency refusals to act.¹⁰

There is little risk in predicting that the rationale and reach of the *Chaney* decision will provoke considerable controversy in the courts and elsewhere. This article explores the implications of *Chaney* for judicial review of agency enforcement decisions, attempting in the process to develop a set of guidelines for resolving claims of unlawful administrative inaction. That inquiry will be based on an analysis of the role of regulatory agencies and reviewing courts in the modern era.

I. REVIEWABILITY: A PRIMER

Under the Administrative Procedure Act (APA),¹¹ agency action is generally subject to judicial review. The presumption of reviewability is reflected in the legislative history of the APA,¹² producing the understanding, frequently repeated by the courts, that statutes will not be held to preclude review unless there is "clear

process as a means of achieving public or statutory values); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985) (contrasting interest-representation and fidelity models of administrative law). For an elaboration of this transformation, see *infra* notes 84-101 and accompanying text.

⁶ 421 U.S. 560, 566-68 (1975).

⁷ *Id.* at 567 n.7 ("We agree with the Court of Appeals, for the reasons stated in its opinion, that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion.") (citation omitted). For a discussion of the limits of the analogy of administrative discretion to prosecutorial discretion, see *infra* notes 75-122 and accompanying text.

⁸ 105 S. Ct. 1649 (1985).

⁹ *Id.* at 1660 (Marshall, J., concurring in the judgment).

¹⁰ *Id.* at 1665.

¹¹ 5 U.S.C. §§ 551-706 (1982).

¹² See H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946), quoted in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1967) ("To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.").

and convincing” evidence that Congress intended to do so.¹³

The presumption of reviewability under the APA is based on a set of considerations, loosely captured in the notion of the rule of law, that relate to the perceived need to constrain the exercise of discretionary power by administrative agencies.¹⁴ Judicial review serves important goals in promoting fidelity to statutory requirements and, where those requirements are ambiguous or vague, in increasing the likelihood that the regulatory process will be a reasonable exercise of discretion instead of a bow in the direction of powerful private groups.¹⁵

These concerns are especially powerful in light of the awkward constitutional position of the administrative agency. The absence of the ordinary safeguards of electoral accountability and separation of powers has generated, in the administrative context, especially intense fears of factional influence over governmental processes and of decision free from public scrutiny and review. Such fears were a prime reason behind the nondelegation doctrine.¹⁶ After the demise of that doctrine,¹⁷ surrogate safe-

¹³ See, e.g., *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2457 (1984) (“clear and convincing” test controls unless congressional intent to preclude review is “fairly discernible in the statutory scheme.”); *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1967).

¹⁴ See LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320-27 (1965). See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1203 (1982) (discussing functions of the rule of law).

¹⁵ See Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983). But see R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983) (criticizing certain effects of the judicial role). On agency “capture,” see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87 (1975); Stewart & Sunstein, *supra* note 14, at 1226-27.

¹⁶ It is thus unsurprising that the primary case invoking that doctrine involved a delegation of government power to private groups. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See generally Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937) (discussing advantages and dangers of participation by private groups in the administrative process).

¹⁷ While the nondelegation doctrine has never been expressly repudiated by the Court, it has not been used to strike down a statute since *Schechter Poultry*. In fact, broad legislative delegations of power to the executive branch were upheld prior to the New Deal period. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 521 (1911) (upholding statute that permitted executive to make regulations declaring conduct criminal as a proper delegation of administrative power rather than an improper delegation of legislative power); *Field v. Clark*, 143 U.S. 649, 692-94 (1892) (upholding Tariff Act authorization of presidential suspension of favorable tariff status as not constituting grant of legislative power). Since *Schechter Poultry*, the Court has often found very broad “standards” to be an adequate basis for judicial review. See, e.g., *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 611-15 (1980) (reviewing exercise by OSHA of power to regulate toxics “to the extent feasible”); *Yakus v. United States*, 321 U.S. 414, 420-25 (1944) (sustaining broad

guards—judicial review prominent among them—have been developed to protect the coherence and the integrity of the regulatory process.¹⁸

In this regard it is important to keep in mind the fact, traditionally overlooked in discussions of judicial review of agency action,¹⁹ that the availability of review will often serve as an important constraint on regulators during the decisionmaking process long before review actually comes into play. The prospect of review increases the likelihood of fidelity to substantive and procedural norms—a fact that will be missed if one focuses only on the reported cases, where, to be sure, the courts make their share of mistakes.²⁰

The concerns that support the APA's presumption of reviewability appear no less applicable to review of inaction than to review of action. Review at the behest of statutory beneficiaries may perform a critical function in ensuring against unduly lax enforcement that would violate statutory requirements. Such requirements may be undone through inadequate implementation as well as through overzealous enforcement. In both contexts, judicial review serves to vindicate the will of Congress as against the executive branch and may guard against the undue influence of powerful private groups over the regulatory process.²¹ In the case of inaction, as well as in that of action, it is appropriate to take into ac-

grant of price-fixing powers). But some Justices have indicated a renewed interest in the doctrine. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., joined by Burger, C.J., dissenting).

¹⁸ While much stress has traditionally been placed on judicial review, see, e.g., L. JAFFE, *supra* note 14, at 327, it is important not to disregard the potential of nonjudicial mechanisms for fulfilling these functions. See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 150-60 (discussing legislative veto and other modes of legislative control). Nonjudicial mechanisms are particularly crucial for assuring presidential control and interagency coordination. For important modern illustrations, see Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985), and Exec. Order No. 12,291, 3 C.F.R. 127 (1982), which attempt to coordinate the regulatory process through supervision by the Office of Management and Budget.

¹⁹ For criticisms of judicial review that do not discuss the phenomenon of "anticipated reaction" CARL FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS* 16-18 (1937), see, e.g., JERRY MASHAW, *BUREAUCRATIC JUSTICE* 8-11 (1983) (arguing that judicial review is irrelevant to internal agency decisionmaking, without reference to effect of prospect of review); R. MELNICK, *supra* note 15, at 379-83 (discussing impact of courts on EPA solely in terms of court-ordered action).

²⁰ See generally R. MELNICK, *supra* note 15 (contending that judicial review under Clean Air Act has had undesirable consequences for environmental policy).

²¹ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2870 (1983) ("that the regulated industry has eschewed a given safety device . . . hardly constitutes cause to revoke the standard" requiring it).

count the deterrent effect of the prospect of review on administrators during the implementation process. The affirmative case for judicial review thus appears identical in the two contexts.

On its face, moreover, the APA treats agency inaction the same as agency action. Indeed, the statute defines agency action to include "failure to act"²² and says that courts shall "compel agency action unlawfully withheld or unreasonably delayed."²³ But it would be a mistake to understand this language as an across-the-board repudiation of principles of prosecutorial discretion. To understand how those principles interact with the APA, it is necessary to explore the exceptions to the general rule of reviewability.

The APA provides that agency decisions are unreviewable in two categories of cases: (1) those in which the statute precludes review,²⁴ and (2) those in which agency action "is committed to agency discretion by law."²⁵ The first exception is not difficult to understand, though in particular cases it may be difficult to decide whether there has been statutory preclusion of review.²⁶ The second exception creates two puzzles. First, a conclusion that agency action is committed to agency discretion "by law" appears substantially identical to a conclusion that a statute has precluded review. Second, there is an obvious tension between the idea that some exercises of discretion are unreviewable²⁷ and the fact that the APA allows courts to review agency action for "abuse of discretion."²⁸

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,²⁹ the Supreme Court attempted to resolve both of these puzzles. According to the Court, the "committed to agency discretion" exception precludes review "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"³⁰ This interpretation, based on the legislative history of the APA,

²² 5 U.S.C. § 551(13) (1982). The definition of agency action also includes the denial of a rule, order, license, sanction, or other relief. *Id.*

²³ *Id.* § 706(1).

²⁴ *Id.* § 701(a)(1).

²⁵ *Id.* § 701(a)(2).

²⁶ See, e.g., *Morris v. Gressette*, 432 U.S. 491 (1977) (holding by a divided Court that Attorney General's approval of reapportionment under Voting Rights Act was unreviewable).

²⁷ Compare *Davis, Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643, 643 (1967) (administrative arbitrariness is sometimes unreviewable), with *Berger, Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 999 (1969) (only non-arbitrary use of discretion is potentially unreviewable).

²⁸ 5 U.S.C. § 706(2)(A) (1982).

²⁹ 401 U.S. 402 (1971).

³⁰ *Id.* at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

has provoked sharp criticism.³¹ As we shall see, however, the Court's interpretation is consistent with sensible understandings of when agency action should be subject to judicial supervision.

The principal question raised by *Overton Park* is how one decides whether, in a given case, there is "law to apply." The answer turns on two considerations—one familiar, the other frequently ignored. The familiar consideration is the governing substantive statute, which is the major source of the "law to apply." *Overton Park* itself illustrates the point. The issue there was the legality of a decision by the Secretary of Transportation to approve the building of an interstate highway through a park in Memphis, Tennessee. The Court concluded that there was "law to apply" because the statute provided that the Secretary "shall not approve" construction through a public park unless "no feasible and prudent" alternative was available. That provision imposed constraints on the Secretary's decision by which a court might assess its legality.³² The same conclusion is appropriate with respect to the great proportion of administrative law cases, at least in the context of review of action. Governing statutes almost always set out standards by which to assess the legality of agency behavior or to evaluate a claim of arbitrariness.

The second consideration in deciding whether there is "law to apply" is the precise allegation made by the plaintiff. The importance of this point cannot be overstated, particularly in the context of review of agency inaction. For example, if a plaintiff claims that an agency has taken constitutionally impermissible factors into account, there is always "law to apply"—no matter what the governing statute may say.³³ Similarly, if the plaintiff alleges that the agency's conduct has been based on factors that are irrelevant under the governing statute, there is always law to apply, even if the agency has especially broad discretion in weighing those factors that are statutorily relevant.³⁴ Judicial evaluation of these claims will be equally straightforward whether the government has chosen to take or to refrain from taking enforcement action on the basis of these factors. On the other hand, if the plaintiff makes a generalized claim of agency "arbitrariness" in failing to act, there may sometimes be no judicially administrable standards by which to as-

³¹ See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 28.16, at 638-41 (1976).

³² 401 U.S. at 411-13.

³³ See *infra* notes 129-32 and accompanying text.

³⁴ See *infra* notes 135-40 and accompanying text.

sess the claim.³⁵ The central point is that the “law to apply” inquiry can be made coherent only by measuring the plaintiff’s allegation against the governing substantive statute. There may be review with respect to one allegation, but no review with respect to another, under the same statute.

Understood in these terms, the *Overton Park* test for reviewability—the “law to apply” inquiry—looks very much like a decision on the merits. Once one has said that an action is unreviewable because there are no legal constraints on the exercise of discretion with respect to the particular allegation, one might as well say that, with respect to that allegation, there is no legal violation. In this respect, the distinction between a conclusion that a decision is not reviewable and a conclusion that a decision is lawful is easy to collapse.³⁶ In both cases, one is saying the same thing: that the governing statute does not impose legal constraints on the action at issue.

The APA does, however, distinguish the issue of reviewability from that of the merits, and so long as the underlying considerations are understood, the distinction need not cause significant difficulties. The important point is that agency actions are “committed to agency discretion by law” whenever the governing statute imposes no legal constraints on the agency with respect to the particular allegation made by the plaintiff.³⁷

The framework provided by *Overton Park* thus provides courts with workable standards for deciding the reviewability of both agency action and agency inaction. Since *Overton Park*, the Supreme Court and lower courts have used these standards to review agency enforcement decisions.³⁸ The mere fact that inaction is

³⁵ See *infra* note 156 and accompanying text.

³⁶ This point is parallel to the idea, raised in connection with the political question doctrine, that a conclusion that a matter presents a “political question” is equivalent to a conclusion that there is no constitutional violation on the merits. See Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 606, 622-23 (1976).

³⁷ This formulation raises the question of how one decides that it is appropriate to dispose of a case on the merits rather than on grounds of reviewability. The decided cases furnish no clear criteria by which to make that decision. To some extent, they suggest that the question is to be answered on the basis of whether the statutory standard, measured against the plaintiff’s allegation, furnishes ascertainable standards by which to assess the legal question. If it does not, a decision on reviewability grounds is more likely. See, e.g., *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970) (holding that statute provides inadequate standards for judicial review of FHA rental rates). To some extent, however, the decision is likely to be cast in terms of reviewability rather than the merits simply because of tradition. But see *Pendleton v. Trans Union Sys. Corp.*, 430 F. Supp. 95 (E.D. Pa. 1977) (dismissing mandamus action against FTC on the merits).

³⁸ See cases cited *supra* notes 2-4.

involved is insufficient to preclude review; inaction, no less than action, might be unlawful. The question turns on the nature of the governing statute and of the plaintiff's allegation.

Despite *Overton Park* and its progeny, one might readily have predicted that the Supreme Court would not be entirely receptive to efforts to obtain judicial review of the enforcement decisions of administrative agencies. In a number of areas of administrative law, the Court has recently confined the supervisory role of the federal courts, especially in suits brought by the beneficiaries of regulatory statutes. For example, the Court has held that federal courts may not impose procedural requirements on administrative agencies beyond those set out in the APA.³⁹ The Court also has slightly weakened the ordinary presumption of reviewability of agency action by lowering the standard required to demonstrate congressional intent to preclude judicial review.⁴⁰ In addition, the Court has stated that courts should accord considerable deference to executive constructions of regulatory statutes whenever "Congress has not directly addressed the precise question at issue."⁴¹ Finally, the Court has indirectly limited the role of judicial review through the doctrine of standing. In a decision of particular importance, the Court held that parents of children attending segregated schools did not have standing to challenge the failure of the IRS to deny tax-exempt status to private schools that discriminated on the basis of race.⁴² Relying in part on the "take Care" clause,⁴³ the Court concluded that separation-of-powers concerns require plaintiffs seeking a "restructuring" of executive-branch operations to

³⁹ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-46 (1978) (rejecting judicial addition of procedural requirements for APA informal rulemaking).

⁴⁰ *Compare* *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2456-58 (1984) (intent to preclude review must be "fairly discernible" from legislative scheme), *with* *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (requiring "clear and convincing evidence" of intent to preclude review).

⁴¹ *See* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984); *see also* *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1108, 1110 (1985) (requiring clear, unambiguous expression of intent contrary to that of agency). Decisions of this sort may herald a quite general return to a variation of "formalism" in statutory interpretation. For critical appraisals of the "formalist" approach, see *Stewart & Sunstein, supra* note 14, at 1199-1201, 1220-32; Note, *Intent, Clear Statements, and the Common Law*, 95 HARV. L. REV. 892, 899-907 (1982). For a defense, see *Diver, Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 582-92 (1985).

⁴² *Allen v. Wright*, 104 S. Ct. 3315 (1984).

⁴³ U.S. CONST. art. II, § 3 (the Executive shall "take Care that the Laws be faithfully executed").

meet especially stringent standing requirements.⁴⁴

This is not to say that the recent cases form an unbroken line of deference to executive authority. In one case, the Court applied the “hard-look” doctrine⁴⁵ with considerable rigor, overturning an administrative decision to rescind an existing regulatory standard.⁴⁶ And elsewhere the Court has shown a willingness to supervise the regulatory process with some care.⁴⁷ But the basic pattern is unmistakable. The Court’s decisions reflect skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries.⁴⁸ Such skepticism has resulted in a willingness either to deny review entirely or to restrict its scope, often through “clear statement” principles of statutory construction.⁴⁹ It was against this background that the Supreme Court decided *Heckler v. Chaney*.

II. THE *Chaney* DECISION

The *Chaney* case involved a suit by inmates on death row to require the Food and Drug Administration (FDA) to take enforcement action to prevent particular drugs from being used in executions by lethal injection.⁵⁰ The FDA had approved the drugs at issue for some purposes, but not for use in executions. The inmates contended that the drugs had not been tested and labeled for use in human executions and that in the hands of untrained personnel the drugs would cause “torturous pain” rather than the intended quick and painless death.⁵¹ According to the inmates, the use of the drugs in human execution thus violated the “misbranding” and

⁴⁴ 104 S. Ct. at 3330. For a critical appraisal, see Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985).

⁴⁵ For discussion of the doctrine, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). See generally Sunstein, *De-regulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181-82 (collecting cases).

⁴⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 103 S. Ct. 2856, 2862 (1983).

⁴⁷ See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 658-59 (1980) (plurality opinion) (rejecting OSHA benzene standard after “a more detailed examination of the record than is customary”).

⁴⁸ For suggestions that this skepticism is misplaced, at least if the judicial role is suitably cabined, see Stewart & Sunstein, *supra* note 14, at 1316-22; L. JAFFE, *supra* note 14, at 320-27, 589-92. Most of the recent cases restricting the judicial role involved suits by beneficiaries, and the restrictions on the law of standing and reviewability will primarily affect beneficiaries rather than regulated entities. It remains uncertain whether the Court will similarly limit judicial power when the plaintiff is a member of the regulated class.

⁴⁹ See *supra* note 14.

⁵⁰ 105 S. Ct. at 1651-52. The requested enforcement actions were detailed in the opinion below, *Chaney v. Heckler*, 718 F.2d 1174, 1178 (D.C. Cir. 1983).

⁵¹ 718 F.2d at 1177.

“new drug” provisions of the Food, Drug and Cosmetic Act.⁵² The FDA had declined to act, claiming that it did not have jurisdiction over the use of drugs for human execution⁵³ and that, even if it did, it had the “inherent discretion” not to act unless there was “a serious danger to the public health or a blatant scheme to defraud.”⁵⁴ According to the FDA, neither of the conditions that would require action was present in *Chaney*.

The Supreme Court, in an opinion by Justice Rehnquist, held that the FDA’s inaction was an unreviewable exercise of prosecutorial discretion.⁵⁵ In thus reversing the decision of the court of appeals, the Court said that there was often “no law to apply” to enforcement decisions. Such decisions should therefore be presumed unreviewable under the “committed to agency discretion” exception to the general rule of reviewability under the APA.⁵⁶

The Court marshaled four considerations in favor of this conclusion. First, it said that because of limited administrative resources, agencies must evaluate a wide range of factors in setting enforcement priorities and that such decisions are ill-suited to judicial review.⁵⁷ Second, it observed that “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”⁵⁸ Third, it indicated that inaction, unlike action, does not provide a focus for judicial review.⁵⁹ Fourth, it said that “an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict”—a decision that, the Court noted, is entrusted to the executive under the “take Care” clause of article II.⁶⁰

In the Court’s view, these considerations were sufficient to justify a “conclusion that an agency’s decision not to take enforcement action should be presumed immune from judicial review.”⁶¹ But the Court emphasized that the presumption could be rebutted

⁵² 21 U.S.C. §§ 352(f), 355 (1982).

⁵³ 105 S. Ct. at 1652.

⁵⁴ *Id.* (quoting statement by FDA Commissioner).

⁵⁵ *Id.* at 1659.

⁵⁶ 5 U.S.C. § 701(a)(2) (1982).

⁵⁷ 105 S. Ct. at 1656.

⁵⁸ *Id.* (emphasis in original).

⁵⁹ *Id.*

⁶⁰ *Id.* See *infra* notes 102-11 and accompanying text (evaluating the “executive function” argument).

⁶¹ 105 S. Ct. at 1656.

“where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”⁶² The Court found that the presumption of unreviewability had not been rebutted in *Chaney* because the Food, Drug and Cosmetic Act provided no statutory constraints on the exercise of discretion.⁶³ The Court distinguished *Dunlop v. Bachowski*⁶⁴ on this ground. In that case, the Court said, the Labor-Management Reporting and Disclosure Act required the Secretary of Labor to file suit if certain “clearly defined” factors were present, and this requirement was an adequate basis for judicial review.⁶⁵

The result in *Chaney* is easy to defend. The FDA’s failure to investigate the unapproved use of the drugs was not constrained by the governing statute. There were various possible sources of statutory and regulatory “law” in *Chaney*, but the Court was probably correct in concluding that none formed a sufficient basis for judicial review. The court of appeals had relied on a policy statement indicating that the agency considered itself “obligated” to act against unapproved uses of approved drugs,⁶⁶ but the statement was ambiguous and was in any event appended to a rule that the agency never adopted.⁶⁷ The plaintiffs had also invoked a provision in the substantive statute stating that the Secretary of Health and Human Services need not prosecute “minor violations” if she “believes that the public interest will be adequately served by a suitable written notice.”⁶⁸ They argued for the negative implication that this provision was intended to require prosecution of “major” violations. But the Supreme Court read the provision as applicable to situations in which a violation had already been established to the agency’s satisfaction, not as an effort to require investigation of possible violations.⁶⁹ Furthermore, the plaintiff’s allegations did

⁶² *Id.*

⁶³ *Id.* at 1658-59.

⁶⁴ 421 U.S. 560 (1975).

⁶⁵ 105 S. Ct. at 1657. This was not an accurate reading of the understanding of the Court in *Dunlop* itself. In *Dunlop*, 421 U.S. at 567 n.7 (quoted *supra* note 7), the Court endorsed the reasoning of the lower court, which had said that principles of prosecutorial discretion should operate as a bar to review only when the interests represented by plaintiffs were those of the public as a whole (as in the case of a criminal prosecution), rather than those of identifiable individuals, *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974). Of course, *Chaney* itself involved the interests of identifiable individuals.

⁶⁶ *Chaney v. Heckler*, 718 F.2d 1174, 1186 (D.C. Cir. 1983).

⁶⁷ 105 S. Ct. at 1658. The court of appeals had suggested that the fact that the rule was not adopted was “not decisive” and that the statement itself constituted a “rule” under the APA. 718 F.2d at 1186 & n.28.

⁶⁸ 21 U.S.C. § 336 (1982) (quoted in *Chaney*, 105 S. Ct. at 1659).

⁶⁹ 105 S. Ct. at 1659.

not indicate specific deficiencies in agency decisionmaking that distinguished their claim from that of many others who could assert an interest in how the FDA's investigatory authority is used.⁷⁰ The plaintiffs were thus left with precisely the kind of generalized claim of "arbitrariness" that is often so difficult to sustain.⁷¹

On all this the Court was unanimous. The controversial character of the decision stems from the adoption of a seemingly broad presumption against review of enforcement decisions. Justice Brennan issued a short concurrence, noting that the majority opinion left open the possibility that agency inaction might be reviewable in a wide variety of circumstances.⁷² In an extensive separate concurrence, Justice Marshall took issue with the Court's creation of a "presumption of unreviewability" for enforcement decisions. In his view, decisions not to act will frequently survive on the merits, largely for the reasons identified by the Court. But that conclusion should not imply a refusal to review the particular bases for inaction—review that will generally serve as a safeguard against "caprice and lawlessness."⁷³ In Justice Marshall's view, the traditional principles of prosecutorial discretion are inconsistent with "one of the very purposes fueling the birth of administrative agencies"—the "reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."⁷⁴ The FDA's conduct in *Chaney*, according to Justice Marshall, was lawful only because it was reasonable on the merits.

⁷⁰ Such deficiencies would require special allegations—for example, a claim that agency inaction was based on constitutionally or statutorily irrelevant factors, see *infra* notes 129-32, 135-40 and accompanying text, or a showing that the inaction involved a matter that, because of the nature of the private conduct at issue, had a special claim on the agency's resources.

⁷¹ This is not to say that the case was quite as easy as the Court seems to have thought. A response to the foregoing line of reasoning might be that the Court should have looked more carefully at the nature of the plaintiffs' claim and at the FDA's enforcement priorities, in order to assure itself that the allocation of limited resources was reasonable in light of the various options before the agency. But such an examination is, in the absence of unusual circumstances, extremely difficult for a court to undertake. In light of the nature of the statute and the allegation, a posture of deference was appropriate.

⁷² 105 S. Ct. at 1659-60 (Brennan, J., concurring).

⁷³ *Id.* at 1665 (Marshall, J., concurring in the judgment).

⁷⁴ *Id.* at 1666. In constitutional law, this perception is reflected in *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937) (suggesting that government refusal to enact minimum wage law would amount to government subsidy to employers), and *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (describing governmental inaction as "none the less a choice"). See *infra* notes 84-91 and accompanying text.

III. THE LIMITS OF "PROSECUTORIAL DISCRETION" IN THE REGULATORY STATE

The *Chaney* Court's presumption against judicial review of agency enforcement decisions is based on principles of "prosecutorial discretion." Prosecutorial discretion has traditionally been thought to immunize decisions of criminal prosecutors from judicial review;⁷⁵ it has sometimes been extended to the administrative context, shielding agency inaction from legal control.⁷⁶ As Justice Marshall emphasized in *Chaney*, these principles are at odds with the general presumption of reviewability.

Judicial control of agency inaction has its origins in the law of mandamus, which allows courts to compel "nondiscretionary" agency decisions.⁷⁷ In an early case, however, the Supreme Court held that the federal courts had no general mandamus authority.⁷⁸ That authority has now been conferred on the courts by statute,⁷⁹ but "discretionary" decisions are immunized from judicial review.⁸⁰ This state of affairs, in conjunction with standing limitations,⁸¹ explains why judicial review of agency inaction has generally occurred under the APA rather than the federal mandamus statute.⁸² Under the APA, however, the *Chaney* Court's invocation of prosecutorial discretion does not justify the adoption of a presumption against review. This conclusion becomes apparent by scrutinizing the four central considerations on which refusal to review agency inaction is based: judicial solicitude for private rights, deference to executive discretion, the existence of alternative remedies, and various prudential concerns. Whatever their original merit, these considerations no longer carry significant weight.⁸³

⁷⁵ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973). For a discussion and critique of prosecutorial discretion in the criminal context, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969).

⁷⁶ See cases cited *supra* note 1.

⁷⁷ See generally L. JAFFE, *supra* note 14, at 178-92.

⁷⁸ *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813).

⁷⁹ 28 U.S.C. § 1651 (1982).

⁸⁰ *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930).

⁸¹ See *infra* note 87.

⁸² But see *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981) (holding mandamus available under Davis-Bacon Act).

⁸³ For additional treatment of some of these considerations, see Stewart & Sunstein, *supra* note 14, at 1202-20 (discussing traditional concepts as obstacle to development of judicial remedies for administrative misconduct); Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 630-38 (1983) (discounting traditional obstacles to review).

A. Judicial Solicitude for Private Rights

The original role of judicial review of administrative conduct was based on two related understandings. The first was that market ordering within the constraints of the common law was normal and natural.⁸⁴ In light of this assumption, government intervention in the market appeared exceptional and was subject to special judicial control. For this reason, courts adopted what was in effect a one-way ratchet, consisting of legally enforceable constraints on regulation but no such constraints on inaction.⁸⁵ The second understanding was that the purpose of judicial review was to safeguard traditional private rights as defined by the common law.⁸⁶ The interests of those who were likely to benefit from administrative action were not traditional liberty or property interests and were thus not entitled to judicial protection.⁸⁷ The political process

⁸⁴ Compare *Lochner v. New York*, 198 U.S. 45 (1905) (reflecting a similar understanding), with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (rejecting this understanding).

⁸⁵ Indeed, the very concepts of "inaction" and "action" are coherent only if one has a background understanding of the normal or desirable functions of government. Cf. LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 246-48 (1985) (discussing dependence of notion of "state action" on *Lochner*-like understandings of private and public spheres); Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1297-99 (1982) (same). See also Justice Frankfurter's suggestion, in interpreting the "negative order" doctrine, that

"negative order" and "affirmative order" are not appropriate terms of art. . . . "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—nonaction as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability. "Negative" and "affirmative," in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "malfeasance."

Rochester Tel. Corp. v. United States, 307 U.S. 125, 140-42 (1939) (citations omitted).

⁸⁶ See Stewart, *supra* note 15, at 1671-76.

⁸⁷ This notion was most important under the law of standing, where early cases involved claims of competitive disadvantage as a result of government action; standing was denied because of failure to allege violation of a "legal right" or "protected interest." See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479-80 (1938). See generally Stewart, *supra* note 15, at 1723-24 (recognized "legal rights" were common law contract and property rights). With the rejection of the "legal interest" test, see, e.g., *Association of Data Processing Serv. Orgs., Inc., v. Camp*, 397 U.S. 150, 153-54 & n.1 (1970) (competitor standing), standing was broadened to include the interests of regulatory beneficiaries, see, e.g., *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970) (tenant-farmer beneficiaries of upland-cotton program). Since a wide range of beneficiary injuries have been held to be "fairly traceable" to government conduct and to satisfy the "injury in fact" test, see, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 (1978) (local citizens have standing to challenge the effect of federal liability limit on the building of nuclear power plants), standing is a barrier to beneficiary actions in much more limited circumstances. *But cf.* *Allen v. Wright*, 104 U.S. 3315, 3329-30, 3333 (1984) (holding plaintiffs' claim of injury to strict causality standard where special circumstances raise separation-of-powers concerns).

was seen as the appropriate safeguard against unlawful inaction, especially since large numbers of people were often affected by failure to act.⁸⁸ Together, these two understandings represent a *Lochner*-like view of the judicial role.⁸⁹ The *Lochner* Court, too, saw the judicial role as the vindication of private rights, defined by reference to market ordering within the common law, against government "intervention."

With the rise of the regulatory state, however, this *Lochner*-era approach to judicial review of administrative inaction is no longer tenable. And it should be unsurprising to find that this view arose and declined in constitutional and administrative law in parallel fashion.⁹⁰ In the constitutional context, the Court recognized in *West Coast Hotel v. Parrish*⁹¹ that common law ordering was in no sense "natural," but was the product of governmental choice: both action and inaction amount to decisions. It was pursuant to this view that a failure to act might be seen as, in the Court's words, a "subsidy" to those who benefited from the inaction. Similarly, in the administrative context, the notion that judicial review is limited in purpose to safeguarding traditional private rights and in scope to the promotion of traditional private autonomy has become unacceptable.

This doctrinal shift is reflected in changes in three related aspects of administrative law, changes which undermine the *Lochner*-like deference to agency inaction. The first of these changes is the growth of public rights. The creation of administrative agencies was based on an understanding that interests unrecognized by the common law nonetheless merit governmental protection.⁹² Regula-

⁸⁸ Cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (due process does not require individual hearings for determinations that affect large numbers of people, in part on ground that legislature is the appropriate forum for redress).

⁸⁹ *Lochner v. New York*, 198 U.S. 45 (1905). See Kennedy, *Form and Substance in Private Law Litigation*, 89 HARV. L. REV. 1685, 1746-48 (1976) (discussing theory of "naturalness" of economic interaction under common law).

⁹⁰ See Sunstein, *Interest Groups in American Public Law*, STAN. L. REV. (forthcoming).

⁹¹ 300 U.S. 379 (1937).

⁹² This conclusion was alternately based on (1) the notion that the common law catalogue of private rights was insufficient to protect private autonomy, and that new rights should be added to the list; (2) a conclusion that important decisions ought to be subject to collective control in the service of democratic ends of self-government; or (3) an economic rationale pointing to the externalities not taken care of by an unregulated market. See generally Stewart & Sunstein, *supra* note 14, at 1235-39 (discussing the entitlement, production, and public value accounts of the rise of administrative regulation). At times, of course, the creation of a regulatory scheme might be understood as an interest-group deal. See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

tory interests, representing public “rights,”⁹³ are created by congressional or administrative action and are entitled to judicial protection under the APA. The fact that inaction does not affect traditional private rights is therefore an insufficient basis for distinguishing between action and inaction.

The second change is in the law of standing. It is no longer necessary to show a traditional private right in order to obtain review of agency conduct;⁹⁴ beneficiaries of regulatory programs may bring suit if they can show “injury in fact” and demonstrate that a judicial decree will remedy the harm alleged.⁹⁵ Private autonomy, as it was understood at common law, need not be involved at all.

The third change is authorization of judicial review of agency action by the APA. Under the APA, the function of judicial review is to ensure governmental conformity with legal requirements, whether such requirements require or forbid regulation.⁹⁶ This conformity is to be achieved in two ways. First, courts are charged with promoting adherence to the governing statute—with adherence understood to include identification and implementation of the values set out in that statute. Statutorily irrelevant factors may not be considered,⁹⁷ and those factors made relevant by statute must be taken into account.⁹⁸ Second, where the statute is ambiguous, as is frequently the case, courts must ensure that there has been a reasoned exercise of discretion on the part of administrators.⁹⁹ These purposes apply with equal force to action and

⁹³ It may be misleading to treat such interests as “rights” at all. See Mashaw, “Rights” in the Federal Administrative State, 92 YALE L.J. 1129, 1173 (1983) (discussing “rights” as epiphenomena of political choice under “statist” concept of administrative law); Stewart, *Regulation in a Liberal State: The Role of Non-commodity Values*, 92 YALE L.J. 1537, 1556-59 (1983) (discussing limits of entitlement conception of regulation).

⁹⁴ This was the traditional requirement of the “legal interest” test. See *supra* note 87. See generally J. VINING, *supra* note 5, at 20-33 (discussing the test and its limits); Stewart, *supra* note 15, at 1723-25 (discussing the traditional standing model).

⁹⁵ This is something of an oversimplification of current doctrine. See *supra* note 87; cf. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 475 (1982) (suggesting that a “zone of interests” requirement may also be an element of current standing doctrine under article III).

⁹⁶ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 103 S. Ct. 2856, 2866 (1983) (“[T]he direction in which an agency chooses to move does not alter the standard of judicial review established by law.”).

⁹⁷ See *infra* notes 135-40 and accompanying text.

⁹⁸ See *infra* notes 141-43 and accompanying text.

⁹⁹ The notion of reasoned decisionmaking has often been invoked by courts in recent years. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Ins. Co.*, 103 S. Ct. 2856, 2874 (1983); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425-26 (D.C. Cir. 1983); *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982). That notion has three components. First, regulatory decisions should be based on a detailed inquiry into

inaction.

Moreover, the availability of political remedies does not, as a general rule, distinguish inaction from action. The possibility of political redress has not been thought sufficient to justify the elimination of judicial review of agency action.¹⁰⁰ The same conclusion is properly reached in the context of inaction. Often political remedies are more readily used by well-organized members of regulated classes than by regulatory beneficiaries, who must overcome substantial barriers to the exercise of political power.¹⁰¹ At least in some contexts, differential access to the political process may well make judicial review of agency inaction a particularly necessary safeguard.

B. Reviewing Discretion and Usurpation of the Executive Function

Reluctance to review inaction has traditionally been based in part on a set of considerations counseling against judicial usurpation of the executive function. Indeed, it is sometimes suggested that a court engaging in judicial review of executive inaction or issuing an order compelling an agency to act would be undertaking to “take Care that the Laws be faithfully executed”¹⁰²—an executive rather than a judicial task.¹⁰³ The suggestion is based on the understanding that enforcement activity is entrusted to the execu-

the advantages and disadvantages of proposed courses of action. Second, issues involving values must be resolved in accordance with the governing statute. Sometimes that statute will require consideration of particular factors; sometimes it will exclude consideration of other factors; and sometimes it will indicate that some factors, although relevant, are of secondary importance. Third, to the extent that issues of value are to be resolved through an exercise of discretion by administrators within the confines of the statute, it is important to ensure that the relevant considerations—and the actual bases for decision—are explicitly identified, are subject to public scrutiny and review, and reflect a reasonable weighing of the relevant factors. See Sunstein, *supra* note 45, at 181-82 (collecting cases).

¹⁰⁰ The reason lies in the fact that political remedies are too crude to be a reliable basis for preventing or redressing unauthorized or arbitrary regulatory action. Cf. R. LITAN & W. NORDHAUS, *REFORMING FEDERAL REGULATION* 60-81 (1983) (discussing the imperfections of congressional and presidential control of bureaucracy).

¹⁰¹ See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1983); cf. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 49 (1982) (suggesting that legislators, concerned with reelection, will be most likely to delegate responsibility when regulation has diffuse rather than concentrated benefits).

¹⁰² U.S. CONST. art. II, § 3.

¹⁰³ See Note, *Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 *YALE L.J.* 885, 901-02 (1977); see also Allen v. Wright, 104 S. Ct. 3315, 3330 (1984) (using “take Care” clause as a basis for denying standing to claimants objecting to alleged IRS failure to deny tax-exempt status to racially discriminatory private schools).

tive, not to the courts, and that judicial involvement—in the form of a decree compelling prosecution—would violate the separation of powers. While this basic understanding is correct, the conclusion does not follow. The “take Care” clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws. If judicial involvement is based on a statutory violation by the executive, review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives.¹⁰⁴

This is not to deny that the executive has the power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe.¹⁰⁵ Congress frequently appropriates a smaller amount than would be necessary to redress all private violations of the law, in the expectation that the executive will use its discretion to allocate funds to the most pressing problems. Exercising discretion in this way is ordinarily consistent with congressional will. But there is a distinction between exercising such discretion and refusing to carry out obligations that Congress has imposed on the executive. The distinction turns, here as elsewhere, on interpretation of the substantive statute. Although there will be difficult intermediate cases, the “take Care” clause does not authorize the executive to fail to enforce those laws of which it disapproves.¹⁰⁶

Sometimes the separation-of-powers objections to review of agency inaction are supplemented with a reference to the remedial problems that may result whenever a court requires someone to act.¹⁰⁷ The executive may, for example, simply refuse; or it may decide to acquiesce in the court’s ruling by bringing an enforcement proceeding, but do so without much vigor. Any judicial remedies for such executive misconduct, it might be thought, would constitute impermissible judicial entanglement in the executive

¹⁰⁴ *Accord* *Allen v. Wright*, 104 S. Ct. 3315, 3348 (1984) (Stevens, J., dissenting) (relying on power of courts to say “what the law is”); *see also* *Nichol*, *supra* note 44.

¹⁰⁵ *See* Easterbrook, *On Not Enforcing the Law*, REGULATION, Jan.-Feb. 1983, at 14-16.

¹⁰⁶ The parallel here is to the impoundment controversy, which arose when President Nixon asserted an authority to decline to spend funds appropriated by Congress. That assertion was properly rejected. *See* Mikva & Hertz, *Impoundment of Funds—The Courts, the Congress, and the President: A Constitutional Triangle*, 69 NW. U.L. REV. 335 (1974).

¹⁰⁷ This debate has focused on the question of whether courts would be required to undertake the management of institutions whose policies they sought to reform. *Compare* Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 40-42 (1984) (arguing that granting standing in *Allen v. Wright* would have in effect required judicial management of IRS), *with* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 603-04 (1985) (denying same).

function. The principal answer to such objections is that they assume intransigence on the part of the executive in the face of a court order, an assumption that is inconsistent with the general willingness of executive officials to obey the law as it has been interpreted by the courts.¹⁰⁸ Moreover, the defendants in these cases are institutions, not individuals; the people who are assigned the task of bringing the court-ordered enforcement proceedings may well not object to them. Finally, the same objections are applicable to the wide range of cases requiring action by state officials in the last quarter-century and have no more force here than there.

In the early period of administrative law, these concerns were more forceful in light of the fact that courts had not developed techniques to review the exercise of discretion on the part of administrators. Because courts lacked methods to review discretion without usurping it, review of inaction threatened to transform courts into prosecutors. The absence of such techniques buttressed traditional separation-of-powers concerns about judicial review of agency inaction. But the modern period has seen the rise of a number of strategies by which courts might review the exercise of discretion without usurping the executive function. Courts may require explanations for decisions,¹⁰⁹ and in reviewing those explanations, they may be quite deferential. The "arbitrary and capricious" standard of review under the APA,¹¹⁰ for example, authorizes review of discretion in order to assure reasoned decision-making within the confines of a statute.¹¹¹ That standard, properly applied, does not involve usurpation of the executive function.

C. Alternative Remedies

As a historical matter, the pressure for judicial review of prosecutorial decisions was relieved by the existence of alternative remedies by which to enforce the law if the prosecutor failed to act. Indeed, the notion of prosecutorial discretion developed in large part because of the availability of private prosecution.¹¹² Moreover, common law remedies were traditionally available for

¹⁰⁸ In the school-desegregation area, for example, courts have ordered action by executive officials, generally without having to usurp executive functions. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

¹⁰⁹ *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 103 S. Ct. 2856, 2871-74 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

¹¹⁰ 5 U.S.C. § 706(2)(A) (1982).

¹¹¹ *See supra* note 99.

¹¹² *See Langbein, Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443-46 (1974).

the same harms that were redressed by criminal prosecutors.

These considerations carry much less force in the modern period. In general, affected citizens have no right to proceed directly against the private person whose conduct violates a statutory standard. The modern Court's skeptical attitude toward implied causes of action¹¹³ has guaranteed this result. Even if it is available, a private right of action is often an inadequate surrogate remedy.¹¹⁴

D. Prudential Concerns

The final consideration is that review of inaction imposes unique burdens on courts. Agencies are almost always funded at levels that prevent them from redressing all violations of the law. A decision not to act is a choice of how to allocate these limited resources. This decision turns not only on the legality of the private conduct, but also on a wide variety of managerial considerations that are not well suited to judicial review.¹¹⁵ A decision not to act may be based on competing priorities, the desire to establish favorable precedents in an orderly fashion, the reaction of the public and of relevant officials in Congress and the executive branch, and so forth. When a plaintiff alleges that an agency has acted "arbitrarily" in failing to take action in a particular case, the court must consult all of these factors in order to make a reasoned decision. The fact of resource constraints thus makes review of prosecutorial decisions different from review of ordinary administrative action.

This consideration might be buttressed with other institutional concerns. Inaction may be the result of delay in agency decisionmaking rather than evidence of a decision not to act.¹¹⁶ Again, in light of budgetary constraints, failure to act is more frequent

¹¹³ See, e.g., *Universities Research Ass'n. v. Coutu*, 450 U.S. 754 (1981) (no implied employee right of action for back wages absent administrative determination that Davis-Bacon Act applies); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-25 (1979) (no implied right of action for monetary relief where statute contains express enforcement mechanisms); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-71 (1979) (no implied right of action against accountant performing audit required by statute). *But see Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) (granting implied right of action under Title IX in part because statute passed during period when Congress would have expected Court to imply cause of action).

¹¹⁴ Cf. *Stewart & Sunstein*, *supra* note 14, at 1305, 1312-13 (arguing that private rights of action are inappropriate under some regulatory statutes).

¹¹⁵ See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (discussing "polycentric" questions not readily susceptible to judicial resolution).

¹¹⁶ The fact that there may be no decision at all raises questions of ripeness and finality. See Note, *supra* note 83, at 647 & n.131, 652-55, 683-84.

than action.¹¹⁷ Decisions not to act are likely to have been reached informally¹¹⁸ and will often be unaccompanied by a record that a court might examine to assess the legality of the agency's conduct. If judicial review were available, it might become necessary to formalize inaction decisions, a step that could have considerable costs.

These considerations do serve to distinguish action from inaction, and they must be taken into account. Most important, the breadth of the considerations that may lawfully be considered by an administrative prosecutor suggests that judicially administrable standards are less likely to be available for assessing a plaintiff's claim. Consider, for example, an allegation by a consumer that the Federal Trade Commission (FTC) acted unlawfully in failing to initiate proceedings against a particular advertiser. Suppose that the ground of the complaint is that the advertisement is deceptive and misleading within the meaning of the Federal Trade Commission Act, or indeed that it is especially so and should be a high priority for the agency. In order to assess that claim, the court must evaluate the FTC's enforcement program to see where the advertisement in question "fits" in light of competing priorities. That inquiry must be undertaken without statutory guidance. In general there is "no law to apply" to such an allegation.

The matter may be different if the private conduct at issue can be shown to be especially egregious, or if the plaintiff is able to demonstrate that inaction is based on unconstitutional or statutorily irrelevant considerations.¹¹⁹ But a generalized allegation of arbitrariness will often be an insufficient basis for judicial review.

The other institutional concerns, which stress the informal character of inaction decisions, carry less weight. The courts have developed a number of techniques by which to review informal ac-

¹¹⁷ This point raises the concern that the creation of private rights to initiate regulatory action might impose significant burdens on the federal courts. Cf. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-166 (1985) (discussing caseload explosion). But initiating litigation against the government is expensive, and experience suggests that the incremental increase in litigation would be insubstantial. See 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 9:5, at 229-35 (2d ed. 1979) (arguing that a mandatory enforcement system can be viable); Dimento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. L. 413 (1976) (examining the effect of state environmental citizen suit provisions); Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 HARV. ENV. L. REV. 23 (1985) (examining the effect of federal environmental citizen suit provisions). Of course, it is by no means clear that it would be undesirable to increase the federal caseload if the increase produces greater administrative compliance with the APA and governing substantive statutes.

¹¹⁸ "Informal" decisionmaking here means the use of methods that, while reviewable under the APA, are not subjected to special procedural requirements by the APA.

¹¹⁹ See *infra* notes 129-32, 135-40 and accompanying text.

tion,¹²⁰ so long as the various other prerequisites for review—finality, standing, ripeness, exhaustion—are satisfied. In this regard, inaction does not stand on a substantially different footing from action. While the frequently informal character of such decisions must be taken into account in conducting review, it does not justify a presumption against review.

It follows from this discussion that it is no longer possible to justify a general rule that enforcement decisions are unreviewable. To say this is hardly to say that inaction will often be found unlawful on the merits; it is not even to say that inaction is always reviewable. But it is to say that enforcement decisions should be subject to the same principles governing reviewability as are applied to other administrative decisions, formal and informal. Those general principles, it will be recalled, make the availability of review turn on an assessment of whether the statutory standards, measured against the plaintiff's allegation, furnish law that courts might apply to assess the claim.

To be sure, the distinctive features of inaction decisions—the numerous factors that must be taken into account—will mean that claims of arbitrariness are often an insufficient basis for judicial review. But claims of other sorts might well be enough to provide justiciable standards.¹²¹ In short, the application of generalized notions of prosecutorial discretion to the administrative context is often inappropriate, for the force of the considerations supporting deference to prosecutorial discretion will vary substantially with the statutory scheme and the plaintiff's allegation. The concept of prosecutorial discretion should, in this light, be understood as a metaphor that tends to conceal the underlying reasons for and against review in particular contexts.

These considerations suggest that the *Chaney* Court's reasoning was unpersuasive insofar as it indicated a general rule that inaction ought to be treated differently from other agency decisions. The "take Care" clause does not justify special judicial deference if the administrator's failure to act is in violation of duly enacted laws. The analogy to the discretion of the criminal prosecutor is largely unavailing. The fact that inaction does not appear "coercive" is also an unpersuasive distinction; unlawful governmental failure to act can be as harmful as unlawful action and is equally

¹²⁰ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (requiring Secretary of Transportation to provide statement of reasons for informal decision in order to establish basis for judicial review).

¹²¹ See *infra* notes 123-55 and accompanying text.

subject to judicial review under APA standards. And while inaction may not involve traditional property or liberty interests, the existence of a constitutionally protected interest is not a necessary predicate for the invocation of judicial review.

Of course, failure to act may be based on limited prosecutorial resources, and that factor provides an important consideration in evaluating claims of unlawful agency inaction. But the problem of limited resources does not justify a broad rule immunizing inaction from judicial review. Whether these institutional concerns carry force depends, as always, on the relationship between the statutory standard and the plaintiff's allegation. For example, an allegation that the FDA had failed to act because of a bribe from state officials seeking to use the drugs in question to administer the death penalty would be reviewable¹²²—no matter how many competing priorities one could find before the agency, and no matter how sparse the record.

IV. THE LIMITS OF *Chaney*: UNANSWERED QUESTIONS

It would probably be a mistake to read *Chaney* as establishing a general rule of nonreviewability for enforcement decisions. The opinion is filled with more than the usual number of disclaimers. The Court expressly puts to one side the following cases: (1) review of a refusal to undertake rulemaking;¹²³ (2) inaction based on a conclusion that statutory jurisdiction is lacking;¹²⁴ (3) cases in which an “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities”;¹²⁵ (4) refusal to enforce properly adopted agency rules;¹²⁶ (5) nonenforcement that violates constitutional rights;¹²⁷ and—the catch-all category—(6) cases in which the governing substantive statute sets priorities or circumscribes “an agency’s power to discriminate among issues or cases it will pursue.”¹²⁸ The breadth of the decision will depend on how cases falling in these categories are treated, and how large the categories are

¹²² Cf. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-250 (1980) (“A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”).

¹²³ 105 S. Ct. at 1652 n.2.

¹²⁴ *Id.* at 1656 n.4.

¹²⁵ *Id.* (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

¹²⁶ 105 S. Ct. at 1658.

¹²⁷ *Id.* at 1659.

¹²⁸ *Id.* at 1657.

themselves said to be.

Chaney thus leaves unanswered a number of questions. The answers to those questions will determine the fate of the private right to initiate administrative proceedings. This section discusses the various categories left open in *Chaney*, in descending order of the strength of the case for review of inaction.

A. Inaction Based on Constitutionally Impermissible Factors

If agency inaction is based on constitutionally impermissible factors, such as race or exercise of first amendment rights, there is "law to apply" and the failure to act, or selective action, is reviewable.¹²⁹ Suppose, for example, that a plaintiff contends that an agency has failed to bring an enforcement proceeding because the potential defendants are white, or because the defendants were willing to waive their right to free speech in exchange for immunity from prosecution. In such cases, there are judicially administrable standards by which to evaluate the plaintiff's allegation; the Constitution furnishes the relevant constraints.¹³⁰ A case decided the day before *Chaney* reflects the same point by subjecting the discretion of criminal prosecutors to constitutional constraints.¹³¹ The remedial issue may turn out to be troublesome,¹³² but the issue of reviewability is not.

B. Inaction Based on Asserted Absence of Statutory Jurisdiction

In a case decided over two decades ago, the Supreme Court made clear that review is generally available when an agency's failure to act depends on a conclusion that it lacks jurisdiction over a particular class of cases.¹³³ The underlying reason is clear and

¹²⁹ The APA requires reviewing courts to set aside agency actions found to be "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B) (1982).

¹³⁰ Cf. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 301 (1943) (indicating in dictum that constitutional questions are exceptions to rule that agency decisions are unreviewable); *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1338-39 (5th Cir. 1983) (same), *cert. denied*, 104 S. Ct. 2385 (1984); *United States v. Feaster*, 410 F.2d 1354, 1366 (5th Cir. 1969) (same); *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949) (district court has jurisdiction to review NLRB certification decision if plaintiff raises constitutional question that is "not transparently frivolous").

¹³¹ See *Wayte v. United States*, 105 S. Ct. 1524, 1531 (1985) (subjecting selective prosecution of vocal draft resisters to review for first and fifth amendment violations).

¹³² The problem arises from the awkwardness of one possible remedy—compelling prosecution. See *supra* notes 105-11 and accompanying text.

¹³³ *Office Employees Int'l Union Local 11 v. NLRB*, 353 U.S. 313, 318-20 (1957); see also *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1339-40 (5th Cir. 1983) (court can review agency methods of enforcement where Congress determined how the rights it created should

straightforward. Assume, for example, that the FDA had declined to act in *Chaney* on the sole ground that the governing substantive statute did not authorize the FDA to regulate the unapproved use of approved drugs. If the plaintiffs challenged that jurisdictional conclusion, the court could review the conclusion on the basis of "law"—that is, the governing statute. Allocation of scarce prosecutorial resources is not an issue—even if the agency may decide, after the issue of statutory jurisdiction has been resolved, not to bring enforcement proceedings notwithstanding its power to do so.¹³⁴ The considerations invoked in *Chaney* are thus inapplicable to questions of statutory jurisdiction. This conclusion follows naturally from the Court's statement that review of inaction is available when Congress has imposed constraints on enforcement discretion.

C. Inaction Based on Statutorily Irrelevant Factors or Otherwise in Violation of Statutory Constraints on Enforcement Discretion

Suppose a plaintiff alleges that agency inaction is based on a factor that is not relevant under the governing statute. For example, the claim may be that nonenforcement resulted from a bribe¹³⁵ or, to take a less extreme case, that an agency decided not to act because of the costs of regulation in a case in which costs are not a relevant consideration under the statute.¹³⁶ The most important exception in *Chaney* becomes relevant here. It will be recalled that the Court endorsed review of agency enforcement decisions when the governing statute "provided guidelines for the agency to follow in exercising its enforcement powers."¹³⁷ Whenever a plaintiff can allege that statutorily irrelevant factors have entered into a decision not to act, there are by hypothesis such guidelines to control the exercise of prosecutorial discretion.

This understanding captures a large number of the cases that have reviewed agency inaction before *Chaney*.¹³⁸ Indeed, this is the ground on which the *Chaney* Court distinguished and preserved

be enforced), *cert. denied*, 104 S. Ct. 2385 (1984).

¹³⁴ That there may be nonjurisdictional reasons for failing to act is not relevant here. Under *SEC v. Chenery Corp.*, 318 U.S. 80, 92-94 (1943), a court may not uphold an agency decision on grounds not articulated by the agency.

¹³⁵ See *supra* note 122.

¹³⁶ See, e.g., *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980) (prohibiting EPA from considering costs in setting lead standards under Clean Air Act).

¹³⁷ 105 S. Ct. at 1656.

¹³⁸ See *supra* notes 2-4.

Dunlop v. Bachowski.¹³⁹ The same conclusion is appropriate whenever the plaintiff has alleged that irrelevant factors have influenced the decision¹⁴⁰ or that inaction is inconsistent with statutory constraints on enforcement discretion.

D. "Abdication" of Statutory Duty or a "Pattern" of Nonenforcement

In a number of cases in recent years, the courts have reviewed claims that agencies have abdicated their statutory obligations by failing to undertake enforcement action in a substantial category of cases. The most celebrated of these decisions, *Adams v. Richardson*,¹⁴¹ involved an alleged failure to enforce Title VI of the Civil Rights Act of 1964. According to the court, abdication of authority to enforce the statute was subject to judicial review. *Adams* was cited with apparent approval in *Chaney*.¹⁴²

The question remains why a "pattern" of nonenforcement, or "abdication" of statutory duty, should be treated differently from an isolated decision not to act. At least some of the factors referred to by the *Chaney* Court apply in both contexts. But the difference lies in a differing assessment of congressional intent, and thus of available "law to apply," in the two categories of cases. For example, if an agency announces that it will no longer enforce a particular statute—to take an extreme case—it is not difficult to conclude, at least as a general rule, that this decision is contrary to the will of the legislature that enacted the statute. Such a decision raises the possibility that the executive's inaction is based on its underlying disagreement with the goals of the statute and thus on executive usurpation of the legislative function.¹⁴³ With an isolated fail-

¹³⁹ See *supra* note 65 and accompanying text.

¹⁴⁰ This conclusion assumes that the agency has made some decision not to act. If there is no "decision," judicial relief should generally be unavailable in the absence of statutory requirements for action. Such requirements may take the form of statutory deadlines, which render delay in enforcement actionable. See, e.g., Clean Air Act, 42 U.S.C. § 7408(a)(2) (1982) (setting deadline for EPA issuance of air quality criteria). The use of deadlines is a familiar example of legislative action creating an active role for judicial review.

¹⁴¹ 480 F.2d 1159 (D.C. Cir. 1973). The *Adams* litigation has had a complex history. See Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407, 423-25 (1978). For the latest episode, see *Women's Equity Action League v. Bell*, 743 F.2d 42 (D.C. Cir. 1984) (remanding for consideration of issue of standing, raised by the court sua sponte, in light of *Allen v. Wright*, 104 S. Ct. 3315 (1984)).

¹⁴² 105 S. Ct. at 1656 n.4 (noting that the governing statute might constrain discretion in such a case).

¹⁴³ Traditions of prosecutorial discretion have served, in the criminal context, as a safeguard against enforcement of outmoded or unpopular statutory prohibitions. Congress or a state legislature need not repeal such proscriptions; in the enforcement process, prosecutors

ure to act, it is difficult to draw that conclusion.

While the principal characteristic of a “pattern” of nonenforcement or “abdication” is a refusal to act in a large number of cases, an approach based on sheer magnitude is incomplete. If the agency’s jurisdiction is extensive, a refusal to act in a large number of cases might be the result of legitimate processes of setting priorities in light of the pertinent statutory standards. To conclude that abdication has occurred, it may therefore be necessary to find that the refusal to act applies in a large number of cases weighed against the total jurisdiction of the agency under the relevant statute.

Of course, it will not always be easy to tell whether a particular case falls in the category of “abdication” or of isolated refusal to act. The plaintiffs in *Chaney* might have argued that their claims belonged to the former category. The argument would be unavailing, however, in light of the breadth of the enforcement opportunities before the FDA—opportunities of which the inmates’ claim was but a small part. Of course, hard intermediate cases will inevitably arise, but here as elsewhere, the existence of such cases is not a reason to abandon an otherwise sensible distinction.

E. Refusal to Enforce Agency Regulations

A refusal to enforce an agency regulation is different from a refusal to enforce a statute in the important sense that in the former context, the principal basis for judicial intervention appears unavailable. That basis, as we have seen, is agency action—or inaction—that is inconsistent with “law,” understood to mean the statute that Congress enacted. When failure to act violates a duty imposed on the executive branch by Congress, separation-of-powers concerns counsel in favor of, not against, an aggressive judicial role.

The matter is different when an agency complies with the will of Congress but refuses to enforce its own voluntarily adopted regulation. To be sure, there is a general principle requiring agencies

may achieve most of the benefits of a repeal through refusal to enforce. Recognition of a private right to initiate administrative action might remove this safeguard and intrude on desirable prosecutorial flexibility. To a large extent, however, the executive’s authority to allocate limited prosecutorial resources to the most egregious violations should ensure that most inaction under obsolescent statutes will survive review. *See supra* notes 115-18 and accompanying text (discussing resource limitations as a basis for deference). Moreover, in some contexts the appropriate remedy for obsolescence is repeal by the legislature. And in any event, the dangers of effective repeal of statutes through executive inaction outweigh the risks produced by diminished flexibility.

to follow their regulations.¹⁴⁴ If a regulation evinces an intention to require an agency to act or otherwise to confine its enforcement discretion, this principle may in most instances be invoked by private parties.¹⁴⁵ The *Chaney* Court left open the possibility that a regulation that obligates an agency to act might provide “law to apply” in the same way as does a statute.¹⁴⁶

Nonetheless, the fact that a regulation indicates that certain private conduct is unlawful does not, in and of itself, impose on the agency any duty of enforcement. Such a regulation does not purport to require the agency to act but only sets out standards to guide regulated class members and regulatory beneficiaries. A failure to enforce such a regulation should not be grounds for judicial intervention. In short, the difference is between a regulation that purports to bind an agency to undertake certain enforcement actions and a regulation that merely describes what conduct is unlawful under a statutory program.

F. Failure to Initiate Rulemaking

In an important opinion by Judge McGowan, the Court of Appeals for the District of Columbia Circuit granted judicial review of a decision not to promulgate a rule.¹⁴⁷ The court emphasized that such review should be unusually deferential,¹⁴⁸ but said that in certain cases decisions not to issue rules might be reversed. A later decision applied this reasoning to allow review of failure to initiate rulemaking proceedings.¹⁴⁹ These decisions are thrown into question by *Chaney*. Many of the considerations that justify refusal to

¹⁴⁴ See, e.g., *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 389 (1932) (regulatory agency may not ignore its own quasi-legislative pronouncements); *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1974) (Watergate special-prosecutor regulation has force and effect of law and binds its issuer); Note, *Violation by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974) (examining interests supporting requirement that agencies observe their own rules).

¹⁴⁵ Once a rule is found to have been made pursuant to a proper statutory authorization, as will be the case for most rules, the question is whether the rule creates judicially enforceable private rights. See, e.g., *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976); *Brown v. Lynn*, 392 F. Supp. 559, 562 (N.D. Ill. 1978). But cf. *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980) (doubting whether executive order may deny private rights of action and thus make itself unenforceable).

¹⁴⁶ See 105 S. Ct. at 1658.

¹⁴⁷ *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979).

¹⁴⁸ *Id.* at 1047 (such cases amenable to “at least a minimal level of judicial scrutiny”).

¹⁴⁹ *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981) (availability of review acknowledged, but its scope said to be necessarily narrow).

review in that case are applicable in cases involving a refusal to issue a rule or to initiate rulemaking proceedings.

There are two grounds on which one might contend that judicial review should be available for refusals to initiate rulemaking. The first would rely on the legislative history of the APA. The Senate committee report said that the "refusal of an agency to grant the petition [for rulemaking] or to hold rulemaking proceedings . . . would not per se be subject to judicial reversal."¹⁵⁰ This language has been read to mean that generally such refusals would be subject to review and at least sometimes to reversal.¹⁵¹ But the language probably cannot bear that weight. It is an isolated statement in the legislative history; it is contradicted by the influential report of the Attorney General on the APA;¹⁵² and, perhaps most important, it is too ambiguous to support a general rule of reviewability.

The second ground for seeking review of a decision to deny rulemaking petitions is more plausible. A refusal to initiate rulemaking should be reviewable if there is "law to apply" in light of the allegation measured against the substantive statutory standard. Here as elsewhere, the reviewability of inaction will turn on whether the statute provides constraints on the agency's failure to act in the particular circumstances. Significantly, a refusal to engage in rulemaking is likely to affect a broader range of people than is an isolated enforcement decision; such a refusal is therefore more likely to implicate the concerns associated with a pattern of nonenforcement.

A recent example is provided by *Community Nutrition Institute v. Young*.¹⁵³ The case involved an effort to require the FDA to ban the use of aflatoxins, carcinogenic substances. The relevant statute reads:

Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe . . . ; but when such substance is so required or cannot be so avoided, the Secretary shall pro-

¹⁵⁰ ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 201 (1946) [hereinafter cited as LEGISLATIVE HISTORY]), quoted in *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 n.14 (D.C. Cir. 1979) (emphasis added by the court).

¹⁵¹ See *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 n.14 (D.C. Cir. 1979).

¹⁵² See LEGISLATIVE HISTORY, *supra* note 150, at 229-30.

¹⁵³ 757 F.2d 354 (D.C. Cir. 1985).

mulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe¹⁵⁴

According to the court, the word “shall” was indicative of a congressional instruction, established as well by the statutory structure and history, to establish a tolerance level for foods with unavoidable poisonous or deleterious substances.¹⁵⁵ The FDA was therefore required to issue the regulation in question.

Whether or not the court’s interpretation of the statute was correct, its approach is entirely consistent with *Chaney* and suggests a more general principle. Some statutes may require agencies to undertake enforcement action, including rulemaking, in certain circumstances. When a court vindicates such requirements, it is acting consistently with the APA.

G. Generalized Arbitrariness

An allegation that an agency has acted arbitrarily because it has failed to take action against a particular violation of the governing statute presents the weakest claim for reviewability. Such cases implicate all the concerns emphasized by the *Chaney* Court about judicial involvement in the allocation of scarce prosecutorial resources.

The matter may be different if the plaintiff is able to make a persuasive showing, in light of the statutory standard, that the violation in question poses an especially powerful case for regulatory action. Assume, for example, that a plaintiff can demonstrate that a particular substance causes special risks to life and health and that the costs of inaction are substantial in terms of both.¹⁵⁶ Such a demonstration may be sufficient to justify review of enforcement decisions, for the situation has features in common both with inaction in violation of statutory standards and with inaction that amounts to abdication of statutory authority. Cases in which re-

¹⁵⁴ 21 U.S.C. § 346 (1982).

¹⁵⁵ 757 F.2d at 357-58. At the same time, a statute that is phrased in permissive terms—stating, for example, than an agency “may” act in a category of cases—should not immunize inaction from review. In some circumstances, inaction may be based on factors that are impermissible under even “permissive” statutes. Decisions resting on impermissible factors are unlawful even if the agency has discretion not to act when the proper factors are taken into account.

¹⁵⁶ *See, e.g.,* *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594-95 (D.C. Cir. 1971) (plaintiffs utilized EPA findings of dangerousness of DDT as basis for review of EPA inaction).

view is justified under this rationale should, however, be relatively rare in light of the difficulty of assessing the agency's enforcement program that such review would entail.

CONCLUSION

The trend in the direction of judicial review of agency inaction is a salutary one. That trend is in keeping with the general movement of modern public law, which has increasingly abandoned the assumption that reviewing courts should act on the basis of a presumption against government regulation. The rise of the modern regulatory state results in large part from an understanding that government "inaction" is itself a decision and may have serious adverse consequences for affected citizens. It should not be surprising to find that judicial doctrines have moved in the same direction.

In the modern era, the judicial role is to ensure the identification and implementation of statutory values and to guard against factional power over the regulatory process. That role applies regardless of whether the agency is increasing or decreasing the scope of regulation. Judicial review is, to be sure, only one of a number of mechanisms for controlling agency performance, and it has serious disadvantages. Exclusive reliance must not be placed on the courts.¹⁵⁷ But judicial review has served as an important source of constraints on administrative action. Whatever the defects of judicial review, they do not justify a one-way ratchet against regulation, which may skew regulatory processes in directions inconsistent with the governing statute.

Notwithstanding these considerations, *Heckler v. Chaney*, the Court's first major encounter with the problem in the last decade, presented a weak case for review. The plaintiff's allegation, measured against the statutory standard, furnished little basis on which to assess the legality of the agency's decision not to act. But the *Chaney* decision, in keeping with the general direction of lower court cases over the past decade, made clear that judicial review of agency inaction is available when the agency's enforcement decision violates statutory constraints. Over time, one may expect that understanding to become increasingly prominent, as the problem of agency inaction is assimilated to the rest of the law governing judicial review of the conduct of administrative agencies.

¹⁵⁷ See *supra* note 18.

Attachment 3

pursuant to Local Civ. Rule 7.05(C)(2)

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

Accommodation of Religion: An Update and a Response to the Critics

Michael W. McConnell*

Introduction

For decades conflicts over the Religion Clauses of the First Amendment were mired in slogans and multipart tests that could be manipulated to reach almost any result. More recently, the Supreme Court has moved to bring greater clarity (leave for the moment whether it has brought greater wisdom) to this confusing area of the law. This movement has been explicit in the case of the Free Exercise Clause, where the Court has jettisoned balancing and adopted a position of formal neutrality toward religion.¹ Currently, under the Free Exercise Clause, the government has met its obligations if it has pursued its secular policies without reference or regard to religion—even if the exercise of a religion is thereby seriously disadvantaged, or even destroyed.² This movement has been only implicit in the case of the Establishment Clause, where the Court still purports to follow its ambiguous three-part “*Lemon* test.”³ But it is increasingly evident that the *Lemon* test is largely

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1. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

2. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (upholding government action that the Court admitted would “have devastating effects on” a minority religion).

3. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” (citations omitted)).

irrelevant or indeterminate when applied to most serious establishment issues. A new, much less ambiguous, test has effectively replaced *Lemon*, though the Court has continued to be coy about the change of doctrine.⁴

The central questions under the Religion Clauses have come to be framed in terms of “accommodation” of religion, which even critics now call “the central motif of religion clause thought.”⁵ Accommodation refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person’s or an institution’s religion. The key difference between legitimate accommodation and impermissible “establishment” is that the former merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government’s action, while the latter creates an incentive or inducement (in the strong form, a compulsion) to adopt that practice or conviction. Within the term accommodation, I include both constitutionally compelled, or “free exercise” accommodations (those required by the Free Exercise Clause), and legislative, or “discretionary” accommodations (those not required by the Free Exercise Clause but nonetheless permitted by the Establishment Clause).⁶

Accommodations can take the form of either negative rights or positive rights, though the circumstances surrounding each are distinct. Negative rights arise whenever government action threatens to interfere with the exercise of religion. Accommodation, in this context, consists of exemption: it is the right to be left alone. Examples include the freedom of churches to reconfigure their places of worship without interference from landmark commissions, or the freedom of a member of the Native American Church to ingest peyote at a religious ceremony. Positive rights arise in two contexts: (1) when the government has extended benefits or services to parallel secular concerns, and (2) when the government has taken other action that puts religion at a disadvantage. Examples of the first context include the extension of jobless benefits to persons unemployed for religious reasons when the government extends comparable benefits to persons unemployed for various secular reasons,⁷

4. See *infra* notes 35-96 and accompanying text.

5. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 556 (1991).

6. This terminology differs from that used by Professor Lupu in *Reconstructing the Establishment Clause*. *Id.* Lupu confines the term “accommodation” to accommodations that “are not required by the Free Exercise Clause or any other provision of the Constitution.” *Id.* at 559; see also Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992). This seems an unnecessary and inconvenient limitation on the ordinary usage of the term. It is more common to treat accommodation as comprising both “mandatory” or “constitutionally compelled” accommodations (also sometimes called “free exercise accommodations”) and “legislative” or “discretionary” accommodations. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-5, at 1169 (2d ed. 1988) (organizing the discussion according to “Forbidden, Permissible, and Required Accommodation”). Nothing of substance turns on the difference in terminology.

7. As explained in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (quoting *Bowen v. Roy*, 476 U.S. 693, 707 n.17 (1986) (Stevens, J., concurring in part)), for a state to regard “‘religious claims less favorably than other claims’” is to subject “religious observers [to] unequal treatment.”

and protection of individuals from private discrimination on the basis of religion when it protects individuals from private discrimination on various secular grounds. Examples of the second context include providing released time programs or moments of silence when compulsory schooling disrupts what would otherwise be opportunities for private religious practice,⁸ or providing military chaplains when military service takes soldiers away from their home churches. As in other fields of constitutional law,⁹ there is no legitimate claim for accommodation when the obstacles to religious exercise are not caused by the government and the failure of the government to accommodate would not constitute unequal treatment.¹⁰

I must stress at the outset that this Article's conception of accommodation does *not* include government action that acknowledges or expresses the prevailing religious sentiments of the community, such as the display of a religious symbol on public property or the delivery of a prayer at public ceremonial events. Such acknowledgements do *not* leave the decision about religious practice to the individual or group, but rather serve as a social or collective expression of religious ideas. Some Justices of the Supreme Court have used the term accommodation to describe these symbolic actions,¹¹ but the arguments in this Article have no application to them. Whether government expression of religious sentiments is legitimate is beyond the scope of this Article.¹²

The issue of accommodation arises under both Religion Clauses. Under the Free Exercise Clause, the question is when (or whether) accommodations are constitutionally compelled. Under the Establishment Clause, the question is when (or whether) accommodations are constitutionally permitted. The Supreme Court's current position is that accommodations are not required under the Free Exercise Clause (with minor exceptions), but are permissible under the Establishment Clause. The accommodationist position, which I defend here, holds that accommodations are sometimes required and,

8. See *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (striking down moment of silence law, but suggesting that some such provisions, enacted with proper intent, would be constitutional); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding released time program).

9. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (rejecting the claim that the Fourteenth Amendment imposes an affirmative obligation on the government to protect a citizen's interests from invasion by private parties).

10. I do not claim that these lines are clear or easily administered, but the analysis is comparable to that governing positive rights in other constitutional contexts. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

11. See *County of Allegheny v. ACLU*, 492 U.S. 573, 659, 663, 679 (1989) (Kennedy, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

12. I discuss the "symbolic" issues in Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 187-94 (1992).

within rigorous limitations defined below, are always permitted. That does not mean, of course, that every benefit to religion masquerading as an accommodation is constitutional, but it does mean that the principle of accommodation, when properly applied, is consistent with the requirements of the Religion Clauses. Thus, I oppose the Court's current interpretation of the Free Exercise Clause and defend the Court's emerging jurisprudence of accommodation under the Establishment Clause (with some qualifications and modifications).¹³

This Article has two purposes. First, it explains and discusses the Supreme Court's doctrinal framework for analyzing cases involving accommodation of religion as it has developed since 1985.¹⁴ Second, it responds to the principal academic arguments against accommodation that have appeared in recent years. Before turning to those issues, I briefly restate the affirmative case for accommodation.

I. A Brief Restatement of the Affirmative Case for Accommodation

Accommodations of religion are government policies that take religion specifically into account not for the purpose of promoting the government's own favored form of religion, but of allowing individuals and groups to exercise their religion—whatever it may be—without hindrance. As Justice Brennan has explained, the “government [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.”¹⁵

Accommodation must be distinguished from the establishment of religion, which is government action designed to promote, channel, or direct religious exercise in socially-preferred ways. The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. The government simply facilitates (“accommodates”) the decision of the individual or group; it does not induce or direct, by means of either incentives or compulsion. The hallmark of establishment is that the government uses its authority and resources to support one religion over another, or religion over nonreligion. Much of the argument over accommodation is based on a failure to perceive the fundamental difference between these two postures toward religion.

13. This does not mean, of course, that I agree with other aspects of the Court's establishment jurisprudence. For a critical appraisal of current doctrine, see *id.*

14. This will provide an opportunity for me to revisit some of the issues raised in Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, in light of recent opinions.

15. *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in judgment) (footnote omitted).

Accommodation must also be distinguished from the idea of “formal neutrality”—the view that the government should base public policy solely on secular considerations, without regard to the religious consequences of its actions. The debate between accommodation and formal neutrality comes down to a question of means: Is the freedom of religion best achieved when the government is conscious of the effects of its action on the various religious practices of its people, and seeks to minimize interferences with those practices? Or is it best advanced through a policy of “religion blindness”—keeping government aloof from religious practices and issues? An accommodationist believes that it is good public policy, and sometimes constitutionally required, for the state to make conscious and deliberate efforts to avoid interference with religious freedom (even though this requires the government to make sometimes difficult and controversial judgments about the nature and strength of religious claims). An opponent of accommodation believes that it is good public policy, and indeed constitutionally required, for the government to avoid religion-specific policy even at the cost of inhibiting religious exercise.

Two simple examples will make the difference between accommodation and formal neutrality clear. If the government were to pass a law prohibiting any person facing personal bankruptcy from making contributions to a church, the law would be an infringement on the right of free exercise under both approaches because it would single out religion for burdensome treatment not visited upon other interests (bankrupts are permitted to make other contributions and expenditures).¹⁶ If the government were to outlaw all consumption of alcoholic beverages, thereby making religious ceremonials in some Christian and Jewish traditions unlawful, this action would constitute a free exercise violation under the accommodationist view, because its effect would be to outlaw a religious practice. But it would not constitute a free exercise violation under the formal neutrality approach, because the law is generally applicable and was not passed for the purpose of suppressing religion. There are countless examples of government actions of this second sort and very few of the first. The difference between the two views is the difference between a Free Exercise Clause that is a major restraining device on government action that affects religious practice and a Free Exercise Clause that will rarely have practical application.

I have made the affirmative arguments for accommodations elsewhere and will present only a summary here.¹⁷ The affirmative case

16. Whether there is a sufficient governmental justification is another question.

17. For fuller treatment, see McConnell, *supra* note 14; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*]; Michael W. McConnell, *Neutrality Under The Religion*

is based on several related propositions.

First, the accommodationist interpretation is most consistent with the language of the First Amendment.¹⁸ The Religion Clauses contain two parallel provisions, both specifically directed at “religion.” The government may not “establish”¹⁹ religion and it may not “prohibit” religion. Taken together, the Religion Clauses can be read most plausibly as warding off two equal and opposite threats to religious freedom—government action that promotes the majority’s favored brand of religion and government action that impedes religious practices not favored by the majority.²⁰ The requirements are substantive, not formal, because the concern of the Religion Clauses is with the preservation of the autonomy of religious life, not (just) with the process value of ensuring that government does not act on the basis of religious bias.²¹

Terms like “establish” and “prohibit” can be interpreted narrowly, as applying only to direct government compulsion, or broadly, as applying also to disadvantageous treatment in the allocation of government “benefits.” In keeping with the expansion of constitutional rights under the rubric of the “unconstitutional conditions doctrine,” which I consider necessary to preserve the conditions of personal liberty under the circumstances of the welfare-regulatory state,²² I endorse the broad interpretation. The government “establishes” or “prohibits” religion when it structures government benefits in such a way as to create incentives or disincentives to religious practice, or to redistribute wealth along lines defined by religious practice, just as it does through the requirements and prohibitions of criminal law.²³

Clauses, 81 Nw. U. L. Rev. 146 (1986) [hereinafter McConnell, *Neutrality*]. On the historical issues, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*].

18. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

19. The text states the “Congress” may make no law “respecting an establishment” of religion, which meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they then existed in the various states. After the last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this “federalism” aspect of the Amendment has lost its significance, and the Clause can be read as forbidding the government to establish religion. For arguments that the federalism aspect of the Establishment Clause should be reinvigorated, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-62 (1991); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990); see also Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479-92 (1991) (arguing that the Court failed to appreciate the profound implications of incorporating the Religion Clauses against the states).

20. I use the expression “majority” to signify elements within the population who enjoy political power, whether or not they are a numerical majority.

21. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); McConnell, *Neutrality*, *supra* note 17.

22. For a fuller explanation, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1046-50 (1991) [hereinafter McConnell, *Selective Funding*]; Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989) [hereinafter McConnell, *Unconstitutional Conditions*].

23. See McConnell, *supra* note 12.

The alternative construction of the Religion Clauses—that they guarantee formal, not substantive, neutrality—is considerably less probable as a linguistic proposition. The command of the Religion Clauses, according to this view, is that government may not “single out” religion for special treatment, whether favorable or unfavorable.²⁴ This treats the Religion Clauses as specialized equal protection provisions (interpreted according to intent rather than effects), rather than as substantive protections for a particular liberty. It interprets the Religion Clauses as allowing the government to do whatever it wishes to or for religion, provided it does the same to or for comparable secular entities and beliefs. If the government prohibits all alcoholic consumption by minors, for example, it can prohibit minors from taking part in communion; if government prohibits all employers from discriminating on the basis of sex, it can put an end to the all-male priesthood. Paradoxically, this view would make the Religion Clauses violate the Religion Clauses, since the Religion Clauses “single out” religion by name for special protections.²⁵ There would have to be powerful reasons for adopting so unlikely a construction of the words.

Second, the accommodationist position also best achieves the purposes of the First Amendment. Formal neutrality confines the protection of the Free Exercise Clause to persecution or overt discrimination against religion. But there is no reason to believe that the First Amendment conception of religious freedom is so narrow. Just as the Establishment Clause is more than a ban on a compulsory official church, the Free Exercise Clause is more than a ban on the Inquisition. One of the few comments in the First Congress on what would become the Free Exercise Clause was Daniel Carroll’s remark that the “rights of conscience . . . will little bear the gentlest touch of governmental hand”—not an apt description of a provision

24. See PHILIP B. KURLAND, *RELIGION AND THE LAW* 18 (1962).

25. The drafting history of the Free Exercise Clause further supports the accommodationist interpretation. Madison’s original draft provided that “[t]he civil rights of none shall be abridged on account of religious belief or worship,” 1 *ANNALS OF CONGRESS* 434 (Joseph Gales ed., Washington, Gales & Seaton, 1834) (June 8, 1789), and that the “full and equal rights of conscience” should not “be in any manner, nor on any pretext, infringed,” 1 *id.* The first part speaks in terms of formal neutrality; civil rights may not be abridged “on account of religious belief or worship.” This is classic nondiscrimination language. The second part is accommodationist; it prohibits the infringement of conscience “on any pretext”—that is, for any reason. Legislative motive or intent is irrelevant; the effect is all that matters. The select committee abbreviated Madison’s draft to read: “nor shall the equal rights of conscience be infringed.” 1 *id.* at 757 (Aug. 15, 1789). In effect, the select committee dropped the first part of Madison’s draft (the nondiscrimination language) and kept the second. If the framers had been concerned about formal neutrality rather than the substantive liberty, they would have retained the first part and dropped the second (Later, the text was further changed to substitute the “free exercise of religion” for the “equal rights of conscience;” but that change does not seem to affect this point.).

confined to persecution or deliberate discrimination.²⁶ The principle underlying the First Amendment is that the freedom to carry out one's duties to God is an inalienable right,²⁷ not one dependent on the grace of the legislature.²⁸

Accomplishment of this purpose requires more than the "religion blindness" prescribed by advocates of formal neutrality. Government is too pervasive—it touches too much—for a strategy of formal neutrality to work. When the sphere of government action is small, it is possible for government to ignore religion in most cases. The "watchman state" rarely imposes burdens on religious practice, and when it does so, the government interest will almost always be compelling. But when the government extends its reach to a wide variety of social objectives, including the direct regulation of churches (through zoning laws, employment laws, taxes, discrimination laws, licensing requirements, educational accreditation laws, and other "generally applicable" laws), the conflicts with religious practice become frequent and intense. Laws that are appropriate for secular entities are sometimes inappropriate for religious entities—at least if we believe that religious entities have a protected right to define and carry out their religious missions in accordance with their various religious beliefs. Under conditions of the modern welfare-regulatory state, benign neglect ceases to be benign.

The same can be true of other preferred freedoms, such as the freedoms of speech or press, but the problem is most acute for the free exercise of religion. Speech can be threatened by generally applicable laws; but in most instances, there are alternative channels of communication that will allow the speaker to convey his message. O'Brien may have been forbidden to burn his draft card, but he could still denounce the draft.²⁹ By contrast, when a member of the Native American Church is forbidden to ingest peyote, he has no alternative means for practicing his religion. Generally applicable laws can have a far more serious effect on religious freedom than on any other constitutional right.

If we want to have both an activist state and religious freedom, it is not enough to say that religious institutions and religiously motivated individuals must be treated the same way as comparable secular institutions and individuals. The effect of applying secular norms to religious entities is simply not the same as applying those norms to secular entities. The government must make special provision to preserve a degree of independence for religion, unless religion is to become—like secular entities—subject to pervasive

26. 1 *id.* at 730 (Aug. 15, 1789).

27. On the recognition of religious freedom as an inalienable right, see McConnell, *Origins*, *supra* note 17, at 1456 & n.238.

28. Of course, the right is limited by the rights of others, including the public right of peace and good order, as was well recognized at the time. McConnell, *Origins*, *supra* note 17, at 1461-66. This necessary limitation, however, does not detract from the fact that the free exercise of religion was envisioned as a substantive right and not merely a privilege against discriminatory legislation.

29. See *United States v. O'Brien*, 391 U.S. 367 (1968).

regulation by majoritarian institutions. Formal neutrality would deny this special status.

In its weak form, the doctrine of formal neutrality leaves protection of religious freedom to legislative grace. In its strong form, formal neutrality imposes a requirement of mandatory indifference to the impact of government action on the religious lives of the people. The objectives of the Religion Clauses cannot fully be achieved in this way. It is good to protect against persecution and overt discrimination; but under the conditions of the welfare-regulatory state, it is necessary to do more—to take deliberate action to preserve the autonomy of religious life.

Third, the accommodationist interpretation is particularly necessary to protect adherents of minority religions from the inevitable effects of majoritarianism, which include ignorance and indifference, as well as overt hostility. Because laws in a democratic republic inevitably are based on the presuppositions of the majority, they will not infrequently conflict with the religious scruples of those holding different world views, even in the absence of a deliberate intent to interfere with religious practice. Sometimes this effect is unavoidable as a practical matter, since some laws are so necessary to the common good that exceptions would be intolerable. But in other instances the injury to religious conscience is so great, and the advancement of public purposes so small, that only indifference or hostility could explain a refusal to make exemptions. Because of the pluralist traditions of this country, legislators and executive officials frequently are willing to make such exemptions when the need is brought to their attention. But this may not be the case when the religious position is either unknown at the time of enactment or is for some reason unpopular. A constitutional interpretation that *allows* accommodations thus prevents needless injury to the religious consciences of those who can attract the solicitude of the legislature. A constitutional interpretation that *requires* accommodations extends this treatment to religious faiths less able to protect themselves in the political arena.

Fourth, the historical record amply demonstrates that, in the years preceding adoption of the First Amendment, the colonies, states, and Continental Congress enacted religious exemptions and viewed them as necessary for protection of the rights of conscience. There is no substantial evidence that anyone at the time of the Framing viewed such accommodations as illegitimate, in principle. At a minimum, the message of history is that religious accommodations are permissible and desirable, even if not constitutionally compelled.³⁰

30. For a summary of the evidence, see McConnell, *Origins*, *supra* note 17, at 1466-73. Even opponents of accommodation generally recognize this fact. See Ellis West, *The*

Would the principle of free exercise of religion at the time of the Framing have been understood to *require* accommodations? The best evidence, the wording of the various state constitutions, supports the accommodationist position;³¹ but the issue is not beyond doubt. Changes in circumstances subsequent to 1791, however, make the accommodationist position more compelling. As noted above, accommodation becomes increasingly necessary as government assumes a wider and more intrusive role in society. In 1791, it was generally true that religion would be free so long as the government did not undertake special efforts to interfere with it. Today, the protection of religious freedom requires more than mere disregard. If the original level of religious freedom is to be preserved, it is necessary to carve out special protections for spheres of life that were not intended to be subject to government regulation and control.

Perhaps the strongest affirmative argument for accommodation is not theoretical but practical: In the absence of accommodations or exemptions, many otherwise beneficial laws would interfere severely with religious freedom. Employment discrimination laws conflict with the Roman Catholic male priesthood; laws against serving alcoholic beverages to minors conflict with the celebration of communion; regulations requiring hard hats in construction areas can effectively exclude Amish and Sikhs from the workplace; practices of public hospitals can conflict with the religious scruples of doctors and nurses in such matters as euthanasia and abortion; zoning laws interfere with religious ministries; laws requiring jury service conflict with the tenets of Jehovah's Witnesses; laws giving historic preservation commissions authority over changes in old buildings, if applied to churches, can result in official second-guessing of ecclesiastical decisions; and laws establishing the schedule of compulsory public schools conflict with the prayer requirements of Muslim students. Exemptions from such laws are easy to craft and administer, and do much to promote religious freedom at little cost to public policy. If there were no accommodations, the underlying legislation would become much more controversial and difficult to enact. Accommodations are a commonsensical way to deal with the differing needs and beliefs of the various faiths in a pluralistic nation.

Case Against a Right to Religion-Based Exemptions, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 635 (1990).

31. See McConnell, *Origins*, *supra* note 17, at 1455-63. The most common form of the state constitutional protections was (in various words): "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." GA. CONST. of 1777, art. LVI, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 377, 383 (Benjamin P. Poore ed., Washington, Government Printing Office 1878). I interpret these provisions to mean that government may interfere with the practice of religion only when necessary to protect the public "peace and safety"—a concept I take to be roughly analogous to the modern "compelling governmental purpose." As Madison put the point, the rights of free exercise should prevail "in every case where it does not trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gailard Hunt ed., 1910).

II. *The Current Status of Accommodations in Supreme Court Doctrine*

As already noted, accommodation of religion is governed by judicial interpretations of both the Free Exercise Clause and the Establishment Clause.³² One might expect that these two provisions, which form a single grammatical unit and reflect a common history, would be interpreted complementarily. This rarely has been true. Until recently, the Free Exercise Clause was interpreted in a manner favorable to accommodation,³³ while the Establishment Clause was interpreted to create obstacles to accommodation.³⁴ This led to a jurisprudence in which judicial discretion was maximized and the results appeared to be at war with one another. The current trend in the Court is the reverse: The Free Exercise Clause no longer is

32. See *supra* text accompanying note 13.

33. See, e.g., *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (requiring state to provide unemployment compensation for a person discharged for compliance with religious obligations inconsistent with work requirements); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (holding that a person discharged because she could not work on the Sabbath because of religion was entitled to unemployment compensation); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (requiring state to provide unemployment compensation benefits for a person who terminated his work because it was forbidden by his religion); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (requiring state to exempt Amish from requirement of attending school after the eighth grade); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (requiring city to exempt religious colporteurs from tax on door-to-door salesmen); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (requiring municipal ordinance to exempt religious colporteurs from license tax); see also *Jensen v. Quaring*, 472 U.S. 478 (1985) (affirming by an equally divided Court a decision requiring the state to exempt religious objector from requirement of a photographic driver's license); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (construing National Labor Relations Act narrowly to avoid conflict with the church's free exercise rights). Justice Scalia, a critic of free exercise exemptions, stated in 1989 that the Court had "held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting).

34. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down law requiring employers to accommodate sabbath observances of employees); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down statute providing moment of silence for prayer or meditation in the public schools); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (interpreting Title VII's religious accommodation provisions extremely narrowly, apparently to avoid supposed Establishment Clause problems); *Welsh v. United States*, 398 U.S. 333 (1970) (interpreting draft exemption statute broadly, to avoid supposed Establishment Clause problems with an exemption limited to religious conscientious objectors); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (holding that public school programs that enable religious groups to give instruction in public buildings violate the First Amendment). The Court's posture toward legislative accommodation was not, however, unremittably hostile. See *Gillette v. United States*, 401 U.S. 437 (1971) (upholding draft exemption limited to religious objectors); *Arlan's Dep't Store, Inc. v. Kentucky*, 371 U.S. 218 (1962) (dismissing challenge to religion-specific exemption to Sunday closing law for want of a substantial federal question); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding public school released time program).

interpreted to require accommodation in most instances, but the Establishment Clause no longer is interpreted to interfere with them, in most instances. This leads to a jurisprudence in which legislative discretion is maximized and the Clauses, since they are rarely applied, rarely conflict.

The constitutional doctrine of accommodation of religion has thus undergone significant transformation in the past five years. The purpose of this Section is to set forth and explain the Court's current approach to both the free exercise and the establishment issues. The discussion will be divided into three parts: (a) a summary and analysis of recent decisions, (b) an analysis of the Establishment Clause test now employed in accommodation cases, and (c) an analysis of the boundary between mandatory and permissible accommodation.

A. Recent Accommodation Cases

The principal recent case interpreting the Free Exercise Clause is *Employment Division v. Smith*,³⁵ in which the Court held that “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”³⁶ The opinion suggests certain exceptions to the rule, which on their face appear to be potentially expansive, but it seems probable that these exceptions were mentioned for the purpose of distinguishing disfavored precedents and will not survive to do serious work.³⁷ On the other hand, in some areas of law the need for religious exemptions seems so compelling that it is hard to believe courts will not begin to fashion exceptions. For example, it is difficult to believe that courts will be permitted to interfere with the selection of ecclesiastical officers, as would seem to be required by Title VII.³⁸ Either doctrine or reality must give. Nonetheless, in the foreseeable future, it appears that the Free Exercise Clause of the Federal Constitution will not be interpreted to require accommodations.

Recent decisions regarding Establishment Clause challenges to religion-specific accommodations likewise suggest a change in doctrine, this time favoring accommodations. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,³⁹ the Court, in a decision unanimous in result, for the first time upheld the constitutionality of a statute that explicitly exempted only religious organizations from its scope. The Court noted that “it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and

35. 494 U.S. 872 (1990).

36. *Id.* at 878-79.

37. *See id.* at 877-78.

38. *See* 42 U.S.C. §§ 2000e(j), 2000e-2(a) (1988).

39. 483 U.S. 327 (1987).

carry out their religious missions.”⁴⁰ That the accommodation “singles out religious entities for a benefit” did not concern the Court: “Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.”⁴¹ In *Texas Monthly, Inc. v. Bullock*,⁴² the Court struck down a statute exempting religious periodicals (and no others) from a state sales tax.⁴³ This case has been greeted by some as if it were a repudiation of the concept of legislative accommodations and inconsistent with *Amos*.⁴⁴ However, the plurality opinion—written by the Court’s leading exponent of free exercise exemptions, Justice Brennan—expressly reaffirmed the free exercise exemption cases and was careful to note that “we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.”⁴⁵ In *Texas Monthly*, the Court could discern “[n]o concrete need to accommodate religious activity,”⁴⁶ and in the absence of a legitimate accommodative purpose, the exemption was nothing but a benefit to religion. The concurring and dissenting opinions would have allowed even greater latitude for accommodation of religion.⁴⁷

40. *Id.* at 335.

41. *Id.* at 338.

42. 489 U.S. 1 (1989).

43. *Id.* at 21-25.

44. See, e.g., Mark Tushnet, “Of Church and State and the Supreme Court”: *Kurland Revisited*, 1989 SUPP. CT. REV. 373, 388.

45. *Texas Monthly*, 489 U.S. at 18 n.8.

46. *Id.* at 18. I do not necessarily agree with the Court that sales taxes are not a serious inhibition on the distribution of religious magazines. As the Court noted, a legislative accommodation is justified if it is “designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause”, *id.* at 18 n.8, even if the Free Exercise Clause does not *require* an accommodation. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944), the Court struck down facially neutral taxes on door-to-door selling, as applied to Jehovah’s Witness colporteurs. The purported distinction of *Murdock* and *Follett* in *Texas Monthly* (the former cases involved “flat taxes”) was so thin that Justices Blackmun and O’Connor were moved to comment that the plurality had “subordinat[ed] the Free Exercise value” to the Establishment value, “at the expense of longstanding precedents.” *Employment Div. v. Smith*, 494 U.S. 872, 906 (1990) (O’Connor, J., concurring in judgment). A situation so close to a recognized free exercise exemption right ought to have been sufficient to justify a legislative exemption. A more persuasive basis for the decision in *Texas Monthly* was suggested by Justice White in a one-paragraph concurrence, where he argued that the Press Clause of the First Amendment prohibits differential taxation of periodicals on the basis of their content. *Texas Monthly*, 489 U.S. at 25-26 (White, J., concurring). Where free exercise activity takes the form of pure speech or publication, the content-neutrality principles of the Speech and Press Clauses arguably control over the content-based protections of the Religion Clauses.

47. Justices Blackmun and O’Connor stated in a concurring opinion that the statute “might survive Establishment Clause scrutiny” if it “exempted from taxation the sale of atheistic literature distributed by an atheistic organization.” *Texas Monthly*, 489 U.S. at

Employment Division v. Smith, though primarily a free exercise case, also has implications for the Establishment Clause treatment of legislative accommodations. The Court referred approvingly to state laws that exempted the religious use of peyote from the criminal law, and observed that “to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required.”⁴⁸ This view, coupled with *Amos* and *Texas Monthly*, virtually assures that properly drafted legislative accommodations will be upheld against Establishment Clause challenges.

B. *The Establishment Clause Test in Accommodation Cases*

In *Texas Monthly*, Justice Brennan articulated a three-step framework for analyzing cases involving benefits to religion.⁴⁹ Because Brennan tended to adopt a strict understanding of the Establishment Clause, it is safe to predict that the Court’s position toward accommodation will not be more restrictive than this test. It consists of three questions: (1) Are the benefits provided to a broad array of recipients, secular as well as religious?; (2) Do the benefits alleviate an obstacle to the exercise of an independent religious choice (or, conversely, do they create an incentive or inducement for making that choice)?; and (3) Is there an undue burden on nonbeneficiaries? I will also discuss a fourth possible element in accommodation analysis, not mentioned in *Texas Monthly*: (4) Is the accommodation provided to all similarly situated religions without favoritism or discrimination?

1. *The Array of Beneficiaries*

The first step in the Supreme Court’s accommodation analysis is to ask whether the benefits flow to nonreligious as well as religious groups, in a manner defined by secular criteria.⁵⁰ When a “subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause.”⁵¹ This is an important doctrinal development in its own right, with implications for issues such as educational choice. It appears likely that the Establishment Clause will no longer be used so often as a rationale for discriminating against religion in the mixed public-private sector.

To satisfy the first stage of this analysis, it is not necessary that every conceivable nonreligious analog to religion be included, but

29 (Blackmun, J., concurring). This statement apparently means that a viewpoint-neutral exemption for periodicals addressing religious issues would be constitutional, even if periodicals addressing secular subjects are taxed.

48. *Smith*, 494 U.S. at 890.

49. *Texas Monthly*, 489 U.S. at 11-15.

50. *See id.* at 10-17.

51. *Id.* at 14-15 (footnote omitted).

simply that the array be broad enough to show that religion is not being singled out. In Justice Harlan's words, quoted by Justice Brennan: "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."⁵² As Justice Brennan noted, the necessary breadth of the array of beneficiaries will vary according to the nature of the program.⁵³ In *Texas Monthly*, for example, the sales tax exemption did not have to extend to all magazines; it could have been confined to publications devoted to "discussion about questions of ultimate value and the contours of a good or meaningful life."⁵⁴ One suspects that, in practice, this category would not be much larger than the one struck down in *Texas Monthly*.⁵⁵ In an educational choice program, if state financial assistance is extended to private schools, it may not be confined to religious schools; the relevant category is probably all accredited schools, or at least all non-profit accredited schools satisfying economic criteria for eligibility.

If a government program is "wholly neutral in offering . . . assistance to a class defined without reference to religion,"⁵⁶ it should withstand Establishment Clause scrutiny without further analysis. Only if the benefits flow exclusively (or nearly so) to religious individuals or institutions is it necessary to proceed to the next step in the analysis.⁵⁷

52. *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring), cited in *Texas Monthly*, 489 U.S. at 15-16.

53. *Texas Monthly*, 489 U.S. at 15-16.

54. *Id.* at 16.

55. See *supra* text accompanying note 42.

56. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 490-91 (1986) (Powell, J., concurring).

57. Professor Mark Tushnet has interpreted *Texas Monthly* as forbidding the legislature to "single[] out religious activities by name If religious activities are to be exempted from general regulations, 'the benefits derived by religious organizations [must] flow[] to a large number of nonreligious groups as well.'" Tushnet, *supra* note 44, at 389 (quoting *Texas Monthly*, 489 U.S. at 11). He thus treats the first step in the analysis as a necessary, rather than a sufficient, element. This interpretation, however, is a misreading of *Texas Monthly*. The quoted language from the opinion appeared not in a discussion of religious accommodations, but in a separate section of the opinion addressing "government policies with secular objectives [that] incidentally benefit religion." *Texas Monthly*, 489 U.S. at 10. The Court's examples were tuition tax credits, property tax exemptions, and access to public facilities by religious clubs. *Id.* at 10-11. Properly read, *Texas Monthly* stands for the proposition that government benefits to religion can be sustained under the Establishment Clause if the benefits either "flow[] to a large number of nonreligious groups as well [as religious entities]," *id.* at 11, or are "designed to alleviate governmental intrusions [on religious practices]," *id.* at 18 n.8. Contrary to Professor Tushnet, the Court explicitly denied that it was suggesting "that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.*

2. Accommodation Versus Inducement

The second step in the Court's accommodation analysis is to ask whether the challenged government action is "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause."⁵⁸ Although the Court has not had an opportunity to flesh out the operational meaning of this principle, it seems plausible to interpret this step as inquiring into the effects of the challenged action on the intended beneficiary. If the effect is to remove a significant obstacle to the exercise of a religious belief adopted independently of the government action, the accommodation is legitimate. By contrast, if the effect is to induce the person to adopt (or feign) the religious belief in order to receive the benefits of the accommodation, the government action goes beyond the range of permissible accommodation and becomes an unlawful establishment of religion. In then-Justice Rehnquist's words, "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment."⁵⁹ This analysis requires a careful distinction between government "benefits" or "inducements" to religion, on the one hand, and the lifting of government "restraints" or "inhibitions" on religion, on the other.⁶⁰ This approach is consistent with Madison's apparent position on accommodations. While he supported constitutional exemptions for religious individuals from laws that would compel them to violate their "religious[] scrup[les],"⁶¹ he opposed measures that would convey upon persons of certain religious faiths "extraordinary privileges, by which proselytes may be enticed from all others."⁶²

58. *Texas Monthly*, 489 U.S. at 18 n.8; *see also id.* at 15 (stating that the test is whether the challenged action can "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion").

59. *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting). Justice Brennan has offered a similar formulation. *See Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting).

60. This corresponds to the economic distinction between subsidies and penalties. *See Michael W. McConnell & Richard A. Posner, An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 14 (1989).

61. Madison proposed that the following provision be appended to what is now the Second Amendment: "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONGRESS, *supra* note 25, at 451 (June 8, 1789). Madison's proposed language for the Virginia Declaration of Rights, similarly, espoused a broad view of the need for accommodations of religion "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." *See McConnell, Origins, supra* note 17, at 1463 (quoting SANFORD COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 492 (1902)).

62. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 63, 66 (1947). In the same passage, Madison also objected to granting "peculiar exemptions" to members of certain specified denominations, when there are other sects with a similar claim. *Id.* This relates to the issue of denominational equality, discussed *infra* notes 84-96 and accompanying text, but it is

Undoubtedly, some government actions with respect to religion encourage or induce the religious practice being accommodated. If the government exempts “ministers of the gospel” from paying taxes (while continuing to accord them all government benefits paid for out of tax revenues), the exemption creates an incentive to become a minister. Public school prayer is another conspicuous example: Especially in the younger years, organized school prayer inculcates even as it accommodates, making it impossible to distinguish “independent religious choice” from conformity to authority.⁶³ Other government actions with respect to religion are pure accommodations. For example, if the government exempts Sikh construction workers from the safety requirement of wearing a hard hat (which conflicts with their religion), this exemption will not make it more desirable for individuals to adopt the Sikh religion. It will simply remove a government obstacle to adherence to their faith. Allowing Jewish prisoners a special diet will not encourage kosher eating (as long as the alternative meals are no better than the standard fare); allowing Amish buggy drivers not to display a bright orange triangle will not induce conversions to the Amish religion; allowing Native American Church members to ingest peyote at religious ceremonials will not create an incentive to practice peyotism (because peyote is not a desirable recreational drug); allowing Jewish military officers to wear yarmulkes will not induce non-Jews to become Jews or to cover their heads in homage to the God of Israel.

Difficult intermediate cases also exist. Some accommodations facilitate a religious practice independently arrived at, but concurrently create some additional incentive to adopt the practice. An example is the exemption for Jewish merchants from the Sunday Closing law, denied under the Free Exercise Clause in *Braunfeld v. Brown*⁶⁴ but upheld against Establishment Clause challenge in *Arlan's Department Store, Inc. v. Kentucky*.⁶⁵ On the one hand, the observance of the Sabbath on Saturday is a long-held tenet of Judaism, and the principal effect of the exemption is to relieve the economic

sometimes mistakenly read as a categorical condemnation of religious “exemptions” altogether, even when extended evenhandedly to all faiths that face a particular conflict with the law. In light of Madison’s advocacy of religious draft exemptions, that is an implausible construction of the passage.

63. I thus disagree with Justice Stewart, who argued that spoken school prayer and Bible reading could be defended on accommodationist grounds. See *School Dist. v. Schempp*, 374 U.S. 203, 308-320 (1963) (Stewart, J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 444-450 (1962) (Stewart, J., dissenting). Because only one religious tradition (a watered-down nondenominational theism) was reflected in these exercises, the tendency was to flatten and homogenize the student’s religious lives rather than to give greater latitude to religious pluralism. Moreover, in practical terms, the exercises had a coercive impact on those who wished not to participate.

64. 366 U.S. 599, 609 (1961).

65. 371 U.S. 218, 219-20 (1962).

pressure to violate the Sabbath generated by the enforced closure on Sunday. On the other hand, because the large majority of stores are owned by non-Jews, the combined effect of the Sunday Closing law and the exemption is to give the stores owned by Saturday Sabbath observers a competitive edge they would not have if there were no Sunday Closing law. Similarly, an exemption from military service accommodates a sincere belief, but also creates a significant incentive to adopt the tenet of pacifism. Cases of mixed effect, such as these, call for difficult exercise of judgment to determine which effect is likely to be primary. In many such cases the result has been to deny a free exercise exemption but to uphold a legislative accommodation if one is made.⁶⁶ That approach may well be the best resolution of this thorny problem.

3. *Burdens on Nonbeneficiaries*

The third step in the analytical framework set forth in *Texas Monthly* is to ask whether the challenged accommodation would “impose substantial burdens on nonbeneficiaries.”⁶⁷ The logic here is that a truly neutral government (one that valued all of the legitimate interests of its citizens, without bias or favoritism) would take into consideration the impact of its actions on religious practice, but would not necessarily allow those considerations to outweigh substantial competing interests. This logic does not mean that the costs to others must be reduced to zero, but that they should not be “undue” in light of the need for accommodation.⁶⁸

At one time, I believed that only the religious freedom interests of other parties should be treated as a constitutional limit on legislative accommodations.⁶⁹ My reasoning was that it is anomalous to give purely economic interests constitutional protection when the legislative purpose is to accommodate religion, when those interests receive no constitutional protection against other forms of legislation. Protection for purely economic countervailing interests appears to resurrect economic substantive due process. If a state imposes costs on the employer for the purpose of accommodating a worker’s pregnancy, jury duty, or military service, with virtually no serious constitutional scrutiny, why should it be unconstitutional to impose similar costs for the purpose of accommodating a worker’s religion? Thus, I contended that accommodations should be invalid on account of the burdens on nonbeneficiaries only if those burdens were infringements on First Amendment (not economic) rights. School prayer is an unconstitutional accommodation because it invades the

66. See *supra* text accompanying notes 64-65. The most famous example is exemption from military conscription, which is not a free exercise right but has been statutorily granted by Congress and upheld by the Court. See *Gillette v. United States*, 401 U.S. 437 (1971); *Selective Draft Law Cases*, 245 U.S. 366 (1918).

67. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); see *id.* at 14-15.

68. For an argument that accommodation should not be permitted when the “secular costs of accommodation are high,” see Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 *YALE L.J.* 127 (1990).

69. See *McConnell*, *supra* note 14, at 37-39.

religious freedom of those who do not wish to participate; the sabbath protection law is not unconstitutional because the only interest invaded is the employer's pocketbook.⁷⁰

I now think that my prior position was too narrow. An accommodation that imposes costs on others disproportionate to the alleviation of a burden on religious practice could be a form of favoritism for religion, symmetrical to the hostility to religion evinced by the legislature's refusal to give religious concerns as much weight as secular concerns, as was the case in *Sherbert v. Verner*.⁷¹ Presumably, this threat is more serious when religious practices of politically influential groups are accommodated at the expense of others, than when minority groups are accommodated.

It remains to be seen how much of a burden on nonbeneficiaries is too much. The language in *Texas Monthly* ("substantial burdens") is not well chosen, because it appears to refer to the absolute magnitude of the burden rather than to the possible disproportionality between the burden imposed and the burden alleviated. Surely a larger burden is justified to alleviate a major obstacle to religious exercise than to alleviate a minor obstacle. In *Estate of Thornton v. Caldor, Inc.*,⁷² the Court held that a Connecticut statute violated the Establishment Clause because it required employers to adjust work schedules so that workers who observe a sabbath could have that day off, a requirement the Court found "absolute and unqualified."⁷³ The Court noted that there were no exceptions in the statute for "special circumstances" where the accommodation of Sabbath observers "would cause the employer substantial economic burdens or . . . require the imposition of significant burdens on other employees required to work in place of the Sabbath observers."⁷⁴ This holding suggests an upper bound on the accommodation principle, where the burden on the nonbeneficiaries is disproportionate to the effect on the believer.

70. *See id.*

71. 374 U.S. 398 (1963). See the analysis of *Sherbert* in *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (Burger, C.J., joined by Powell, J., and Rehnquist, J.) (Where the government extends accommodation to other private interests, the "refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent" against religion.).

72. 472 U.S. 703 (1985). Readers should be aware that I participated in this litigation as author of an amicus curiae brief for the United States in defense of the constitutionality of the statute.

73. *Id.* at 710.

74. *Id.* at 709-10. The error in the Court's analysis was to treat the absolute character of the statute as the basis for striking it down on its face. There was no evidence that accommodation of the petitioner in the particular circumstances would be especially burdensome. If Establishment Clause challenges are subject to the same principles of facial and as-applied challenges as are cases in other areas, the Connecticut statute should have been upheld if it was susceptible to constitutional application. See *Bowen v. Kendrick*, 487 U.S. 589 (1988). That there might be applications of the law that would

On the other hand, in *Trans World Airlines v. Hardison*,⁷⁵ the Court construed the religious accommodation provision of Title VII as requiring no more than “de minimis” accommodation—probably out of concern that a more burdensome accommodation requirement would violate the Establishment Clause.⁷⁶ This cannot be the constitutional test; most accommodations that have been recognized as legitimate impose more than a de minimis burden on others.⁷⁷ Moreover, when legislatures adjust the benefits and burdens of economic life among the citizens, they regularly impose more than a de minimis burden for the purpose of protecting important interests of the beneficiary class. The legislature should have as much latitude to protect the exercise of religion that it has to protect other important values in life. Indeed, to prevent accommodation of religion when accommodation of other values is permitted would evince an indifference or hostility toward religion out of keeping with the fundamental premises of the First Amendment. Congress struck the balance in Title VII by requiring “reasonabl[e] accommodat[ion],” short of “undue hardship” to the employer⁷⁸—the same statutory standard that it applies to accommodation of persons with disabilities.⁷⁹ This standard seems superior—recognizing that accommodations may impose more than a de minimis burden, but that an “unyielding weighing in favor” of religious interests⁸⁰ crosses the line between reasonable accommodation and favoritism.

Another aspect of the analysis should be whether alternative accommodations could be found that would reduce the secular costs to nonbeneficiaries. The burden on others can be said to be “undue” if it could be eliminated or reduced without significantly undermining the accommodative purpose. An example is the administration of some released time programs in public schools, which allow students to leave the premises for a class period to study religion under the auspices of their own chosen religious instructor. In my view, the purpose of these programs is legitimate: They provide an opportunity for students who cannot afford to attend private schools to include a religious component in their education, and thereby redress (in part) the inhibition on religious

impose excessive costs on employers or fellow workers should not have been a basis for striking the statute down on its face.

75. 432 U.S. 63 (1977).

76. *Id.* at 84. The Court did not explicitly refer to the Establishment Clause as a basis for its interpretation, but the petitioner had argued in the case that “to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment,” *id.* at 70, and as an interpretation of the statute alone, the decision is almost certainly wrong, *see id.* at 89 (Marshall, J., dissenting) (the Court’s interpretation “effectively nullif[ies]” the statute). *See also id.* at 89-90 (suggesting that the Court adopted this construction in order to avoid consideration of the constitutional question).

77. Draft exemptions for religious conscientious objectors, for example, increase the probability that other eligible young men will be forced to fight, and perhaps die.

78. 42 U.S.C. § 2000e(j) (1988).

79. 42 U.S.C.A. § 12112(b)(5) (West 1991).

80. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

education caused by the combination of compulsory school attendance laws and the secular character of the public school curriculum. But what will happen to the remaining students, who choose not to participate in the released time program? If the school fails to provide useful and attractive alternative uses for the time, then they will be forced to waste a valuable part of the school day—a circumstance that may also serve as an incentive to participate in the program, even if they would not otherwise choose to do so. Since it is possible for the school to alleviate this burden without injury to the released time program, I would treat the burden as “undue.” The remedy, of course, is not to cancel the released time program, but to provide alternatives for the remaining students.⁸¹

It would be helpful in all these cases for courts to compare the extent of accommodation of religion and the burdens entailed by accommodation, to the extent and burden of accommodation of other important private interests in an analogous context. Freedom of religion, for example, could be compared to reproductive autonomy, which is another important personal right that comes into conflict with the economic interests of employers and fellow workers. In *California Federal Savings & Loan Ass'n v. Guerra*,⁸² the Court upheld a state statute requiring employers to provide female employees an unpaid pregnancy disability leave of up to four months.⁸³ This accommodation was no less “absolute” and far more costly than that in *Thornton*. The existence of this accommodation to a nonreligious personal interest suggests that state governments are not discriminating in favor of religion, but are simply attempting to protect the personal rights of workers that are most likely to come into conflict with the demands of the workplace.

Any comparison of benefits and burdens will admittedly suffer the problem of comparing apples and oranges. One should therefore not expect a high degree of rigor at this stage of the analysis. The courts should be satisfied if they have examined the legislative accommodation and determined that the burden on nonbeneficiaries is not obviously disproportionate. Deference to legislative judgment is appropriate here; secular economic interests are not underrepresented in the political process.

81. See McConnell, *Neutrality*, *supra* note 17, at 163 n.73 (asserting that the constitutionality of a released time program should depend on “whether alternative uses of the time are sufficiently attractive that there is no coercion to attend the religious classes”); see also McConnell, *supra* note 14, at 36. *Zorach* is a difficult case because the opinion does not provide sufficient information about the activities in which the nonparticipating students were engaged. In my opinion, a released time program of the sort Professor Lupu experienced as a child, in which the nonparticipating students were inflicted with “an entirely wasted hour of school,” Lupu, *supra* note 6, at 744, would be unconstitutional.

82. 479 U.S. 272 (1987).

83. *Id.* at 292.

4. Equality Among Religions

Although neither *Amos* nor *Texas Monthly* alludes to the issue, the logic of the Religion Clauses requires that accommodations be extended to all comparable religious practices unless the government has sufficient justification for differential treatment. One of the most firmly ingrained principles of the Religion Clauses is that all religious faiths must enjoy an equality of rights.⁸⁴ Accommodations should not be allowed to favor one religion over another.⁸⁵ For this reason, accommodations should be framed so far as possible in neutral terms, without reference to particular faiths or denominations.

It does not follow, however, that accommodations are suspect merely because they accommodate only a particular religious practice. Most accommodations are of this sort; when the legislature becomes aware that a particular law or government action infringes on the religious exercise of a particular religious minority, it typically carves out a particular exception. When Congress enacted Prohibition, it incorporated an exception for sacramental wine; when Congress enacted military conscription, it included an exception for religious conscientious objectors; when Congress extended Social Security to self-employed persons, it included an exemption. That these laws work to the benefit of only those religious groups whose practices are inconsistent with the law in question cannot be an objection.

Thus, Justice O'Connor's explanation for the invalidation of the sabbath protection law in *Thornton* should not be accepted. She complained that the statute "single[d] out Sabbath observers for special . . . protection without according similar accommodation to ethical . . . and religious beliefs and practices of other private employees."⁸⁶ She presumably was referring to religious dress requirements or prayer requirements that may conflict with the rules of the workplace, and that were not accommodated by the sabbath protection law. One commentator has called this a "discriminatory favoring of Sabbatarian over other religious traditions."⁸⁷ But Justice

84. As Madison stated in *Memorial and Remonstrance Against Religious Assessments*: If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience."

James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 66 (1947) (quoting the Virginia Declaration of Rights, arts. 1, 16 (emphasis added by Madison)).

85. The Supreme Court's decision in *Hernandez v. Commissioner*, 490 U.S. 680 (1989), appears to violate this principle by denying tax benefits to the Church of Scientology that are extended to other religious groups. *See id.* at 700-03. Nothing in the opinion suggests, however, that the Court intended to alter established constitutional doctrine on this point. The case appears to be one in which the unattractive qualities of the religious group involved may have influenced the Court to fail to apply the law as it should have been applied, as the dissenting opinion of Justice O'Connor persuasively argues. *Id.* at 704-13 (O'Connor, J., joined by Scalia, J., dissenting).

86. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor J., concurring).

87. Lupu, *supra* note 6, at 769.

O'Connor and the commentator failed to take into account the context of the statute. The statute was not addressed to work conditions in general; it was part of the state law imposing a six-day work limitation and liberalizing the state's former Sunday Closing law. The only religious practice affected by the law under consideration was the observance of the sabbath. The state does not discriminate when it includes a Sabbath protection requirement in a law pertaining to work days, any more than it discriminates when it includes a labor union exemption (for members of sects that cannot join) in a labor statute, a spiritual healing exemption in a statute governing medicine, or a sacramental use exemption for peyote in the drug laws. It is only natural for legislatures to address free exercise problems as they arise.

The problem of denominational discrimination arises only when an accommodation is extended exclusively to members of certain faiths, when members of other faiths face the same burden of religious exercise. For example, if the Prohibition law had exempted wine used for a eucharistic mass but not wine used for a Jewish Seder, that would have been discriminatory. If Congress exempted Quakers and Mennonites from the draft, but not members of other churches who entertain similar convictions about participation in war, that would be discriminatory. Discrimination of this sort would require powerful justification.

The requirement of denominational neutrality must, however, be applied realistically. Not all religious practices have the same impact on government policy, and too exacting a requirement of equal treatment would likely discourage sensible and beneficial accommodations. In *Cruz v. Beto*,⁸⁸ for example, a lone Buddhist prisoner demanded equal treatment in terms of chapel access, chaplains, worship services, and religious books and facilities, to that provided prisoners of more numerous denominations. Obviously that is not practical, and such a requirement would have the effect of causing prison officials to curtail religious accommodations for the rest of the inmates. The Supreme Court held that "a special chapel or place of worship need not be provided for every faith regardless of size, nor must a chaplain, priest, or minister be provided without regard to the extent of the demand."⁸⁹ The proper disposition of other cases is less clear. In *Gillette v. United States*,⁹⁰ the Court upheld the federal law exempting religious conscientious objectors from all wars, but not objectors to particular wars, on the grounds that adjudication of the latter claims presented a far more serious "danger of

88. 405 U.S. 319 (1972).

89. *Id.* at 322 n.2.

90. 401 U.S. 437 (1971).

erratic decisionmaking.”⁹¹ A recent appellate court decision involved the federal regulations that exempt peyote use by the Native American Church. These permissive exemptions do not apply to the “Peyote Way Church of God,” an unrelated, largely urban, non-Native American church that subscribes to many tenets similar to those of the Native American Church.⁹² In upholding the exclusion of the group from the exemption, the court reasoned that the differential treatment is attributable to the federal government’s “constitutional role as protector of tribal Native Americans” and that an exemption for non-Indian groups does not have any such justification.⁹³ Courts must scrutinize these differences in treatment to ensure that the reasons are not pretextual, but it would be counterproductive to forbid them altogether. The test seems to be that accommodations need not be equal if there are “neutral, secular reasons,”⁹⁴ not based on religious favoritism, for distinguishing among religious beliefs.

If it is found that an accommodation is improperly discriminatory, the proper remedy is not to invalidate the exemption, but to extend the exemption to others under the Free Exercise Clause, unless there is good reason to believe that the legislature would have preferred to accommodate no one rather than to extend the accommodation to all similarly affected groups. This is a routine application of severability principles, consistent with constitutional doctrine in the analogous area of equal protection,⁹⁵ but the point has eluded some judges.⁹⁶ Thus, it should not be possible for a person having no claim for accommodation to bring a lawsuit under the Establishment Clause to strike down an accommodation law on the ground that it impermissibly excluded some other group. Only a member of the excluded group has standing to raise the issue of denominational discrimination.

C. *Mandatory and Permissible Accommodations*

Justice Brennan insisted at several points in his *Texas Monthly* opinion that his approach would permit accommodations that are not actually *mandated* by the Free Exercise Clause. “[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the

91. *Id.* at 458.

92. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).

93. *Id.* at 1217.

94. *Gillette*, 401 U.S. at 458.

95. *See, e.g.*, *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (extending Social Security benefits to widowed father). Similarly, in *Larson v. Valente*, 456 U.S. 228 (1982), the benefit of the law was extended to the excluded group rather than denied to the benefitted group.

96. In *Peyote Way Church of God, Inc. v. Thornburgh*, for example, Chief Judge Clark would have invalidated the peyote exemptions in federal law and the law of some 23 states, needed for the protection of the religious worship of some 250,000 Native American Church members, because the exemption was not also extended to the 150 members of the Peyote Way Church of God. 922 F.2d at 1220-21 (Clark, C.J., dissenting).

Free Exercise Clause.”⁹⁷ This repudiates the position, sometimes found in the literature,⁹⁸ that the political branches have no discretion to institute accommodations that are not constitutionally compelled by the Free Exercise Clause.

Unfortunately, however, the Court has not made clear precisely what the relation is between permissible and mandatory accommodations. *Amos* speaks of “alleviat[ing] significant governmental interference” with religious practice,⁹⁹ and *Texas Monthly* speaks of “remov[ing] a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause.”¹⁰⁰ We know that the government has some latitude to accommodate religion beyond the requirements of the Free Exercise Clause, but there has been no discussion of where the line may be drawn.

Prior to *Employment Division v. Smith*,¹⁰¹ the accommodation question could be seen as a variant on the theme of institutional capacity and judicial restraint.¹⁰² The Free Exercise Clause, like all provisions of the Constitution, is addressed to the political branches as well as to the judiciary, and both have a responsibility to enforce it. Indeed, Congress is textually vested with the power to enforce the provisions of the Fourteenth Amendment, which include the protections of the First Amendment.¹⁰³ The judiciary, moreover, is properly constrained in its enforcement of the Constitution; it must not override legislative decisions except where the demands of the Constitution are reasonably clear.¹⁰⁴ Courts are particularly constrained when part of the constitutional analysis includes whether the government’s action serves a “substantial governmental purpose.” This judgment implicates questions of legislative policy, and the decisions of the political branches must necessarily carry great weight.

When the legislature itself considers a question of free exercise, by contrast, it is not so constrained. The legislature can assess supposed government interests without deference to anyone. It is to be expected, therefore, that legislative accommodations will often extend to conflicts between conscience and law where the judiciary

97. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); *see also id.* at 14-15.

98. *Lupu*, *supra* note 6, at 749-54.

99. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

100. *Texas Monthly*, 489 U.S. at 18 n.8.

101. 494 U.S. 872 (1990).

102. *See Welsh v. United States*, 398 U.S. 333, 371 (1970) (White, J., dissenting) (discussing institutional competence of Congress to promote “free exercise values” even where the Court would not require it).

103. U.S. CONST. amend. XIV, § 5.

104. *Ashwander v. TVA*, 297 U.S. 288, 354 (1936) (Brandeis, J., concurring); *see Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

would be bound to enforce law notwithstanding the claim of conscience.

This analysis has become complicated by the decision in *Smith*, which was decided after *Amos* and *Texas Monthly*. According to *Smith*, neutral laws of general applicability do not violate the Free Exercise Clause.¹⁰⁵ When the legislature carves out an accommodation, after *Smith*, it is not merely expanding on the believer's free exercise rights; it is creating a protection wholly unlike that reflected in the First Amendment. After *Smith*, to say that the government may not make any accommodations not mandated by the Free Exercise Clause is to say that it may not make any accommodations.

Smith obviously did not shrink the scope of permissible accommodation, and in light of its grounding in judicial restraint, the opinion may augur an expansion.¹⁰⁶ It is safe to assume that any accommodation that might have been thought mandatory under the pre-*Smith* test is still permissible. Moreover, as Justice Brennan made clear in *Texas Monthly*, the Establishment Clause permits the legislature to make accommodations in cases in which the courts would not have required them even under the prior test. He specifically cited three cases in which the Court approved, or would have approved, accommodations that it had determined were not constitutionally required.¹⁰⁷

There are three principal ways in which the government's authority to accommodate is broader than its obligation to accommodate under pre-*Smith* law. First, the government should be entitled to recognize and accommodate burdens on free exercise that would not be recognized as such by the courts. Free exercise claims are frequently rejected at the first stage of the analysis, without any examination of the importance of the governmental interest, on the ground that there was no cognizable "burden" on religion. In many such instances, however, a government committed to religious pluralism should be entitled to recognize and accommodate the religious interest, even if it does not fit within the judiciary's definition of "burden" under the Free Exercise Clause. For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,¹⁰⁸ the Court held that religious plaintiffs have no constitutional right to affect the government's use of its own land, but stated that that "need not and should not discourage [the government] from accommodating religious practices like those engaged in by the [plaintiffs]."¹⁰⁹ Similarly, in

105. *Smith*, 494 U.S. at 881-82.

106. The author of *Smith*, Justice Scalia, took an expansive view of permissible accommodation in *Texas Monthly*, but supplied no standard for determining the boundary of permissibility.

107. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (citing *Zorach v. Clauson*, 343 U.S. 306 (1952), and Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. *Amos*, 483 U.S. 327 (1987), as cases in which accommodations that would have been held mandatory were approved, and *Goldman v. Weinberger*, 475 U.S. 503 (1986), as a case in which accommodation that was denied by the Court would be permissible if enacted by Congress).

108. 485 U.S. 439 (1988).

109. *Id.* at 454.

Tony & Susan Alamo Foundation v. Secretary of Labor,¹¹⁰ the Court expressed skepticism that the acceptance of wages (in accordance with minimum wage laws) would conflict with the petitioners' religious practices,¹¹¹ but there surely would be no constitutional obstacle if the government had come to the opposite conclusion and had made appropriate accommodation.

Indeed, broadening the definition of burden will sometimes obviate the entanglements caused by determinations of what claims are sincere and religious. In *Amos*, for example, the Free Exercise Clause (as understood before *Smith*) was interpreted to require the state to allow religious organizations to employ religious criteria for hiring persons whose duties are closely connected to the religious mission of the church.¹¹² But to confine the exemption to those workers would require the government to "determin[e] whether an activity is religious or secular [by means of a] searching case-by-case analysis," which would "result[] in considerable ongoing government entanglement in religious affairs."¹¹³ It is better to allow the government to extend the exemption to all the noncommercial activities of the church.

Second, the legislature is entitled to conclude that accommodation is possible without undue damage to "compelling governmental interests" even if a court would be reluctant to reach such a conclusion. The legislature presumably is the best judge of the necessity of its own policies, whereas courts are ordinarily reluctant to controvert legislative judgments of policy.¹¹⁴ This reluctance is especially evident in certain categories of cases, such as those involving the military, the prisons, or the use of government land, where the courts typically defer to governmental assessments of need, and rarely override government policy in the interest of protecting constitutional rights.¹¹⁵ Accommodations are particularly vital in these

110. 471 U.S. 290 (1985).

111. *Id.* at 304-05; *cf. id.* at 303 n.27 (citing but disregarding testimony of adherents about their religious beliefs).

112. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (assuming for the sake of argument that the Free Exercise Clause requires "no more" than exemption of employees engaged in religious activities); *id.* at 342-43 (Brennan, J., concurring in judgment) (stating that interference with the religious organization's hiring for religious activities "involves what we normally regard as infringement on free exercise rights").

113. *Id.* at 343 (Brennan, J., concurring in judgment).

114. *See Rostker v. Goldberg*, 453 U.S. 57, 64, 83 (1981) (holding that the lower court "was quite wrong in undertaking an independent evaluation of this evidence [regarding the justifications for the policy under constitutional challenge], rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence"); *see also Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (stating that the Court does "not lightly second-guess such legislative judgments"); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) (stating that the Court "must afford great weight to the decisions of Congress").

115. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)

contexts, where religious exercise is all but impossible without government cooperation. But even in other contexts, the legislature should be permitted to decide that its rules are not of sufficient importance to override legitimate religious objections.

Third—contrary to language in the recent accommodation cases¹¹⁶—the government should be able to require accommodations in the private sector, at least where it has extended comparable protections to secular concerns of a similar character. For example, Title VII of the Civil Rights Act of 1964 requires employers to make “reasonable accommodations” to the religious needs of their employees.¹¹⁷ Obviously, accommodations of this sort are not mandated by the Free Exercise Clause, because there is no state action; yet they are widely assumed to be legitimate. In reference to Title VII, Justice Marshall observed: “If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.”¹¹⁸

In part, the issue of accommodations in the private sphere hinges on conceptual changes in legal doctrine arising from the twentieth-century expansion of the welfare-regulatory state. In an earlier era, when most personal interests were left to the tender mercies of the private market, the accommodation of religion in the private sphere would have been a form of promotion or favoring of religion. Now, when government intervenes in the private sphere to protect a wide variety of personal interests, the idea that religious interests (alone) should be treated with indifference cannot be maintained. When government protects religious freedom in the private sphere in ways comparable to its protection of secular interests, it should be held to be constitutional.

(government land); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military). In *Shabazz*, accommodations were made, and then terminated, before the litigation; in *Goldman* and *Lyng*, accommodations were made after the litigation.

116. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (stating that “when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant *state-imposed* deterrent to the free exercise of religion . . . it ‘provide[s] unjustifiable awards of assistance to religious organizations’ and cannot but ‘conve[y] a message of endorsement’ to slighted members of the community” (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring in judgment)); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O’Connor, J., concurring) (“Title VII attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause.”).

117. 42 U.S.C. § 2000e(j) (1988).

118. *Trans World Airlines v. Hardison*, 432 U.S. 63, 90-91 (1977) (Marshall, J., dissenting).

III. Arguments Against Religious Accommodations, with Responses

Since 1985, several legal scholars have published extended criticisms of the doctrine of accommodation. These critics divide into three camps.¹¹⁹ Some contend that legislative accommodation is permissible under the Establishment Clause but that accommodation is never required by the Free Exercise Clause.¹²⁰ Some contend that accommodations are sometimes mandated by the Free Exercise Clause but that it is unconstitutional for the legislature to accommodate religion when not required to do so.¹²¹ These two positions both style themselves as anti-accommodationist, but they are diametrically opposed to one another. Finally, some contend that the Free Exercise Clause does not compel, and the Establishment Clause does not permit, accommodation of religion.¹²²

The most common anti-accommodationist position is that legislative accommodations are constitutionally permissible under the Establishment Clause (in proper circumstances) but not constitutionally compelled by the Free Exercise Clause.¹²³ This view coincides with the current majority position on the Supreme Court. On closer inspection, however, the arguments offered in opposition to constitutionally compelled exemptions usually turn out to be arguments against legislative exemptions as well. I will therefore address first the argument that accommodations are unconstitutional under the Establishment Clause, and then turn to the various arguments made against mandatory accommodations.

A. The Argument That Accommodations Are Unconstitutional

I consider the argument that accommodations of religion are by their very nature unconstitutional in purpose and effect extremely weak. By this I do not mean that all government benefits to religion called "accommodations" are constitutional, but that accommodations that comply with the standards set forth in the previous section

119. Here I address doctrinal arguments. I have not had an opportunity to see or respond to the historical arguments raised by Professor Philip Hamburger in his forthcoming article. Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 *GEORGE WASHINGTON LAW REVIEW* (forthcoming Apr. 1992). I understand Hamburger's argument to relate to the questions of mandatory accommodation, which I agree presents a close question, rather than permissible accommodation, where I consider the historical evidence strongly in favor.

120. See William Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 *U. CHI. L. REV.* 308 (1991); West, *supra* note 30.

121. See Lupu, *supra* note 6; Lupu, *supra* note 5.

122. See Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 *U. PITT. L. REV.* 75 (1990); Tushnet, *supra* note 44; Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 *GEORGE L.J.* 1691 (1988).

123. See Marshall, *supra* note 120; West, *supra* note 30.

are constitutional.¹²⁴

To begin with, there is no ambiguity with regard to the historical record: Accommodations of religion in the years up to the framing of the First Amendment were frequent and well known, and no one took the position that they constituted an establishment of religion. For the most part, the largely Protestant population of the states as of 1789 entertained few religious tenets in conflict with the civil law;¹²⁵ but where there were conflicts, accommodations were a frequent solution.¹²⁶ Although the existence of these exemptions does not necessarily establish that accommodations were mandatory,¹²⁷ it at least demonstrates that they were permitted. The Continental Congress, for example, exempted members of the peace churches from military conscription,¹²⁸ and Madison, at the urging of the ratifying conventions of North Carolina, Virginia, and Rhode Island, proposed that this policy be enshrined in the Bill of Rights.¹²⁹ Madison's proposal was narrowly defeated, but the principal opponents took the position that such exemptions should be left to the discretion of the legislature. Typical was the argument of Egbert Benson that "the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion."¹³⁰ The anti-accommodation position thus flies in the face of what we know about the purposes and understanding of the Religion Clauses.

It is significant, as well, that early nineteenth-century judicial decisions rejecting claims for *mandatory* accommodation under state constitutional free exercise provisions invariably assumed that accommodations were within the legislative discretion.¹³¹ Decisions granting such claims (as well as decisions containing dicta regarding the conditions under which such claims would be granted)¹³² are

124. See *supra* notes 32-118 and accompanying text.

125. The Baptists, who were the most assertive advocates of religious freedom at the time of the framing and ratification of the First Amendment, had no religious objections to taxes, oaths, or bearing arms—the principal occasions of conflict between civil law and religious conscience that arose during this period. JOHN LELAND, *The Virginia Chronicle*, in THE WRITINGS OF JOHN LELAND 120 (L.F. Greene ed., photo reprint 1969) (1845). This helps to explain why exemptions do not figure prominently in the Baptist arguments for free exercise. See West, *supra* note 30, at 631-32.

126. See McConnell, *Origins*, *supra* note 17, at 1466-73.

127. That legislatures chose to make accommodations does not prove that they thought they had to. When constitutional principles are enforced through legislatures rather than judicial review, it is usually impossible to distinguish between legislative policy and legislative constitutionalism. Here, the argument is enhanced by the fact that the appeals for exemption were often framed in terms of natural or constitutional rights.

128. See Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (1905).

129. 1 ANNALS OF CONGRESS, *supra* note 25, at 451 (June 8, 1789).

130. 1 *id.* at 780 (Aug. 17, 1789).

131. See, e.g., *Simon's Ex'rs v. Gratz*, 2 Pen. & W. 412, 417 (Pa. 1831) (describing a free exercise claim for the priest-penitent privilege as involving "considerations of policy [that] address themselves with propriety to the legislature").

132. E.g., *Specht v. Commonwealth*, 8 Pa. 312, 326 (1848) (rejecting free exercise exemption from Sunday Closing law but implying that there might be such a claim if the claimant's religion required work on Sunday); *accord Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 50 (Pa. 1817).

similarly inconsistent with the theory that accommodations are establishments. Indeed, the notion that exemptions violate the nonestablishment principle seems to have been absent from early nineteenth-century legal argument.

Much of the historical argument against accommodations is based on a straw man: that proponents of accommodation believe that in every conflict between religious conscience and the law, conscience must prevail, no matter what the consequence. Professor Ellis West, for example, writes that on historical grounds "it is simply not credible to say that the free exercise clause of the first amendment was intended to give persons or churches the right to disobey laws with impunity provided they had religious reasons for wishing to do so."¹³³ Indeed, such an extreme assertion would not be credible. The actual question is of more limited scope: whether there are occasions in which the Free Exercise Clause requires that religious exercise be given precedence over civil law. To say that there are valid free exercise claims for exemption does not mean that all claims for free exercise exemption are valid.

Putting aside the historical question, it is exceedingly impractical to treat accommodations of religion as categorically unconstitutional. It stands to reason that when a particular law or government policy threatens to inflict serious injury to the legitimate interests of a particular segment of the population, whatever the reason, the government should consider making a special provision. That the injury happens to involve religious conscience—a matter of particular importance and concern in a liberal republic—makes the desirability of accommodations even more evident. If accommodations were deemed illegitimate in principle, the legislature frequently would be forced to choose between violating the religious conscience of a segment of the population or dispensing with legislation it considers beneficial to society as a whole. For example, must Congress choose between attacking the male Catholic priesthood and failing to forbid sex discrimination in employment? This seems both pointless and illiberal because it is possible both to protect religious conscience and to achieve the public purpose. To exempt churches from this aspect of the law seems manifestly more reasonable than either of the alternatives: no exemption or no law.

Opponents of accommodation simply do not face up to the practical consequences of their position—except by trotting out the occasional tired bogeymen of accommodation claims that would have terrible consequences.¹³⁴ No one denies that some accommodations would be terrible. But is this an argument against making any

133. West, *supra* note 30, at 632.

134. *E.g.*, Lupu, *supra* note 5, at 583-86 (discussing religious exemptions from the

accommodations at all? For the most part, arguments against accommodation proceed on a high level of abstraction, without descending to address the impact of this position on real people in real cases.¹³⁵ For my part, it would require an extremely powerful argument to persuade me that it is *unconstitutional* to excuse a Muslim school child from class for a few moments at the appropriate hours of the day for prayer, to allow Jewish military personnel to wear a yarmulke, to permit a church to choose its minister without supervision by the Equal Employment Opportunity Commission (EEOC), or to excuse Jehovah's Witnesses from jury duty. How can such cruel consequences be read into a provision designed to protect the full and equal rights of religious conscience?

The argument that accommodations are unconstitutional turns out to be predicated, almost exclusively, on the claim that accommodations are a form of "subsidy"¹³⁶ or "favoritism"¹³⁷ toward religion—that accommodation "courts the possibility of aggressive state encouragement of religious activity."¹³⁸ This can mean only one of two things. Either accommodations "favor religion" in the sense that they reward and encourage religious behavior, or they "favor religion" in the sense that they protect religion from interference even though nonreligious individuals and institutions would not receive the same degree of protection.

If the first meaning is adopted, the charge that accommodations "favor" religion is simply inaccurate. Under the Supreme Court's analysis of accommodation, set forth in the previous section, government action that rewards or encourages religion is unconstitutional. Accommodation is legitimate only to the point that it facilitates or removes obstacles to independent religious decisions; any supposed "accommodation" that induces or "aggressively encourages" a religious practice should be invalidated. There are many examples of accommodations that permit the religious observer to engage in a practice but create no incentive to do so: to wear a turban or a yarmulke, to say prayers at designated times, to limit one's diet, to attend religious services on particular occasions,

requirement to obtain medical treatment for minor children). The literature offers surprisingly few actual examples of objectionable legislative accommodations, perhaps because the political check is generally sufficient to prevent abuse. Professor Lupu's chief example in this Symposium, the released time program, loses its sting when one considers that the object of his concern, Patti H., chose to participate in the program notwithstanding the "spotlight" it threw on her Catholicism. Lupu, *supra* note 6, at 744. As Lupu tells the story, *id.* Patti's alternatives were worse. Unable to afford a Catholic education, denied by the public school monopoly on public funds the freedom to choose an education appropriate to her religious needs, Patti and her family preferred conspicuous accommodation to inconspicuous assimilation.

135. Professor Tushnet, who has moved from a "dubitante" position on accommodations to the view that they are unconstitutional, has acknowledged that the accommodation principle is "normatively attractive" but difficult to "work out as a coherent principle of constitutional adjudication." Tushnet, *supra* note 122, at 1691.

136. Tushnet, *supra* note 44, at 377.

137. Gey, *supra* note 122, at 77; *see also id.* at 148 ("A literal reading of the establishment clause would prohibit the state from advancing religion in any way, and would therefore preclude the accommodation of religion.").

138. Lupu, *supra* note 6, at 748.

to avoid personal photographs, to prevent an autopsy on the body of a loved one, to refuse to display an orange warning triangle on the back of one's buggy, to decline the benefits of ninth and tenth grade, to ingest a bitter and unpleasant drug, to decline medical care, or to refuse to participate in Social Security—just to mention a few examples from recent free exercise controversies. It is absurd to say that the government “promotes” these practices when it decides not to penalize them. As Justice Brennan once commented, exemptions from laws that burden the exercise of religion “reflect[] nothing more than the governmental obligation of neutrality in the face of religious differences.”¹³⁹

It is particularly peculiar to say that accommodations “promote” religion in view of the fact that accommodations in the government sector arise, by definition, only when religious practices and government policy are in conflict. Far from “enacting into law the religious preferences of the political majority,”¹⁴⁰ or bringing about an “alliance between church and state,”¹⁴¹ accommodations reflect a decision to tolerate dissent from the policies adopted by the political majority. Accommodations are forbearance, not alliance. They do not reflect *agreement* with the minority, but *respect* for the conflict between temporal and spiritual authority in which the minority finds itself.

The second possible interpretation of the charge that accommodations “favor religion” is that they protect religious freedom more than the freedom to conduct oneself in accordance with nonreligious norms. This kind of “favoritism toward religion,” however, is inherent in the very text of the First Amendment. The government must refrain from actions that officially prefer one religion over another, or religion over nonreligion—even though it is free to embrace certain secular ideologies and organizations and to oppose others. The government must also refrain from actions that punish or penalize the practice of religion—though it is free to punish or penalize other forms of human conduct. How could the First Amendment forbid the establishment or protect the exercise of “religion,” if religion cannot receive protection not accorded secular individuals or institutions?

Anti-accommodationists are not without response to this “simple fact,” which one scholar has called “the textualist trap.”¹⁴² One response is to attribute their conundrum to the First Amendment itself. If the Establishment Clause prohibits the advancement of

139. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

140. *Gey*, *supra* note 122, at 76.

141. *Id.* at 186.

142. *Id.* at 148. Anti-accommodationists understandably have a tendency to disparage arguments based on constitutional language. See West, *supra* note 30, at 622 (calling

religion, and if extending special constitutional protection to free exercise advances religion, then the Religion Clauses are contradictory; and we should be free to substitute non-textualist interpretations of the self-contradictory text.¹⁴³ But it is surely more sensible to ask, instead, whether there is a reading of the two clauses that is not contradictory—especially since historians tell us that the free exercise and nonestablishment arguments were invoked interchangeably and “represented a double declaration of what Americans wanted to assert about Church and State” rather than being two separate, let alone inconsistent principles.¹⁴⁴ In the context of their purposes and intellectual history, the Religion Clauses are complementary provisions guarding against two equal and opposite threats to the autonomy of religious life. The Establishment Clause guarantees that the federal (and after incorporation, state and local) government will not give official status or preference to any religion or religions, and the Free Exercise Clause guarantees that it will not interfere (without sufficient justification) with the beliefs and practices of any religion. In other words, decisions about whether and what religious practices to engage in will be left to individual citizens and their churches.

It is the anti-accommodationists who fail to appreciate the significance of the Establishment Clause for the accommodation question. Anti-accommodationists object to “singling out” religion for special protection under the Free Exercise Clause, but they typically¹⁴⁵ have no qualms about “singling” out religion for special prohibitions under the Establishment Clause. Government may advance secular causes such as feminism or capitalism, subsidize controversial private organizations such as Planned Parenthood or the Republican

the accommodationist argument “a classic example of how a literal or common sense reading of a constitutional or legal text can be completely misleading”); Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 683 (1990).

143. This seems to be the thrust of Stephen Gey’s argument:

There are several flaws in these claims that the particular phrasing of the first amendment mandates that religious expression be given greater protection than nonreligious expression. . . . [T]he establishment clause also singles out religion in a manner that directly contradicts the accommodation principle. A literal reading of the establishment clause would prohibit the state from advancing religion in any way, and would therefore preclude the accommodation of religion. The accommodationist and separationist interpretations are each defensible readings of the first amendment, but neither reading follows inevitably from the simple fact that religion is mentioned in the constitutional text.

Gey, *supra* note 122, at 148. I cannot resist commenting in passing that a “literal reading” of the Establishment Clause would do nothing more than prohibit an official church. I agree with Gey that the Establishment Clause means more than this, but I would not be so bold as to claim that this broader reading is inherent in the text. It is an indefensible leap, however, to choose a non-literal definition of “establishment” that contradicts the literal meaning of the Free Exercise Clause, which “singles out” and forbids laws that “prohibit” the exercise of religion. On the literal language of the Free Exercise Clause, see McConnell, *Free Exercise Revisionism*, *supra* note 17, at 1115-16.

144. See THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 216-17 (1986).

145. The fully symmetrical “formal neutrality” proposed by Professor Kurland and recently embraced by Professor Tushnet escapes this criticism.

Party, and issue government propaganda about improper private habits such as smoking or teenage sex; but it may not identify itself officially with Christianity, subsidize churches as such, or propagandize for religious views. This half of the Religion Clauses suits the anti-accommodationists just fine. But when religion is singled out for *protection*, this strikes them as terribly unfair. My position is that the government must “single out” religion in *both* free exercise and establishment contexts, with the goal of approximating a substantive neutrality in a religiously pluralistic culture. The anti-accommodationists seemingly take the position that the government must never “advance” religion, but may inhibit, penalize, and punish it.

A second response by anti-accommodationists to the “textualist trap” is to argue that, properly read, the Free Exercise Clause does not “single out” religion. The purpose of the Clause, they say, is to make clear that religious expression is part of the First Amendment’s “broad protection [of] all forms of expression without regard to their religious nature.”¹⁴⁶ The Free Exercise Clause has “a crucial role in First Amendment theory by expanding the concept of expression beyond the purely political context.”¹⁴⁷ But religion is protected as speech, and nothing more. Free exercise protection is strictly limited to “religious beliefs, verbal expression . . . and the symbolic representation of faith through religious iconography”—subject always to “traditional time, place, and manner regulation.”¹⁴⁸

One need look no further than the Constitution’s use of the term “exercise” to appreciate the implausibility of an interpretation that would confine the Clause to speech and belief.¹⁴⁹ Even the modern

146. Gey, *supra* note 122, at 149.

147. *Id.* Ironically, though Gey asserts that it “contradicts” the view, which he attributes to Robert Bork, “that the first amendment protects only a narrow range of mainstream political expression,” *id.* at 182, this interpretation of the Free Exercise Clause actually confirms that position. If the Free Exercise Clause was necessary (“crucial,” in Gey’s estimation) to “expand[] the concept of expression beyond the purely political context,” then without the Free Exercise Clause the First Amendment must not have extended to the nonpolitical. An implication of Gey’s anti-accommodationist interpretation of the Free Exercise Clause, then, is that there exists no First Amendment protection for nonpolitical, nonreligious expression—including art and science. If the First Amendment already extended to the nonpolitical, then the Free Exercise Clause would be redundant.

148. *Id.* at 181; see also William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

149. On the definition of “exercise” in contemporary dictionaries, see McConnell, *Origins*, *supra* note 17, at 1489. Gey attempts to ground his interpretation in the drafting history of the Free Exercise Clause, specifically the early drafts that referred to “rights of conscience” rather than “free exercise of religion.” Gey, *supra* note 122, at 149-50. He does not point out that the House and Senate voted repeatedly on drafts presenting the choice between these phrases (at one point using them both, which strongly suggests that they were not seen as redundant), eventually settling on “free exercise of religion.” McConnell, *Origins*, *supra* note 17, at 1481-82, 1488-1500. It is untenable to base an

Supreme Court, which has adopted an extraordinarily narrow view of free exercise, has unanimously rejected that reading.¹⁵⁰ The Virginia Declaration of Rights, which was the principal precursor to the First Amendment, began: “That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion.”¹⁵¹ Unless the duties we owe to our Creator are confined to speech and belief, this demonstrates that “free exercise of religion” was understood to extend beyond the rights of expression.

But if First Amendment protections for religion extend beyond speech and belief, to “exercise,” then the anti-accommodationist construction of the Amendment collapses. It is not credible to argue that accommodation of religion violates the First Amendment on the ground that it protects religion and not other institutions and systems of belief, because the same argument could be made against the First Amendment itself.

The final point to be made against the claim that accommodations “favor religion” because they protect religious but not nonreligious objections is that this is not necessarily true. Accommodation of religion must not be viewed in isolation, as if no other personal interests of the citizens receive protection from otherwise applicable laws. To hold that accommodation of religion is unconstitutional is to hold that the government *must* refuse to accommodate, even if it would accommodate a secular concern of comparable strength.

Consider an example posited by Professor Steven Gey: the case of a female student whose religion does not permit her to bare her legs in public, but is compelled to attend gym class, where for “aesthetic” reasons the students are required to wear shorts.¹⁵² Gey does not identify the hypothetical student’s religious belief, but it resembles that of many traditional Hindus and Moslems. Although recognizing that allowing the student to wear alternative dress “would not ‘coerce, compromise, nor influence the religious beliefs of any school children,’ ”¹⁵³ Gey maintains that this accommodation

interpretation on the rejected phrase rather than the one that was adopted. For an interpretation of the drafting history that leads to the opposite conclusion, see *supra* note 25.

150. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (“[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts.”); see also *id.* at 893 (O’Connor, J., concurring) (“[T]he First Amendment does not distinguish between religious belief and religious conduct.”); *id.* at 909 (Blackmun, Brennan, and Marshall, JJ., dissenting) (joining this part of O’Connor’s opinion). If applied unflinchingly, Professor Gey’s interpretation would allow the government to discriminate against religion, so long as the laws pertained to conduct rather than speech.

151. Virginia Declaration of Rights § 16 (June 12, 1776), reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 70 (Philip B. Kurland & Ralph Lerner eds., 1987).

152. Gey, *supra* note 122, at 182. Gey attributes the example to Dean Jesse Choper, who in turn drew the example from a case that arose in Alabama.

153. *Id.* (quoting Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 689 (1980)).

“would not be permissible.”¹⁵⁴ “By ceding authority over the objecting student to the higher religious authority,” Gey states, “the school board subjugates democratic control over a particular policy area to a nondemocratic, extra-human force.”¹⁵⁵

What are we to make of this argument? One can only presume that a reasonable school board would accommodate a student who had equally powerful secular claims for accommodation (though the Free Exercise Clause would not *require* it). To say that the board *may not* accommodate the objection if it is grounded in religious belief means that religion is given least-protected status. But what if the school board has refused to accommodate secular objections to the gym uniform? It does not necessarily follow that the board would refuse to accommodate *all* secular objections, no matter how strong they may be. The “governmental interest test” is the means by which we can evaluate these counterfactual cases. If the government has a “compelling” (perhaps even a “substantial”) interest in enforcing the rule, then we can assume that secular interest would be overridden. (That is what we mean when we say that the government’s interests are “compelling.”) But if the government’s interests are not particularly strong, as in this case, there is every reason to believe that some secular beliefs, if held with anything like the strength of the religious example, would be accommodated.

The example thus helps to explain why accommodation is permitted, and also why it is sometimes required. If there were a Hindu or Moslem majority in the community, the uniform would have a different design, and all the students would, in effect, conform to the Hindu and Moslem mores (unless they had other constitutionally cognizable objections). Indeed, a modest uniform would probably be viewed as “natural” or “traditional,” and not religious at all. Because there is neither a Hindu nor a Moslem majority, and because the majority’s view of aesthetics and convenience favors the wearing of shorts, those who have different mores (whether religious or secular) pose a problem for the officials with control over the program. The ordinary checks of the political process are fair guarantees that government officials will ordinarily exercise reasonable judgement and will not mindlessly subject their young citizens to oppressive rules. Accommodations will probably be made. But the peculiar circumstances of minority religions and the danger of religious majoritarianism make it necessary to buttress the political checks with constitutional protections when the objection is based on adherence to religion (which, given the majoritarian character of the rule, will virtually always be a minority religion). The only reason I can think

154. *Id.*

155. *Id.* at 183.

of that school officials might deny the student's request for accommodation is that they are hostile to Hinduism or Islam, or (less likely, but still possible) to religion in general, or to any religion that deviates from the society's norm of conduct. That is what the Religion Clauses are designed to prevent. The claim that the Religion Clauses *require* accommodation seems perfectly consistent with the general constitutional commitment to the protection of minority rights; the claim that the Religion Clauses *outlaw* accommodation of this sort is both normatively and doctrinally wrong. What legitimate interest of the state is served by requiring a Moslem or Hindu girl to violate the tenets of her faith?

B. The Argument That Accommodations May Be Made by Courts but Not Legislatures

Some commentators argue that courts can impose exceptions to formally neutral laws of general applicability under appropriate circumstances, pursuant to the Free Exercise Clause, but that the political branches are strictly forbidden to do so. In other words, the Establishment Clause forbids any accommodation that the Free Exercise Clause does not require. Professor Ira Lupu is the leading exponent of this position.¹⁵⁶ His position raises questions regarding the institutional competence of the political and judicial branches of government, as well as of practical consequence for Religion Clause doctrine.

1. Institutional Competence

Professor Lupu's argument that courts are the only decisionmakers authorized to require accommodations of religion is based on two premises. First, he argues that, for a variety of reasons, courts are likely to be more principled and even-handed than political bodies. Confining the authority to accommodate religion to the courts thus reduces the danger of unequal treatment of unpopular or unfamiliar religious groups.¹⁵⁷ Second, he argues that, insofar as accommodation is implemented at the state and local level, it will result in "a nonuniform pattern of special treatment for religions dominant in particular states," aggravating the dangers of inequality.¹⁵⁸ Lupu would not allow legislatures to enact accommodations even when they believe an accommodation is constitutionally compelled, and he has qualms about allowing legislatures to enact accommodations in response to an actual judicial decision that the accommodation is required.¹⁵⁹

This conception of judicial exclusivity in the enforcement of the Constitution is utterly foreign to our legal system. The commands of the Constitution are addressed to all persons exercising authority under it; that is why our senators and representatives, and executive

156. *See* Lupu, *supra* note 5, at 556, 559-611.

157. *Id.* at 600-05.

158. *Id.* at 605-06.

159. *Id.* at 606-07.

as well as judicial officers, at both the state and the federal level, are required to take an oath to support the Constitution.¹⁶⁰ Judicial review is not even mentioned in the Constitution. The First Amendment applies to the states by incorporation through the Fourteenth Amendment;¹⁶¹ Section five of the Fourteenth Amendment vests the authority to enforce that Amendment in the Congress.¹⁶² I cannot fathom on what theory Professor Lupu contends that legislators and executive officers are *forbidden* to conform their acts to constitutional requirements.

The institutional strengths of the judiciary to which Professor Lupu refers are real (even if somewhat exaggerated). It may be true that courts are more likely to reach principled decisions and less likely to discriminate in favor of mainstream faiths.¹⁶³ It surely is true that there would be greater uniformity if federal courts made all the decisions. But this is equally true of many other issues of constitutional dimension. For example, racial discrimination—both against minorities and on their behalf—is a knotty problem, entailing great risk of unprincipled and racist decisionmaking. For all the reasons Lupu rehearses, courts might well be the best decisionmakers. But no one would contend that Congress should have been kept from passing the Civil Rights Act of 1964, or that states and localities should be barred from enacting local codes and ordinances forbidding discrimination. Indeed, in the especially sensitive area of affirmative action, the prevailing view is that Congress—pursuant to its section five authority—has broad latitude to engage in affirmative action, even though the courts' authority to do so is limited to circumstances in which affirmative action is a narrowly tailored remedy for a specific constitutional violation.¹⁶⁴

Legislative discretion in other areas of constitutional concern is not confined to the bare requirements of the Constitution. The political branches are entitled, within their delegated authority, to secure the blessings of liberty and promote the values of the Bill of Rights in ways that go beyond what courts could require. Why should the free exercise of religion be an exception? Of course, the substantive scope of permissible accommodation is limited by the Establishment Clause (just as the scope of permissible affirmative action is limited by the Equal Protection Clause). But the Establishment Clause limits the type of action all branches of government

160. U.S. CONST. art. VI.

161. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

162. U.S. CONST. amend. XIV, § 5.

163. As noted *infra* notes 165-75 and accompanying text, however, there is reason to doubt that legislative accommodations are as discriminatory as Lupu suspects.

164. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Fullilove v. Klutznick*, 448 U.S. 448, 473-75, 491 (1980); see also *id.* at 510, 515 n.14 (Powell, J., concurring); *id.* at 517-20 (Marshall, J., concurring in judgment).

may take; it provides no warrant for the proposition that courts may accommodate while legislatures cannot.

2. *Practical Consequences*

The position that the First Amendment compels some judicially-created exemptions but forbids legislative accommodations, is normatively superior to the view that all accommodations are forbidden—provided that the prevailing interpretation of the Free Exercise Clause is hospitable to accommodations. Under pre-*Smith* doctrine, judicial accommodations would protect the most powerful and pressing claims, leaving unprotected only those religious practices where the burden is less clear, where the government interest is apparently strong, or where the obstacle to the exercise of religion derives from private sources. The main effect would be to force religious freedom litigants to go to court and to obtain relief piecemeal, which many of them cannot afford. It is hard to see any practical advantage to this (except to the litigation bar), but it is better than no accommodation at all.

Under the current interpretation of the Free Exercise Clause, however, this position is indistinguishable from the position that all accommodations are unconstitutional. Under *Smith*, accommodations are not constitutionally required. Under the judicial exclusivity position, any accommodations not required by the Constitution are unconstitutional. Ergo, all accommodations are unconstitutional.

Professor Lupu's own version (because he rejects *Smith* in some contexts) would allow some accommodation for religiously motivated individuals, but would forbid accommodation of religious institutions.¹⁶⁵ For example, he contends that courts and the EEOC should have the same power to oversee the selection of clergy that they have under the employment discrimination laws to oversee the selection of ordinary workers; churches should be forced to hire women, homosexuals, or unbelievers as priests and ministers, even if they have ecclesiastical principles to the contrary.¹⁶⁶ This position strikes me as exceedingly odd. Exemption of religious institutions from intrusive regulation presents the strongest, not the weakest, claim for accommodation because the integrity of the religious community—its ability to determine its own structure, doctrine, membership, and leadership—is generally prerequisite to individual faith, and because such matters rarely, if ever, affect outsiders to the religion.

Professor Lupu's explanation for confining free exercise accommodations to noninstitutional claims betrays a highly individualistic conception of religion. He maintains that "large, bureaucratized religious organizations" present problems of "agency costs (who

165. See Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987).

166. See *id.* at 437-38.

speaks for whom), good faith, financial self-interest, and threats to social cohesion" so serious that they should be denied the right to invoke the Free Exercise Clause.¹⁶⁷ He believes that the state should intervene to protect religious believers from the power of their chosen religious denominations, because it is "highly questionable" to think that self-sacrificing demands of organized religion, taught to "subjugated group members . . . from early ages as natural and divinely inspired" have received the genuine assent of the members.¹⁶⁸ I think Lupu is wrong on both scores. Whether religious organizations accurately reflect the beliefs of their members and whether members are "subjugated" or brainwashed by early-childhood propaganda are matters for the believers and their religious communities to decide, without government help. If the constitutional protections for free exercise are not extended to the institutional manifestations of religious practice, a great deal of what adherents deem to be valuable about religion will be lost.¹⁶⁹

It is possible that the opposite of Lupu's position will be adopted: that some degree of constitutional protection for institutional autonomy will be retained (perhaps under the Establishment Clause), even though individual free exercise is left to the mercy of the state. The *Smith* opinion approvingly cites the line of cases in which the Court held that government must defer to religious authorities in internal church property disputes—a potentially wide-ranging jurisprudence based as much on establishment as on free exercise principles.¹⁷⁰ *Smith* also cites a decision suggesting that churches retain the power to set their own membership criteria.¹⁷¹ It is difficult to see why these decisions would survive *Smith* unless the Court senses that institutional claims stand on a different footing than individual claims.

The relation between the free exercise and establishment provisions might be reconceptualized as follows. Instead of treating free

167. Lupu, *supra* note 6, at 774.

168. *Id.* at 751 n.31.

169. See Glendon & Yanes, *supra* note 19 (arguing for greater recognition of the associational and institutional dimensions of free exercise); accord Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 87 (James D. Hunter & Os Guinness eds., 1990).

170. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-52 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952)). On the expansive potential of these decisions, see Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

171. *Smith*, 494 U.S. at 482 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

exercise as the clause under which to challenge burdens on religious exercise and establishment as the clause under which to challenge promotion or preference for religion, free exercise could be seen as the protection for *individual* religious autonomy and establishment as the provision governing the *institutional* relations between church and state. The value animating the first would be something like formal neutrality (under *Smith*), and the value animating the second would be something like separation. Institutional exemptions promote the value of separation as well as that of religious liberty: they reduce the degree of interaction and friction between officers of the state and the institutions of the church.¹⁷² This has been an important element in religious freedom in the West for some nine hundred years.¹⁷³ In *NLRB v. Catholic Bishop*,¹⁷⁴ the Supreme Court recognized that the same considerations of “entanglement” that have informed Establishment Clause decisions striking down aid to parochial schools also militate against government regulation that would intrude deeply into the internal governance of religious institutions. One of the consequences of *Smith* may be to spark interest in a new conception of “separationism”—one designed to protect religious association from government control rather than to eliminate religion from public life.¹⁷⁵

C. *The Argument That Accommodations Are Permitted but Not Required*

The most common anti-accommodationist position is the narrowest: that the Free Exercise Clause does not compel accommodations but (within appropriate limits) the Establishment Clause permits them. This position now commands a majority on the Supreme Court.¹⁷⁶ Interestingly, the academic defenders of this position almost invariably state that they reject the reasoning, though not the result, of the Supreme Court’s decision.¹⁷⁷ Professor Marshall, for example, writes: “The *Smith* opinion itself, however, cannot be readily defended. The decision, as written, is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction. . . . My task is then to defend *Smith*’s [result] without defending *Smith* itself.”¹⁷⁸ Elsewhere I have analyzed and criticized the reasoning of the Court in *Smith*.¹⁷⁹ Here, I will address each of the major arguments made by scholarly opponents of free exercise exemptions.

172. See McConnell, *Neutrality*, *supra* note 17.

173. See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) (identifying the struggle for the independence of the institutional church in the late eleventh century as one of the most significant developments in the Western legal tradition).

174. 440 U.S. 490 (1979).

175. See Stephen D. Smith, *Separation and the “Secular”*: *Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

176. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

177. See, e.g., Marshall, *supra* note 120, at 308-09; West, *supra* note 30, at 600-13.

178. Marshall, *supra* note 120, at 308-09.

179. McConnell, *Free Exercise Revisionism*, *supra* note 17.

1. Religious Accommodations Constitute a "Benefit" to Religion

The most frequent argument against religious accommodations is that they "constitute[] special or favored treatment for . . . religion."¹⁸⁰ Professor West argues that "granting exemptions as constitutional rights violates the principle of neutrality toward religion."¹⁸¹ Professor William Marshall calls accommodations "favoritism for religious beliefs over other beliefs."¹⁸² This should sound familiar. It is the same argument made by those who contend that accommodations are forbidden by the Establishment Clause.¹⁸³ I have already shown the fallacy in the argument: it rests either on the false claim that all accommodations are an affirmative inducement or subsidy for religion, or on the argument that special constitutional protection for free exercise violates the Establishment Clause—a patent misconstruction of the First Amendment.

This time, however, the argument is *not* that accommodations are unconstitutional. West states that his "is not an argument against all religion-based exemptions, including those granted by legislatures as privileges."¹⁸⁴ Indeed, he explains, "to show that no religion-based exemptions are *required* by the Constitution is not to show that all such exemptions are *prohibited* by the Constitution."¹⁸⁵ This is true—but to show that accommodations are not required *on the ground that they violate the principle of neutrality* is to show that they are, in fact, prohibited. If accommodations are preferences, and the Establishment Clause prohibits preference, it must follow that accommodations are not only not required, but forbidden.

West's argument that accommodations are not required thus contradicts his argument that legislative accommodations are permitted. In an attempt to escape this contradiction, West notes that the founders "were willing to condone some religion-based exemptions granted by legislatures."¹⁸⁶ He calls this fact "puzzling," but calmly observes: "Nevertheless, it is a fact, and it allows the Supreme Court to uphold some legislature-granted exemptions on the basis of their 'unique history,' just as it did in upholding prayers in legislatures by paid chaplains."¹⁸⁷ This explanation is patently inadequate.¹⁸⁸ A better explanation is that the Founders did not agree

180. West, *supra* note 30, at 600.

181. *Id.*

182. Marshall, *supra* note 120, at 320.

183. See *supra* text accompanying note 145.

184. West, *supra* note 30, at 634.

185. *Id.*

186. *Id.* at 635.

187. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

188. It was also an inadequate explanation in the case of legislative chaplains. See Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362-63 (1988).

with West that accommodations violate the principle of neutrality. West also states that because

legislatures are always crafting exemptions from laws for categories of persons, groups, or businesses that might be unduly harmed . . . by having to conform to those laws. . . . The principle of neutrality or fairness would suggest that religious entities that might suffer special but significant hardship should also be allowed to receive such exemptions.¹⁸⁹

West fails to note that a similar argument can be made for constitutionally compelled accommodations: because legislatures are “always crafting” accommodations for secular groups and politically influential religious groups, it is necessary for courts to do so for minority religious groups whenever they would be “unduly harmed” by enforcement of the law, if we are to avoid discrimination against them. The Free Exercise Clause serves as a backdrop to guarantee “fairness” to religious minorities when the political process fails.

Professor Marshall’s argument against constitutionally compelled accommodations contains the same contradiction. On the one hand, he argues that “[t]he free exercise exemption . . . offends Establishment Clause principles.”¹⁹⁰ On the other hand, he states that “statutory exemptions” do not necessarily violate the Establishment Clause.¹⁹¹ A “conclusion that the Free Exercise Clause does not require a particular result does not mean that the Establishment Clause necessarily prohibits that result.”¹⁹² This argument is true, but if the Establishment Clause does not prohibit the result, the alleged offense to “Establishment Clause principles” cannot be used as an argument against the accommodationist interpretation of the Free Exercise Clause. Marshall’s attempt to resolve the contradiction is no more persuasive than West’s.¹⁹³ Marshall asserts that “[l]imited statutory exemptions . . . do not necessarily send th[e] forbidden message [of endorsement of religion].”¹⁹⁴ He does not explain why “limited constitutional exemptions” would be any different.¹⁹⁵

Marshall offers one additional argument: that statutory exemptions are subject to “stringent constitutional review,” in contrast to constitutional exemptions, which are “presumptively valid.”¹⁹⁶ This argument implies that courts do not trouble to assure themselves that the remedies they impose are constitutional. This simply is not

189. West, *supra* note 30, at 635.

190. Marshall, *supra* note 120, at 320.

191. *Id.* at 323.

192. *Id.*

193. See *supra* text accompanying notes 184-189.

194. Marshall, *supra* note 120, at 323.

195. Another critic of accommodations, Professor Tushnet, argues the opposite. He says that “[p]recisely because accommodation statutes are accommodations of religion, they necessarily ‘send a message’ that exercises of religion are approved.” Tushnet, *supra* note 122, at 1703.

196. Marshall, *supra* note 120, at 324.

the case.¹⁹⁷ If anything, one would expect courts to be particularly circumspect about imposing remedies that come close to being constitutional violations.

In any event, the supposed “benefits” to religion from an accommodationist interpretation of the Free Exercise Clause are balanced by the ‘disadvantages to religion from the Establishment Clause. When dealing with religion, government must refrain from action that inhibits the activity (without sufficient justification), and it must also refrain from action that induces the activity (without sufficient justification). Some believe that a constitutional regime of substantive neutrality toward religion promotes religion;¹⁹⁸ others conclude that this regime is hostile to religion.¹⁹⁹ I think it more accurate simply to say that the lawful scope of government authority to influence the religious life of the people is constrained strictly.

In the end, these attacks on religious accommodation are simply a play on ambiguous words like “benefit” and “neutrality.” As Professor Douglas Laycock has persuasively shown, there are at least three quite different senses in which the concept of “neutrality” is commonly used in interpreting the First Amendment.²⁰⁰ Religious accommodations violate one of these conceptions of neutrality: “formal neutrality.” They do not violate—indeed, they are in many cases required by—another conception of neutrality, which Professor Laycock labels “substantive neutrality.”²⁰¹ The serious question is which conception of neutrality best comports with the purposes of the First Amendment. It cannot be resolved by a naive invocation of “neutrality” as if it were obvious that formal neutrality is the only conception of the term.

2. *Adoption of the Accommodationist Interpretation Would Eviscerate the Establishment Clause*

A related argument made by some opponents of religious accommodation is that adoption of the accommodationist position would force a radical revision and devaluation of the Establishment Clause. Professor Lupu, for example, contends that my accommodationist

197. See *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

198. Gey, *supra* note 122.

199. See, e.g., David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. (forthcoming 1992) (reviewing MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991)).

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

201. *Id.* at 1003.

position rests on a “weak or underdeveloped account of the Establishment Clause.”²⁰² Accommodationists, he says, are “reluctant” to give the Establishment Clause “its due.”²⁰³ The charge is misplaced.

To begin with, it is not true that proponents of accommodation always or necessarily take a “weaker” view of the Establishment Clause, or that opponents of accommodation take a “stronger” view. Among the institutional proponents of legislation that would overturn the *Smith* decision and restore an accommodationist construction to the Free Exercise Clause are the American Jewish Congress, the American Civil Liberties Union, Americans United for Separation of Church and State, and People for the American Way—all of which are well known for taking an expansive view of establishment. By the same token, most leading academic opponents of the accommodationist interpretation of free exercise—Ellis West, Bill Marshall, Michael Malbin, and Walter Berns, and to some extent Mark Tushnet and Phil Kurland—have advocated interpretations of the Establishment Clause less expansive than the Supreme Court’s.²⁰⁴ The leading advocates of free exercise exemptions on the Supreme Court in recent years (Justices Brennan, Marshall, and Blackmun) are also the leading advocates of a “strong” Establishment Clause, while the opponents of free exercise exemptions (except for Justice Stevens) also tend to advocate a less expansive conception of establishment.²⁰⁵ Given this mix of opinions, it is evident that free exercise accommodationism does not necessarily imply a devaluation of establishment principles.

Moreover, the claim that accommodationism devalues the Establishment Clause depends on the claim that accommodations are a special benefit to religion. For reasons already discussed,²⁰⁶ that claim is not warranted. If accommodations were a special benefit, I would agree that acceptance of accommodations would require radical revision in the Establishment Clause. But it makes more sense to see the two Religion Clauses as complementary and symmetrical

202. Lupu, *supra* note 6, at 748.

203. *Id.*

204. Kurland and Tushnet would expand establishment doctrine in some respects and contract it in others—allowing more nondiscriminatory financial assistance but fewer exemptions from intrusive regulation. Lupu’s own self-description as an advocate of “Strong Establishment Clause, Strong Free Exercise Clause,” Lupu, *supra* note 6, at 780, will raise questioning eyebrows in most circles. Lupu favors a much greater latitude for financial aid to religious institutions than has been permitted under *Lemon*, see Lupu, *supra* note 5, and the extent of free exercise protection under his proposed approach is exceedingly limited. See Lupu, *supra* note 165.

205. Thus, Justices Brennan, Marshall, and Blackmun, who dissented in *Smith*, were dissenters in *Bowen v. Kendrick*, 487 U.S. 589 (1988), and in the majority in *Augilar v. Felton*, 473 U.S. 402 (1985). Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, who were in the majority in *Smith*, were in the majority in *Kendrick* and (except for Scalia and Kennedy, who were not yet on the Court) dissented in *Augilar*. Only Justice Stevens was in the majority in *Smith*, the majority in *Augilar*, and the dissent in *Kendrick*.

206. See *supra* notes 180-201 and accompanying text.

propositions, protecting the autonomy of religious life against government inhibition as well as inducement. I do not see this construction as “weakening” the Establishment Clause.

Most accommodations in the institutional context further the separationist values of the Establishment Clause as well as the religious liberty values of the Free Exercise Clause. The typical case involves a government regulation that intrudes into the decisionmaking autonomy of the church. The leading example is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.²⁰⁷ In *Amos* the Court held that the government could exempt religious institutions from the religious antidiscrimination requirements of Title VII, thereby allowing them to favor members of their own faith in hiring for positions in noncommercial activities of the church. If it were not for the accommodation, the government would become deeply entangled with religiously sensitive church decisions. The government would have to determine why a church fired or refused to hire a particular person, which would entail discovery into internal church governance, and it would have to determine whether the particular function is one for which religious affinity is a legitimate qualification, which would entail second-guessing the church’s understanding of its religious mission. There is a strong argument that invasive and entangling regulation of this sort violates the Establishment Clause.²⁰⁸ To exempt religious institutions from some forms of regulation protects the separation of church and state. In this sense, institutional religious accommodation strongly reinforces, and may be required by, the Establishment Clause.²⁰⁹

The charge that the accommodationist interpretation of the Free Exercise Clause will eviscerate the Establishment Clause has a certain irony. In several important respects, the accommodationist interpretation of free exercise is doctrinally more compatible with a

207. 483 U.S. 327 (1987). *Amos* is discussed *supra* notes 39-41 and accompanying text.

208. See Esbeck, *supra* note 170, at 348.

209. *Amos* is a much misunderstood decision. One scholar has described the case as “favor[ing] free exercise in the form of the theological integrity of religious organizations over free exercise in the form of personal freedom of conscience and belief.” Gey, *supra* note 122, at 92. But, an employee of a church has no “free exercise” rights against the church; the Free Exercise Clause runs only against the government, not against private parties. The *Amos* decision favored the free exercise right against governmental interference over a statutory right to nondiscrimination. Another scholar has described *Amos* as “prefer[ring] religion to their non-religious counterparts.” Lupu, *supra* note 6, at 768 & n.121. But Title VII does not prohibit discrimination on the basis of secular ideology; secular, ideological organizations are permitted to discriminate in favor of their adherents. The Sierra Club can hire only environmentalists if it chooses. Though in form the exemption upheld in *Amos* was religion-specific, in effect it merely placed religious organizations on the same plane as their nonreligious counterparts.

vigorous Establishment Clause than is its principal competitor, reflected in *Smith*.²¹⁰ First, the impetus behind the *Smith* opinion was less the proper relation between religion and government than it was the proper relation between the courts and the political branches. *Smith* is a major step toward increased judicial deference to the political branches in the area of religion. The logical corollary to *Smith* on the establishment side is to increase the deference to the political branches. The accommodationist position on the Free Exercise Clause is more consistent with a strong, continued judicial role.

Second, both the accommodationist position on free exercise and the “strong” interpretations of the Establishment Clause insist that—at least in some contexts—the government must treat religion differently from other activities and ideologies. The logical corollary to abandoning that position in *Smith* is to abandon it for establishment purposes as well, which would mean that government support and endorsement of religion would be treated in much the same way as government support and endorsement of other activities and ideologies. Needless to say, this would constitute a major departure from Establishment Clause principles. In a world in which the police powers of the state have extended to permit the support or regulation of virtually any activity in the private sphere, the separation of church and state requires a sharp distinction between “church” and anything else.

Third, the accommodationist position employs an “effects test” under the Free Exercise Clause, while *Smith* holds that only facial or intentional discrimination against religion is unconstitutional. The logical corollary for the Establishment Clause would be to dispense with the effects and entanglement tests under *Lemon v. Kurtzman*,²¹¹ making only laws with a religious purpose vulnerable to Establishment Clause challenges. This would be a more restrictive position than any Justice or commentator has ever suggested.

Far from threatening Establishment Clause principles, therefore, the accommodationist position strengthens those principles against the much more serious danger posed by the competing position of deference to majoritarian decisionmaking affecting religion. It is true that accommodation is inconsistent with the hypertrophic understandings of establishment that have animated secularists and their allies for so many years—but that would be true of any serious recognition of free exercise principles. Unlike the formal neutrality position, accommodation seeks to maintain the independence of religious life from government influence and control. That position simply cannot be described as favoring the establishment of religion.

210. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

211. 403 U.S. 602 (1971).

3. *Accommodations May Favor Mainstream Religions over Nonmainstream Religions*

Some commentators have argued that religious accommodations are inconsistent with the principle of denominational neutrality—what Professor Lupu has helpfully termed the principle of “equal religious liberty.”²¹² They say that judicially mandated accommodations tend to protect mainstream religions and not to protect religious faiths that seem unfamiliar or bizarre. Professor Mark Tushnet, for example, contends that those administering religious accommodations are inherently more likely to find that religious claims that seem “familiar”—that is, similar to “the kinds of worship that the Justices of the Supreme Court are accustomed to”—are sincere and therefore protected than they are the claims of “non-mainstream denominations, sects, and cults.”²¹³ As a preliminary point, I doubt the accuracy of this assessment. The one empirical study of

212. Lupu, *supra* note 5, at 580 (emphasis added). Professor Lupu criticizes my statement in an earlier work that “religious liberty is the central value and animating purpose of the Religion Clauses” on the ground that this neglects the principle of equal religious liberty. *Id.* at 567 (quoting McConnell, *supra* note 14, at 1); *see also id.* at 580 (arguing that “accommodationists like Professor McConnell cannot blithely ignore the need for some strong version of an equality principle in this field”). For the record, I have consistently maintained that the First Amendment requires an equality of religious liberty. *See* McConnell, *supra* note 14, at 39; McConnell, *Free Exercise Revisionism*, *supra* note 17, at 1130-32. Contrary to Professor Lupu’s argument that “[t]he principle of religious liberty taken alone is insufficient to fully justify an antidiscrimination principle,” Lupu, *supra* note 5, at 567, I would contend that nondiscrimination is an indispensable element in a regime of religious liberty. If the government confers benefits to one religion and not another, the religious decisions of the people will be distorted. Fundamental to my understanding of religious liberty is that the government should (within the constraints imposed by the necessities of public policy) create neither incentives nor disincentives to religious practice. *See* McConnell & Posner, *supra* note 60, at 37-38. Far from “ignor[ing]” the need for an equality principle in this field, I have based my arguments in favor of accommodation, in significant part, on the proposition that accommodations are necessary for the protection of “the full and equal rights of conscience,” McConnell, *Free Exercise Revisionism*, *supra* note 17, at 1133-36, and in favor of constitutionally compelled accommodations on the proposition that, in light of legislative selectivity, “the only hope for achieving denominational neutrality is a vigorous Free Exercise Clause,” *id.* at 1132.

213. Tushnet, *supra* note 44, at 382-83; *see also* Lupu, *supra* note 5, at 586-87. Tushnet also points to what he calls the “troubling” pattern of Supreme Court free-exercise cases in which, “put bluntly, the pattern is that sometimes Christians win but non-Christians never do.” Tushnet, *supra* note 44, at 381. I think Professor Tushnet is a bit paranoid here. No one has won a free-exercise accommodation case in 20 years, except for disappointed unemployment compensation claimants. One of the winners was a Jehovah’s Witness, which is a decidedly non-mainstream group. Interestingly, Professor Kurland, whose position Professor Tushnet has adopted, argues that smaller religions have a greater likelihood of winning free-exercise exemptions than larger religions—the opposite of Professor Tushnet’s opinion. *See* Philip B. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment’s Religion Clauses*, 75 W. VA. L. REV. 213, 243 (1973).

free exercise cases of which I am aware found that “marginal” religions benefitted more than “established” religions.²¹⁴ It is true that well-documented claims of long-standing groups are less likely to be dismissed as insincere,²¹⁵ but nonmainstream religious groups often can produce extensive documentation of their beliefs.²¹⁶ Indeed, Protestant beliefs may get short shrift because their tradition of individual assessment of scripture sometimes makes it difficult to demonstrate a denominational basis for their actions.²¹⁷ Of course, truly mainstream religions have little need for accommodations at all. Given their influence on the culture, it is unlikely that the laws will conflict in any serious way with their deeply held principles.

More fundamentally, it does not follow from this argument—even assuming its empirical validity—that First Amendment doctrine should be interpreted to preclude free exercise accommodations. Rather, the doctrine should be drawn in such a fashion as to protect the rights of nonmainstream groups. Critics should not be complaining about *Sherbert* and *Yoder*; they should be complaining about cases like *Hernandez*, in which the Court permitted denominational discrimination.²¹⁸ Moreover, concern about nonmainstream religions is properly an argument *in favor of* free exercise accommodations, and against the proposition that accommodations are permitted but not required. Presumably, the political branches are more likely than the courts to favor mainstream over nonmainstream religions. That is why the Court was forced to admit in *Smith* that its ruling would “place at a relative disadvantage those religious practices that are not widely engaged in.”²¹⁹ The Free Exercise Clause is needed as a backstop to legislative accommodations, to ensure that fringe religious groups receive no less protection than is afforded to familiar religions.

Again, the abstract quality of the argument against accommodation is apparent. In the real world, the most enthusiastic supporters of free exercise accommodations, and the most outraged opponents of *Smith*, are the members of and advocates for minority religious

214. Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652, 664-65 (1983).

215. See Tushnet, *supra* note 44, at 382.

216. For example, the Native American religious practices involved in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), were well documented by anthropological studies. *Id.* at 442. Lawyers for the Yoruba and Santeria religious groups, whose animal sacrifices have been outlawed in Florida, traced those practices back many centuries to West Africa. See Reply Brief of Appellants at 3-4, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 936 F.2d 586 (11th Cir. 1991) (No. 90-5176). My sometime clients, the Hare Krishnas, who are not a mainstream group, are able to show a history that goes back many thousands of years. Brief Amicus Curiae of the World Hindu Assembly of North America at 2, *International Soc’y of Krishna Consciousness v. George*, 111 S. Ct. 1299 (1991) (No. 89-1399). Sincerity was thus successfully proven in *Lyng*, and essentially unquestioned in *Lukumi* and *George*.

217. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). In *Mozert*, the Sixth Circuit adopted a very narrow interpretation of the plaintiffs’ asserted religious beliefs, contrary to both the factual findings of the district court and the testimony of the plaintiffs. *Id.* at 1063-65.

218. See *supra* note 85 and accompanying text.

219. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

sects. When lawyers for Muslims, gypsies, Rastafarians, Scientologists, Orthodox Jews, Amish, Hare Krishnas, Jehovah's Witnesses, and the Native American Church begin to oppose religious exemptions on the ground that they discriminate against nonmainstream religion, it may be time to take this argument more seriously.

4. *Accommodations Require an Intrusive Investigation into the Content and Sincerity of Religious Beliefs*

Some commentators object to religious accommodations on the ground that they require the government to decide what claims are sincerely religious. As Professor Marshall explains, "exemption analysis threatens free exercise values because it requires courts to consider the legitimacy of the religious claim of the party seeking the exemption."²²⁰ This process "does more than simply limit religion; it places an official imprimatur on certain types of belief systems to the exclusion of others."²²¹

There is something to this argument,²²² but it is not a serious enough objection to warrant elimination of religious accommodations. As a practical matter, sincerity has been an issue in only a relative handful of cases. In part, this may be because of the self-limiting character of the accommodation doctrine. Because accommodations are designed to alleviate a burden, not to bestow a benefit, the incentives to feign religious belief are reduced—and it is precisely the cases in which the incentives are strong that the government is most likely to be able to establish a compelling interest in not having to make accommodations.²²³

Moreover, it seems odd to say that because the courts might erroneously deny some claims it ought to reject them all. There is undoubtedly a measure of psychic injury to one whose deepest beliefs are held to be insincere, and the court's ruling may have some symbolic effect on the community as a whole. But for the most part the only consequence of an insensitive ruling on the sincerity issue is that injustice is done in the particular case. Professor West claims that the doctrinal judgments entailed by accommodations will entangle government with religion "in the worst sort of way."²²⁴ This

220. Marshall, *supra* note 120, at 310; see also Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 953-60 (1989) (discussing the components of a free exercise claim); John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713; West, *supra* note 30, at 609-10 (examining the necessity of courts entangling themselves in judgments concerning religious beliefs in free exercise cases).

221. Marshall, *supra* note 120, at 310-11.

222. See McConnell, *Neutrality*, *supra* note 17, at 154-55.

223. See *United States v. Lee*, 455 U.S. 252, 263 & n.3 (1982) (Stevens, J., concurring) (expressing particular concern about accommodations that would create "an economic motivation to join the favored sects").

224. West, *supra* note 30, at 609.

assessment is abstract and artificial: to the free-exercise claimant, the “worst sort of way” the government involves itself with religion is to stand in the way of its exercise. To ignore the real effects on religious exercise because of the symbolic effects of this kind of “entanglement” is an example of misplaced priorities.

It also bears mentioning that the problem of sincerity is no worse with constitutionally compelled exemptions than with legislative exemptions. Those commentators, like Marshall and West, who claim to support the legitimacy of legislative exemptions cannot consistently offer this as an argument against constitutional exemptions.

5. *Free Exercise Accommodation Rights Cannot Be Administered Fairly or Objectively by the Courts*

The principal argument in *Smith* is that judges are institutionally incapable of engaging in the balance between religious conscience and the interests of the government that free exercise accommodations are said to require. Indeed, the Court described this process as “horrible to contemplate.”²²⁵ Some commentators have seconded this concern. Ellis West, for example, maintains that “there is no clear, workable, or fair way of limiting the number and kinds of exemptions to be granted if persons had a recognized constitutional right to disobey for religious reasons whatever laws they chose to disobey.”²²⁶ West’s choice of language, which is presumably not accidental, betrays the gulf of misunderstanding between those who view religious scruples as a “choice” to “disobey” and those who view religion as conformity to the dictates of an authority higher than civil society. Jefferson, Madison, and the other Founders who insisted on protecting “the duty which we owe to our Creator, and the manner of discharging it” would not recognize West’s trivialization of the dictates of conscience.²²⁷ But putting aside the language, this argument, too, carries considerable weight. As West points out, the “courts in deciding who is eligible for exemptions will inevitably make decisions that are arbitrary, unpredictable, and discriminatory.”²²⁸

Unlike the previous arguments, this claim distinguishes between constitutionally compelled and constitutionally permitted accommodations, at least to a degree. The most difficult aspect of the free exercise balance is assessment of the weight that should be given to enforcement of the government’s policy, as applied to the religious objector. Where the government has directed that claims of religious conscience should outweigh the government’s interest, this aspect of the adjudication is greatly eased. For example, it is relatively easy to administer a law that allows use of peyote in Native

225. *Employment Div. v. Smith*, 494 U.S. 872, 889 n.5 (1990).

226. West, *supra* note 30, at 604; *see also* Gey, *supra* note 122, at 185 (discussing inherent difficulties in exemption analysis); Marshall, *supra* note 120, at 310-12.

227. Virginia Declaration of Rights § 16 (June 12, 1776), *reprinted in* 5 *THE FOUNDERS’ CONSTITUTION*, *supra* note 151, at 70.

228. West, *supra* note 30, at 605.

American Church ceremonies. We know that the legislature deems the detrimental impact of its policies of less weight than the injury to conscience.

On the other hand, if the government enacts accommodation legislation in general terms (requiring religion to be “reasonably accommodate[d]”²²⁹ or accommodation in the absence of a “compelling governmental interest”²³⁰) the courts will have no choice but to engage in the difficult process of balancing interests. This indicates that the real distinction is not between constitutionally compelled accommodations and legislative accommodations, but between those that are specific and those that are general.

I have argued elsewhere that some of the arbitrariness and unpredictability of the free exercise analysis can be reduced by applying a more categorical approach to the cases, basing this argument on the historical roots of the free exercise doctrine.²³¹ But assuming that some degree of judicial discretion—and hence potential for arbitrariness—remains, as it will, the argument still seems but a weak reason to scuttle the doctrine. As Professor Lupu has observed: “the assertion that judicially manageable standards are lacking here more than in other areas of constitutional adjudication simply rings false.”²³² For example, the courts have a terrible time determining what a “reasonable” search and seizure is, and the results are not always sensible or consistent; the negative commerce clause cases are all over the map; the Supreme Court’s “takings” jurisprudence is a mess. Free exercise cases have been no worse than the rest—only less favorable to the plaintiff.²³³ It is worth remembering Justice Jackson’s words in *Barnette*:

[T]he task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. . . . These changed conditions often . . . cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in [particular fields], withhold the judgment that history authenticates as the function of this Court when liberty is infringed.²³⁴

229. This is the language in Title VII. 42 U.S.C. § 2000e(j) (1988).

230. This is the language in the proposed Religious Freedom Restoration Act. H.R. 2797, 102d Cong., 1st Sess. (1991).

231. McConnell, *Free Exercise Revisionism*, *supra* note 17, at 1144-49.

232. Lupu, *supra* note 6, at 760.

233. Professor Marshall makes the astonishing assertion that the free-exercise exemption process “necessarily leads to underestimating the strength of the countervailing state interest.” Marshall, *supra* note 120, at 312. Has he not noticed that the government almost invariably wins these cases?

234. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943).

Moreover, it should not be assumed that problems of potential arbitrariness exist only under the accommodationist interpretation. To be sure, proponents of formal neutrality claim that theirs would be a “rigid and easily applied test,”²³⁵ but this assertion is too optimistic. Professor Kurland, the originator of this approach, has admitted that formal neutrality does not eliminate the problem of establishing sincerity,²³⁶ though it may be an improvement. It is not always easy to tell whether a given law is religiously neutral. Is building a road through the holy places of the Yurok Indians of California formally neutral (because the decision was based on secular considerations) or discriminatory (because no other religion would be affected and it is hard to believe the road would be built if it had a similar effect on a more powerful religious group)?²³⁷ Is a ban on the “ritual slaughter” of animals “neutral,” as the City of Hialeah argued, because it would apply to fraternity house antics as well as to the Santeria religion?²³⁸ Ironically, the formal neutrality test cannot even resolve the leading free exercise case in the Supreme Court. On the facts of *Sherbert v. Verner*,²³⁹ would it be formally neutral for the State to deny unemployment benefits to persons unemployed for reasons of religious conviction, when others are given benefits for unemployment caused or prolonged by some (but not all) nonreligious personal factors, such as inappropriateness of the work or distance from home? A theory that cannot supply an answer to the leading case in the field is somewhat lacking in ease of application.

I have great sympathy for the view that legal principles should be structured to avoid excessive judicial discretion, which can lead to unprincipled results. But the proper approach is to design rules that will produce the right answer most of the time. Clear rules are of little value if they do not achieve the purpose of the constitutional provision they are designed to illuminate.

6. *The Constitution Privileges the Secular over the Religious*

A final argument against accommodation of religion is that religious commitments—at least those most likely to give rise to claims of accommodation—are inconsistent with the democratic order. Although these commitments should not be suppressed, neither should they be encouraged. Professor Lupu calls this the principle of “secular advantage.”²⁴⁰ He sees religious accommodation as a

235. Tushnet, *supra* note 44, at 400.

236. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 63 (1961) (stating that determining sincerity “may be the insoluble problem under any theory of the meaning of the first amendment religion clauses”). On the problem of sincerity, see *supra* notes 220-224 and accompanying text.

237. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

238. *Church of the Lukimi Babalu Aye, Inc. v. City of Hialeah*, 936 F.2d 586 (11th Cir. 1991) (unpublished opinion, available in LEXIS, 1991 U.S. App. LEXIS 12925 (11th Cir. June 11, 1991)), *aff’g* 723 F. Supp. 1467 (S.D. Fla. 1989), *cert. granted*, No. 91-948, 1992 U.S. LEXIS 1707 (U.S. Mar. 23, 1992).

239. 374 U.S. 398 (1963).

240. Lupu, *supra* note 5, at 596. Professor Kathleen Sullivan makes a similar plea for

threat to “the project of constitutional democracy, which depends upon a citizenry capable of exercising independent and critical judgment concerning policies and leaders.”²⁴¹ “[R]eligious institutions . . . frequently claim divine inspiration of their principles and leaders as a basis of power and legitimacy.”²⁴² “Such claims,” Lupu says, “discourage skepticism and make intense demands for obedience by adherents. The Constitution requires toleration of such institutions, but it would be constitutional folly to read the Establishment Clause to permit support and encouragement [for them].”²⁴³ Such institutions “undermine rather than mutually reinforce habits of mind necessary for democratic decisionmaking.”²⁴⁴ In a similar vein, Professor Gey states that religion is “fundamentally incompatible” with the “intellectual cornerstone of the modern democratic state,” which is the realization that “there can be no sacrosanct principles or unquestioned truths.”²⁴⁵ Religions fail to inculcate the “anti-authoritarian mindset” on which democracy depends.²⁴⁶ The Establishment Clause, he says, “is itself a value choice in favor of collective relativism and uncertainty about everlasting political truth.”²⁴⁷

There is no way to know how much of the opposition to a vigorous Free Exercise Clause is attributable to sentiments of this sort.

privileging secular over religious world views, in the name of the “establishment of the secular public moral order.” Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. (forthcoming 1992) (manuscript at 8, on file with *The George Washington Law Review*). From this premise, Sullivan draws the conclusion that “religious subcultures [should be allowed] to withdraw from regulation insofar as compatible with peaceful diarchic coexistence,” *id.* (manuscript at 51), but should be denied the right to participate in public programs, *id.* Professor Lupu, by contrast, would deny any right of exemption from regulation, but would allow equal participation in public programs. Lupu, *supra* note 5, at 594. Thus, from a common premise that religion is contrary to the liberal democratic order, Sullivan and Lupu reach opposite positions on free exercise and establishment.

241. Lupu, *supra* note 5, at 597.

242. *Id.*

243. *Id.* at 597-98.

244. *Id.* at 598.

245. Gey, *supra* note 122, at 174.

246. *Id.* Gey associates what he supposes to be my “Rightist political principles” with political authoritarianism. *Id.* at 178. Curiously, Professor Sullivan, whose view of religion resembles Gey’s, describes my position as that of “an erstwhile religious anarchist.” Sullivan, *supra* note 240 (manuscript at 46). While I prefer to think of myself as espousing a workable balance between republican government and individual rights, I would admit that my position leans somewhat closer to anarchy than to authoritarianism. I believe that our Constitution recognizes the legitimacy of a belief in powers higher than the state. I believe, moreover, that judgments about the dictates of the higher power can be made only by individuals and communities of believers, and not by the state. The First Amendment, thus understood, undermines any claim by the state to ultimate normative authority. On the other hand, I believe that religion establishes a connection between each individual believer and his fellow man, which helps to overcome the aggressive individualism that so threatens civil order. In this sense, religion is an antidote for anarchy.

247. Gey, *supra* note 122, at 179.

They are rarely expressed.²⁴⁸ Is it necessary to respond? Is it necessary to point out that the great attacks on the democratic ideal and the most intense demands for obedience in this century have come from those for whom no extraworldly source of decent limits exists? Or that their prison camps were filled with brave individuals who claimed divine inspiration for their adherence to principle? Is it not obvious that intolerance and ideological blindness come in secular as well as religious hues? That persons of varying faiths can be equal citizens in a pluralistic republic? Indeed, that the wellsprings of religious experience have made a certain contribution to the development of the democratic spirit?

The canard that the First Amendment was a deliberate “value choice in favor of collective relativism”²⁴⁹ is more often heard among religious demagogues than among those who count themselves as supporters of our pluralistic constitutional order. Let there be no doubt: The Establishment Clause was a deliberate choice to allow all sects and modes of belief, religious as well as secular, to compete for the allegiance of the people, without official preference. The attempt to press the Religion Clauses into service as an instrument for “collective relativism,” or any other official orthodoxy, must be condemned in the strongest possible terms.

The view that religion “undermines” the democratic spirit certainly played no part in this country’s adoption of the First Amendment. The Founders were far more likely to assume, as did Washington, that religion is the “indispensable support[]” for republican government.²⁵⁰ The reaction of the Founders to the subgroups among them whose religious convictions conflicted with the needs of the civil order was not to accuse them of undemocratic tendencies, but to protect their sincere claims of conscience. It was at the time of greatest national peril that the Continental Congress passed this resolution:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.²⁵¹

Tocqueville observed that the Americans of the early days of the

248. They were much more commonly articulated in the last half of the nineteenth-century, though almost exclusively with reference to the Roman Catholic Church. *See, e.g.*, R. W. THOMPSON, *THE PAPACY AND THE CIVIL POWER* 695-716 (New York, Harper & Bros. 1876).

249. *See* Gey, *supra* note 122, at 179.

250. President George Washington, Washington’s Farewell Address, (Sept. 17, 1796), in 1 *DOCUMENTS OF AMERICAN HISTORY* 169, 173 (Henry S. Commager ed., 1973).

251. Resolution of July 18, 1775, *reprinted in* 2 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 187, 189 (Worthington C. Ford ed., 1905).

Republic considered religion “necessary to the maintenance of republican institutions.”²⁵² He had come to agree with them. “Despotism may be able to do without faith, but freedom cannot. Religion is much more needed in the republic they advocate than in the monarchy they attack, and in democratic republics most of all.”²⁵³ He said the French “pedants” find this “an obvious mistake” and believe that “freedom and human happiness” would be advanced by the spread of secular Enlightenment ideas. “To that,” Tocqueville responded, “I have really no answer to give, except that those who talk like that have never been in America and have never seen either religious peoples or free ones.”²⁵⁴

Nor would the view that religion undermines democracy have received the support of more than a tiny segment of the population at any point since then. It is the narrow ideological position of the secular elite, and it can claim no democratic or constitutional warrant. It relegates the large majority of the American public, for whom religion is the most important source of normative understanding, to second-class citizenship.²⁵⁵ Some democracy.

I make no claim that religious positions should be privileged because they are religious, but only that secular positions should not be privileged because they are secular. In a regime of popular sovereignty, the people should be free to draw their normative insights from whatever sources they find convincing, without the government tipping the scales in one direction or another. The arguments for and against accommodation should not rest on dubious presuppositions about the degree to which religion is indispensable to democracy, as Washington and Tocqueville said, or undermines democracy, as Professors Lupu and Gey say. Ours is not a Christian republic, but it is not a secular republic, either. It is a free and pluralistic republic, in which religious voices from a variety of traditions, along with nonreligious voices from other traditions, have an equal right to speak and strive for their visions of justice.

Conclusion

The United States is fortunate that our debates over free exercise of religion are confined to the alternatives of a ban on overt discrimination and a ban on laws that restrict the practice of religion without sufficient justification. Either position would be an improvement over the law of almost all other nations during almost the whole of history. Adoption of the formal neutrality standard of

252. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293 (J.P. Mayer ed., 1969).

253. *Id.* at 294.

254. *Id.*

255. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 169-77 (1991).

Smith does not mean that religious liberty in the United States is at an end—though it does mean that the federal courts will cease to play a large role in enforcing it. It is troubling that minority religions will be the ones to suffer, as the *Smith* majority conceded. The Supreme Court has already sanctioned government action that, it recognized, would “virtually destroy” one small religion.²⁵⁶ Others may be similarly vulnerable. But the good news is that Congress intervened and put an end to the threat that the Court had permitted.²⁵⁷ Our tradition of respect for minority religious opinion is sufficiently robust that a decline in judicial attention will probably not have enormous consequences.²⁵⁸

Adoption of the more extreme formal neutrality standard, under which religious accommodations are unconstitutional as well as not required, would cause far more serious problems. This standard would force the legislatures to ignore religious objections to generally applicable laws, even when their own assessment is that accommodations would be practical and beneficial. Their only alternative would be to forego legislation altogether, which is not always a practical or beneficial alternative. It seems to me exceedingly unlikely that the Supreme Court will take this step, both because the consequences would be so horrific and because the current jurisprudence of judicial restraint points the other way. It is logically unsatisfying, however, for an interpretation of the Free Exercise Clause to prevail when the principal arguments in its support are such that, if applied logically to the Establishment Clause, would be so obviously untenable. The goal of harmonizing the two Religion Clauses appears as distant as ever.

256. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451-52 (1988).

257. HOUSE COMM’N ON APPROPRIATIONS, DEP’T OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS BILL, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (defunding the road project at issue in *Lyng*).

258. A disturbing counterexample is the decision of the Occupational Safety and Health Administration to rescind an exception from its hard-hat requirement for construction workers, which is repugnant to Amish and Sikhs. *No Exemption From Hard Hat Wear Based on High-Court Decision, OSHA Says*, 20 O.S.H. Rep. (BNA) 1018 (Nov. 14, 1990) (discussing OSHA Notice CPL 2 (Nov. 5, 1990)). OSHA reasoned that because the exemption is no longer required under Supreme Court precedent it could be eliminated. It did not appear to occur to OSHA that it might continue to protect religious liberty even if not required to do so.