Whose Accommodation?

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The *Hobby Lobby* case[1] has inspired novel and useful insights from the other participants in this roundtable. As a second-string teacher of Legislation, I'm dazzled by James Oleske's Ginsu-like vivisection of the argument that legislative history evidence proves Congress' intent in RFRA to extend religious accommodations to for-profit businesses.[2] As someone with a longtime interest in religious accommodation and the Establishment Clause, I'm especially taken with the virtual debate between Rick Garnett[3] and Fred Gedicks/Andy Koppelman[4] on the question whether the Establishment Clause bars Congress in RFRA from broadly extending religious accommodations to for-profit businesses. In this roundtable and elsewhere, like Professors Gedicks and Koppelman, I've answered yes to that question.[5] Their masterful analysis here strengthens my confidence in that answer, and not even Professor Garnett's sharp reasoning and eloquent rhetoric has shaken it. Here I will pivot from an aspect of Professors Gedicks' and Koppelman's argument that I find limiting to discuss problems I find in a couple of especially rich passages by Professor Garnett.

The core of the Gedicks/Koppelman argument follows a syllogism: any religious accommodation that imposes substantial costs on third parties violates the Establishment Clause; exempting Hobby Lobby from the Obamacare contraception coverage mandate would impose grave costs on women who work for Hobby Lobby and want affordable birth control; therefore, exempting Hobby Lobby from the

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1. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F. 3d 1114 (10th Cir.), *cert. granted,* 134 S. Ct. 678 (2013).

2. *See* James M. Oleske, Jr., *Obamacare, RFRA, and the Perils of Legislative History,* 67 VAND. L. REV. EN BANC 77 (2014).

3. *See* Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion,* 67 VAND. L. REV. EN BANC 39 (2014).

4. *See* Frederick M. Gedicks and Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause,* 67 VAND. L. REV. EN BANC 51 (2014).

5. *See* Gregory P. Magarian, Hobby Lobby *in Constitutional Waters: Two Life Rings and an Anchor,* 67 VAND. L. REV. EN BANC 67, 70-71 (2014) (hereinafter Magarian, Hobby Lobby); Gregory P. Magarian, *The New Religious Institutionalism Meets the Old Establishment Clause* (work in progress, on file with the author) (hereinafter Magarian, *New Religious Institutionalism*).

contraception mandate would violate the Establishment Clause. I agree with that entire syllogism, and I have invoked the cost-shifting argument in discussing the circumstances in which institutional religious accommodations generally might violate the Establishment Clause.[6] Even so, strong emphasis on the cost-shifting argument carries the usual problems that attend economic analysis in law. First, the argument opens up challenging empirical questions. Can we, for example, really distinguish the high external costs of a Hobby Lobby accommodation from the nonexistent or low external costs of most other accommodations with the ease Professors Gedicks and Koppelman suggest?[7] Second, the cost-shifting argument strikes me as somewhat reductionist and bloodless. Do Establishment Clause principles really boil down to balancing a ledger?

Professor Garnett begins his attack on the Establishment Clause argument by labeling *Hobby Lobby* merely "a question of statutory interpretation"[8] and then chastising his political opponents for finding "metaphysical or moral questions" in the case.[9] That chastisement quickly turns ironic, as Professor Garnett delivers a largely theoretical argument that includes more than trace amounts of metaphysics and morality. Good for him. Questions of accommodation and non-establishment deserve analysis at lofty as well as earthbound levels, and Professor Garnett's essay succeeds, at the very least, in advancing big ideas. I'll focus here on what strike me as two of Professor Garnett's biggest, most interesting, and most problematic ideas. The statements I have in mind aren't novel, but they're bold and contentious, and Professor Garnett deploys them to do important work.

First, in setting out what he sees as the proper scope of an Establishment Clause discussion, Professor Garnett states: "[T]he Constitution allows governments to accommodate those with religious commitments and objections even if it does not similarly accommodate people with equally deep commitments and objections that are philosophical, ethical, or conscientious in nature."[10] Later, at the end of his argument, he extols the general social value of religious accommodations: "[W]e all benefit, whatever our religious tradition and whether or not we embrace or practice a religious faith at all, from practices and commitments—alike the accommodation of religion—that place limits on the state, on its demands, and on its authority."[11] Set

6. *See* Magarian, *New Religious Institutionalism, supra* note 6.
7. *See* Gedicks and Koppelman, *supra* note 5, at 56-57.
8. Garnett, *supra* note 4, at 39.
9. *Id.* at 40.
10. *Id.* at 43 (footnote omitted).
11. *Id.* at 49 (footnote omitted).

aside one another, these two statements form the foundation of Professor Garnett's strong theoretical argument for the viability of purely religious accommodation in cases like *Hobby Lobby*.[12] I think they also point toward important problems with that argument.

Professor Garnett, like most advocates of religious exceptionalism, bases his claim for legally distinguishing religion from other sources of deep commitments on his interpretation of the constitutional text and his understanding of tradition. The First Amendment does indeed refer to "religion" and not to philosophy, ethics, or even conscience. We need to decide, however, what the constitutional term "religion" means, today, not just in the abstract but in the particular setting of religious accommodation. The inquiry is not merely lexical but also contextual and practical. Tradition provides scant help. Throughout our history, adherents of particular religions have often derided believers in other creeds as not religious at all. That sort of subjectivity about religion clouds inquiry into how past generations understood "religion." More importantly, religions and ideas about religion mutate and evolve just like any other broad principle of social organization. We shouldn't let outmoded understandings of "religion," even relatively recent ones, dictate the boundaries of religious accommodation today.

How, then, can we hope to distinguish "religious" commitments from commitments grounded in philosophy, ethics, or conscience? "Religion" can't mean what it meant to at least some of the founding generation: Protestantism alone.[13] All religious sects? But what about religious believers who join with no sect? In any event, "religious sects" depends on "religion," putting us back at square one. Religions must, one might think, depend on a belief in God or (let's be inclusive) gods. But must that (now let's not) God be all-powerful? Must He actively direct the temporal world's affairs? Must He—hold on; where did that "He" come from? Even if we leave aside the gender specificity (and furtively jettison the patriarchal baggage it exposes), must God have a human aspect? Must believers praise, worship, and serve God? If so, must those activities involve collective or even solitary rituals? Must believers love God? How? Fear God? How much? If we imposed any of these qualifiers on our understanding of "religion," we would exclude some phenomena or practices that most people would recognize as

12. Professor Garnett does not argue here that the Court should hold in favor of Hobby Lobby. He argues only that the Court should not hold against Hobby Lobby on Establishment Clause grounds.

13. This meaning animated, for example, the "multiple Establishments" of Protestantism that some states in the early republic enacted in attempts to reconcile religious liberty with sectarian preferences. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 427-28 (1969).

falling within "religion." If, on the other hand, our understanding of "religion" abjures all the qualifiers, then "God" becomes a very broad rubric for different accounts of transcendence or spirituality, and distinguishing "religious" commitments from commitments grounded in philosophy, ethics, or culture becomes very difficult.

Thinking functionally about religion as a predicate for accommodation takes us down another road to nowhere. Must a religious commitment, for accommodation purposes, be something God demands of the believer? If so, we seem to have circled back to our discarded patriarchal constraint, with its emphasis on hierarchy and obedience. May a religious commitment, then, simply be something the believer or her spiritual leader (must she have one, by the way?) believes will bring her closer to God? Assuming such a soft commitment would even satisfy RFRA's "substantial burden" requirement,[14] it stretches our net awfully wide. How do we treat the cultural Jew who still attends Passover Seders, the lapsed Catholic who doubts Christ's divinity but still tries to live by his example, or the dweller in post-modernity who is earnestly "shopping" for a religion but hasn't yet settled on one? Can those people have "religious" commitments? In my own adult life, I have experienced my strongest feelings of transcendence when listening to the early music of Al Green (who later turned to gospel music and became a minister) or when gazing at waterfalls. If my government employer fired me for taking an unearned vacation day at a time of spiritual need to travel to a Green concert, or if a court convicted me for trespassing on closed state land in a moment of personal crisis to visit an especially beautiful waterfall, could I bring a facially viable "religious" accommodation claim? If not, then what constitutional principle would barring my claim serve or even satisfy?

The Supreme Court dealt with this problem two generations ago, in two decisions that extended to nontheists the federal right of conscientious objection to military service.[15] The Court in those cases didn't purport to define religion, but it treated nontheistic conscientious objections to war as functionally identical to theistic objections. The relevant federal law spoke in flatly theistic terms, but the Court applied a saving construction to avoid the obvious Establishment Clause problem.[16] Those decisions embody two essential truths. First, the hard

14. *See* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb4 (1994).

15. *See* Welsh v. United States, 398 U.S. 333 (1970) (plurality opinion); United States v. Seeger, 380 U.S. 163 (1965).

16. *See Welsh,* 398 U.S. at 339-40 (holding that qualification for "religious" conscientious objector status required that "opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions") (plurality opinion); *see also id.* at 357-61 (Harlan, J., concurring

task of defining the proper boundaries of "religious accommodation" is essential for a good society. Second, the Establishment Clause looms over any government effort to distribute a valuable social good solely among theists. Even if we grant the contentious premise that the Establishment Clause in theory permits a regime of solely "religious" accommodations, the Establishment Clause in application cannot countenance the reasoning needed to draw a narrowly theistic boundary around "religion."

If Professor Garnett viewed "religion" in the capacious terms of the conscientious objector decisions, I could (mostly) sign on to his second statement: roughly, that we all benefit from a robust system of religious accommodations, whether we avail ourselves of that system or not. Because he doesn't,[17] I can't. Of course we all benefit from public goods—public schools, green areas, mass transit systems—whether we use them or not. They make our overall society work better, and they help a great many people about whom we care. Those public goods, however, are available for everyone's use, and a wide variety of people actually use them. Moreover, if I disdain a particular public good, I can probably gain a reciprocal benefit from a comparable public good more to my taste: your Amtrak is my interstate highway. Religious accommodations, on what I take to be Professor Garnett's account, work very differently. They're categorically unavailable to huge numbers of people, and no comparable "Get Out of Law Free" card exists to compensate those excluded. Under such conditions, a robust system of religious accommodations looks less like a generally beneficial feature of a good society and more like a spoils system for a preferred class.

Comparison of *Hobby Lobby* to an accommodation case from more than a half century ago, *Braunfeld v. Brown,*[18] reveals an interesting progression in the political economy of religious accommodation. *Braunfeld* presented a challenge by Orthodox Jewish merchants to a state law that required businesses to close on Sundays. The Jewish challengers argued that the Sunday closing law put them at an unfair competitive disadvantage because their religion already required them to close on Saturdays. They sought an accommodation under the Free Exercise Clause to remain open on Sundays. The Court, in an opinion by Chief Justice Warren, dismissed the challengers' plight as a mere economic disadvantage that resulted from a neutral state law.[19] One might think that a Sunday closing law reflects not neutrality

in the judgment) (finding the conscientious objector statute explicitly theistic and therefore in violation of the First Amendment).

17. *See* Garnett, *supra* note 4, at 43 (objecting to Justice Harlan's distinction in *Welsh* between religious and nonreligious grounds for conscientious objector status).

18. 366 U.S. 599 (1961).

19. *See id.* at 605-06.

but a preference for Christianity, in clear violation of the Establishment Clause. In a companion case to *Braunfeld,* however, the Court rejected an Establishment Clause challenge to Sunday closing laws.[20] Chief Justice Warren in *Braunfeld* explained why: "[W]e cannot find a state without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility."[21] *Braunfeld* shows a state of affairs in which legislatures openly promoted mainstream Christian norms and courts endorsed those norms. Claims for religious accommodation, especially accommodations that might undermine Christian primacy, were a nuisance to be dismissed. Mainstream Christians had little use for either the Free Exercise Clause or the Establishment Clause.

Sherbert v. Verner[22] rebuked *Braunfeld,* announcing a strong regime of Free Exercise Clause accommodations. As I've discussed, however, the *Sherbert* regime had little real effect, and it certainly never validated the sort of threat to mainstream Christian norms that *Braunfield* had squelched.[23] In fact, the beneficiaries of *Sherbert* were relatively small, non-mainstream Christian groups: Sabbatarians[24] and Amish.[25] The major *de facto* exemption case during the *Sherbert* era that primarily, massively benefited mainstream Christians was *Walz v. Tax Commission,*[26] which rejected an Establishment Clause challenge the federal tax exemption for churches. During the *Sherbert* period, mainstream Christians still didn't need to invoke the Free Exercise Clause, and they still didn't need to fear the Establishment Clause.

Just over halfway down the timeline from *Braunfeld* to now, Justice Scalia in *Employment Division v. Smith*[27] ended the *Sherbert* experiment with Free Exercise Clause accommodations. In its place, he left a loud invitation for legislatures to engage in discretionary accommodation,[28] a practice the *Sherbert*-era Court had sharply constrained under the shadow of the Establishment Clause.[29] For mainstream Christians, *Smith* offered a tactical improvement over

20. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

21. *Braunfeld,* 366 U.S. at 607.

22. 374 U.S. 398 (1963).

23. *See* Magarian, Hobby Lobby, *supra* note 6, at 69-70.

24. *See, e.g., id.* (sustaining a Seventh-Day Adventist's Free Exercise Clause accommodation claim).

25. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

26. 397 U.S. 664 (1970).

27. 494 U.S. 872 (1990).

28. *See id.* at 890.

29. For a discussion of the Court's shifts in thinking about accommodation and nonestablishment across the *Sherbert* and *Smith* eras, see Magarian, *New Religious Institutionalism, supra* note 6.

Braunfeld. *Smith* made clear that the Establishment Clause offered no real check against legislative accommodations that favored the religious majority. At the same time, the decision left religious accommodation, from the mainstream Christian standpoint, as neither the threat of *Braunfeld* nor the irrelevance of *Sherbert* but rather as a tool to be wielded exclusively by majoritarian, mostly Christian legislatures. *Hobby Lobby,* in which Christian business owners seek judicial confirmation of a legislative accommodation to protect their distinctive interests, fulfills the promise of *Smith* for mainstream Christians. Never before has the Court considered a religious accommodation claim from a for-profit business, and only once before has the Court even considered RFRA's application to a federal law.[30] The Establishment Clause, if Professor Garnett is right, should not bar the Court from construing an enactment of our mostly Christian Congress to accord these Christian claimants an entirely novel, quite momentous sort of religious accommodation.

If the *Hobby Lobby* claim reflects mainstream Christianity's increased prominence in constitutional conflicts over religious freedom, it also reflects a broader decrease in power. The past half century has brought a large, steady decline in the political and social influence of mainstream Christianity. Organized school prayer has, in most places, disappeared. The Court has ingrained contraception and abortion as objects of Due Process Clause protection. Religious censors no longer have any meaningful say in what books, movies, or broadcasts can say, and in any event the Internet has made a mockery of efforts to impose moral standards on mass media. Our society has largely accepted same-sex relationships, and we increasingly accept same-sex marriages. Efforts by the Moral Majority, Focus on the Family, and similar groups to move these and other social dynamics in a traditionalist conservative direction have failed. Christians, to be sure, still make up a majority of our population and still hold most of the levers of political and social power. People in power, however, increasingly bifurcate their religious and political identities. Culturally conservative Christians have increasingly given up on influencing the larger culture and have instead hunkered down in enclaves. In the *Hobby Lobby* case, a once-dominant interest group seeks to restore some prerogatives of lost cultural power, like a deposed king who tries to salvage at least a few place settings from his crumbling palace.[31] When we don't merely define religious

30. *See Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal,* 546 U.S. 418 (2006) (holding that a federal bar on the claimants' sacramental drug use violated RFRA).

31. The increased appeal of accommodation for mainstream Christians tracks what my colleague John Inazu has described as the decreased salience of free exercise claims for the population generally. *See* John Inazu, *More Is More,* 99 MINN. L. REV. (forthcoming 2014).

accommodation as exclusively theistic but also comprehend it as majoritarian and predominantly Christian, Professor Garnett's vision of accommodation as a broadly beneficial institution looks especially dubious.

I said I could "mostly" support Professor Garnett's statement about the broad social value of religious accommodations on a capacious understanding of "religion." My lingering unease arises when he extends his enthusiasm not just to accommodations but to all "practices and commitments . . . that place limits on the state, on its demands, and on its authority."[32] In my view, limits on government authority can be quite destructive when they stop the state from protecting people from excesses of private power or from providing valuable public services. I have little doubt that the first Black students to enter flashpoint Southern schools in the 1950s and 1960s welcomed the National Guard; that parents in Head Start programs have welcomed government-funded teachers and case workers; and that people who couldn't afford important medical goods and services, including birth control, welcome Obamacare.

We should mistrust government power because we should mistrust all power. We should also understand, however, that power never stops acting on us and that only by harnessing power can we move mountains. The government can sometimes advance public welfare.[33] So can the alternative repository of power we call "religion." A central challenge of politics and civic life lies in figuring out why, when, and how to harness power and to enable one source of power over another.

32. Garnett, *supra* note 3, at 49.

33. For a leading account, in the free speech setting, of how government can do good as well as harm, see Owen M. Fiss, *Why the State?*, in LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER, at 31 (1996).