RELIGIOUS LIBERTY AND THE CONSTITUTION: OF RULES AND PRINCIPLES, FIXITY AND CHANGE

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Our constitutional law of religious liberty is a riot of principles: principles of freedom of conscience, neutrality, separation of church and state, and others. To resolve concrete disputes, we must identify what those principles are and how they could ever jointly deliver singular answers to constitutional questions. Furthermore, to identify what the principles are, we must grasp what makes them so. This Article aims to meet these three needs. It clarifies what grounds our constitutional principles, sketches what our constitutional principles of religious liberty are today, and explains how the law could ever lie decisively on the side of one litigant or rule over another when individual principles point in opposite directions. It develops and tests its claims by analyzing two questions at the law's frontiers: whether free exercise principles support a constitutional entitlement to exemption from antidiscrimination obligations beyond what free speech principles alone mandate, and whether publicly chartered religious schools are constitutionally permitted, required, or prohibited.

This is an investigation into the constitutional law of religious liberty, of course. But two of the three essential tasks it tackles—explaining how our principles are what they are and how multiple principles could ever provide determinate legal answers to contested constitutional questions—are critical across all regions of constitutional law. Accordingly, this Article examines the constitutional law of religious liberty both for its own sake and as a window into the fundamental elements and mechanics of American constitutional law generally. Its central arguments are that principles are the building blocks of our constitutional law, that they change organically as legal practices and commitments change, and that they can yield singular constitutional facts or rules despite their plurality.

INTRODUCTION

Consider a small sampling of the diverse constitutional questions of religious liberty that have occupied the Supreme Court, past and present: whether social-distancing rules intended to slow the spread of Covid-19 may be applied to houses of worship; whether a state may maintain a 32-foot tall Latin cross on public land; whether observant Jews serving in the military are entitled to wear religious head coverings; whether state law may prohibit the teaching of evolution in public schools; whether public schools may require students to engage in prayer; whether states may prohibit non-essential work on Sundays, the Christian day of rest; whether anti-polygamy laws may be applied to Mormons who believe plural marriage to be religiously mandated.[1]

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In all the above cases—and in hundreds of others more or less like them—constitutional answers are determined, in some deep way, by the Free Exercise and Establishment Clauses of the First Amendment.

That much is uncontroversial. But *how* do the Religion Clauses resolve our constitutional disputes? What are we looking *for* when we look *to* the text?

Normative (or prescriptive) theories of constitutional interpretation offer competing accounts of what we *should* look for. Public meaning originalists urge us to seek the original public meaning of the text, the communicative contents of the Clauses that were fixed upon ratification. Common law constitutionalists direct our attention to the judicial precedents that have given the Clauses effect. Dworkinians are guided by readings of the Clauses that show the text and our practices in the best moral light.[2]

Notwithstanding theoretical disagreements about what we should do, what we actually do is clear: we look for principles. When we—judges and lawyers, scholars and journalists, elected officials and engaged citizens—invoke the Religion Clauses in constitutional argument, our thought and talk bristle with "principles"—the "principle of separation of church and state," "the principle of religious neutrality," "the principle of freedom of conscience," and more. When we conclude that a challenged action is constitutionally prohibited or permitted, we often explain and defend our judgments by reference not just to the Religion Clauses, but to the "principles" that "inform," "underlie,"

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1 *See, e.g.*, Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020); Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067 (2019); Goldman v. Weinberger, 45 U.S. 503 (1986); Epperson v. Arkansas, 393 U.S. 97 (1968); Engel v. Vitale, 370 U.S. 421 (1962); McGowan v. Maryland, 366 U.S. 420 (1961); Reynolds v. United States, 98 U.S. 145 (1879).

2 *See infra* Section III.A.

"animate," or "implement" them,[3] or that the Clauses "embody," "stand for," or "reflect."[4]

We should take this fact about our practices seriously. While principle-talk could be a linguistic quirk that should be abandoned, we ought not leap to that conclusion prematurely. Better to start by assuming that there are such entities as constitutional principles, and that they properly play a part in resolving disputes under the Religion Clauses. If we indulge this assumption as a working hypothesis, at least three questions present themselves with some urgency.

Perhaps the most obvious question is this: what *are* our constitutional principles of religious liberty? What are their contents, and (if they possess such properties) also their contours and weights? For example, scholars and judges debate whether there is a constitutional principle of religious neutrality and, if so, what its content is.[5] Do we have such a principle and, if so, what does it provide? Call this the *substance* question.

If *substance* comes first to our minds, it is not first in order of explanation, for any answer to it presupposes an answer (or range of answers) to a logically prior question: what makes our principles what they are? What gives them their contents or substance? If we do have a principle of religious neutrality that provides thus-and-such, in virtue of what is that so? In conformity with

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[3] *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 16 (1989) (appealing to "the principles informing the Establishment Clause"); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 166 (2011) (Kagan, J., dissenting) (appealing to "the principles underlying the Establishment Clause"); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 468 (1988) (Brennan, J., dissenting) (appealing to "the principles animating the [Free Exercise Clause]"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting) (appealing to "familiar principles of law implementing the First Amendment's Establishment and Speech Clauses").

[4] *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 809 (1995) (Stevens, J., dissenting) (appealing to "the principles embodied by our Establishment Clause"); Mueller v. Allen, 463 U.S. 388, 416 (1983) (Marshall, J., dissenting) (appealing to "the principles of neutrality embodied by the Establishment Clause"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 853 (1995) (Thomas, J., concurring) (appealing to "the principles embodied in the Establishment Clause"); Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 124 (7th Cir. 1987) (appealing to "the principle of government neutrality" that the Religion Clauses have "come to stand for"); Lamont v. Woods, 948 F.2d 825, 841 (2d Cir. 1991) (appealing to "the principle of separation of church and state reflected in the Establishment Clause").

[5] *Compare, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990) (identifying three distinct principles of religious neutrality and endorsing one), *with* STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM, 128-38 (2014) (rejecting any principle of religious neutrality).

current developments in metaphysics and general jurisprudence, call this the *grounding* question.[6]

Whatever answers we might supply to the first two questions, so long as we accept more than one principle into our constitutional firmament, we immediately confront a third: how do our principles operate in combination? How do plural principles jointly deliver singular answers to constitutional questions (when they do)? This is the question of our principles' collective *operation*.

This Article offers answers to these three questions about the nature, substance, and workings of our constitutional principles of religious liberty and seeks to explain the bearing of those answers on more general debates about constitutional interpretation. It does so over four parts.

Part I addresses *substance*, offering a stab at a comprehensive yet concise set of our current principles. This will be a familiar lot, centering on *freedom of conscience*, *special solicitude for religious practice*, *religious neutrality*, and *separation of church and state*. Part I will note some differences between my list and others in the literature, but those differences are modest. This Article's chief contribution does not lie in the catalogue of principles it distills.

Part II addresses *operation*. If our religious principles are plural, how can they collectively deliver singular resolutions to constitutional disputes? Although judges and scholars have paid this question little explicit attention, one view is especially natural. Principles either *are* forces or entities that *exert* force. Individually, they weigh, bias, or incline in favor or against outcomes or judgments. Collectively, they sometimes press in unison and sometimes in partial opposition to one another. When principles do oppose one another, the forces they exert can be netted out such that, sometimes or usually, one principle or set of principles outweighs another, thus dictating an overall outcome or judgment. Call this the "net forces account." While an account along these lines is highly intuitive, some religion scholars seem to find it unintelligible or otherwise unacceptable.[7] Accordingly, this Part unearths from the literature, and briefly considers, two inchoate accounts that would derive singular verdicts without accepting that principles can conflict or oppose. I

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[6] *See, e.g.*, Samuele Chilovi & George Pavlakos, *Law-determination as Grounding: A Common Grounding Framework for Jurisprudence*, 25 LEGAL THEORY 53 (2019) (observing that legal philosophers increasingly treat the question of what gives law its content as one of metaphysical grounding, and endorsing that view); RONALD DWORKIN, LAW'S EMPIRE 4 (1986) ("Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions . . . . [that] I shall call the 'grounds' of law.").

[7] *See infra* notes 50, 69.

call them the "single value theory" and the "jigsaw puzzle picture." After dispatching these two non-conflictual analyses, it argues for the net forces account and explains its workings in non-mysterious terms.

Many sophisticated constitutional theorists have doubted that a plurality of fundamental constitutional elements (principles, on my account) can collectively produce what constitutional practice needs—singular answers to concrete constitutional disputes—without lexical ordering.[8] If the account put forth in Part II is sound, it is a substantial contribution to debates over American constitutional interpretation because it would make pluralistic approaches—approaches that most jurists accepted reflexively before a wave of theory-driven skepticism hit in the late twentieth century[9]—vastly more eligible. Over a generation ago, Richard Fallon remarked with surprise that, despite the "intuitive plausibility" of multi-factor non-lexical approaches to constitutional law and interpretation, "no powerfully argued balancing theory has achieved prominence in the scholarly literature."[10] The account offered in Part II is the framework of a balancing theory (though "balancing" is an unfortunate label). Whether it achieves prominence remains to be seen. Whether it is powerfully argued is for readers to assess.

Part III tackles *grounding*. As already intimated (but now generalizing from my initial examples), we can distinguish three familiar positions regarding what makes our principles what they are: "originalist," "anti-positivist," and "organicist." As a class, originalist approaches maintain that our principles are fixed at ratification. Its dominant member would fix them by the original public meaning of the Clauses. The anti-positivist approach holds that morality plays an inescapable role in the shaping of our principles. On the best known of the anti-positivist approaches, Ronald Dworkin's, the contents

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[8] *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1489 (2019) (criticizing an initial presentation of my theory); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 398 (2002) (insisting on the need for a "reasonably strict hierarchy of constitutional argument"); Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 521 (1998) (arguing that there is no way to combine multiple factors to realize singular conclusions without "some clear lexical order"); H. Jefferson Powell, *Constitutional Investigations*, 72 TEX. L. REV. 1731, 1740 (1994) (discussing criticisms of Philip Bobbitt's multiple-modalities theory of constitutional argumentation for its failure to provide a meta-rule to resolve modal conflicts).

[9] *See* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 624 (2012) ("Everyone essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling (as applicable, and in a relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion.").

[10] Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1227-1228 (1987).

and weights of our religious liberty principles are whatever best justifies the history of our legal regime or shows our legal practices in the best light. The organicist approach, of which David Strauss's common law constitutionalism is representative, holds that our principles change over time in at least partially undirected, decentralized fashion. This Part defends the organicist approach to grounding generally, and one member of that camp in particular: the account that I have introduced in recent work and call "organic pluralism."[11]

Part IV applies the analyses and arguments developed in the first three parts to two live issues, both teed up by recent decisions of the Roberts Court. The first issue concerns religious objections to same-sex marriage. In *303 Creative v. Elenis*, decided the last day of the 2022 Term, the Court held, six-to-three, that, principles of religious liberty aside, the First Amendment's Free Speech Clause shields wedding vendors who engage in "pure speech" from any state-imposed legal duty to provide services for same-sex weddings.[12] Section IV.A explores whether wedding vendors who are religiously opposed to same-sex marriage, but whose services are insufficiently expressive to come within the free speech rule of *303 Creative*, are nonetheless entitled under free exercise principles to decline to service same-sex weddings.

The second issue concerns state support for religious elementary and secondary education. In *Carson v. Makin*, decided the last week of the 2021 Term, the Court held, also six to three, that states that offers tuition vouchers for parents who send their children to private schools may not exclude parents whose children attend private religious schools.[13] Section IV.B examines whether this non-discrimination rule governs charter schools too. It asks whether a state that charters non-religious private schools must, may, or must not charter religious private schools as well. Although I defend bottom-line judgments in both cases, my goal for this Part is less to persuade readers that my constitutional verdicts are correct, and more to exhibit and render more plausible the general theory of constitutional content on offer.

This Article has several independent but mutually supportive ambitions: to clarify what our constitutional principles of religious liberty are and how they interact to underwrite singular constitutional verdicts in disputed cases; to productively analyze two live controversies in the law of religion; and to

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[11] *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018) (providing an initial sketch of an account in which legal practices ground legal principles, and legal principles determine derivative legal rules or facts); *see also* Mitchell N. Berman, *How Practices Make Principles, and How Principles Make Rules*, J. ETHICS SOC. PHIL. (forthcoming 2024) (developing the account further and situating it within the jurisprudential literature).

[12] 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

[13] Carson v. Makin, 142 S. Ct. 1987 (2022).

illuminate more general and abstract debates over theories of constitutional content and adjudication.

I. SUBSTANCE: A PRICKLE OF PRINCIPLES

I am not the first to emphasize the centrality of principles in our constitutional law of religious liberty. Very far from it. More than three decades ago, the distinguished federal judge Arlin Adams and the religion scholar Charles Emmerich argued that the key to understanding our constitutional law of religious liberty lies in the "four historical principles animating the religion clauses: federalism, institutional separation, accommodation, and benevolent neutrality."[14] Soon thereafter, Jesse Choper advocated for "reasoned elaboration" and deft deployment of a different set of four "principles that are grounded in the history and text of the First Amendment but that also take into account the values and traditions we have derived over time . . . ."[15] Choper's quartet was more idiosyncratic than Adams and Emmerich's: the "deliberate disadvantage" principle, the "burdensome effect" principle, the "intentional advantage" principle, and the "independent impact" principle.[16] A decade later, Frank Ravitch saw things more as Adams and Emmerich had, though he carved more finely. Ravitch proposed that our religion jurisprudence could be made sensible and coherent only by more careful judicial attention to "multiple narrow principles of interpretation that ebb and flow based on context."[17] Ravitch detailed seven "major principles" that our courts have used: "neutrality, liberty, equality, separationism, accommodationism, traditionalism, and nonpreferentialism (usually veiled)."[18] Sometimes, he observed, "these principles are used in coordination with each other, and sometimes they are used alone."[19] The following year, Martha Nussbaum offered her own take on our "distinctively American combination of principles," listing six: equality, respect-conscience, liberty, accommodation, nonestablishment, and separation.[20] Around the

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14 ARLIN M. ADAMS & CHARLES EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 43 (1990).

15 JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 1 (1995).

16 *Id.* at 35.

17 FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 2 (2007)

18 *Id.* at 6.

19 *Id.*

20 MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 22-26 (2008)

same time, Kent Greenawalt published his two-volume treatise, *Religion and the Constitution*.[21] A tour de force of eclecticism, it identified nine controlling values and four distinct principles.[22]

With no disrespect intended other treatments, the most notable and influential scholarly examination of our constitutional principles of religious liberty is probably the comprehensive and incisive single-volume treatise, *Religion and the American Constitutional Experiment*, sole-authored in 2000 by the scholar of religion John Witte, Jr.,[23] now in a co-authored fifth edition with Joel Nichols and Richard Garnett. "Combin[ing] historical, legal, and theoretical analysis," the book "tell[s] the unique American story of religious freedom—from the adoption of the First Amendment in 1791 to the Supreme Court's most recent interpretations of its guarantees. . . ."[24] The leading actors, in the book's telling, are six principles of religious liberty that were "gathered under th[e] founding canopy" and remain "at the heart of the American experiment today—as central commandments of the American constitutional order and as cardinal axioms of a distinct American logic of religious liberty."[25] Those six principles are: "(1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) no establishment of a national religion."[26]

That's a good list. Differences between their account and mine are modest. I hope that my enumeration resonates with the reader. Either way, I will not defend my mapping of the terrain against competitors here, for a serious defense depends on an account of our principle's grounding, which is the business of Part III.

That being so, one might worry that even to float a catalogue of our principles now puts the cart before the horse: because what our principles are depends on what makes a putative principle an actual principle, we need grasp of the latter before we can affirm the former. It is true that the correct account of grounding precedes the correct account of substance. But the optimal orders of discovery and exposition need not track the order of explanation.

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[21] KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006); KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008).

[22] *See* Nelson Tebbe, *Eclecticism,* 25 CONST. COMMENT. 317, 317 (2009) (offering this count).

[23] JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (1st ed. 2000).

[24] JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT xi (5th ed. 2022).

[25] *Id.* at 2.

[26] *Id.* This is the same list from Witte's sole-authored first edition, except that #6 had been "disestablishment of religion." WITTE, JR., *supra* note 23, at 4.

As Part III details, we do not start with a clear shared answer to the grounding question. If, as I have argued elsewhere, some version of reflective equilibrium furnishes the best method for reaching warranted judgments about matters of constitutional theory,[27] and if, as I hope, most readers will mostly accept most of the claimed principles that follow, then this preliminary and under-theorized presentation of our constitutional principles will helpfully inform our later investigation into their grounding. To the extent you question any of my formulations, you may take my claims as hypotheses or provisional stipulations.

With preliminaries out of the way, my list of our constitutional principles of religious liberty and freedom, circa 2024 follows. The quotation accompanying the label for each principle is indicative, not definitive, of the principle's substance.

1. *Freedom of conscience*. "The Religion . . . of every man must be left to the conviction and conscience of every man... ."[28]

2. *Neutrality among religions*. "Neither a state nor the Federal Government can . . . pass laws which . . . prefer one religion over another."[29]

3. *Neutrality between religion and nonreligion*. It is "a principle at the heart of the Establishment Clause, that government should not prefer . . . religion to irreligion."[30]

4. *Special solicitude for religious practice*. "[L]aws 'neutral' toward religion . . . should not substantially burden religious exercise without compelling justification."[31]

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[27] Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizen Clause*, *in* GRANT HUSCROFT & BRADLEY W. MILLER EDS., THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY 246 (Cambridge 2011); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1778-84 (2013); *see also* Richard H. Fallon, Jr., *Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123 (2017).

[28] James Madison, Memorial and Remonstrance Against Religious Assessments (1785). Madison continued: "and it is the right of every man to exercise it as these may dictate." As explained shortly in the text, I think that latter right is not protected by *freedom of conscience* but by related principles of *neutrality* (against targeting of religious exercise) and of *special solicitude* (requiring reasonable accommodation from non-targeted burdens on religious exercise). Paradigmatic violations of *freedom of conscience* include government support for religious indoctrination (in more than a but-for causal sense), and burdens imposed on professions of belief.

[29] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[30] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).

[31] Religious Freedom Restoration Act § 2(a) (findings), 107 Stat. 1488 (Nov. 16, 1993). The term "special solicitude" comes from Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 189 (2012), where it reflects something closer to *separation of church from*

5. *Separation of church and state*. "Religion and government are equally necessary, but their interests should be kept separate and distinct . . . . Upon no plan, no system can they become united, without endangering the purity and usefulness of both—the church will corrupt the state, and the state pollute the church."[32]

6. *Religious people*. "We are a religious people whose institutions presuppose a Supreme Being."[33]

While my parsing of the principles largely accords with standard wisdom, my cuts and labels differ from predecessors' accounts in some respects. If you are struck by the seeming absence of any principle that you expected to see, I hope and wager (but don't guarantee) that it's covered by a different one. For example, Witte, Nichols and Garnett hold out *free exercise of religion* as a needed act-focused counterpart to the belief-focused principle *liberty of conscience.*[34] I do not recognize a principle of that description but believe that everything that their *free exercise of religion* covers but that *liberty of conscience* might not (such as laws prohibiting celebration of the Catholic mass)[35] is equally covered by one or the other of my principles of *neutrality* or by *special solicitude.* My principles of *neutrality* also cover the much-debated principle of *non-endorsement* of religion. And so forth.

A final caution: even if my six principles make out an adequate start at a comprehensive list of extant American constitutional principles *of* religious liberty, they are not the only principles that bear on constitutional disputes that *implicate* religious liberty. In any given dispute, other constitutional principles of greater generality—principles not limited to matters of religious liberty—might bear too. This is not the place to attempt a comprehensive catalogue of

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state. I understand "religious practice" broadly to reach (to a first pass) conduct (including omissions) that the individual feels to be strongly expected or encouraged by their religious faith if even if not a religious duty, let alone a mandated religious ritual.

[32] Tunis Wortman, A Solemn Address to Christians and Patriots (1800) (quoted in WITTE, NICHOLS & GARNETT, *supra* note 24, at 79). *See also, e.g.*, Thomas Jefferson, Letter to the Danbury Baptists (Jan. 1, 1802) (extolling the Religions Clauses for "building a wall of separation between Church & State"); Buckley v. Valeo, 424 U.S. 1, 248-49 (1976) (Burger, C.J., concurring) (declaring "the separation of church and state" to be "basic to our national tradition" despite not being "explicit in the Constitution").

[33] Zorach v. Clauson, 343 U.S. 306, 313 (1952). Whereas all the other quotations use normative terms (e.g., "should" and "may"), the language in this much-quoted passage is entirely descriptive. Don't be misled. Courts plainly put this passage to normative use, treating the statement not as bare description but as telegraphic of a claim that our citizens' religious observances and sensibilities are *due* extra or unusual respect or regard. (Thanks to Ben Eidelson for encouraging this clarification.)

[34] WITTE, JR., NICHOLS & GARNETT, *supra* note 24, at 66.

[35] *See* Laycock, *supra* note 5, at 21-22.

our constitutional principles. I start on that project elsewhere.[36] At this stage it's enough to note the potential bearing of constitutional principles beyond the six I have just identified, particularly including principles of federalism, historical practice, and equality. We will return to this point throughout.

II. OPERATION: E PLURIBUS UNUM

Part I sketched the core principles that populate this region of constitutional law. Some are reasonably contestable *tout court*. The constitutional status of *special solicitude*, for example, (arguably) split the Court in *Employment Division v. Smith*[37] and has divided commentators ever since.[38] All are disputable at the margins, and in nomenclature. To repeat my earlier assurance, you need not view our principles just as I do to benefit from my analyses of *operation* and *grounding*. For this Part's purposes, the essential takeaway from Part I is only that our principles of religious liberty are plural. Our tradition does not deliver a single principle of religious liberty; it delivers a multiplicity of principles that bear on, concern, or effectuate religious liberty.[39] These multiple principles, however, must produce (or guide the production of) unitary answers to the bottom-line questions of constitutional law that drive lawsuits. From multiple principles we must be able to derive unitary verdicts to the effect that particular acts or events are, or are not, constitutionally permitted. *E pluribus unum.* But how?

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[36] *See* Berman, *Our Principled Constitution*, *supra* note 11, at 1383–92 (outlining a general set of constitutional principles).

[37] *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that people are not constitutionally entitled to exemption from neutral laws of general applicability when the application of such laws burdens their religious practices). The natural thought about *Smith* is that the three dissenting Justices, plus Justice O'Connor who concurred, accepted *special solicitude*, while a five-Justice majority, led by Justice Scalia, rejected it. Certainly the majority rejected a rulified conception of *special solicitude*. *See id.* at 882 ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."). The majority also rejected, as "horrible to contemplate," judicial doctrine that would require lower court judges to give effect to *special solicitude* by means of case-by-case balancing. *Id.* at 888–90 & n.5. Neither move alone, nor both together, requires rejection of *special solicitude* as a constitutional principle, and the majority opinion is not resolutely unfriendly to that possibility.

[38] *See infra* note 175.

[39] *See, e.g.*, NUSSBAUM, *supra* note 20, at 26 ("The American law of religion is not a tidy area. It does not look the way a philosopher usually likes an argument to look: neat, well articulated . . . ."); GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS, *supra* note 21, at 9 ("[I]deas about free exercise and nonestablishment are not reducible to any single value; a number of values count").

Let me unpack those last few sentences. When inquiring into how multiple principles collectively deliver singular verdicts, we might have two different ideas in mind. We might think that principles exist only to guide judges in the exercise of their discretion to *make* law when preexisting law is "silent" or underdetermined. Or we might think that principles somehow make it the case that the conduct at issue in a lawsuit is or is not constitutionally permissible, a legal fact, verdict, or state of affairs that judges can sensibly endeavor to *discover*. Few people doubt that principles can operate in the former fashion. But our thought and talk presuppose that they also operate in the latter. While navigating this sea of principles, we at least sometimes ask whether, or assert that, specified act types or tokens are (un)constitutional here and now; we do not only (or even mostly) reason about how judges should extend or develop the law.

This Part assumes, defeasibly, that such thought and talk is warranted. It examines how a plurality of principles could collectively make it the case that any act or event possesses a singular legal property such as *permissible*, *impermissible*, *valid*, *invalid*. To be clear, I am not assuming that every act whose permissibility is challenged is, as a matter of legal fact, either permissible or impermissible, that there is a determinate truth of the matter for all contested legal or constitutional questions. I'm assuming only (and, again, only presumptively) that *some* actions are permissible or impermissible (or have other constitutional properties) even in contexts that implicate more than one principle. And I'm inviting us to wonder how that could be, when it is.

As far as I can tell, the question about how multiple principles can or should jointly operate has received little attention.[40] Recall that *Religion and*

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[40] One rare exception is Ravitch, who asks: "[H]ow do we choose between the available principles? If we are able to use more than one principle, how do the applicable principles interact?" RAVITCH, *supra* note 17, at 7. His answer: Because "a number of principles are applicable in religion clause interpretation, . . . an interpretive approach . . . must be devised to navigate the surf between these principles." *Id.* at 8.

Another apparent exception, perhaps even more conspicuous, is Nelson Tebbe, who has developed a sophisticated and nuanced theory—what he calls "social coherence" methodology—designed to enable pluralists to meet the skeptical charge that "decisionmaking in the area is *necessarily* rudderless." Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 364 (2015). *See generally* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017). In fact, though, I think that Tebbe is not really the exception to the claim in text that he might seem to be. His limited objective "is just to defend against the charge that interpretations and outcomes [in religious liberty disputes] can only be arbitrary or patternless." Nelson Tebbe, *Reply: Conscience and Equality*, 31 J. CIV. R. & EC. DEV. 1, 63 (2018). Put another way, his goal is to show that judicial decisions in this area can be rational. Tebbe, *Religion and Social Coherentism*, *supra* note 40, at 366. The *e pluribus unum* challenge, as I have just construed it, is to explain how a plurality of

the American Constitutional Experiment is entirely organized around the "six principles of religious freedom [that] were ultimately gathered under th[e] founding canopy" and that "remain at the heart of the American experiment today—as central commandments of the American constitutional order . . . ."[41] Yet the book offers no focused discussion responsive to what I've called the operation question much beyond announcing that "[t]he founders arranged these multiple principles into an interlocking and interdependent shield of religious liberties and rights for all."[42] What the "arrangement" of principles that effectuates or constitutes the interlocking shield *is* is never made clear. Rather than offering a "theory" or structured account of operation, the book presents a critical history of the principles' changing fortunes at the Supreme Court over time. It aims more to show than to theorize. Given that its principal author, Witte, is a distinguished legal historian, not a constitutional lawyer,[43] its orientation should not surprise, even if its relative lack of engagement with *operation* might not fully satisfy readers who are lawyers and not (only) historians.[44]

Also not surprising is the relatively spare attention from the courts. The question appears difficult—perhaps it even appears at all—only when two or more principles press in opposition. Yet Supreme Court opinions too rarely acknowledge that factors or arguments that the Justices surely consider constitutionally relevant militate toward opposed outcomes.[45] That tendency

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principles can ever deliver or constitute singular constitutional content, uniquely right answers to constitutional questions. "Social coherence" is not offered as a solution to *that* problem. *See also infra* Section II.D.2 (distinguishing theories of constitutional content from theories of constitutional adjudication).

41 WITTE ET AL., *supra* note 11, at 2.

42 *Id.* at 92.

43 *See* John Witte, Jr., *Back to the Sources? What's Clear and Not So Clear About the Original Intent of the First Amendment*, 47 BYU L. REV. 1303, 1306 (2022) ("I come to this topic not as a constitutional lawyer but as a legal historian interested in . . . understanding key historical human rights texts in their original context.").

44 One astute reviewer of the first edition seemed unsatisfied with what he took to be the book's central forward-looking message—that "constitutional doctrine could be made more 'coherent' if judges were carefully to 'balance' and 'integrate' these 'interlocking' and 'cooperating' principles"—grousing that "few proposals seem less likely to lead to more coherence in any area of law than a call for judges to 'integrate' and 'balance' six eighteenth-century first principles." Richard W. Garnett, Book Review, John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties*, 3 GREEN BAG 2D 447, 452 (2000).

45 *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1229 (1987) ("[I]f balancing provided the best account of how arguments of different kinds are weighed in a single scale, then we would expect judicial opinions and legal briefs to acknowledge that various kinds of arguments indicate different conclusions and to discuss the weight that different arguments merit. But this seldom happens. Far more common are opinions and

is much less pronounced in the religion arena than in most,[46] but not absent.[47] The push and pull between open discussion, and winking denial, of conflicts between or among religious principles were on display in the recent *Kennedy* decision, with Justice Sonia Sotomayor, in dissent, challenging the majority's contention "that the lower courts erred by introducing a false tension between the Free Exercise and Establishment Clauses." To the contrary, she reminded readers, "[t]he Court . . . has long recognized that these two Clauses, while 'express[ing] complementary values,' 'often exert conflicting pressures.'"[48] If Justices are loath even to admit that *operation* presents a problem worthy of attention, careful engagement with that problem or question is unlikely. Thus, one scholar has concluded, "when the Supreme Court confronts colliding First Amendment [principles]—whether in the context of speech, religion, or both—it consistently avoids any substantive analysis of the collision."[49]

Despite the lack of careful attention, one broad-stroke answer is highly intuitive. Like other norms, principles are forces or entities that exert force—"normative force." Individually, a principle weighs or inclines in favor or

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arguments that, while emphasizing one factor more than others, assert or imply that the most persuasive arguments . . . are consistent with a preferred conclusion.").

[46] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 683 (2005) ("Our cases, Janus-like, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history . . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom. This case, like all Establishment Clause challenges, presents us with the difficulty of respecting both faces."); McCreary v. ACLU 545 U.S. 844, 875 (2005) ("[I]ssues of interpreting inexact Establishment Clause language, like difficult interpretative issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit."); American Am. Legion v. Am. Humanist Ass'n 139 S. Ct. 2067, 2090–2091 (2019) (Breyer, J., concurring) ("[T]here is no single formula for resolving Establishment Clause challenges. The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its "separate spher[e]."); Thomas v. Re.Bd. of Ind. Empl. Sec. Div., 450 U.S. 707 (1981) (Rehnquist, J., dissenting) (crediting the majority decision because it "correctly acknowledges that there is a "tension" between the Free Exercise and Establishment Clauses of the First Amendment," but ultimately errs because "it reads the Free Exercise Clause too broadly" and "simply exacerbates the "tension" between the two Clauses.").

[47] *See, e.g.*, Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 188 (2007) ("[L]egal disputes frequently arise that pit competing First Amendment interests against one another . . . . Most commonly, the Court refuses even to acknowledge conflicting claims of constitutional magnitude, instead denying salience to one of the competing First Amendment interests.").

[48] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2447 (Sotomayor, J. dissenting) (2022) (citations omitted).

[49] *See* Magarian, *supra* note 47, at 188 (writing "interests" where I have substituted "principles").

against a given outcome. Collectively, principles sometimes row together and sometimes in tension or conflict. When principles do oppose one another, the forces they exert can be netted out such that, sometimes or usually, one principle or set of principles outweighs another, thus dictating an overall outcome. I believe that this first stab at an answer—the "net forces account"—is on target. But some scholars and Justices appear to find an answer along these lines impossible, unintelligible, undesirable, or just overly mysterious.[50] Accordingly, before fleshing out the net forces account, we should investigate possible alternatives.

Section II.A distills from the literature, and briefly considers, two inchoate accounts that would derive singular verdicts without accepting that principles come into actual conflict or opposition. After dispatching these non-conflictual accounts, it develops and defends the net forces account. The challenge, in William Baude and Stephen Sachs's vivid imagery, is to explain how a prickle of weighted and opposing principles can collectively determine unitary legal answers "rather than merely make soup."[51] Section II.B aims to meet it. Section II.C bolsters and extends the net forces account by showing how it is reflected in a representative Supreme Court decision, *Marsh v. Chambers*. Section II.D draws forth several lessons.

A. NO-CONFLICT ACCOUNTS

I have already claimed that the existing literature on principles' operation is thin. I can extract two incipient no-conflict accounts from the literature, what I will call the single value theory and the jigsaw puzzle picture.

1. Single value theory. If *e pluribus unum* presents a difficult problem only when principles conflict, the problem disappears if conflicts do not arise.

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[50] *See, e.g.*, Matthew Szymanski & Stephen M. Clarke, Book Review, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*, 14 CONST. COMMENT. 395, 416 (1997) (objecting to Choper's multi-principle proposal on the basis that "judges inevitably would give effect to their individual predilections, further confusing and mystifying Religion Clause jurisprudence"); Steven D. Smith, *Review of* Religion and the American Constitutional Experiment, FIRST THINGS (2000) ("[T]he very notion of a constitutional 'principle' is richly deserving of skeptical scrutiny. What sort of entity is such a 'principle,' exactly? A mental state? A partially charted chunk of moral reality? Or merely a verbal, honorific label that allows judges and scholars to do all sorts of creative or mischievous things in the name of 'the Constitution'?"); Laurent B. Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 748 ("As soon as he finishes measuring the unmeasurable, the judge's next job is to compare the incomparable."); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987) ("[T]o a large extent, the balancing takes place inside a black box.").

[51] William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1489 (2019); *see supra* note 8.

A clutch of prominent religion scholars including Michael McConnell, Douglas Laycock, and Michael Paulsen have long argued precisely that.[52] Here's how one proponent has put the position:

> The Free Exercise Clause and the Establishment Clause do not conflict. Instead, they do different work, each in its own way protecting religious liberty and properly ordering church-state relations. When circumstances are such that their labors overlap, the Religion Clauses necessarily compl[e]ment rather than conflict. Thus the Court's imagining these two negations on governmental power as frequently clashing—two bones grinding one upon the other at an arthritic joint that has lost its 'play'—is a dangerously misguided metaphor.[53]

As another scholar summarizes, "[t]o resolve th[e] conflict [between the religion clauses]," single-value theorists "maintain that both clauses should be interpreted to serve the same purpose, the protection of religious liberty."[54]

It might be that, at a moderately high level of generality, the Religion Clauses further a single value: religious liberty. But single-value theory is not a way to derive verdicts *from* multiple principles; it is a way to derive verdicts *without* multiple principles. If it is a solution to the challenge of conflicting or opposed principles, it operates by dissolution not by resolution. It is not incidental that these scholars rarely speak about "principles" at all, instead couching their claims, with few exceptions, in terms of the two *Clauses*: "The two clauses, naturally enough, address a single, central value from two different angles: The free exercise clause forbids government proscription; the establishment clause forbids government prescription."[55]

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[52] *See infra* notes 55 & 56.

[53] Carl H. Esbeck *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331, 1336 (2006).

[54] Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates*, 32 CARDOZO L. REV. 1701, 1702 (2010).

[55] Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986). *See also, e.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 GEO. WASH. L. REV. 685, 718 (1991) ("[P]roperly understood, the two clauses are symmetrical and complementary--not redundant. The Establishment Clause is about the use of governmental power in favor of religion (either a particular religion or religion in general), and the Free Exercise Clause is about the use of governmental power against religion (either a particular religion or religion in general)."); Edward McGlynn Gaffney Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 200 (1993) ("[B]oth provisions of the Religion Clause are meant to foster and protect religious freedom.").

So what? Is it a bug or feature of single-value theory that it does away with principles?[56] That's a big question that I cannot take on directly, though I hope that, by Article's end, the reader will have found it to have said much in response. I'll limit myself here to two brief replies.

First, whether or not we should displace a multiple-principles picture of the constitutional terrain of religious liberty with a single-value picture, this Part's assignment was to examine how outcomes or judgments can derive from multiple principles. Because that complex task is essential to constitutional law and theory beyond the religion context, it is worth trying to complete it before abandoning it on the grounds that, when it comes to the Religion Clauses, the task need not even be undertaken after all.

Second, the turn from multiple, sometimes-conflicting principles to the single value that supposedly underlies the principles disrespects the function that principles so often serve within complex normative systems. Principles often mediate between the values that the system is designed or adapted to promote and the action-guiding rules it outputs and maintains. Good principles reflect reliable or efficient means to realize values,[57] and recourse to them helpfully forestalls the need for continuous appeal to, and debate about, fundamental values themselves. For these reasons, it is not nearly as easy to *do* without principles as to *say* one is doing without them.

The limitations of a full embrace of single-value theory are illustrated by *McCreary County v. ACLU*, which presented a constitutional challenge to display of the Ten Commandments in two county courthouses in Kentucky.[58] The Court held the displays unconstitutional, five to four, in an opinion by Justice Souter. Justice O'Connor concurred in a brief opinion that appeared to channel single-value theory. "[T]he goal of the Clauses is clear," she said: "to carry out the Founders' plan of preserving religious liberty to the fullest

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[56] Laycock's theory of the Religion Clauses, "substantive neutrality," holds that government should "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance," in the effort to "maximize[] . . . religious liberty." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–02 (1991). He elsewhere describes a view that he does not call "substantive neutrality" but that seems close kin: "the fundamental point of religious liberty is liberty, and all the other concepts that courts and commentators invoke—including "separation," "voluntarism," "equality," and "neutrality"—"are instrumental at most, distractions at worst" because the judiciary's single goal should be to "seek to maximize religious liberty." Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOB. LEG. STUD. 503, 517 (2006).

[57] *See, e.g.*, Trinity Lutheran Church v. Comer, 582 U.S. 449, 487-89 (2017) (Sotomayor, J., dissenting) (describing our religion principles as "rooted in this Nation's understanding of how best to foster religious liberty").

[58] McCreary County v. ACLU of Ky., 545 U.S. 844 (2005).

extent possible in a pluralistic society."[59] Given that goal, she thought the counties' purpose of endorsing or advancing religion rendered the displays palpably unconstitutional. While that conclusion might be correct, it is unclear how one could reliably reach it from the premise that we should preserve religious liberty to the fullest extent possible. How could O'Connor assess whether religious liberty is most fully preserved by prohibiting the display out of solicitude for those, perhaps few in number, who might find the display chilling of their religious beliefs and practices or by permitting the display out of solicitude for those, likely a majority, who find it supportive of their religious beliefs and practices? Eschewing reliance on a single-value theory, Souter's opinion for the Court declared that our two Religion Clauses "sometimes . . . compete," and that "tradeoffs are inevitable."[60] Difficult constitutional questions "arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit."[61] Principles, he recognized, are the tools by which we navigate this tension.

The difficulties with conflict-escaping theories appear even more clearly if we imagine generalizing from a single-value theory of the Religion Clauses to a single-value theory of all constitutional law. "The supposed value of religious liberty is not itself a fundamental value," my imagined proponent of this generalization might begin. "Rather, *protect religious liberty* is a principle that serves and is explained by the fundamental value of human flourishing. Happily, that's the value underlying the whole Constitution." Surely that fact, if true, would not justify our jettisoning the numberless principles that currently suffuse constitutional law—from *separation of powers* and *limited government* to *equal dignity* and *colorblindness*—or thinking that they do not jointly present the question of *operation.* Sometimes, say, *federalism* and *textualism* are mutually reinforcing (true in some disputes implicating the Tenth Amendment). Sometimes they press in opposition (true in some disputes implicating the Eleventh). What to do then? The reminder that both principles serve human flourishing might be true, but not truly helpful. Because "no single principle can answer all of life's complexities," constitutional disputes involving claims of religious liberty will inevitably

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[59] 545 U.S. at 882 (2005) (O'Connor, J., concurring).

[60] *Id.* at 875.

[61] *Id.*

confront courts with a "plurality of principles" that they must somehow reconcile or navigate.[62]

2. The Jigsaw Puzzle Picture. A generation ago, one student author offered an alternative solution to the apparent conflict among principles that spurred the single-value theory. In lieu of an account that affirms that "the principles underlying these two clauses are mutually inconsistent," Jonathan Nuechterlein proposed "a different approach [that] enables us to fit the two principles together like pieces in a jigsaw puzzle."[63] A similar idea is suggested by Witte's image of "an interlocking and interdependent shield."[64] Regardless of the metaphor, the thought seems to be that we can escape the hard problem of weighing conflicting principles—without denying the seemingly obvious fact (as single-value theory seems to) that principles can *incline* toward opposed outcomes—by channeling principles such that their opposing inclinations do not come into actual conflict. Where single-value theorists believe that the fundamental drivers of our constitutional law concerning religious liberty ("principles") *cannot* come into conflict—they lack the potential to come into conflict—because, after all, they all embody or advance the same value, jigsaw-puzzle theorists grant that our principles have the capacity to come into conflict but believe that they *do not* come into conflict because the law is structured to prevent potential conflicts among principles from materializing.

Legislatures can accomplish this trick easily. They can impose different rules for schools or legislatures or unemployment compensation, ensuring, if they wish, that different principles will prevail in different contexts. They can, so to speak, assign principles non-overlapping jurisdiction. Courts can do much the same via constructed doctrines that take the form of complex if-then

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[62] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 593–94 (1940). While it might seem ironic to seek support from one of our more widely reviled decisions, the irony is only apparent. The decision's defects are not the product of anything said here, but only that the Court got the balance among principles wrong. Having announced that "every possible leeway should be given to the claims of religious faith," *id.*, the majority trampled on those claims by vastly exaggerating the social importance of compulsory displays of patriotism.

[63] Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1127–28 (1990). His jigsaw puzzle solution was this: "The free exercise clause stands for the principle that the government should accommodate religion unless an important state interest precludes doing so—i.e., unless the secular costs of accommodation are high. When the state acts according to this principle, it acts out of a secular respect for the needs of religious people. The internal logic of the anti-establishment principle permits the state to pursue this goal. By contrast, where the free exercise principle does not require accommodation, the state generally cannot accommodate without revealing an illicit religious purpose." *Id.*

[64] *See supra* note 42 and accompanying text.

statements.[65] But constitutional principles are not the same as constitutional doctrines or tests. Tests are devices that courts construct and use to *implement* the outcomes or judgments that the principles collectively explain or determine.[66] And while courts' roles in the grounding of principles is a complicated matter (addressed in Part III), courts do not have the same purposive control over principles that they have over constructed tests. Because principles *emerge*, while doctrines, like statutes, are *engineered*, principles do not fit together the way doctrines can. Part IV will argue that principles *are* sometimes contoured to *reduce* conflict.[67] But it would be heroic to think they can be contoured to *eliminate* conflict. Any interlocking character of principles complements, rather than displaces, their more fundamental overlapping character, and the conflicts that their overlap can generate.[68]

B. NET FORCE PICTURE

Now that I have contrasted principles both with values and with doctrinal tests (albeit gesturally), it is time to say more about what principles are. Some commentators worry that the word is meaningless or used in misleading and inconsistent fashion.[69] To the contrary, I take principles to be norms of a

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65 Nuechterlein's proposal can be restated thusly: If a favorable treatment of a religious observer does not "lift an identifiable burden," or if it lifts a burden at high secular costs, then the treatment is unconstitutional; if not, then accommodation is permissible. Nuechterlein, *supra* note 63, at 1129.

66 For different ways to distinguish the judicial construction of doctrine from the (logically prior) judicial determination of existing law, see, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2001); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); Henry Paul Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

67 *See infra* note 207.

68 Gregg Strauss, in personal communication, wonders whether my position here signals a rejection of specificationism about moral rights. That's a reasonable surmise, and I'm grateful for the suggestion (or challenge), but pursuit of the thought must await another day.

69 *See, e.g.*, Thomas J. Curry, Book Review, *Securing Religious Liberty*, 16 J.L. & RELIGION 309, 312 (2001) ("The fundamental problem with these 'principles' is that they are not principles at all . . . . Calling them principles is indicative of the habit of both the Court and commentators to inflate language, part of a general tendency in this Church-State discipline to move from hypotheses to principles without any intervening test of evidence or proof. It is typified by the grandiosity of those who proclaim the principle of separation of church and state, when they mean nothing more than that there shall be no establishment of religion!"); *see also* Steven D. Smith, *The Not-Your-Ancestors' Principle-Plush Constitution*, *in* STEVEN D. SMITH ET AL. EDS., A PRINCIPLED CONSTITUTION? FOUR SKEPTICAL VIEWS 39, 44 (2022) (complaining that "it can be maddeningly difficult to try to figure out just what a 'principle' is"); *see also* Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255, 2324 ("Strictly speaking and in terms

particular logical type. This Section elaborates on the conception of principles that I have been assuming—a conception that I believe is widely shared, though often implicitly—and explains how principles so conceived net out to yield the singular verdicts that we need. The Section illustrates these ideas with two distinct models for graphical representation.

Most discussions of legal principles in American legal theory start with the work of Ronald Dworkin, who mounted his first challenge to legal positivism on the back of a claimed "logical distinction" between two kinds of norm: rules and principles.[70] While details of Dworkin's discussion on this point have proven controversial, the nub of his distinction is widely accepted.[71] "Rules," Dworkin explained, "are applicable in an all-or-nothing fashion." If the facts that the rule (complete with any exceptions) specifies are satisfied, "then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing" to the outcome or decision.[72] Principles are different. Whereas rules are like on/off switches, principles are norms with variable "weight or importance."[73] Their function is to "incline a decision one way, though not conclusively, and they survive intact when they do not prevail."[74]

To appreciate the significance of this distinction, it will be helpful to step briefly away from legal theory and into the philosophy of reasons and

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of the usual claims, there are no principles, just more or less persuasive uses of highly charged vocabularies by politically situated agents."); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 21 (1995) ("If we ask . . . what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is 'None.'").

70 Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted and revised as The Model of Rules I*, *in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 2 (1977). Dworkin's challenge from principles is often misunderstood. I clarify its logic in Mitchell N. Berman, *Dworkin vs. Hart Revisited: The Challenge of Non-Lexical Determination*, 42 OXFORD J. LEG. STUD. 548 (2022).

71 *See, e.g.*, Dale Smith, *Dworkin's Theory of Law*, PHIL. COMPASS 267, 268 (2007) ("While many positivists thought that [Dworkin] over-stated or misunderstood the difference between rules and principles, most accepted that there *is* a difference between these two types of norm."); Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 745 (1997) (observing that the Dworkinian distinction between rules and principles reflects "an entire jurisprudential tradition, a tradition that has shaped not only academic thought on these matters but also how lawyers and judges think and operate"). Principles are especially important to European and Latin American constitutional thought, in large measure thanks to the work of the German legal theorist Robert Alexy. *See especially* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans. 2002). Alexy's system is elaborate. I could not explain our points of agreement and divergence briefly.

72 DWORKIN, *supra* note 70, at 24.

73 *Id.* at 26.

74 *Id.* at 35.

normativity.[75] As two practitioners of the art, Errol Lord and Barry Maguire, have recently argued, any normative theory must recognize "two central cross-cutting distinctions": one between "strict" and "non-strict" notions, and a second between "weighted" and "non-weighted" notions.[76] Typically, non-strict notions are weighted and weighted notions help explain the strict. For Lord and Maguire, reasons are the "paradigmatic" weighted and non-strict normative notion and help explain strict (usually non-weighted) notions like duty, and all-things-considered ought.[77] What's important for our purposes is that what Lord and Maguire say about reasons is true of principles too: they are weighted, non-strict notions whose function is to contribute to a strict or decisive normative outcome or verdict. Rules, in contrast, are strict notions by nature, whose function is to deliver decisive verdicts all by themselves, even if the decisive verdicts they purport to deliver are sometimes countermanded by others. (I am speaking here of rules and principles as concepts or normative operators. I am not claiming that people always use the *words* "rule" and "principle" in this consistent manner. Of course they do not.)

Insofar as principles are to rules as reasons are to all-in oughts, we might gain insight by attending to how reasons underwrite or explain what-you-ought-to-do. Take a toy example. Law student Alex is deliberating between two post-graduate job offers, from Firm One and Firm Two. After investigation, Alex determines that the employers differ on only three relevant dimensions: interestingness of the work, remuneration, and appeal of co-workers. Firm One, Alex concludes, offers significantly more interesting work, but Firm Two offers somewhat more pay and just a bit more appealing colleagues. The fact that Firm One offers more interesting work is a reason for Alex to select it over Firm Two. The facts that Firm Two offers more pay and better

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[75] All references here to "normativity," "normative theory," "normative domains," and the like, are noncommittal between what has been called "robust" and "thin" normativity. Robust normativity is the grade of normativity routinely associated with morality. If you ought$_{\text{morality}}$ to φ, then you *really* ought to φ, unconditional on your own desires or commitments. Thin normativity is associated with manners, prescriptive grammar, and the rules of games and organizations. Even if you ought$_{\text{grammar}}$ not to split an infinitive, it is an open question whether you *really* (robustly) ought not to. The same is true, most positivists believe, about law: that you ought$_{\text{law}}$ not to φ does not entail that you *really* ought not to φ. The literature on the robust/thin distinction (often under different labels) is burgeoning. For an introduction, see David Plunkett, *Robust Normativity, Morality, and Legal Positivism*, *in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 105 (David Plunkett, Scott J. Shapiro, & Kevin Toh eds. 2019). When I say that principles and rules pack normative force, I don't presuppose that they bear on what anyone really or truly ought to do, or what citizens or subjects have "real reason" to do.

[76] Errol Lord & Barry Maguire, *An Opinionated Guide to the Weight of Reasons*, *in* WEIGHING REASONS 3–4 (Errol Lord & Barry Maguire eds. 2016).

[77] *Id.*

colleagues are two separate reasons for Alex to select it over Firm One. What should Alex do?

A knee-jerk thought is that Alex should select Firm Two because it dominates Firm One two reasons to one. That would be naïve. Practical reasoning does not direct that we ought to act in conformity with the balance of *reasons* (a count noun) but rather with the balance of *reason* (a mass noun).[78] Alex's task is not to tally up the number of reasons that favor each option, but to determine which option the applicable reasons favor all told. That is a surprisingly complex matter. I will simplify, for my limited ambition is not to present a full account of the accrual of reasons, but to make tolerably clear how reasons, the paradigmatic contributory and weighted normative notion, collectively explain or constitute a different normative notion that is decisive, not contributory—here, what an agent *ought to do.*

The simplified account has two moving parts. First, the force each reason individually exerts is a function of (1) the *extent* to which each option advances the interest or value that the reason invokes better or less well than the other option, and (2) the relative importance, to Alex, of each interest. Second, the force that each reason individually exerts aggregates with the force exerted by every other reason by simple addition.[79] I have already indicated, in imprecise qualitative terms ("significantly," "somewhat," "just a bit"), Alex's judgments with respect to (1). With respect to (2), let us suppose that Alex adjudges remuneration and appeal of co-workers to be comparably important and interestingness of work to be twice as important as either. Table 1 below assigns numerical values to these qualitative judgments and represents the underlying structure of reasoning, even if Alex's actual deliberations will be less formal, more intuitive. It displays numerically how reasons can point in different directions and nonetheless aggregate to determine what the agent ought to do, all things considered—in this case, to accept Firm One's offer of employment.

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[78] *See* Daniel Fogal, *Reasons, Reason, and Context*, *in* WEIGHING REASONS, *supra* note 76, at 74 (defending this claim at length); *see also* JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES 16 (2004) (asserting it in passing).

[79] This analysis simplifies. Current analyses of how reasons accrue involve not only reasons but auxiliaries to reasons such as attenuators, enhancers, enablers and cancelers, all descendants of Joseph Raz's famous distinction between first- and second-order reasons. *See* JOSEPH RAZ, PRACTICAL REASONS AND NORMS (2d ed. 1999).

TABLE 1: HOW REASONS ACCRUE

Reason	Raw favoring		Relative weight	Weighted favoring	
	Firm One	Firm Two		Firm One	Firm Two
Interestingness of work	3		2	6	
Remuneration		2	1		2
Appeal of co-workers		1	1		1
Total weight of reasons				6	3

Principles operate much like reasons. First, the force that any principle exerts toward a rule is a function of its importance relative to other principles in the system and the extent to which it is implicated or activated on the facts. For example, a principle of *federalism*, whatever its relative importance (a matter vigorously debated), will exert more of its potential force in opposition to federal regulations of state governmental functions than of non-governmental functions;[80] it will weigh more heavily against commandeering of state legislative functions than of state executive functions.[81] The principle of *beneficence* will activate more strongly toward an option that would raise five people from abject poverty than toward an option that would raise one. Second, the contribution made by each principle individually combines with the contributions made by all the others by simple aggregation.

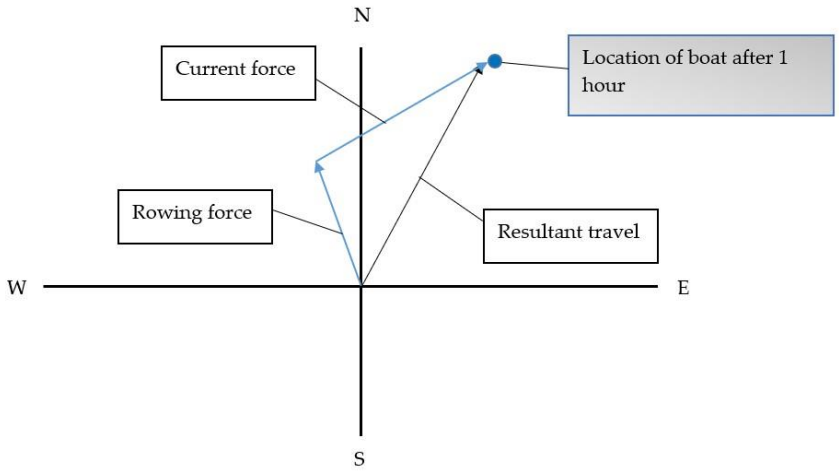
Because principles exert their force *directionally* (toward or against an outcome or judgment) and with *scalarity*, their joint operation can be modeled as vector addition and represented graphically. Take a stock example from high school precalculus. Dori is rowing a boat across a river at 10 km/hr, heading 20° west of due north. The heavy river current flows 30° north of due east at 15 km/hr. After one hour of rowing, where is Dori relative to their

[80] *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (holding that otherwise valid federal statutory requirements do not apply to state governmental functions described as "traditional" or "integral").

[81] *See* Printz v. United States, 521 U.S. 898, 975 (1997) (Souter, J., dissenting) (arguing that commandeering of state executive functions threatens federalism less than commandeering of state legislative functions does).

launch point? The answer, as represented in Figure 1 below, is that Dori has traveled approximately 19.5 km away, 30° east of due north.

FIGURE 1: STANDARD VECTOR ADDITION



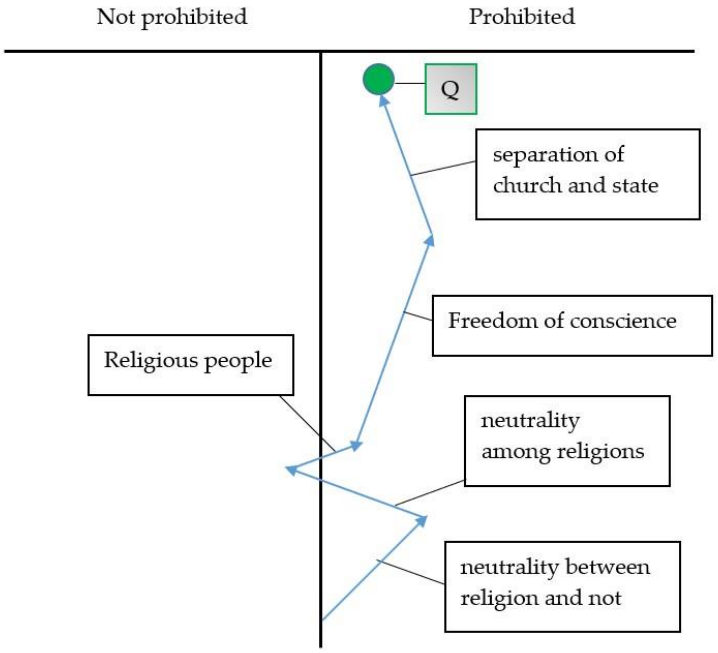
That's vector addition in two-dimensional physical space. The model can be adapted for one-dimensional normative space. Imagine a legal-normative field defined by the contradictory poles "legally prohibited" and "not legally prohibited."[82] Then consider any specific description of any act or event type, Q, that is a proper subject of the predicates that define the field. For example, Q could be a Sunday closing law, or a criminal ban on polygamy, or a state spending program that subsidizes breakfast at secular private schools but not religious private schools. Any given legal principle, P_n, can be represented as an arrow that bears for one or the other of two potentially applicable legal statuses of Q (prohibited or not prohibited), or that has no bearing at all. If P_n does bear on the legal permissibility of Q, the force it individually exerts is (to a first approximation) the percentage of its potential relative force (weight, magnitude, strength, importance) that is activated given the facts.[83] A

[82] For other legal questions the poles might be, say, "legally valid" and "legally invalid" or "legally immune" and "legally not immune."

[83] But "isn't it always possible for a particular principle to be more fully activated?" asks Sherif Girgis (in personal correspondence). "For any action that undermines federalism, isn't there one that undermines it more? And so on for other principles." Possibly. That's why the analysis I offer here is only a first approximation. Girgis's fair worry could be accommodated easily if, for example, the increase in principles' activation is asymptotic.

principle's relative weight—a context-invariant property—is represented by its length, and the degree of its activation—a context-variant property—is represented by the angle it describes relative to neutrality (here represented by the y-axis): the further it tilts toward horizontal from vertical, the more it is activated. The force that the principles exert collectively is determined by linking the arrows head to tail. If the chain of vector-arrows starts at neutral, then Q has the legal property or status that corresponds to the area of the plane where the chain ends. Figure 2 illustrates. (To repeat: this is a *one*-dimensional plane; distance along the y-axis has no significance. Distance from the y-axis along the x-axis does have significance, albeit limited. It does not signal how much an act type is prohibited or permitted, but does signal how close a prohibited or permitted act is to possessing the opposite property or status. That is, distance from neutral signifies how close the case is.)

FIGURE 2: OPERATION OF PRINCIPLES, VECTOR MODEL

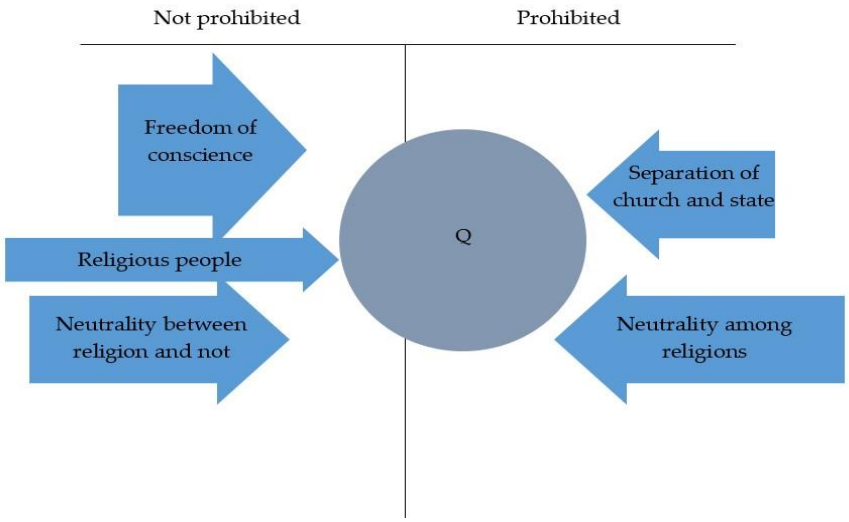


Here are several of the many things one can read off the graphic. (1) *Separation of church and state* and *neutrality among religions* have the same

"valence" with regard to Q—they both bear toward its permissibility ("not prohibited")—while the remaining principles all bear against Q's permissibility (toward "prohibited"). (2) *Freedom of conscience* is a weightier principle than is *religious people* (it possesses more potential force), but (3) *religious people* is more fully activated against the permissibility of Q than is *freedom of conscience* (it exerts more of its potential). (4) The net weight or force of the principles establishes that Q is prohibited.

The diagram above is the orthodox way to model vector addition.[84] I will call it the vector model. But the same information could be communicated in varied ways. Figure 3 presents an alternative representational schema in which the height of a vector arrow represents the principle's relative importance, its direction represents whether it militates for or against the legal permissibility of the conduct at issue (Q) under the circumstances, and its length represents the extent to which the principle bears toward one normative status or the other given the facts. This model displays the relative weight and degree of activation of a principle in a fashion that many people will find more intuitive, but makes the all-things-considered verdict appear more impressionistic. I call it the intuitive model.

FIGURE 3: OPERATION OF PRINCIPLES, INTUITIVE MODEL



The vector and intuitive models are inter-translatable. This Article switches between the two, as one or the other strikes me as more felicitous for

[84] I am indebted to Brandon Walker for recommending that I use the orthodox model in this fashion.

the point at hand. Both models simplify a more complicated normative reality. But they make vivid that, just as reasons that individually favor competing options can accrue to deliver all-in oughts, so can principles that individually favor competing legal outcomes accrue to deliver legal rules.

C. EXAMPLE: LEGISLATIVE PRAYER

That's the simple but powerful account of how legal principles can determine, collectively and non-lexically, legal rules of the form Q is prohibited or Q is permitted. This Section shows how the model makes sense of the contending opinions in one important religious liberty decision, *Marsh v. Chambers*.[85]

Marsh involved a challenge to the Nebraska legislature's practice of opening each legislative session with a prayer offered by a chaplain chosen biennially by the legislature and paid a modest monthly salary out of public funds. The Court rejected the challenge, six to three, in an opinion authored by Chief Justice Warren Burger. Implicitly addressing the bearing of *neutrality between religion and nonreligion*, the central thrust of Burger's short opinion is that whatever force that principle exerts against legislative prayer is swamped by "the unambiguous and unbroken history of more than 200 years."[86]

To start, the first Congress, days before finalizing the language of the Bill of Rights, authorized the appointment of paid chaplains to conduct legislative prayer, thereby demonstrating "what the draftsmen intended the Establishment Clause to mean, but also . . . how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent."[87] Moreover, the practice has remained consistent and nearly ubiquitous ever since, establishing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country,"[88] and remains "part of the fabric of our society."[89] Far from constituting a forbidden "step toward establishment," the invocation of "Divine guidance" in these circumstances "is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As

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[85] 463 U.S. 783 (1983).

[86] *Id.* at 792.

[87] *Id.* at 790.

[88] *Id.* at 786.

[89] *Id.* at 792.

Justice Douglas observed, '[w]e are a religious people whose institutions presuppose a Supreme Being.'"[90]

Justice John Paul Stevens, in a brief lone dissent, hammered at a principle separate from *neutrality between religion and nonreligion* that he thought fatal to Nebraska's practices: *neutrality among religions*. For one thing, he reasoned, "the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another."[91] For another, Stevens thought some of Nebraska's Presbyterian chaplain's prayers "clearly sectarian" in content, illustrating with one prayer that began: "Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified."[92]

Without flatly denying that *neutrality among religions* was implicated on these facts, the majority thought the extent of activation minimal. After announcing itself puzzled by the "suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church," the Court also noted that "guest chaplains have officiated at the request of various legislators and as substitutes during [the appointed chaplain's] absences."[93] Intimating that the issuance of highly sectarian prayers would activate *neutrality among religions* more forcefully, the Court emphasized the absence, in the case record, of any "indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[94]

Justice William Brennan wrote the principal dissent, joined by Justice Thurgood Marshall. Beginning by analyzing the facts under the three-part *Lemon* test,[95] Brennan concluded easily that legislative prayer violates each criterion: it has a religious rather than secular purpose, its principal effect is to advance religion, and its practice fosters an excessive entanglement between government and religion.[96] Happily for our purposes, Brennan's deployment of *Lemon* proved to be a sideshow. "The path of formal doctrine," he explained, "can only imperfectly capture the nature and importance of the

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90 *Id.* at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

91 *Id.* at 823 (Stevens, J., dissenting).

92 *Id.* at 823 & n.2 (Stevens, J., dissenting).

93 *Id.* at 793.

94 *Id.* at 794–95.

95 Lemon v. Kurtzman, 403 U.S. 602 (1971).

96 Marsh v. Chambers, 463 U.S. 783, 797–800 (Brennan, J., dissenting).

issues at stake in this case. A more adequate analysis must therefore take into account" the underlying forces that shape the doctrine.[97]

And for Brennan and Marshall, the underlying forces are fundamental "principles . . . implicit in the Establishment Clause."[98] These principles activate strongly against Nebraska's practice, for legislative prayer

> intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity," with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.[99]

Put in my terms, the principles on which Brennan places greatest weight are *neutrality between religion and nonreligion* ("forces all residents of the State to support a religious exercise that may be contrary to their own beliefs"), *freedom of conscience* ("forc[es] some legislators either to participate in a 'prayer opportunity,' with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate"), and *separation of church and state* ("injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines," and "has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order").

Furthermore, Justice Stevens's preferred principle—*neutrality among religions*—also has force. While conceding that Chaplain Palmer's legislative prayers have been "relatively 'nonsectarian,'" Brennan agreed that they are at least somewhat sectarian and, more fundamentally, that "*any* practice of

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[97] *Id.* at 801–02 (Brennan, J., dissenting). The thought, as I understand (and share) it, is that the Supreme Court legitimately crafts doctrines to efficiently implement the constitutional principles and rules that it tries to discover. The doctrines are directives to lower courts, on whom they are binding. Generally, the Supreme Court should apply its doctrines too. But because these doctrines capture the discovered law imperfectly, the Court may sometimes pierce the doctrine to decide cases based on the underlying principles. Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine,* 89 IOWA L. REV. 1487, 1529–33 (2004).

[98] 463 U.S. at 803 (Brennan, J., dissenting).

[99] *Id.* at 808 (Brennan, J., dissenting) (internal citations omitted).

legislative prayer, even if it might look 'nonsectarian' to nine Justices of the Supreme Court, will inevitably and continuously involve the state in one or another religious debate" and will prove deeply objectionable to at least some religious believers.[100]

That's a powerful case against legislative prayer! Yet Brennan had started by acknowledging that the question is difficult, that the majority's opinion is careful and narrow, and that he himself had in previous opinions suggested agreement with the majority's position.[101] Given his many and forceful constitutional objections to the practice, what made the question hard? Precisely that our principles are plural, and that the principles that condemn legislative prayer "do not exhaust the full meaning of the Establishment Clause as it has developed in our cases."[102] Instead, "there are certain tensions inherent in the First Amendment itself, or inherent in the role of religion and religious belief in any free society, that have shaped the doctrine of the Establishment Clause, and required us to deviate from an absolute adherence to separation and neutrality."[103]

Unfortunately, Brennan's treatment of the competing principles or considerations is, like Burger's, a little hard to follow. It is unclear whether or to what extent he ultimately determines that the (putative) principles he appears to consider—*religious people*, *intended applications*, and *historical practices*—are not genuine constitutional principles at all, are principles with slight weight or importance, or are only modestly activated.[104] What is clear is his judgment that the combined force of principles that support legislative prayer are significantly outweighed by the combined force of the principles that oppose it.

The reasoning of Burger's majority and Brennan's dissent are represented in figures 4 and 5 below, simplified and gently massaged.

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100 *Id.* at 818 n.38, 819–20 (Brennan, J., dissenting).

101 *Id.* at 795–96 (Brennan, J., dissenting).

102 *Id.* at 809 (Brennan, J., dissenting).

103 *Id.*

104 *See Id.* at 810–17 (Brennan, J., dissenting).

FIGURE 4: *MARSH V. CHAMBERS*—MAJORITY OPINION

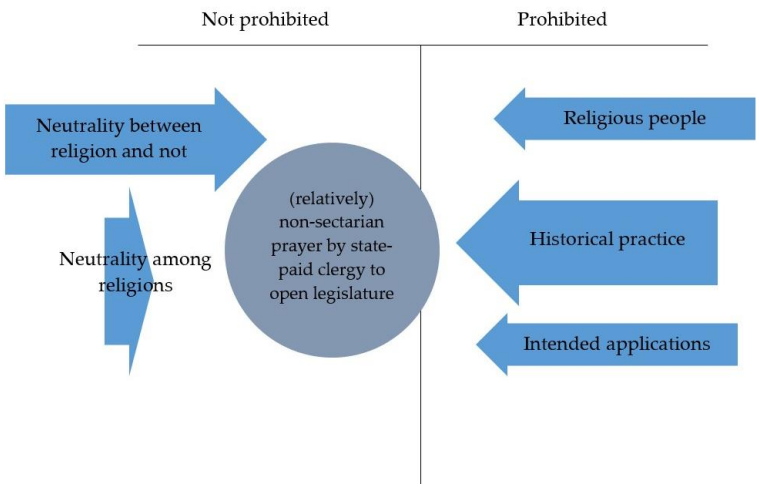
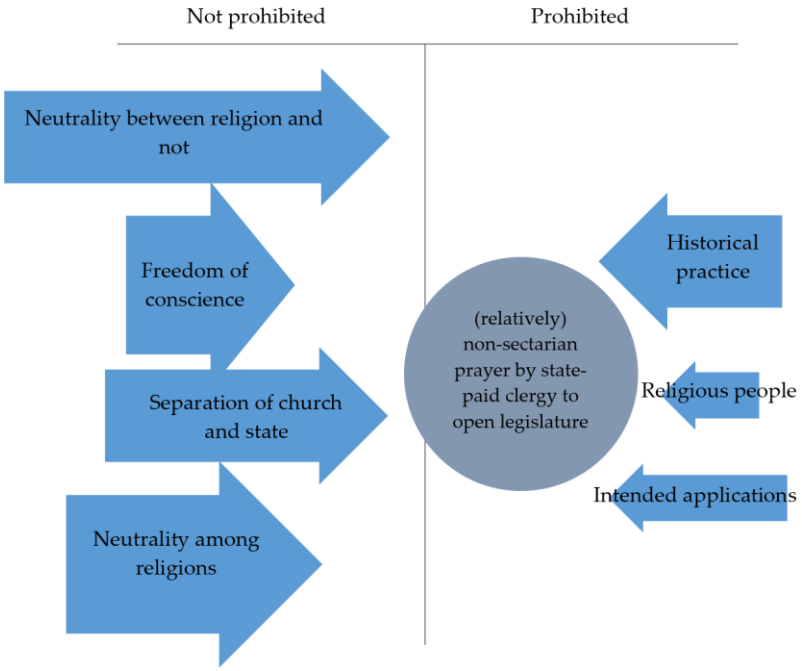


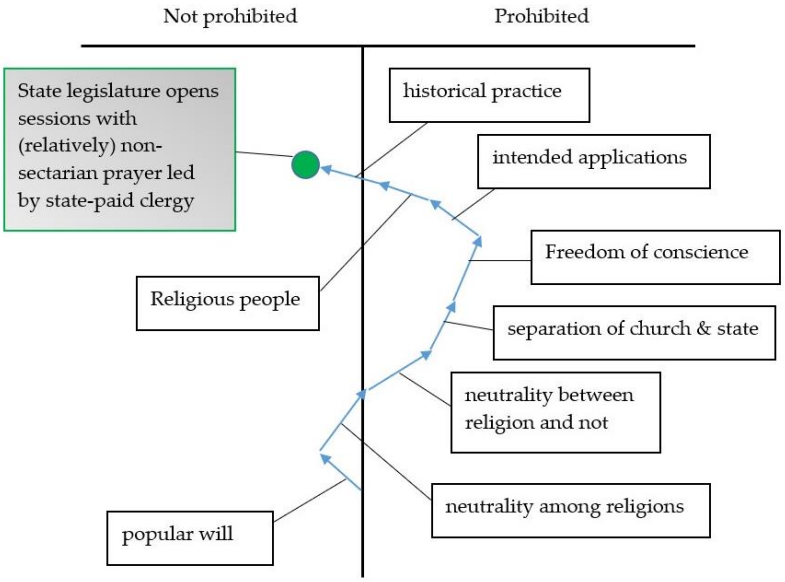
FIGURE 5: *MARSH V. CHAMBERS*—PRINCIPAL DISSENT



My own view is that the principal dissent displays better grasp of the pluralistic, partly conflictual character of our fundamental principles, but the majority is possibly right on the merits. In my judgment, the principles Nebraska invoked are genuine principles of our law that were activated more strongly than the dissent allowed. Although, like Brennan, I find it a close case, on balance I think that legislative prayers are permissible unless excessively sectarian, as the Nebraska prayers arguably were not. Figure 6 below represents my highly provisional take on the dispute when the case was decided. This is a tentative map of principles and their activation circa 1983, not 2024. Assuming that Nebraska has become more religiously diverse over the past forty years, the employment of a single Presbyterian chaplain year after year would offend *neutrality among religions* more greatly today than it did then, very probably enough to yield a different constitutional bottom line.

One additional feature of this mapping warrants emphasis. Because force addition is addition, and addition is commutative, the principles' order is immaterial. Still, some orders of operation might be pragmatically favored over others. Most particularly, our constitutional reasoning in cases involving claimed rights violations does not begin from equipoise. We start with a presumption that challenged state action is constitutional, which presumption can be overcome by principles that serve to limit the legislative freedom of popular majorities. To capture this aspect of our law, this model introduces a principle it designates *popular will* and places that principle at the head of the chain, leading away from the line of origin and weighing toward the permissibility of challenged action. For simplicity, I'm folding *federalism* into *popular will*, but they could be broken apart. Whether represented as one principle or two, the important points are, first, that a claim of unconstitutionality has some distance to travel to succeed and, second, that that distance is not greater than the length of any single rights-promoting principle when activated to the degree that is taken to constitute the right. Subsequent models of the aggregation of our principles in this Article preserve this feature.

FIGURE 6: *MARSH V. CHAMBERS*—A PLAUSIBLE TAKE



D. LESSONS AND FURTHER THOUGHTS

The preceding two Sections show that principles can aggregate and outweigh, and that an account that models their joint operation on force addition is perfectly intelligible and not foreign to our judicial practices and opinions.[105] This Section draws out five lessons.

1. Four loci of disagreement. The net forces account is not sold as a way to eliminate disagreements. Nothing about this picture, or about the account of grounding that I will peddle in the next Part, is remotely algorithmic, mechanical, or demonstrable. The picture does isolate three chief loci of disagreement, and hints toward a fourth. Supreme Court Justices, and all the rest of us, can reasonably disagree about: (1) what our principles are, (2) the relative weight or importance of varied principles, and (3) the extent to which a given principle is implicated or activated on the facts. This is why I am

[105] As I emphasize momentarily, I do not purport to have shown that the interaction of our constitutional principles of religious liberty is not *more* complicated than force addition. *Cf. supra* note 79. Given the immature state of our current understanding of principles' joint operation, even small steps are big advances.

sincere when emphasizing that my own take on the issue in *Marsh* is tentative and offered for purposes of illustration, not to defend a casuistic conclusion. To take only the third locus of reasonable disagreement and uncertainty, it could well be, for example, that the historical practice of legislative prayer was significantly less uniform than I have assumed,[106] or that the separation of church and state concerns are considerably greater than I have appreciated,[107] in either of which cases the bottom-line could come out differently.

Beyond that, we can and do disagree about (4) whether or in what respects the principles deliver outcomes in rule-like, decision-tree fashion rather than in balance-like, aggregative fashion. Although I have emphasized the aggregative character of principles' operation, the analogy between principles and reasons suggests that principles need not operate only by aggregation. Suppose that your friend needs help moving house and that you have promised to provide that help. Both facts—your friend's need and your promise—are reasons to help your friend. Suppose too that, at move time, your favorite sports team is playing in a televised postseason game. Is that fact a reason you may entertain when deciding whether to help your friend or stay home watching TV? Presumably not: your promise excludes your consideration of the fact that you would like to watch the game. If your friend releases you from your promise, only then may you consider the postseason game as a reason not to help, in which case it would balance against the still-existing reason to help grounded not in the fact of your promise, which has been cancelled, but in the fact of your friend's need, which remains. Similarly, a constitutional lawyer or theorist might argue that some principle P (such as fidelity to the original fixed meaning of the text) precludes, preempts, silences, or disables (all or some) other principles, which may come into play only when P is not activated. I do not reject this possibility categorically. As I have argued elsewhere, the function that maps constitutional principles to constitutional rules is not a brute fact about the world but instead is itself determined or constituted by legal practices.[108]

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[106] Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

[107] *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 978 (2010) (arguing that the "overarching lesson of these legislative prayer cases is that these ostensibly harmless endorsements have a way of becoming not so harmless at all").

[108] Berman, *How Practices Make Principles, and How Principles Make Rules*, *supra* note 11, at Section 2.3. As I argue there, while the interplay of principles can be more structured than simple aggregation, there are good reasons to expect simple aggregation to play a significant role in any complex decentralized legal system because departures from simple aggregation demand more concordance in the practices that ground the function.

All these four forms of disagreement are probably in play in *Marsh*, even though some of the Justices' disagreements are hard to classify.

2. Adjudication under uncertainty and underdeterminacy. The same complexities that make disagreement between Justices inevitable all but ensure as well that each Justice will often find themself individually uncertain. And sometimes or often the reason a Justice is uncertain is that the legal facts they're trying to discover—that thus-and-such is or is not constitutionally permissible—are legally underdetermined. (To the extent that my arguments and illustrations up to now suggest a belief that our constitutional law supplies singular constitutional verdicts to all constitutional disputes, let me correct that misimpression. The account does not assume that there exist, in the law of religion or elsewhere, legally right answers to all disputed constitutional questions, just awaiting discovery. The models especially are simplifications of a much cloudier and more complicated reality.) For all these reasons—legal underdeterminacy, intrapersonal uncertainty, and interpersonal intratribunal disagreement—we need an account of how judges should resolve the disputes that are brought to them. Thus far, we have been working out a theory of "constitutional content"—an account of what gives our constitutional law its content, or what makes propositions of constitutional law true, when they are.[109] We also need a theory of "constitutional adjudication"—an account of how federal courts, including the Supreme Court, should resolve constitutional cases.

This Article does not offer a theory of constitutional adjudication. It focuses on what makes propositions about what our constitutional law of religious liberty permits or prohibits true, not on how our Justices should resolve disputes under the Religion Clauses. I understand that my orientation bucks scholarly fashion. Here I say a few words in defense of this Article's

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[109] Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515 (2018). A "theory of constitutional content" is a "theory of legal content" applied to American constitutional law. On theories of "legal content," see, e.g., Andrei Marmor, *What's Left of General Jurisprudence? On Law's Ontology and Content*, 10 JURIS. 151 (2019). What I am calling a theory of "constitutional content," others call a "constitutive" theory of constitutional law (Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004); David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139 (2012)), a "truthmaking" theory of constitutional interpretation (Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 499, 506 (2018); Larry Alexander, *The Objectivity of Morality, Rules, and Law: A Conceptual Map*, 65 ALA. L. REV. 501 (2013)), or a "constitutional standard" (see Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022) (distinguishing a "standard" that makes constitutional norms what they are from a "decision procedure" that directs how courts should ascertain what our constitutional norms are)); *see also* Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to* Originalism: Standard and Procedure, 135 HARV. L. REV. F. 133 (2022) (situating Sachs's distinction within the preexisting theoretical literature)).

focus on constitutional content, followed by even briefer remarks on adjudication.

Whatever a complete theory of adjudication consists in, its centerpiece, almost certainly, is that Justices should try to ascertain and enforce the law. That directive will not be the whole of the theory. The theory must also address, for example, when judges should or may underenforce the law, or overenforce it. But ascertaining and enforcing existing law is surely the heart of a judge's job. So any decent theory of adjudication will be parasitic upon an account of how there could be law to enforce and what determines what that law is—what it directs, permits, requires, and so forth.

Original public meaning originalism purports to be a theory of constitutional content, and not only a theory of constitutional adjudication. Its fundamental directive to judges—try to enforce the original public meaning of the ratified constitutional text—is the product of a banal theory of constitutional adjudication—try to ascertain and enforce the preexisting law—and an arresting theory of constitutional content—the law is all and only the fixed meaning of the constitutional text.[110] Most constitutional scholars believe that this simple theory of constitutional content is simply false.[111] Yet, surprisingly, as the progressive journalist Ezra Klein recently bemoaned, they have offered precious little in its place. Most liberals, he said, "will tell you originalism is a little nutty."[112] But they also "have absorbed quite deeply the critique" of liberal constitutional thought that originalists have pressed, "which is that without some binding interpretive methodology all you're doing is reading your own values into the Constitution."[113] Because constitutional decisionmaking at least starts by seeking constitutionally correct results, liberal jurists' lack of an account that could explain, even to themselves, "how we have confidence of what we're seeing in the Constitution is true," has left them "a little . . .

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[110] As Justice Barrett put the idea when still Professor Barrett:

> Early originalists sometimes presented originalism as a theory of judging—specifically, as a mechanism of judicial restraint. On this view, which is suffused with worries about the counter-majoritarian nature of judicial review, the original public meaning of the Constitution would have no particular claim on the conscientious legislator. The conventional position of modern originalists, however, is that the original public meaning of the Constitution's text is 'the law.'

Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 3 (2016).

[111] For my criticisms see, e.g., Berman, *Our Principled Constitution*, *supra* note 11, at 1340–48; Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

[112] The Ezra Klein Show, *Transcript: Ezra Klein Interviews Larry Kramer*, N.Y. TIMES (July 5, 2022), https://www.nytimes.com/2022/07/05/podcasts/transcript-ezra-klein-interviews-larry-kramer.html [https://perma.cc/85B5-97FZ].

[113] *Id.*

paralyzed."[114] In other words, liberals have had trouble getting behind a theory of constitutional adjudication because they have no theory of constitutional content. This is why we need a theory of content. It alone makes rationally intelligible the activity of trying to discover the legally right answer, what the law permits or requires. And the need is not limited to those coming from left of center. Any political conservative who isn't satisfied with any originalist theory of constitutional content has as much reason as liberals or progressives to seek a better account.

What accounts are possible? If the judge seeks to ascertain the constitutional law, in conformity with their more-or-less conscious theory of constitutional content, and ends up in a state of uncertainty, what might a theory of adjudication then advise? There are too many possibilities to canvass. Some theories counsel deference to legislative majorities.[115] Some encourage the judge to develop the law in accord with (the judge's own view of) the good or the just.[116] Others urge judges to safeguard the legitimacy, stability, and coherence of the legal system.[117]

In my judgment, the organic pluralist theory of legal content fits most naturally with theories of adjudication of the third type.[118] The nub of the idea is that judges should ensure that constitutional rules remain rooted in principles that collectively reflect the diversity of constitutional judgments and commitments of We the People. Principles that enjoy wide and deep support among the public, and that are embedded in the law as supports for constitutional rules that have been recognized and not overruled, must be given their due; they should not be ignored, denied, or downgraded. All our principles that have won meaningful acceptance and that underwrite recognized rules are principles of our law, not only those principles embraced by members of the faction or factions that, thanks to the vagaries and

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114 *Id.*

115 James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), is the obligatory cite, though he urged deference only to acts of Congress not of the states. *Id.* at 154–55. For arguments that our courts should underenforce the Establishment Clause, see Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583 (2011); Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273 (2008).

116 *See, e.g.,* RONALD DWORKIN, FREEDOM'S LAW (1996).

117 *See, e.g.,* Barry Friedman, *Dialogue and Judicial Review,* 91 MICH. L. REV. 577 (1993).

118 Thereby putting some readers in mind, no doubt, of Tebbe's "social coherence" theory. *See supra* note 40. It seems to me, though, that the approach to adjudication I favor fits better with Tebbe's *name* for his theory than it does with that theory itself, which owes more to Dworkin's interpretivism, *see* DWORKIN, LAW'S EMPIRE, *supra* note 6, and Bobbitt's enthusiasm for judicial conscience, *see* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991), than will the position that I expect to advocate.

chicaneries of fortune, have secured a majority of seats on the Supreme Court. The Justices should enforce and preserve our law; they should not arrogate to themselves leading responsibility for driving constitutional change.

That's the thought writ large. Turning from a general theory of constitutional adjudication back to adjudication of claims under the Religion Clauses, Noah Feldman has urged the Court to strive to "reconcile secularists and evangelicals by making both sides feel included in the experiment of American government and nationhood."[119] I'm broadly with Feldman,[120] though defending the account and working out its contours requires an article of its own. For one thing, any sound normative theory of adjudication must account for the game-theoretical aspect of repeated decisionmaking by Justices with divergent ideological priors.[121]

3. Conflicts, contingent and conceptual. As we have seen, many scholars fret about conflict among principles. But as we have also seen, it is not obvious why they should. Putting religious liberty aside, conflict among principles is a common feature of our normative situation. Consider the familiar moral principles *keep your promises* and *help others in need.* If you've promised to help Sam, and Sam needs that help, these principles align in directing what you ought to do: help Sam. But if Sam's need arises in circumstances that prevent you from being able to provide that help while also fulfilling a promise you've made to Rudra, then, in this case, the principles press in opposition. Same with my earlier example of possible conflicts between the legal principles *federalism* and *textualism.*[122] We don't think that the conflict of principles in these mundane cases is deeply problematic or mysterious, so why should conflicts among principles of religious liberty strike us differently?

The answer starts by distinguishing two kinds of conflict: contingent and conceptual. The conflicts between principles that I've just gestured to are contingent: sometimes *keep your promises* and *help others in need* press in accord, sometimes they press in opposition. Same with *federalism* and *textualism*. It all depends on the particular facts. Contrast those pairs of principles with these: *men are superior to women* and *women and men are*

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[119] NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 235–36 (2005).

[120] I don't endorse the particular solution that Feldman proposes. It's the spirit of his proposal that I think is right, both in this region of the law and more generally.

[121] On this last point, see Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (arguing that liberal Justices have repeatedly appeased their conservative colleagues by compromising without reciprocation).

[122] *See supra* p. 868. I appreciate that many people have a gut sense that these principles are made of different stuff and therefore can't combine or interact. I'm showing that they can.

equal. Whereas the other principles are contingently aligned or contingently opposed, it seems that these (supposed) principles always oppose each other. Any fact pattern that implicates *men are superior to women* will also implicate *women and men are equal*, and vice versa. And when these principles are implicated, they always press in opposite directions. These facts might together make the co-existence of these two principles untenable. If they are of equal weight, then they always battle to a stalemate. If one is weightier than the other, then the weightier always prevails and the less weighty always loses out. In the latter case, it seems that we effectively have only one principle; in the former, it seems that we effectively have none. In cases of contingent conflicts, we might say, it's not that the *principles* conflict, but rather that the *outcomes* that individual principles support conflict. In cases of conceptual conflicts, the principles themselves conflict. Maybe, for the reason just given, that's an important distinction.

And if it is, here's the upshot for our catalogue of principles of religious liberty. Most of the conflicts that our principles display in operation are contingent. No problem about those. But some might be conceptual. *Marsh* particularly suggests that *neutrality between religion and nonreligion* appears conceptually opposed to *religious people.*[123] If so, we might think that we cannot have both and must choose one or the other.[124]

Justice Neil Gorsuch advanced essentially this claim in *Kennedy v. Bremerton School District.*[125] Writing for the six-member majority, Gorsuch contended that a "natural reading" of the first sentence of the First Amendment would suggest that the Clauses that comprise it "have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others."[126] If the purposes are "warring," then one "is always sure to prevail over the others," but if one always prevails, then the defeated is always defeated, in which event it's hard to see what difference it makes. And it's hard to see how a purported legal principle that makes no difference is an actual legal principle.

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[123] Although *Marsh* doesn't implicate this issue, we might also think that *neutrality between religion and nonreligion* is in conceptual conflict with *special solicitude*. I address that possibility *infra* note 207.

[124] Justice Brennan recognized the challenge of reconciling *religious people* with *neutrality between religion and nonreligion*. His solution was to construe *religious people* so narrowly as to render it almost inoperative. *See* Marsh v. Chambers, 463 U.S. 78, 810–11 (1983) (Brennan, J., dissenting) ("[G]overnment cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture.").

[125] 597 US. 507 (2022).

[126] *Id.* at 20–21 (citing Everson v. Bd. of Educ. of Ewing, 330 U. S. 1, 13, 15 (1947)).

This reasoning would be nearly sound but for the role of activation. Recall that the force that a principle exerts in context is a function of its context-invariant weight or importance and the context-variant extent of its activation. If conceptually conflicting principles (of equal or unequal weight) can be unequally activated on a single set of facts, then it would not be true that, when conflicts arise, one principle is always the victor and the other always the vanquished. And if either of the conceptually conflicting principles can prevail, depending on the facts, then nothing I have said in this section (and nothing Gorsuch says in *Kennedy*) provides reason to believe that a legal system cannot encompass both. Lastly, conflicting principles will activate differentially so long as even one of their activation or realization curves is nonlinear, as diminishing marginal utility would often suggest.[127]

Consider *Marsh.* It is intuitively plausible that a total ban on legislative prayer offends *religious people* greatly (that is, *religious people* activates strongly against a total ban), but that allowing brief, occasional, and highly non-sectarian legislative prayer offends *neutrality between religion and nonreligion* only modestly. In contrast, a rule that would allow frequent, extensive, and highly importuning prayer would offend *neutrality between religion and nonreligion* greatly, whereas prohibiting such practices (while allowing *some* legislative prayer) offends *religious people* only modestly. If so, then our system of constitutional law can contain both these principles without the stronger canceling the weaker and without each of the two rendering the other inert. Rather, these two principles, conceptually conflicting though they may be, serve to dampen one another. Far from a cause for anxiety, mutual dampening is a healthy way for conflicting constitutional visions and commitments in the polity to operationalize.[128]

Is there any other reason to conclude that *religious people* and *neutrality between religion and nonreligion* cannot coexist in the same prickle? In his dissent in *McCreary*, the case that ruled against display of the Ten Commandments in Kentucky courthouses, Justice Scalia married a full-throated defense of *religious people* to an equally passionate denunciation of

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[127] Unless the conflicting principles' activation curves are nonlinearly inverse. But that's hard to imagine.

[128] The full truth is that mutual dampening makes sense of conceptually conflicting principles even when they do not activate differentially. This is why I said that the reasoning I attribute to Gorsuch would be *nearly* sound were it not for activation. Even if two conflicting principles always activate to equal and opposite degree whenever implicated, thus ensuring that the weightier of the two will always emerge victorious from their pairwise battle, the fact that the weaker of the two has dampened the force of the stronger can affect the aggregate battle of principles when principles beyond the conceptually conflicting pair are also in the mix. Thus even a principle that is consistently dominated by a conceptually conflicting counterpart can make a difference.

"the supposed principle of neutrality between religion and irreligion" in part on the ground that it was not part of the original understanding and in part on the ground that, given *religious people*, the Court could not possibly "apply the neutrality principle consistently," and hasn't.[129] This inconsistent application of the principle is fatal to it, he reasoned, for "[w]hat distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle."[130]

Scalia's paean to consistency of principles and their application is ambiguous. If Scalia means that it's absolutely indispensable that the same principles be applied consistently across generations, his position would be unfortunate because such consistency over time is absolutely unachievable. As Part III argues, legal principles, like all products of human behavior, change organically. If he means that it's important ("absolutely indispensable," in hyperbolic Scalia-speak) that principles be applied consistently within a single time period (however defined), then I fully agree—subject to one massive caveat: consistency in application of a principle does not require that if it carries the day in one case it must also prevail in another case in which it applies. That, of course, is the heart of the difference between rules and principles.

Unfortunately, Scalia's condemnation of *neutrality between religion and nonreligion* founders on his failure to understand this basic logical distinction among norm types. "Today's opinion," he argues,

> forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle. In a revealing footnote, the Court acknowledges that the "Establishment Clause doctrine" it purports to be applying "lacks the comfort of categorical absolutes." What the Court means by this lovely euphemism is that sometimes the Court chooses to decide cases on the principle that government cannot favor religion, and sometimes it does not.[131]

Not so. The majority is not trafficking in euphemism when denying that principles (unlike rules) are not absolutes. What Justice Souter likely meant by his footnote is that sometimes the Court determines that the principle of *neutrality between religion and nonreligion* does not rule the day because the aggregate force that it and other aligned principles exert toward one conclusion is outweighed by the aggregate force of principles pointing toward the opposite conclusion.

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[129] McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

[130] *Id.* at 890–91.

[131] *Id.* at 891 (internal citation omitted).

What considerations might contribute to outweighing *neutrality between religion and nonreligion*? One consideration that the Court often cites when upholding a non-neutral practice—a consideration that we already saw at work in *Marsh*—is that the practice reflects a long and stable tradition.[132] "That would be a good reason for finding the neutrality principle a mistaken interpretation of the Constitution," Scalia objects, "but it is hardly a good reason for letting an unconstitutional practice continue."[133] Again, Scalia misunderstands the normative dynamic. The "antiquity of the practice at issue"[134] is a reason that the practice *is* constitutional—that is, the antiquity of the practice bears constitutively toward the practice's constitutionality—so long as a principle of our legal system provides that historical practices have legal force. If one does, then a court's judgment in support of a longstanding practice that in some fashion favors religion over nonreligion means only that it has determined that the legal force exerted by the coalition of principles that includes *neutrality between religion and non-religion* is outweighed by the force exerted by the coalition that includes *historical practices*. Recall that a principle is like a

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[132] Marc DeGirolami is exploring this aspect of the Court's practice—what he calls "traditionalism"—in a series of articles, starting with Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020). He explores the traditionalist elements of the Court's jurisprudence of the Religion Clauses in Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020). Much of DeGirolami's analysis is useful and instructive. My main disagreements are conceptual and terminological. First, I would not label the practice that interests DeGirolami "traditional*ism*" or call it a "method of constitutional interpretation." DeGirolami, *The Traditions of American Constitutional Law*, *supra* note 132, at 1124. No judge treats the consideration under investigation as a complete method of interpretation, or as the singular target for constitutional interpreters. It is one factor that matters, among many. *See id.* at 1125 ("The interpretive influence of a tradition is presumptive and may be overcome by other considerations. For example, a tradition is authoritative only if it is consistent with constitutional text. Very powerful moral or prudential arguments may overcome the presumption in favor of a tradition as well.") Second, the way that longstanding practices matter is that they bear constitutively on the content of the law. It is therefore much more perspicuous to speak of legal or constitutional "content"—or what "the law is"—rather than of "constitutional meaning." We are interested in what the law is, not (ultimately) what the constitutional text "means." *See, e.g.*, Mark Greenberg, *Legal Interpretation*, STAN. ENCYCLOPEDIA OF PHIL. §2.1 (July 7, 2021), https://plato.stanford.edu/entries/legal-interpretation/ [https://perma.cc/X4Q7-PN9H] (explaining that the linguistic meaning of a legal text is distinct from how that text contributes to the content of the law); *see also* Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 786–96 (2017) (explaining how Scalia's failure to distinguish among *text*, *meaning*, and *law* undermines his arguments). Third, the justification for judicial attention to longstanding traditions, on my view, is neither of the two that DeGirolami invokes. DeGirolami, *First Amendment Traditionalism*, *supra* note 132, at 1661–72. I am not advancing a "conceptual" claim that "enduring practices are constituents of textual meaning," *id.* at 1661, or a "normative" claim about democratic authority and the legitimate or proper role of the judge, *id.* at 1666. Judicial attention to longstanding (nonjudicial) practices is rooted in a *legal* claim about the contents of our existing legal principles.

[133] 545 U.S. at 892 (Scalia, J., dissenting).

[134] *Id.*

reason. Because both can be outweighed, the fact that an agent does not act in accord with a given principle or reason does not entail (as Scalia charges) that they are "ignoring" or "dispens[ing] with" it.[135] To insist otherwise—to insist that one who acts in accord with principle P in one context must act in accord with P in all contexts—is to display just the foolish consistency that Emerson warned against.[136] Scalia did not possess a little mind. But he was the Justice of rules,[137] and he did not understand principles.

4. Facts matter. For Justices operating in good faith, small factual differences can make all the difference. This is why the Court's "Establishment Clause jurisprudence remains a delicate and fact-sensitive one."[138] "When two bedrock principles . . . conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging . . . . Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case."[139]

The potential outcome-determinacy of small changes in facts explains another noteworthy feature of principles' operation: that we speak both in terms of one or more principles "outweighing" others, and in terms of seeking a "compromise" or striking a "balance" among opposing principles.[140] All that has been said so far easily vindicates use of "outweighing" terminology. But can sense also be made of "compromise"?

Here's one way. If we take the facts of a dispute as a given, "outweigh" is the right idea: the normative force that the principles collectively exert weighs on net toward permissibility or toward impermissibility (or in equipoise). But

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135 *Id.* at 891–92.

136 *See* Ralph WALDO EMERSON, SELF-RELIANCE (1841), *reprinted in* THE ESSAY ON SELF-RELIANCE 23 (1908) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.")

137 Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

138 Lee v. Weisman, 505 U.S. 577, 597 (1992).

139 Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). *See also id.* at 852:

> When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does only what courts must do in many Establishment Clause cases—focus on specific features of a particular government action to ensure that it does not violate the Constitution.

140 Alex Aleinikoff flagged this duality in our use of "[t]he balancing metaphor" decades ago, noting that "[w]hat unites these two types of balancing . . . is their shared conception of constitutional law as a battleground of competing interests and their claimed ability to identify and place a value on those interests." Aleinikoff, *supra* note 50, at 946.

when we contemplate general rules designed to cover a range of fact patterns, appearances shift. Because constitutional rules ride the fault lines produced by the net forces operating in instance after instance, they can have the appearance of compromise. Indeed, if you find that the principles weigh on net against your preferred outcome, and if you have the power to alter some facts on the ground, you will sometimes discover that you can change the outcome by changing the facts so that one or more principles that weigh against your preferred position activate less fully. In *Marsh*, suppose the majority, as the dissenting Justices urged, had accorded greater activation to *neutrality among religions*, enough to "tip the balance" against the practice, on these facts. Plausibly, the balance could tip back again if the legislature had truly diversified its clergy. In a context such as this, language of "compromise" is entirely apt: legislators who want to maintain the practice of legislative prayer may be able to preserve the practice by giving something of value to some opponents.[141]

5. False facts. If Justices who operate in good faith will sometimes find that small factual differences drive differences in verdicts, Justices operating in bad faith will be able to intentionally misstate the relative importance of principles or their contextual activation to achieve the results they seek. A speculation: when the litigated question concerns the shape of a general rule, the opportunistic judge is likely to exaggerate (or downplay) a principle's (context-invariant) importance; when the challenge is as-applied, the opportunist is more likely to exaggerate (or downplay) the extent of a principle's (context-variant) activation. This is just what we see—or at least many critics do.[142] For example, in *Town of Greece v. Galloway*,[143] a successor to *Marsh*, the Court could uphold a practice of prayer before every town meeting only by significantly minimizing its sectarian character.[144] In *Kennedy*, the majority's

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[141] This is how legislatures and courts "navigate the surf" that the crash of principles produces. *See supra* note 40.

[142] *See* John M. Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305 (2018), and the sources cited in notes 144 & 145, *infra*. For more general critiques of Supreme Court factfinding not limited to the religion context, see Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 56 (discussing the Supreme Court's recent tendency to eschew deference to lower court fact-finding and "cherry-pick factual assertions . . . to support an outcome."); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

[143] 572 U.S. 565 (2014).

[144] The dissenting Justices make this case powerfully. *Id.* at 615–36 (Kagan, J., dissenting); 572 U.S. at 610–15 (Breyer, J., dissenting). For supportive commentaries see, e.g., Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299 (2015); Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in* Town of Greece v. Galloway, 48 LOY. L.A. L. REV. 371 (2014).

presentation of the facts is, to mince words, less than candid.[145] While willful mischaracterization of the facts of litigated cases by Supreme Court Justices is certainly discouraging, frequent recourse to the gambit suggests a sliver of silver lining: our principles and their weights are probably more secure than skeptics might suspect, else result-oriented judges would play faster and looser with the principles and leave the facts as they are (though it must be conceded that some judges are not honest reporters of our principles either).

III. GROUNDING: THE PRINCIPLES' PROGRESS

What makes the valid principles what they are? What gives them their respective contents and weights? Are they fixed at ratification, or do they change over time? If they are fixed, what, exactly, fixes them? If they are not fixed, what determines their contents or contours at any slice of time? An answer to these questions will approximate a theory of constitutional content.[146] This Part canvasses the main alternatives from 30,000 feet, dropping down a few miles to describe my own proposed answer, "organic pluralism," in marginally richer detail. It then offers reasons to favor my account or others in the same family.

A. OPTIONS

I propose to group answers to the grounding question into three categories: originalist, anti-positivist, and organicist. This is a loose classification that highlights what is most distinctive about various extant approaches. It is not a taxonomy.[147]

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[145] Kennedy v. Bremerton Sch. Dist., No. 21–418, slip op. at 1–13 (June 27, 2022) (Sotomayor, J., dissenting); *see also* Mark A. Lemley, *The Imperial Supreme Court*, 135 HARV. L. REV. F. 97, 107–08 (2022) (charging that the majority "took the remarkable step of rewriting the facts of the case, ignoring what actually happened (as found by both the district court and the court of appeals and documented with photographs), and writing its own (false) set of facts to tell a more favorable story for the outcome it wanted to reach"); *see also* Douglas Laycock, Comment on Kennedy v. Bremerton Sch. Dist., *Faculty Available for Comment on 2021 Supreme Court Term*, UNIV. VA. SCH. L. (June 30, 2022), https://www.law.virginia.edu/news/202206/faculty-available-comment-2021-supreme-court-term [https://perma.cc/A79J-D5EU] (deeming Justice Gorsuch's presentation of the facts "simply false," and "a systematic gerrymander in which most of what actually happened didn't count").

[146] *See supra* Section II.D.2.

[147] A true taxonomy assigns every item within its purview to one and only one taxon. This grouping does not satisfy that demand. For example, Jeffrey Pojanowski and Kevin Walsh are explicitly anti-positivist originalists. Pojanowski & Walsh, *Enduring Originalism*, 105 GEO L. J. 97, 117 (2016). And insofar as Hart is an organicist and they are Hartians, Baude and Sachs are organicist originalists. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1459 (2019).

As a class, originalist approaches hold that our principles are fixed at ratification. The best-known and most widely espoused originalist position would fix the principles by the original public meaning of the clauses. Intentionalist versions would fix the principles by some kind of intentions of some classes of persons. There are other versions as well.

Anti-positivist approaches also come in several forms. The Dworkinian version, at least circa *Law's Empire*, holds that our principles are whatever show our history in its best moral light.[148] Operating from a broadly Dworkinian posture, Christopher Eisgruber and Larry Sager derive strongly egalitarian principles of religious liberty.[149] Adrian Vermeule's "common good constitutionalism" similarly sees the principles as informed or constituted by objective natural morality but conceptualizes that morality in a spirit decidedly more Catholic than catholic.[150]

Organicist approaches are historical, but not fixed. They maintain that our principles owe their being to behaviors, mental states, or dispositions of some class of actors in the legal system, and thus that the contents and continued existence of the principles change in response to changes in the relevant actions or states of the relevant persons. Two influential nonoriginalist theories of constitutional law fit this description. David Strauss's common law approach isolates judges as the wielders and shapers of constitutional law generally, though Strauss does not foreground principles.[151] Larry Kramer's popular constitutionalist theory grounds principles in fundamental commitments of the sovereign people.[152]

My own theory of constitutional law, organic pluralism, resides in the broad territory between Strauss and Kramer. It maintains that fundamental legal principles are grounded in the speech acts by which relevant members of the legal community take up principles in constitutional reasoning and argumentation, where members *are* relevant in virtue of members of the community *taking them to be* relevant, and to that extent. (Compare fashion: those who set fashion norms are those on whom the community of persons who subscribe to the norms have informally conferred that power.) In our

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148 *See* DWORKIN, *supra* note 6.

149 *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

150 ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

151 *See* DAVID STRAUSS, THE LIVING CONSTITUTION 40 (2010) (describing his theory as a decisional practice "governed by a set of attitudes" that, "taken together, make up a kind of ideology of the common law").

152 LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

system, it is fairly settled that the Justices on the U.S. Supreme Court acting in their official capacities play a privileged role in the making, shaping, reinforcing, and embedding of fundamental constitutional principles. All the same, they do not play an exclusive role. (Why not? Because they are understood not to.) Acts of Congress and of the President, of lower court judges, state judges, and other state officials, expressed values and commitments of the people, all have some constitutive bearing on the contours and weights of our principles. The principles emerge from a complex and organic interplay led by the Justices but not owned by them.[153]

If the patron Justice of originalism is Justice Scalia, and if his counterpart for the Dworkinians is Justice Brennan, organic pluralism claims the second Justice John Marshall Harlan as its champion. Exhibit A is his famous *Poe* dissent:[154]

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.[155]

Poe concerned due process. But the thought is general. "One need not be a rigid partisan of Blackstone," Harlan would later emphasize, "to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation."[156]

Justice Anthony Kennedy, one of Harlan's heirs,[157] likewise painted a picture of principles ebbing and flowing, morphing and splintering, as

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153 *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 174 (1965) ("My deeper concern with the Court's current inclination to extract a few homespun absolutes from the complexities of a pluralistic tradition is derived from the conviction that in these matters the living practices of the American people bespeak our basic constitutional commitment more accurately than do the dogmatic pronouncements of the justices . . . .").

154 The block quote and the two paragraphs that follow are lifted almost verbatim from Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS. CONST. L. Q. 311, 342–43 (2019).

155 Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

156 Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).

157 Kennedy is reputed to have authored that portion of the *Casey* joint opinion that embraces Harlan's *Poe* opinion enthusiastically. Planned Parenthood v. Casey, 505 U.S. 833, 849–850 (1992) (plurality opinion).

members of the constitutional community—judges, legislatures, and others—engage in a "recurring dialogue" that drives the "elaboration and the evolution" of the law.[158] As "new insights and societal understandings" emerge, the constitutional community gains "a better informed understanding" of principles that "once passed unnoticed and unchallenged."[159] As "judicial exposition . . . , in common-law fashion, clarif[ies] the contours" of our constitutional principles,[160] they "acquire[] over time a power and an independent significance" that "become part of our constitutional tradition."[161]

B. IN DEFENSE OF ORGANICISM

That's a sketch of the principal accounts of the grounds of our principles. This isn't the place for a sustained defense of my preferred version of organicism or others within the broader family.[162] This Section offers rudiments of the case for an organicist understanding of our principles of religious liberty. It briefly advances four claims: (1) whatever might be said for it in other regions of constitutional law, originalism is distinctly unhelpful as a theory of the grounding of our principles of religious liberty; (2) organicism reflects what we do, and have long done; (3) organicism is the dominant view among both legal historians and legal philosophers; and (4) organicism vindicates widely shared and strongly held mid-level intuitions that cause great trouble for originalism. It concludes by drawing support for organic pluralism from surprising sources.

1. Originalism is (practically) inert. An originalist approach to the grounding of our principles of religious liberty is, if not entirely untenable, woefully unhelpful, a truth accepted by very many scholars, including those more sympathetic to originalism than I am. The original public meaning of

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158 Blakely v. Washington, 542 U.S. 296, 326–27 (2004) (Kennedy, J., dissenting).

159 Obergefell v. Hodges, 576 U.S. 644, 672-73 (2015).

160 J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885 (2011).

161 Minnesota v. Carter, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring). *See also, e.g.*, American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) (explaining that Establishment Clause cases are resolved in accordance with "principles based on history, tradition, and precedent"). Rick Garnett and Sherif Girgis have independently objected that, on their reading of his opinions, Kennedy assumed that our principles have been absolutely consistent over time and that it's only our understanding of them that has changed (partly thanks to Kennedy's own perspicacity). I believe that aspects of Kennedy's writing point in both directions. Garnett, Girgis, and I probably all agree that he wasn't a particularly clear thinker or felicitous writer.

162 The theory is introduced in Berman, *Our Principled Constitution*, *supra* note 11, though under the name "principled positivism." It is developed and defended in Berman, *How Practices Make Principles*, *supra* note 11, where I explain in depth how the account differs from and improves upon Hartian positivism.

the clauses runs out too soon to deliver determinate answers to too many constitutional disputes.[163] And "framers' intent" is no better. "[G]iven the large number of framers and people involved in the ratification process, it is impossible to claim that any single account is 'the intent of the framers' in a specific sense."[164]

Of course, originalism has splintered into many versions. That Scalian public meaning originalism won't get us far doesn't ensure that no others will. But I see slight basis for optimism. New Originalists can easily accommodate the fact that the original public meaning of the Religion Clauses is underdeterminate on many issues we care about, but at the cost of punting almost all of the action to construction.[165] And the more work that must be done by construction—and precedent!—the less to be done by the *originalism* department of "New Originalism." A similar worry attaches to the view that Baude and Sachs have dubbed original-law originalism and inclusive originalism.[166] If the original law was a prickle of principles of contested scope and importance, what determines the right legal answers to constitutional disputes today when principles push toward different outcomes? It's hard to see what theoretical resources these more sophisticated originalists have available to prevent the sea of underdeterminacy from serving as a playground for judicial lawmaking.

2. Organicism is what we do. Everything about our recognition and deployment of principles changes organically. This is the central theme of Witte's *Religion and the American Constitutional Experiment*, which, reduced to its essence, is a telling of the story of our religious principles' changing fortunes over four eras of constitutional development.[167] For example, *special solicitude* had no purchase in the late nineteenth century polygamy cases, but had assumed strength by the 1960s. *Separation of church*

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163 *See, e.g.*, Jeffrey Shulman, *The Siren Song of History: Originalism and the Religion Clauses*, 27 J.L. & REL. 101, 102 (2011) (deeming it "almost certain" that "the muse of history is not going to help those who want the Religion Clauses to stand for something determinate, at least for something determinate enough to serve a heuristic purpose in legal controversy"); *see also* John H. Garvey, *Is There a Principle of Religious Liberty?*, 94 MICH. L. REV. 1379, 1387 (1996) (observing that "the current path of constitutional theory is a repudiation of original meaning").

164 RAVITCH, MASTERS OF ILLUSION, *supra* note 9, at 2–3.

165 *See generally* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (characterizing the ineliminable 'construction zone' created by constitutional underdeterminacy as one accepted and even appreciated by New Originalism).

166 William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817 (2015).

167 For another compelling narration of the same story, broadly speaking, see SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010).

and state grew in the second quarter of the nineteenth century and then again in the first half of the twentieth, fueled in part by anti-Catholic bigotry, before declining in the 1990s.[168] The basic claim is not controversial, even if many of the details are. Organicism, not originalism, would be the hands-down winner of any poll among historians. It is kin to Bruce Ackerman's theory of constitutional law but without his highly regimented account of the conditions necessary to constitute a "constitutional moment."[169]

3. Organicism is in good philosophical order. To be sure, that *recognition* of our constitutional principles (by judges and by others) changes organically does not entail that the principles themselves do. Originalists will argue that the principles have remained constant and that many of our changed views are *mis*recognitions. So too does Vermeule. To some, that's the $64,000 question. I cannot make much progress on it in this space while still frying other fish. The important point for present is that nobody should think organicism weird or on shaky philosophical ground, even if you think it wrong. Organicist accounts of the grounding of principles of American constitutional law do not hang out on a slender jurisprudential limb. They swim comfortably in the main current of legal positivism. Modern positivism is fundamentally organicist because it roots legal content in some class of social facts, and all classes of social facts are inescapably dynamic.[170] This is why norms of fashion, etiquette and art, along with the meanings of words, are not static. And positivism is the dominant philosophical approach to law and legal content.

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168 For enlightening discussions of the organic development of the principle of *separation of church and state*, see STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY (2022); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002). Kent Greenawalt describes the "normal evolutionary development" of principles concerning separation incisively in an excellent review of Hamburger's excellent book. Kent Greenawalt, *History as Ideology: Philip Hamburger's* Separation of Church and State, 93 CAL. L. REV. 367 (2005) (book review).

169 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

170 This claim might surprise readers who associate positivism with the claim that legal content (what "the law" is or requires) is fully determined by whatever authoritative legal texts, principally constitutions and statutes, say or assert. Some writers in the religion space appear to hold that understanding of what positivism maintains. But that view is not positivism *as such*. It is a version of positivism that Mark Greenberg has helpfully dubbed "the Standard Picture." Mark Greenberg, *The Standard Picture and its Discontents in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW (Leslie Green & Brian Leiter eds., 2011). And even if the Standard Picture is routinely presupposed by many lawyers and legal scholars, its flavor is more Austinian than Hartian and, accordingly, is decidedly nonstandard among contemporary positivist legal philosophers. For defenses of the Standard Picture against what the authors recognize is the jurisprudential mainstream, see Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot*, 28 LEGAL THEORY 59 (2022); Larry Alexander, *In Defense of the Standard Picture: The Basic Challenge*, 34 RATIO JURIS (2021).

In short, organicism is not only for historians; it's for (most) legal philosophers too.

4. Organicism generates coherence. Organicist accounts in general, and organic pluralism more particularly, vindicate widely shared and strongly held "mid-level" constitutional judgments, by which I mean judgments more general than casuistic intuitions (such as that Nebraska's practice of legislative prayer is, or is not, constitutional) and less general than high-level theories (such as that originalism is true or, better, that organic pluralism is). On a coherentist epistemology—the epistemological approach associated with the method of reflective equilibrium—these mid-level judgments have epistemic force.[171]

Perhaps the most telling of the mid-level judgments that organicist approaches to grounding can vindicate with ease, but that fluster originalism, concerns incorporation of the Establishment Clause, and the principles associated with it, against the states. The Court incorporated the Clause seventy-five years ago in *Everson v. Board of Education*,[172] and (some) originalists can accept it today on the strength of stare decisis. But, almost certainly, most Americans, legal elites and others, believe not only that *Everson* shouldn't be overruled on this point, but also that "incorporation" of the Establishment Clause was and remains legally correct. Organic pluralism can explain why: thanks to disestablishment movements throughout the states, "long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people."[173] Few originalists can make any legal use of social changes that don't leave a mark on the constitutional text, no matter how profound, widespread, and stable those changes may be.

A second organicist-friendly judgment concerns *special solicitude.* Many conservatives do not like *Employment Division v. Smith.* They very much like *special solicitude.*[174] Very possibly, however, many of that principle's fans express confidence in *special solicitude* beyond what the current state of

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171 Berman, *Our Principled Constitution*, *supra* note 11, at 1354–58.

172 330 U.S. 1 (1947).

173 *See* People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill., 68 S.Ct. 461, 467(1948) (opinion of Frankfurter, J.):

> Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people.

174 See Justice Alito's impassioned concurrence, joined by Justices Thomas and Gorsuch, in Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883–1926 (2021) (Alito, J., concurring).

historical research would warrant if originalism (in either public meaning or intentionalist variants) supplied the right account of grounding.[175] In contrast, there can be little doubt that *special solicitude* is a principle of our law today if organic pluralism supplies the right account of the grounding of our principles. For if organic pluralism is true, and if the judiciary does not own exclusive control over the organic development of American constitutional principles, then surely the 1993 passage of the Religious Freedom Restoration Act by a unanimous House of Representatives and by all but three members of the Senate had *some* constitutive bearing on the status of *special solicitude* as a principle of American constitutional law circa 2000.[176] Simply put, if you're very sure of *special solicitude*, originalism is not your friend but organic pluralism might well be.

5. Allies in strange places. I'll close this section by noting that organic pluralism gains surprising support from two unlikely sources—Steven Smith, directly, and Adrian Vermeule, obliquely.

Smith, a distinguished scholar of the law of religion, has long been the foremost critic of the turn to principles in thought and talk about the constitutional law of religious liberty.[177] Recently, he has branched out, spearheading a slim volume of essays that aim to banish principles from all of constitutional law.[178] But his criticisms miss organic pluralism entirely.

First, Smith concentrates his fire on what he takes to be the misguided quest for "*the* principle of religious freedom embodied in the Constitution," understood as "a singular conception."[179] Smith is right that there is no single principle. But I believe that he overstates the degree to which partisans of

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[175] The debate among legal historians is vibrant. The most recent entry by the time of this writing argues *against* special solicitude as a matter of original meaning. VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022). Justice Barrett had both nuance and evidence on her side in *Fulton* when finding "the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring). For an argument that Alito's opinion "is riddled with false narratives, internal contradictions, and errors of history," see Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, AMERICAN CONSTITUTION SOCIETY, SUPREME COURT REVIEW (5th ed., 2020–21).

[176] *Cf. McCreary v. ACLU*, 545 U.S. 844, 889 (Scalia, J., dissenting) (attributing conceivable constitutional significance to "the current sense of our society" as reflected in a nearly unanimous act of Congress that endorsed the constitutionality of "under God" in the Pledge of Allegiance).

[177] STEVEN D. SMITH, FOREORDAINED FAILURE (1995); Steven D. Smith, *Nonestablishment Under God? The Nonsectarian Principle*, 50 VILL. L. REV. 1 (2005); Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS L. REV. 325 (2005).

[178] STEVEN D. SMITH ET AL., A PRINCIPLED CONSTITUTION? FOUR SKEPTICAL VIEWS (2022).

[179] STEVEN D. SMITH, FOREORDAINED FAILURE 6 (1995) (emphasis added).

principles maintain otherwise. In any event, whatever other judges and scholars believe about principles of religious liberty, organic pluralism insists that they are plural, not singular.[180] Second, Smith objects that principles are supposed by their proponents to be absolute and thus not amenable to compromise.[181] Again, not on my account. As Part II has explained, organic pluralism operates upon a conception of principles according to which it is part of their nature that they are *not* "absolute" and are amenable to being balanced against one another.

In short, although Smith rejects a single, absolute principle of religious liberty, he should welcome multiple, contributory ones. More than that, once we're discussing multiple contributory principles, Smith's own words make clear that they should be understood organically. To start, he is rightly critical of principles' advocates who tend to believe that the principles at issue "in some sense exist independently of people's opinions *about* religious freedom."[182] More arrestingly, in an Afterword to his 1995 book, *Foreordained Failure*, Smith distinguishes "originalist" approaches from "theoretical" approaches, a term he uses to mean pretty much what I mean by "anti-positivist."[183] Smith's typology is a binary, missing just the category that I am championing: organicist. However, after reiterating the book's central claim that neither originalist nor anti-positivist ("theoretical") approaches are plausible or productive, Smith suddenly allows that:

> it is at least imaginable that a full-blooded "historical" (not "originalist" in a positivist sense) approach might be more fruitful. Americans *have,* after all, developed and maintained beliefs about religious freedom; and even if those beliefs were not consciously enacted into positive law at the time of the founding, they have influenced and been embodied in our practices and traditions. Perhaps a historical approach could distill these different, developing beliefs and traditions into a usable law of religious freedom—or even, conceivably, into some modest but usable principles—that would be "constitutional" not in the standard positivist sense or in the theoretical or

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180 *Accord* RAVITCH, MASTERS OF ILLUSION, *supra* note 9, at 153 (agreeing with Smith that "no single principle or theory of religion clause interpretation" can succeed, but arguing for an approach based on "multiple narrow principles" in lieu of "any single broad principle").

181 SMITH, FOREORDAINED FAILURE, *supra* note 179, at 6–14; *see generally* Steven D. Smith, *Unpretentious Beginnings: The Merely Legal Constitution*, *in* A PRINCIPLED CONSTITUTION? FOUR SKEPTICAL VIEWS 5 (Steven D. Smith et al. eds., 2022) (consistently placing principles and compromise in opposition).

182 SMITH, FOREORDAINED FAILURE, *supra* note 179, at 7. Organic pluralism, recall, maintains that people's beliefs and attitudes about legal principles (including "constitutional principles") are ineliminable grounds of those principles.

183 *See id.* at 14, 123 (explaining that the theoretical approach "seeks to articulate the best, or the most plausible, or the most theoretically attractive version of religious freedom," and acknowledging that "more theoretical approaches reflect a natural law orientation").

> natural law sense, but rather in the sense of being "constitutive" of our political community.[184]

Exactly so. What Smith, following Harold Berman, calls an "historical" approach looks very much like what I am calling organicist. Welcome aboard, Professor Smith!

Vermeule, unlike Smith, need not be converted to a conception of legal principles as multiple and contributory rather than single and absolute. Vermeule embraces that part of the picture enthusiastically. What he rejects is the proposition that legal principles emerge and fade away, ebb and flow in organicist (or "historical") fashion. "Progressive constitutionalism," Vermeule says, endorses this picture of legal principles. Not so the view he favors, what he calls "common good constitutionalism" and characterizes as "a kind of developing constitutionalism."[185] Under developing constitutionalism, the legal principles "do not themselves evolve, although their applications may develop, over time, in changing circumstances."[186]

Maybe he's right: maybe the properties of principles—their contents, contours, and weights—do not change, only their applications do. But it's striking how well an organicist account of law fits the data, even on Vermeule's recounting of our constitutional and jurisprudential history. Although *Common Good Constitutionalism* is a sustained brief for a revival of the classical law tradition that Vermeule paints as both a correct accounting of "the true nature of law" and as America's birthright,[187] he is forthright (or actually,

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184 *Id.* at 123; *see also* Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002) (identifying three different ways to interpret the term "separation" (the "developmental,",the "political," and the "traditionalist") and arguing that the "[t]raditionalism...offers a different and less cynical alternative").

185 VERMEULE, *supra* note 150, at 118 (emphasis omitted).

186 *Id.*; *see also id.* at 17–18:

> Doctrine may develop over time, not because principles of constitutionalism change, but because circumstances do, so that the application of permanent principles in new circumstances may require a development of doctrine. Progressivism goes wrong by extending this idea to the principles themselves, proposing to update and even discard them in the service of the endless advance of human liberation.

Vermeule's emphasis on the developing character of his theory serves to make it appear more moderate by dint of favorable comparison to even more conservative alternatives that are only hinted at. Don't be fooled. The supposed universe of "non-developing" forms of constitutionalism probably describes a null set. I am aware of no legal theorist who holds that doctrine cannot change over time because constant legal principles do *not* apply differently as circumstances change. It's hard even to make sense of such a view.

187 *See, e.g.*, *id.* at 1 ("[O]ur public law now oscillates restlessly and unhappily between two dominant approaches, progressivism and originalism, both of which distort the true nature of law and betray our own legal traditions.").

somewhat less than forthright)[188] in complicating the relevant history. For one thing, at no time was the classical law tradition our whole jurisprudential story. Even "during the founding era and through the nineteenth century," it was "central to our legal world" but "not exclusive."[189] Moreover, the tradition always "had multiple strands and was internally complex."[190] "[L]ike any living tradition," it "was no monolith; it was constituted by a series of internal debates within a common framework . . . . [I]ndeed, two strands of that tradition co-existed, sometimes uneasily, in the founding era and well beyond": an older natural law strand focused on the *ius commune*, and tracing to Aristotelian premises and a newer Enlightenment strand that emphasized natural rights and "rest[ed] on social contract theory."[191] Furthermore, starting around the end of the nineteenth century, larger changes took root in our legal thinking. "[P]ositivist notes began to be sounded over time, at first quietly, later as a swelling chorus."[192] This is a story of legal change that organicists embrace. *Of course* the "classical legal framework . . . was a living tradition, as much rife with internal disagreement as are the currently dominant approaches."[193] That's how law works: it is built on the back of legal principles that emerge from internal disagreements.

Given the superficial consistency of organic pluralism with much of Vermeule's story, it is essential to identify and evaluate his arguments for rejecting an organicist account of our multiple fundamental legal principles. Those arguments, however, are disappointingly hard to find. Don't misunderstand: Vermeule says a fair bit in opposition to progressive organicism, what he often calls progressive "living constitutionalism," and which, along with originalism, is one of the two foils that drive the book's argument. But his explicit criticisms of progressive organicism all target the progressive part, and never target organicism alone.[194] Vermeule mocks

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188 The parenthetical claim is argued for at length in Brian Leiter, *Politics by Other Means: The Jurisprudence of "Common Good Constitutionalism"*, 90 U. CHI. L. REV. 1685 (2022). *Cf. supra* text accompanying note 131.

189 VERMEULE, *supra* note 150, at 58.

190 *Id.* at 56.

191 *Id.* at 54, 56.

192 *Id.* at 58–59.

193 *Id.* at 58.

194 At one point, if not more, Vermeule suggests that common good constitutionalism just is organicism without progressivism. *Id.* at 23 (claiming that his book "rebut[s] the widespread assumption that an organic, developmental vision of constitutionalism must be a progressive vision"). The assumption that Vermeule challenges is false. But while organic pluralism rebuts it squarely, it's hard to see how his book does. The suggestion appears to be that developing constitutionalism is an organic view of legal change. But that would be absurd. On Vermeule's theory, legal principles are objective

progressive organicism for its "Whiggish faith that liberty and equality work themselves pure over time."[195] Yet he doesn't explain what is mistaken about organicism without Whiggishness, living constitutionalism shorn of a progressive teleology. To the contrary, that very possibility seems entirely missing from his mental map of possibilities.[196]

That is an unfortunate gap in Vermeule's imagination and in his argument, for the criticisms he advances against both originalism and progressivism—many of which are trenchant—are as supportive of organic pluralism as they are of common good constitutionalism. Organic pluralists believe, as Vermeule does, that "[t]here is a world that lies beyond our exhausted opposition between progressive living constitutionalism and originalism."[197] We simply believe that that legal world is one of organic change at the fundamental level, not one of fixed principles of natural law. Maybe we're wrong and he's right. But Vermeule really cannot help us know so long as he fails even to entertain the possibility of non-teleological organicist theories of law and legal change. And that's the oblique support for organic pluralism that Vermeule offers: the support inherent in his conspicuous failure to address the obvious organicist possibility. Much like Sherlock Holmes's dog that didn't bark, it's Vermeule's silence that speaks volumes—at least to students of constitutional theory not antecedently committed to his avowed "ultimate long-run goal . . . : to bear witness to the Lord and to expand his one, holy, Catholic and apostolic Church to the ends of the earth."[198]

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principles of political morality, fixed for all time. This is not a theory of organic legal development, notwithstanding that the fixed principles operate, necessarily, on changing circumstances.

[195] *Id.* at 68. *See also, e.g.*, *id.* at 117 (fancying that "the true nature of legal progressivism . . . is rooted in a particular mythology of endless liberation through the continual overcoming of the reactionary past").

[196] *See, e.g.*, *id.* at 118:

> Developing constitutionalism celebrates continuity with the enduring principles of the past; it recognizes change in applications only insofar as necessary in order for those principles to unfold in accordance with their true natures and to retain those natures in new environments. Progressive constitutionalism, by contrast, treats legal principles as [a] themselves changing over time [b] in the service of an extrinsic agenda of radical liberation.

I've inserted the bracketed letters to make clearer that Vermeule attributes two properties to progressive constitutionalism, and that we can have the first without the second. Vermeule wholly ignores that possibility.

[197] *Id.* at 89.

[198] Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017). For more extensive discussion of Vermeule's "Catholic integralism" in connection with his theory of American constitutional law, see Micah Schwartzman & Richard Schragger, *What Common Good?*, AMERICAN PROSPECT (Apr. 7, 2022).

IV. CASE STUDIES

The preceding three parts combine to offer a package of views: an organic account of our principles' grounding, the net-forces account of our principles' joint operation, and substantive legal claims about the rough contents of our principles of religious liberty (and of select other principles that frequently bear on disputes that implicate the religious liberty principles). This Part puts that package to work, drawing out plausible implications for two live disputes in the law of religious liberty. Section IV.A analyzes whether wedding vendors who are religiously opposed to same-sex marriage are constitutionally entitled to an exemption from antidiscrimination laws even if the services they offer are not protected by free speech principles alone. Section IV.B analyzes whether states may charter religious schools. The first question is teed up by the Court's 2023 decision in *303 Creative v. Elenis*.[199] The second is invited by the Court's 2022 decision in *Carson v. Makin*.[200]

A. VENDORS AND SAME-SEX WEDDINGS: BEYOND "PURE SPEECH"

The fact patterns are familiar: someone who provides professional or commercial services for weddings and other special occasions, and who harbors strong religious objections to same-sex marriage, seeks exemption from a generally applicable legal obligation not to discriminate on the basis of sexual orientation. Is the vendor entitled to an exemption? May the state penalize the vendor?

The Supreme Court first took up the question in a suit brought by a cake baker, Jack Phillips. In *Masterpiece Cakeshop*,[201] it ruled for Phillips but on such highly fact-specific grounds—that the Colorado human rights commission's ruling against him was infected by anti-religious bigotry—that the decision is likely to have extremely limited precedential significance.[202] Three years later, another Coloradan, Lorie Smith, a web designer doing business as 303 Creative, also filed suit. After losing in the lower federal courts, Smith petitioned for cert, asking "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First

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199 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

200 Carson v. Makin, 142 S. Ct. 1987 (2022).

201 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

202 For ruminations on the decision's possible significance, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus,* 132 HARV. L. REV. 133 (2018).

Amendment."[203] The Supreme Court granted cert, but only on the question "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment," thereby eliminating any religious element from the case.[204] On the last day of the term, the Court held, predictably, for the web designer. Emphasizing that web design is "pure speech," Gorsuch, writing for the six conservatives, reasoned simply that compelling pure speech is unconstitutional.[205] The three liberals dissented.[206]

The question that *303 Creative* leaves conspicuously open is whether a vendor's religious objection to same-sex marriage underwrites a right to withhold services from a same-sex wedding even if the service provided does not involve pure speech. If the vendor loses on their claim under the Free Speech Clause, should they prevail on their claim under the Free Exercise Clause? This Section explores that question, looking, as always, in two directions at once. It employs the theoretical account on offer to try to resolve real constitutional disputes while also using the applied judgments the account supports to test and refine the theoretical account itself.

Collectively, wedding vendors provide a wide array of services: leasing the venue, transportation, officiating for the service, stationery, calligraphy, tuxedo rental, catering, cakes and desserts, flowers and floral design, music, dance instruction, photography and videography, hairstyling and makeup, and more. Let's start with a service that falls far toward the non-expressive end of the spectrum—say, chauffeuring the newlyweds from the ceremony. At first blush, abstracting from any case particulars, the issue appears likely to implicate four of our six principles of religious liberty: *special solicitude*, *freedom of conscience*, *religious people*, and *neutrality between religion and nonreligion.* The first three weigh in favor of an exemption; the last weighs against. (The remaining religion principles—*neutrality among religions* and *separation of church and state*—are not implicated at all or are implicated very slightly.) I believe that these appearances deceive. For reasons relegated to the margin due to their complexity and potential to distract, I believe that *special solicitude* is an exception to *neutrality between religion and nonreligion*, and

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[203] Petition for Writ of Certiorari at i, 303 Creative v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476)

[204] 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (Mem.) (2022)

[205] 143 S. Ct. at 2319.

[206] *Id.* at 2322.

that it subsumes *religious people*.[207] Thus, when *special solicitude* is implicated, both *neutrality between religion and not* and *religious people* drop out of the picture.

If this is right, then only two principles of religious liberty bear on the dispute—*special solicitude* and *freedom of conscience*—and both militate toward the outcome or judgment that application of the non-discrimination obligation to the religiously scrupulous vendor is constitutionally prohibited. (And if this is wrong, little harm is done: *neutrality between religion and nonreligion* and *religious people* should both be returned to the fray, but are likely to nearly cancel each other out.) That would make the issue easy except for the fact that principles of religious liberty do not exhaust our constitutional principles. The principles that weigh most forcefully *against* an exemption from non-discrimination obligations are the equality principles that explain and justify anti-discrimination rules in the first place. Plausibly, two distinct equality principles are implicated: *equal dignity* and *equal pursuit of happiness*. Shifting attention from underlying principles to implementing

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[207] Recall the issue of conceptually conflicting principles discussed in Section II.D.3. There we considered the conceptual conflict between *neutrality between religion and nonreligion* and *religious people*. I argued that the two can coexist and mutually dampen. I think the conceptual conflict between that neutrality principle and *special solicitude* is different. Rather than serving to dampen *neutrality between religion and nonreligion*, *special solicitude* helps carve its contours: no (hostility or) favoritism toward religion or nonreligion *except* for what is required by *special solicitude*. This is the essence of Nuechterlein's proposal, and I think it's right to that extent. (I don't object to all aspects of the jigsaw puzzle picture, only to the suggestion that it can displace rather than supplement the net forces account.) Why does *neutrality between religion and nonreligion* interact with *religious people* differently than it does with *special solicitude*? Briefly: *neutrality between religion and nonreligion* and *religious people* have the same scope; each is implicated whenever the other is. To make an exception to *neutrality between religion and nonreligion* for the sake of *religious people* would be to eviscerate it. In contrast, because *neutrality between religion and nonreligion* has broader scope than *special solicitude*, it can survive a carve-out: it remains vibrant and able to operate fully where *special solicitude* isn't implicated.

And what about *religious people*? The preceding suggestion is that *special solicitude* (like a Razian "protected reason") does double duty: it exerts force in one direction while also canceling the potential force that a different principle (*neutrality between religion and nonreligion*) would exert in the opposite direction. That's what it is to treat *special solicitude* as an exception to *neutrality between religion and nonreligion*. But recall that *neutrality between religion and nonreligion* also conceptually conflicts with *religious people*: they are mutual dampeners, thereby rendering *special solicitude* and *religious people* mutual reinforcers. If *special solicitude* cancels *neutrality between religion and nonreligion* while leaving *religious people* unaffected, then the cancellation would, by liberating *special solicitude*'s mutual reinforcer, effectively augment *special solicitude*'s own first-order force. But that outcome would convert licit double duty into impermissible double-counting. There's a solution: as *special solicitude* cancels *neutrality between religion and nonreligion*, so too does it subsume *religious people*, thereby silencing both members of a pair of mutual dampeners, not only one. When *special solicitude* is implicated, it is the means by which *religious people* exerts its force, not an independent and additive force.

doctrine, these are the principles, now redescribed as "interests," that will be entertained as possible justifications for denying an exemption notwithstanding the thrust of *special solicitude*. If the implementing doctrine were strict scrutiny, these are the interests that a court will be called upon to adjudge either "compelling" or not; if the doctrine were intermediate scrutiny, these are the interests that must be found "important." Of course, judge-crafted implementing doctrine could take a great variety of different forms.

In short, and at second blush, four principles are likely to have significant bearing on the constitutional entitlement of a vendor of non-expressive services not to contribute to (and thus, on their view, not to be complicit in) a same-sex wedding that conflicts with their religious scruples. *Special solicitude* and *freedom of conscience* favor the vendor's claim; *equal dignity* and *equal pursuit of happiness* oppose it. To figure out their collective bearing, we need some handle both on their importance relative to one another, and on the extent of their activation on the facts.

These are contestable questions. Individual judgments about weight and activation are inescapably that—*judgments*, not scientific measurements. But that doesn't mean that such judgments are thoroughly subjective or immune to reason, any more than judgments about our principles' contents are.[208] In principle, principles' relative weights, like their contents, are partly given by what members of the legal community, chiefly but not exclusively judges, say when invoking them. But they are mostly established through use. Relative weights are established by success and defeat in battle, by the rules and rulings that are adjudged victorious, and thus made so, when principles press in opposing directions, as they often will.[209] Part of the job of constitutional lawyers, appellate and trial, is to develop persuasive arguments regarding the contents and relative importance of our principles, as well as the degree to which they are implicated or offended in the litigated case. And part of the job of good judges and good scholars (of a doctrinal style that has been falling

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[208] Of course, some readers will rejoin that our Justices' judgments about the existence and contents of constitutional principles (in the religion arena or generally) *are* purely subjective. *See, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012). That might be true, or might be overstated. But whether our Justices are moved more by will than by judgment, and what an answer to that question implies about how we should structure our institutions, are different questions from whether, if a Justice were to exercise judgment, there would ever be truths for that judgment to latch on to. Organic pluralism is chiefly an attempt to vindicate an affirmative answer to that latter question. It is, to repeat, first and foremost an account of constitutional content and only secondarily an account of how judges should resolve constitutional disputes. *See supra* Section II.D.2.

[209] Mitchell N. Berman, *For Legal Principles*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 241, 254 (Heidi Hurd ed., 2019).

regrettably out of fashion) is to evaluate those arguments, adjudging some persuasive and others not. My judgments here are admittedly impressionistic and tentative. The aim of this Part is not to defend any confident bottom-line constitutional conclusion regarding wedding vendors (or, later, charter schools), but to bring us closer to that goal and to highlight the plausibility and promise of the theoretical architecture that this Article presents.

We can be quick about relative weights because, with one exception, I am not currently persuaded to depart from the useful default assumption that the principles are of equal or comparable importance. The exception concerns *freedom of conscience*, which relevant materials from the founding to the present consistently mark as of paramount importance.[210] I will assume, speaking roughly as usual, that it's half as weighty as any of the others, all of which are of comparable weight to one another.

The seemingly single question of the extent to which a given act or event activates any principle, P, masks two: a theoretical question and a factual one. The theoretical question asks what it is for an act or event to offend or promote P to a greater or lesser degree. What would it take for P to be activated more or less? The factual question asks to what degree a challenged act or event offends or promotes P given what it is for P to be offended or promoted more or less. What follows is a brisk walk through the four principles, offering comments on both the theoretical and factual components of their likely activation. I'll then sum up.

A law that imposes a burden on religiously motivated conduct (act or omission), as by taxing it or prohibiting it on threat of criminal punishment, confronts the religious believer with a choice: either (a) to engage in the conduct (which could be the conduct of *not* doing something) and suffer adverse legal consequences or (b) to forgo that conduct at the cost of violating their religious values or commitments. Sometimes the believer has a third option: (c) to avoid the legal burden without violating their religious commitments by forgoing non-religiously motivated conduct that triggers the

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[210] *See* James MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) ("Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of Conscience.' [Virginia Declaration of Rights, art. 16] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."); James Madison, *On Property* (1792) *in* THE PAPERS OF JAMES MADISON. (William T. Hutchinson et al eds.); *see also* Thomas Jefferson, Letter to New London Methodist (1809) ("No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.").

legal obligation.[211] Whether the law confronts the believer with a dilemma or a trilemma, all the options impose costs, spiritual, psychological, economic, or otherwise. The extent to which *special solicitude* and *freedom of conscience* are activated depends, in some fashion, on the magnitudes of the costs that the believer would incur if not relieved of the burdensome legal obligation.[212] If that's the right way to think about activation (and I think it is, even though the current Supreme Court seems unfriendly to it), then the wedding vendor cases activate these principles only moderately. It is constitutionally relevant that the vendor can avoid the spiritual and psychological costs of complying with state antidiscrimination law, and the tangible or stigmatic costs of violating the law, by not vending for weddings. That is not remotely costless (in some cases it might require going into a different line of work), which is why the principles activate more than a little. But the costs could be considerably higher, which is why they activate less than fully.

Equal pursuit of happiness in these cases is very sensitive to the importance of the good or service at issue and, especially, the extent to which exemptions would leave same-sex couples with "enough and as good."[213] Very possibly, activation of this principle is more variable across the range of real-life cases than is true for any of the other three. Allowing exemptions would leave same-sex couples without providers in some small communities, especially rural and red. *Equal pursuit of happiness* would activate very fully against an exemption in such cases. In large cities, where service providers abound and religious traditionalists might not, an exemption will activate *equal pursuit of happiness* only slightly.

Equal dignity presents an instructive contrast. Its activation is much less sensitive to the availability of comparable alternatives, and much more sensitive to the social meaning, and emotional and psychological injury, of being denied service on account of one's sexual orientation. I will not try to surface the factors that affect the magnitude of dignitary harm that

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211 A point of obvious relevance to "least-cost avoider" theories of constitutional adjudication. *See* Charles L. Barzun & Michael D. Gilbert, *Conflict Avoidance in Constitutional Law,* 107 VA. L. REV. 1, 38–41 (2021) (applying the approach to wending vendor cases); *see also* Aaron Tang, *Harm-Avoider Constitutionalism,* 109 CAL. L. REV. 1847 (2021) (arguing that the Supreme Court has consistently ruled against the best harm-avoider in cases).

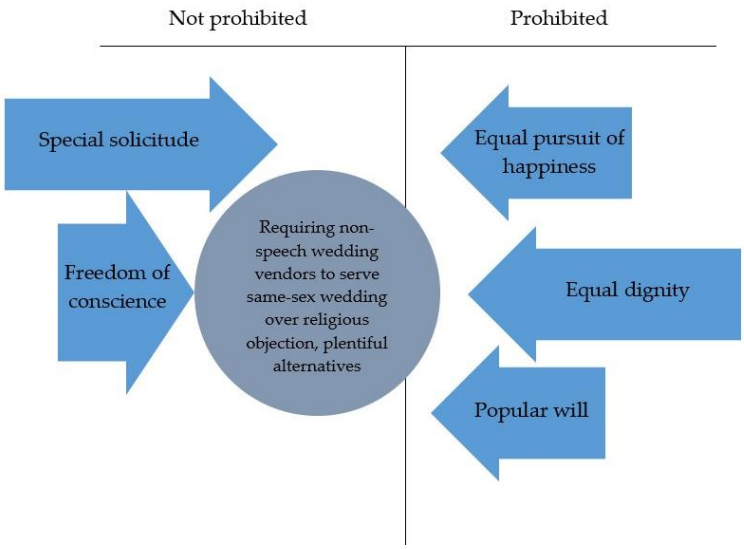
212 *Accord* EISGRUBER & SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION, *supra* note 147, at 85 (arguing "that no balancing formula will be remotely plausible unless it applies a proportionality standard rather than a threshold test: the formula would, in other words, have to be sensitive to the nature and weight of the burden imposed on religious exercise as well as to the gravity of the state's interest").

213 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. V, para. 33 (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

discriminatory denial of service can inflict, and will offer only two thoughts. First, it would be a mistake to believe that all insults are equally insulting. Case-specific activation of *equal dignity*, as for other principles, is scalar not binary. Second, because discriminatory vendors have ways to minimize the dignitary harms that their refusal to serve same-sex marriages threatens, activation of the principle against an exemption should be sensitive to whether those means have been adopted.[214]

My view is that the limo driver (or provider of other non-expressive services) is not entitled to exemption from a consistently enforced nondiscrimination obligation, notwithstanding that *special solicitude* is a principle of our law. This is a sensible result that gives effect to the difference between principles and rules and also keeps the limited grant of cert in *303 Creative* from appearing as the timewasting charade it would be if everybody religiously opposed to same-sex marriage is entitled to an exemption even for conduct that implicates speech principles not at all. This tentative analysis is represented in figure 7 below.

FIGURE 7: VENDORS AND SAME-SEX MARRIAGE—NO SPEECH CLAIM



[214] Andrew Koppelman proposes exempting "only those who post warnings about their religious objections, so that no customer would have the personal experience of being turned away." ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 11 (2020).

Maybe you agree with the constitutional rule that I've just provisionally endorsed. If so, you might also find yourself broadly in accord with my picture of the principles that underwrite that constitutional bottom line: you might think that I've captured, more or less, the set of principles that this dispute implicates, their relative importance, and the extent of their activation. That would be a very happy outcome for me. But maybe you don't agree with my provisional conclusion because you reject this picture root and branch. You might think that there are no such things as legal principles or that answers to constitutional questions of this sort are found entirely in the communicative contents of the clauses or (at another extreme) entirely in timeless moral truths. That would be an unhappy outcome. An intermediate possibility is that you disagree with my bottom line but accept, in broad strokes, the underlying picture. You might think my ultimate conclusion wrong because I overlook a relevant constitutional principle or am mistaken about some principles' relative weights or the extent of their activation. I'd consider that a very good result—not as excellent as the first, but plenty good enough. These are the matters we can disagree about reasonably and argue about productively. Very possibly, one of us could persuade the other to see these matters differently.

Now consider a second and more interesting case—one that involves the provision of services that are more expressive than limo-driving but less expressive than website design. Plausible candidates include floral arrangement, cake baking, and hairstyling. Reasonable people might reasonably disagree about how best to classify this or that activity. But that there exists an intermediate category between activities that free speech principles fully protect against legal compulsion and activities that lie wholly beyond protection of the Free Exercise Clause is both intuitive and strongly suggested by Gorsuch's conspicuous and repeated characterization of Lorie Smith's service as "pure speech."[215] The clear implication is that our constitutional law of free speech divides relevant behavior into three categories, not two—something like "non-speech," "impure speech" (or "symbolic speech" or "speech plus conduct" or "expressive conduct"), and "pure speech."[216] The rule of *303 Creative* governs "pure speech." The

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[215] *See supra* note 197 at 2310, 2311, 2316, 2318, 2319.

[216] For scholarly commentary on the category of "pure speech" and its uncertain boundaries, see, e.g., Wendy Rima, *The Human Body: The Canvas for Tattoos; the Public Workplace: An Exhibit for A New Form of Art?*, 66 DRAKE L. REV. 705, 708–09 (2018); James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 2 (2008).

standards that govern the intermediate category are not spelled out, not even intimated.[217]

In truth, I'd expect most of the Justices in the *303 Creative* majority to backtrack from the implications of Gorsuch's many references to "pure speech" when the rubber hits the road. In an appropriate case, I'd expect the Court to treat florists and bakers and hairstylists just like web designers and videographers, dismissing its earlier references to Lorie Smith's "pure speech" as constitutionally insignificant.[218] Nonetheless, I'd like to investigate the possibility that "pure speech" is a constitutionally meaningful category. It might be if speech and religion principles could combine. And they could combine in the following way: if a vendor who offers "pure speech" services is constitutionally entitled to an exemption from nondiscrimination obligations even without religious objections (the holding of *303 Creative*), a vendor of "impure speech" services is constitutionally entitled to an exemption if (and only if) their objections are religiously grounded,[219] and a vendor of non-expressive services is not entitled to an exemption even if their objections are religious.

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[217] Two questions should be distinguished: what standards determine which of the three categories a given activity falls in, and what standards govern that intermediate category. I'm focusing here on the second.

[218] The majority laid a basis for beating a retreat from "pure speech" when noting that, in Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000), the Court had ruled that the Boy Scouts enjoyed a free speech right to oust a gay assistant scoutmaster even though its decision "may not have implicated pure speech." 303 Creative v. Elenis, 143 S. Ct. 2298, 2311 (quoting Boy Scouts of America v. Dale, 530 U.S. 640, 656 (2000))

[219] Should the vendor's objection have to be religious in nature to ground a constitutional right to an exemption? Some scholars have argued that *neutrality between religion and nonreligion,* along with general constitutional principles of equality, entail that whenever exemptions are required for religiously motivated conduct, so too are they required for like conduct motivated by important personal (ethical, moral) commitments that lack religious inspiration. For a nuanced and powerfully argued version of this position, see EISGRUBER & SAGER, *supra* note 147. On this view, if vendors with religious objections to same-sex marriage were entitled to exemptions (a premise that the scholars I have in mind do not grant, or are unlikely to), then so too would be vendors with deep-seated moral objections to same-sex marriage that have no religious backing. One way to put the thought is that *special solicitude* is shorthand, not for *special solicitude for religiously motivated conduct,* but for *special solicitude for conduct issuing from deep personal commitment,* which broader principle fully encompasses the former narrower one.

I don't think that's the right rendering of our principles at the time of this writing, whether or not it comes closer to capturing the relevant principle of true political morality (if there is such a thing). That is not to say that non-religious counterparts to (actual or hypothetical) successful religious claimants must be left out in the cold. But if they are to prevail, I think their path (at this historical moment) must travel two sides of the triangle (*solicitude for religious conduct* plus *equality* and *neutrality*) rather than the more direct and secure single side (*solicitude for personally committed conduct*). Still, I am open to some non-religious claimants prevailing along that longer route and to the shorter route emerging over time. Both these reasons explain my parenthesizing "and only if".

The (sadly) moribund fundamental interests strand of equal protection review provides an analogy.[220] There, a liberty interest that is not quite strong enough to enjoy protected status under the Due Process Clause can combine with discrimination on non-suspect grounds to add up to real constitutional protection that neither liberty principles nor equality principles could secure on their own. Here, an expressive interest that is not quite strong enough to gain protection under the Free Speech Clause can combine with a burden on religious exercise to deliver constitutional protection that neither speech nor religion principles could secure on their own. That's part of what it means to have a principle of *special solicitude*. Still, on my view, the vendor should be entitled to an exemption only where same-sex couples would be left with an adequate supply of comparable alternatives.[221] That's part of what it means to have principles of *equal pursuit of happiness*.

Instead of pressing these tentative conclusions more vigorously, I want to conclude by addressing one salient reason many people give for dismissing out of hand the possibility that, on some set of facts, a wedding vendor is constitutionally entitled to an exemption from a general legal obligation to service a same-sex marriage. The reason I have in mind takes the form of a reductio and would render unnecessary, even pointless, any more searching investigation into the relevant principles or the relevant facts about the world. If wedding vendors who are strongly religiously opposed to marriage between persons of the same sex (or gender) are entitled to an exemption, then it must follow that vendors who have a religious objection to marriage between persons of different races would also be entitled to exemptions from legal obligations to provide service. The two cases must stand or fall together. As Amanda Shanor, one proponent of "the civil rights analogy," expresses the idea: "it is hard to see how a constitutional rule granting a right to refuse service to LGBTQ+ people on religious grounds would not create a general right for religious entities to refuse service on the basis of race, disability, family status, religion, or other protected status, especially when an antidiscrimination law

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[220] For a discussion of that doctrine penned near its peak, see Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1071–72 (1979). Another analogy is Justice Scalia's effort, in *Smith*, to distinguish *Yoder* as a hybrid rights case, involving parental rights and free exercise. I think Scalia's characterization of *Yoder* was mistaken, but the root idea was not wacky. I mention this example for completeness and candor, not necessarily for support. Micah Schwartzman (in personal correspondence) notes, not approvingly, that my analysis "might yet rescue one of the least plausible things Scalia said in *Smith*!"

[221] *See, e.g.,* Douglas Laycock, *Liberty and Justice for All*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 24, 29 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) [hereinafter FREEDOM, RIGHTS, AND, PROSPECTS] ("we should exempt wedding vendors so long as another vendor is available without hardship to the same-sex couple").

treats those categories identically."[222] But it's obvious, the critic says (and I agree), that religious beliefs and commitments, no matter how sincere, do *not* permit anyone to discriminate against members of a race, or on racial grounds, in the face of conflicting legal obligations.[223] Therefore, vendors with religious objections to furthering a same-sex marriage are also not entitled to an exemption.[224]

Yes, it *is* hard to see how the cases can be distinguished—if you're looking only at the dictates of justice or the meanings of texts. But organic pluralists think that an unduly limited perspective. "The life of the law has not been logic: it has been experience."[225] And who could doubt that, just as our experience has given rise to a principle of special solicitude, so too has it birthed principles specially concerned with racial justice? Indeed, the Court has observed that "[f]ew principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation."[226] For simplicity, call that principle or cluster of principles *Black lives matter.* Thanks to the addition of this principle, a vendor whose religious scruples forbid them from

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[222] Amanda Shanor, *LGBTQ+ Need Not Apply*, REGUL. REV. (JUNE 21, 2021), https://www.theregreview.org/2021/06/21/shanor-lgbtq-need-not-apply/ [https://perma.cc/9G9Z-C37U].

[223] This is a point about what is a correct understanding of our law, not merely a gesture to *Piggie Park* as precedent. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (dismissing religious liberty defense to racial discrimination in restaurant as "patently frivolous").

[224] This is very probably the dominant position in the scholarly literature. *See, e.g.,* Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 136 (2020) (arguing that the "race analogy" should be deployed in the wedding vendor context because treating sexual orientation and race differently "creates incoherence in the law, violates that plain language of the statutes, and sends a normative message that discrimination against LGBT consumers is natural, normal, and acceptable"); *see also* Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations,* 31 J. CIV. RTS. & ECON. DEV. 233, 239–42 (2018) ("At the end of the day, there is no good reason, in the context of LGBT issues, to depart in significant ways from how anti-discrimination law has in the past accommodated religious dissenters in the context of race and gender."); *see also* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 160–61 (2018) (criticizing Douglas Laycock's argument against the race analogy in religious exemption cases).

[225] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). *See also, e.g.*, Comm. for Pub. Ed. & Religious Lib. v. Nyquist, 413 U.S. 756, 802–03 (1973) (Burger, C.J., concurring in part and dissenting in part) ("This fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law, and which I believe governs the present cases, is premised more on experience and history than on logic.").

[226] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150–52 (1970). *See also id.* at 191 (Brennan, J., concurring in part and dissenting in part) (characterizing a series of precedents as "represent[ing] vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination").

participating in same-sex weddings and in interracial weddings could well be entitled to an exemption from antidiscrimination laws in the first case but not in the second.[227] Although the principles favoring an exemption would press just the same in the two cases, there are more principles exerting greater aggregate force against an exemption in the second case than the first. Figure 8 below illustrates—not necessarily how things are, but how they might be. It makes plain how the constitutional verdict is sensitive to variation in facts and circumstances.

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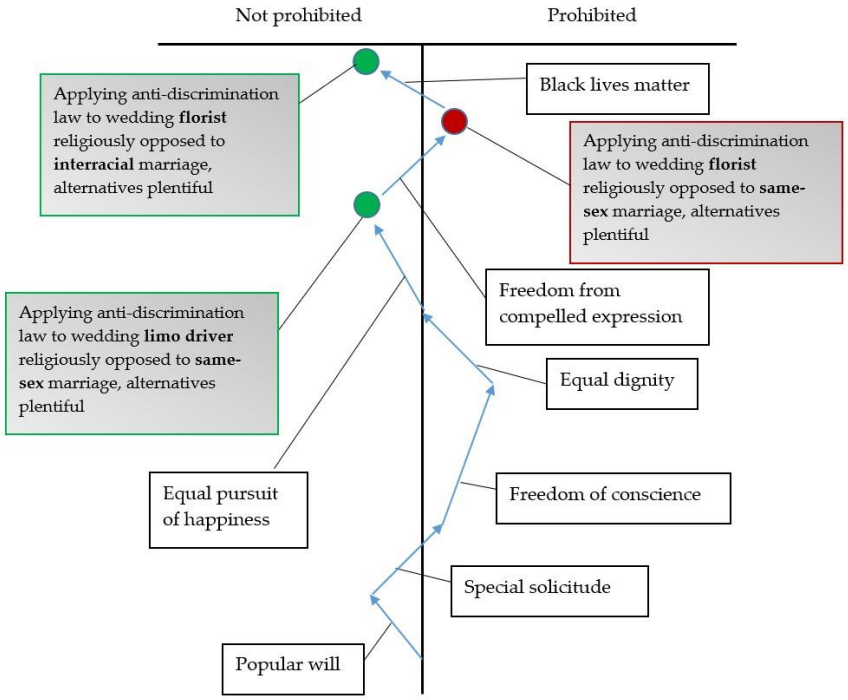
[227] A politically diverse array of distinguished scholars have already rejected the position that exemptions must be constitutionally required in both cases or in neither. Douglas Laycock, *The Campaign against Religious Liberty*, *in* THE RISE OF CORP. RELIGIOUS LIBERTY 231, 232 (Micah Schwartzman et al., eds. 2016); Kent Greenawalt, *Mutual Tolerance and Sensible Exemptions,* FREEDOM, RIGHTS, AND, PROSPECTS, *supra* note 221; Steven D. Smith, *Against "Civil Rights" Simplism, supra* note 221; Michael J. Perry, *Conscience v. Access and the Morality of Human Rights, with Particular Reference to Same-Sex Marriage, supra* note 221; Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm, in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE U.S. 194 (Austin Sarat, ed. 2012); Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 BYU L. REV. 1, 2 (2020).

These scholars do not all traverse the same paths toward their similar conclusions. Here I want to say a quick concluding word about Koppelman. For all that Koppelman says that is smart and wise, most striking to me is his resolute opposition to any talk of "principles of religious liberty." *Id.* at 2. He denounces them as "a distraction, which make each side's claims seem more uncompromisable than they are." *Id.* In place of principles, he urges that we think and talk about "interests of a kind that can and should be balanced against others." *Id.* On the account of the grounding and operation of our principles of religious liberty presented here, however, Koppelman's rightful insistence on "compromise" provides reason to embrace principles not to reject them. Koppelman, like Steve Smith, is eyeing an important opposition, but has not put his finger quite on it. The opposition should not be cast as for or against principles. It should be cast as for principles as absolutes or for principles as contributors. Koppelman, Smith, and I are all on the side of principles as contributors.

FIGURE 8: SOLICITUDE, EQUALITY, AND EXPRESSION



B. STATE SUPPORT FOR RELIGIOUS SCHOOLS: BEYOND VOUCHERS

The Supreme Court's rulings on government aid to religious schools have followed a winding course, largely shaped by the varying enthusiasm shifting majorities have shown the competing principles *separation of church and state* and *neutrality between religion and nonreligion*. The Roberts Court's friendliness to one face of *neutrality* is unmistakable. In *Trinity Lutheran Church v. Comer*,[228] it held that states could not categorically exclude religious schools from the benefits of an otherwise neutral aid program. In *Espinoza v. Montana Department of Revenue*,[229] the Court extended *Trinity Lutheran* to strike down a state constitutional provision that barred aid to religious schools.

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[228] 137 S. Ct. 2012, 2024 (2017).

[229] 140 S. Ct. 2246, 2262–63 (2020).

And in *Carson v. Makin*,[230] it held that a state program that gives parents vouchers to use at private schools could not bar the use of such vouchers at private religious schools, even though the funds would be directly aiding religious instruction. Six months after *Carson* was decided, Oklahoma, one of forty-five states to operate a charter program, became the first to charter a religious school, the St. Isidore of Seville Catholic Virtual School. The chartering of St. Isidore makes concrete the question that *Carson* invited: whether the operational differences between school voucher programs and charter school programs drive a difference in their constitutionality.[231]

Religion scholars appear to be coalescing on a way to think through the problem. In Justin Driver's words, it all depends on "whether charter schools should be considered public (thereby prohibiting the existence of religiously affiliated charter schools under the Establishment Clause) or be considered private (thereby requiring religiously affiliated charter schools under the Free Exercise Clause)."[232] Driver himself, along with Ira Lupu and Robert Tuttle, would classify them as public, and therefore conclude that states are not only permitted, but required, to exclude religious schools from a charter program.[233] Nicole Stelle Garnett, Richard Garnett, Douglas Laycock, Thomas Berg, and others would classify charter schools as private, and therefore conclude that the state may not discriminate against them after *Carson*.[234] Beyond the academy, successive Oklahoma Attorneys General disagreed about the

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230 142 S. Ct. 1987, 2004 (2022).

231 The key operational differences are (1) that voucher programs give money to parents or guardians while charter programs fund schools directly, (2) that charter programs fund schools at roughly the same per-student rate that ordinary public schools receive while vouchers are typically significantly smaller sums, and (3) that charter schools provide open enrollment while schools that benefit from vouchers need not. The discussion in text assumes these pure forms and does not complicate the analysis further by considering hybrids.

232 Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 228 (2022). In saying that religious affiliated charter schools would be required if they are deemed private, Driver means that they'd be required only so long as the state charters other private schools.

233 *See id* at 232 (concluding that "charter schools bear a closer resemblance to public schools than they do to private schools"); Ira C. Lupu & Robert W Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1790 (forthcoming) (manuscript. at 33 n.146).

234 *See* Nicole Stelle Garnett & Richard W. Garnett, *The Future for Religious Charter Schools*, FIRST THINGS (Feb. 14, 2023) https://www.firstthings.com/web-exclusives/2023/02/the-future-for-religious-charter-schools [https://perma.cc/V7XF-QTRY] (concluding that charter schools are neither "government schools" nor "state actors," and must not be excluded under *Carson*); Douglas Laycock et al., *The Respect for Marriage Act: Living Together Despite our Deepest Differences*, 2023 U. ILL. L. REV. (forthcoming) (manuscript at 15).

constitutionality of chartering St. Isidore precisely because they disagreed about whether charter schools are public or private.[235]

In my judgment, the developing consensus is only half right. That consensus affirms two conditionals: (1) if they are "public," then charter schools that engage in religious instruction and indoctrination are constitutionally prohibited; and (2) if they are not "public" (i.e., are "private"), then charter schools that engage in religious instruction and indoctrination are not constitutionally prohibited (and, indeed, are constitutionally required when secular private schools are chartered). Proposition (1) is true, and I won't waste words defending it. But (1) does not entail (2) ("if" does not entail "if and only if"). This Section does two things. It first explains why the fact, if true, that religious charter schools are better characterized as private than public has little bearing on the question that matters: whether the chartering of religious schools is unconstitutional. It then argues that the chartering of religious schools very probably is unconstitutional even if *Carson* was right about vouchers.[236]

1. Private, shmivate. The constitutionality of religious charter schools raises two questions, not one.

$Q1_{EC}$: Does a *charter school* violate the Establishment Clause when engaged in religious instruction and indoctrination?

$Q2_{EC}$: Does a *state* violate the Establishment Clause in chartering a school that engages in religious instruction and indoctrination?

Plausibly, the scholarly consensus reflects the right way to analyze $Q1_{EC}$: a religious charter school itself violates the Establishment Clause if and only if it is public. But the constitutional action surely lies with $Q2_{EC}$ not $Q1_{EC}$. Few informed observers will really believe that the St. Isidore of Seville Catholic Virtual School is positioned to violate the Establishment Clause. If anybody is running afoul of the Establishment Clause, it will be Oklahoma. And whether Oklahoma is violating the Establishment Clause ought not depend on the formalistic classification of charter schools as either public or private. A negative answer to $Q1_{EC}$ cannot itself determine the right answer to $Q2_{EC}$.

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[235] *Compare* John M. O'Connor, Oklahoma Attorney General, Opinion Letter 2022-7 (Dec. 1, 2022) ("[O]nce qualified private entities are invited into the program, Oklahoma cannot disqualify some private persons or organizations 'solely because they are religious'"), *with* Letter from Gentner Drummond, Oklahoma Attorney General, to Rebecca L. Wilkinson, Executive Director, Oklahoma Statewide Virtual Charter School Board (Feb. 23, 2023) ("[C]harter schools 'are public schools established by contract.'").

[236] This is where Driver comes out. Driver, *supra* note 232, at 233.

The difference between the two questions also makes clear that *Peltier v. Charter Day Schools*,[237] a recent en banc decision from the Fourth Circuit involving an equal protection challenge, does not have the implications for religious charter schools that many have supposed. The secular charter school involved in *Peltier* adopted and enforced a uniform policy that required girls to wear skirts, and defended its policy on the strength of an educational philosophy luxuriating in gender stereotypes.[238] The parents of three female students filed suit, challenging the policy as sex- or gender-based discrimination in violation of the Equal Protection Clause.[239] All judges on the en banc court agreed that the constitutional question turned on whether Charter Day School was a state actor.[240] They disagreed strenuously over whether it was. The majority held the school a state actor and thus potentially liable under section 1983.[241] The dissents concluded that the school was not a state actor and thus could not violate the Equal Protection Clause.[242] Because public/private might track or approximate state actor/non-state actor, it's easy to expect that religious charter schools and sexist (or chivalrous) charter schools stand or fall together: there are constitutional violations in both cases or in neither. That's why Court-watchers breathed a sigh of relief or a snort of frustration when the Court denied cert. in *Peltier.*

But the two questions I have distinguished show that *Peltier* has almost no implications for St. Isidore. It too potentially involves two questions, not one:

$Q1_{EPC}$: Does a *charter school* violate the Equal Protection Clause when engaged in sex discrimination that would be unconstitutional if committed by the state?

$Q2_{EPC}$: Does a *state* violate the Equal Protection Clause in chartering a school that engages in sex discrimination that would be unconstitutional if committed by the state?

The Fourth Circuit judges considered only $Q1_{EPC}$. A majority answered yes, a minority said no. None of the judges even considered $Q2_{EPC}$, appropriately enough given that the plaintiffs had not sued the state or any of its officers. But obviously a negative answer to $Q1_{EPC}$–the position pressed

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237 37 F.4th 104, 131 (4th Cir. 2022) (en banc).

238 *Id.* at 7.

239 *Id.* at 62.

240 *Id.* at 13, 45, 57, 84.

241 *Id.* at 26.

242 *Id.* at 69–73.

forcefully by the *Peltier* dissents—has no bearing on $Q2_{EC}$, which is the question that should most occupy St. Isidore.[243]

2. Differences that matter. We can now tackle the constitutional question directly: are the real-world differences between religious charter schools and (let us call them) religious voucher schools sufficient to make a constitutional difference?

The most common objections to religious charter schools are many and varied:[244]

- Direct state payment to schools for religious instruction is a formal and conspicuous breach of separation.
- The social meaning of direct aid is likely to include notes of state endorsement of religious teaching.
- Because state officials must approve or reject charter applications, the process will risk creating the appearance, if not the reality, of favoritism or hostility to religion.
- Because a school's survival can depend entirely on its receipt of charter funds, religious officials may be highly incentivized to lobby the state to increase funding for charter schools, and generally to influence basic state tax policy.
- Because the state must ensure that charter schools deliver an adequate secular curriculum, they assume obligations of oversight that can prove intrusive and objectionable, thereby risking excessive entanglement with religious authorities or the abdication of fundamental state responsibilities.

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[243] Similarly, an affirmative answer to $Q2_{EC}$ would have little bearing on $Q2_{EPC}$, were that question to arise.

[244] For authorities that have raised one or more of these objections, see, e.g., Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. 805, 842 (2023); Mitchell v. Helms, 530 U.S. 793, 842–43 (2000) (O'Connor, J., concurring); Neal McCluskey, *Say "No" to Religious Charter Schools*, CATO AT LIBERTY (Apr. 13, 2023) https://www.cato.org/blog/say-no-religious-charter-schools; Benjamin Siracusa Hillman, Note, *Is There a Place for Religious Charter Schools?*, 118 YALE L.J. 554, 570 (2008); Martell Teasley et al., *School Choice and Afrocentric Charter Schools: A Review and Critique of Evaluation Outcomes*, 20 J. AFR. AM. ST. 99, 106 (2016); Arianna Prothero, *Outsized Influence: Online Charters Bring Lobbying 'A' Game to States*, EDUC. WK. (Nov. 3, 2016) https://www.edweek.org/policy-politics/outsized-influence-online-charters-bring-lobbying-a-game-to-states/2016/11 [https://perma.cc/S77B-UTWS]; Charles J. Russo & Gerald M. Cattero, *Faith-Based Charter Schools: An Idea Whose Time Is Unlikely to Come*, 13 CATH. EDUC. 509, 521 (2010); Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 22–28; Kate Cohen, Opinion, *Taxpayers Shouldn't Be Paying for Religious Schools*, WASH. POST (June 27, 2023) https://www.washingtonpost.com/opinions/2023/06/27/oklahoma-public-religious-school-church-state-funding/ [https://perma.cc/6QR2-4FNU].

- The state must either subject religious charter schools to nondiscrimination rules that their religious orders reject or exempt them from such obligations, and each horn of the dilemma will prove highly divisive. (Christian Nationalist Junior High, anybody?)[245]
- In some communities, religious charter schools will crowd out public schools—what used to be called, more illuminatingly, "common schools"—creating a significant risk that parents will feel compelled to send their children to schools run by denominations not their own, where their children will be subjected to formal and informal pressures to conform, at grave risk to their freedom of conscience.

This is not an exhaustive list, and some worries are more substantial than others. But the aggregate thrust is plain: *separation of church and state* activates very greatly against the chartering of religious schools—much more than it activates against religious schools' receipt of vouchers—and *freedom of conscience* is significantly implicated too.[246] In my estimation, the meanings and risks of religious charter schools make them unconstitutional all things considered, not because *neutrality between religion and nonreligion* isn't offended, but because it's outweighed. (See Figure 9.) When defending the *Trinity Lutheran* result a small handful of years ago, Michael McConnell reasoned that "separation of church and state has never required that churches be cut off from *all* the benefits of tax-funded government programs."[247] McConnell was right. But it's also true that neutrality has never required that churches be cut off from *none* of the benefits of tax-funded government programs. If our "principles" are *principles*, we should expect that the

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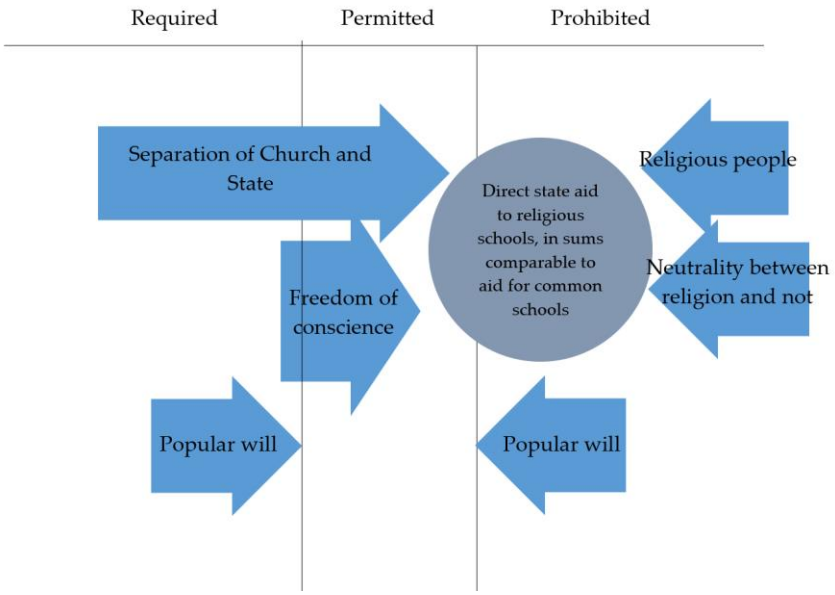
[245] This division is on display in Colorado where two preschools seek exemptions from anti-discrimination conditions attached to the state's new universal preschool program. *See* Darren Patterson Christian Acad. v. Roy, No. 1:23-cv-015557-DDD-STV, 2023 WL 7270874, at *19 (D. Colo. Oct. 20, 2023), ECF No. 1 (granting the plaintiff's request for a preliminary injunction of anti-discrimination provisions that prohibit participating schools from discriminating in hiring on the basis of religion and mandate use of a student's or employee's preferred pronouns); *see* Complaint & Demand for Jury Trial at 2, St. Mary Cath. Parish v. Roy, No. 1:23-cv-02079 (D. Colo. Aug. 16, 2023) (complaining that the program's anti-discrimination conditions amount to the "categorical[] exclusion" of Catholic schools because the conditions "directly conflict" with their "religious beliefs and their religious obligations as entities that carry out the Catholic Church's mission of Catholic education in northern Colorado").

[246] To be clear: these principles activate against religious voucher schools too. My claim is that, due to factual differences between (most) charter programs and (most) voucher programs, these principles likely activate significantly more against the former. *But see supra* note 233.

[247] Michael McConnell, *Churches and Government Funding*, 21 J. MKTS. & MORALITY 49, 52 (2018) (emphasis added).

constitutional outcome will fall someplace between all and none. And we should not be surprised if vouchers and charters end up straddling a constitutional divide.

FIGURE 9: DIRECT PUBLIC FUNDING OF RELIGIOUS SCHOOLS



That, roughly, is how it looks to me. How might somebody resist the conclusion? Many ways.[248] They might argue that religious charter schools don't offend *separation of church and state* nearly as greatly as critics of the schools claim (the *separation* arrow should be much shorter). Or they might contend that *separation of church and state* is a flimsy principle of our order (the arrow should be thinner)—or no principle at all (the arrow should be scratched out). They could insist that, *separation of church and state* notwithstanding, discrimination against religious schools offends *neutrality*, and that concludes the analysis. On this view, *neutrality between religion and not* (more precisely, the facet of that principle that bars discrimination against religion, not in its favor) always wins the day; it is a rule, not a principle.

[248] *See supra* Section II.D.1.

All these arguments already appear in the literature.[249] They are what the net forces account predicts and what our models visually suggest. Where the Court lands (adjudging the chartering of religious schools required, permitted, or prohibited), and what route each bloc of Justices takes, will, as usual, reveal something about the Justices' understandings of our constitutional law. And because every judicial invocation of principles further embeds the principles invoked, the Court's opinions will inescapably affect the principles' contours and relative weights, if only just a little; Supreme Court opinions are never *only* reports of a preexisting constitutional state of affairs. Furthermore, the case of religious charter schools will possibly reveal even more than usual about our Justices' visions of their proper role—as Justices for a diverse nation whose citizens embrace a multiplicity of commitments that partially conflict, or as agents for the political movements they personally favor.[250]

CONCLUSION

The law of religious liberty under the U.S. Constitution is a riot of principles. We cannot understand that law without grasp of the principles. That much is (or should be) obvious to all. Less obvious, but more urgent, is our need for good accounts both of what makes, determines, or constitutes our principles, and of how a plurality of principles can jointly generate unitary answers to our constitutional questions. This Article aims to address all these needs. It argues that our principles are grounded in judicial and extrajudicial practices and thus change in usually slow, organic fashion. It's not only that our principles *aren't* fixed; they are *incapable* of being fixed. The Article also argues that legal principles individually exert legal force, and that they collectively determine legal outcomes or assign legal properties by the aggregation of the principles' individual exertions on the model of force (vector) addition. On the back of these general theoretical claims, the Article refines prevailing scholarly views regarding the contents and contours of the American principles of religious liberty today. Finally, the Article uses the machinery it develops and the principles it identifies to analyze two hotly contested questions in the law of religious liberty: whether religiously

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[249] *See, e.g.*, McConnell, *supra* note 235 at 52; Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 47 (2017); Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools From Becoming Charter Schools?*, 32 J. L. & RELIGION 227, 250 (2017); Aaron J. Saiger, *Charter Schools, the Establishment Clause and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1223 (2013); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 187 (2004).

[250] *See supra* Section II.D.2.

conservative wedding vendors may be legally obligated to service same-sex weddings even in the absence of an individually successful compelled-speech claim; and whether states may charter private religious schools.