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# How to Think about Religious Freedom in an Egalitarian Age

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# McELROY LECTURE

## How to Think About Religious Freedom in an Egalitarian Age

NELSON TEBBE\*

Academic works about religious freedom in the United States often begin with a warning that the jurisprudence is in a state of crisis.<sup>1</sup> According to this convention, something must be done to put the religion provisions of the First Amendment on a firmer foundation.

Today, these warnings have taken on a distinctive urgency and character in religious freedom jurisprudence. A group of skeptics has been arguing that a rational approach to religious freedom is *necessarily* impossible.<sup>2</sup> They believe that the American discourse on free exercise and nonestablishment is broken and cannot be fixed. All we can do is muddle through, on this view, seeking patternless solutions to particular, ground-

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\* Professor of Law, Brooklyn Law School, and Visiting Professor of Law, Cornell Law School. This is the text of the University of Detroit Mercy School of Law McElroy Lecture, modified slightly for print and with the addition of footnote references. Warm thanks to the faculty and students at University of Detroit Mercy School of Law for the kind invitation and for extremely useful feedback. Parts of the argument here draw on Nelson Tebbe, *Religion and Social Coherencism*, 91 NOTRE DAME L. REV. 363 (2015) and Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (forthcoming, Harvard Univ. Press).

1. See, e.g., STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 10 (2014) (noting that the jurisprudence on religious freedom is widely seen to be “incoherent”); ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 1 (2013) (“The American law of freedom of religion is in trouble[.]”).

2. See, e.g., SMITH, *supra* note 1, at 1–13; WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 8 (2005) (arguing that protecting religious freedom is “arguably impossible” without intolerable inequality to nonreligious people); STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 11–12 (1999); FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 123 (1995) (arguing that efforts to make sense of the Religion Clauses are “doomed”); Stanley Fish, *Where’s the Beef?* 51 SAN DIEGO L. REV. 1037, 1043 (2014) (arguing that “there is no satisfactorily rational way of dealing with” cases concerning free exercise and nonestablishment); *but cf.* Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155 (2014) [hereinafter *Hobby Lobby Moment*] (“[T]he very notion of religious liberty—its terms and its value—has become an increasingly contested subject [at least outside courts.]”).

level disputes. This skeptical critique has been influential in the literature on religious freedom jurisprudence.<sup>3</sup>

Here, I investigate this brand of skepticism. That is, I ask whether it is possible to answer questions of religious freedom in a way that is rationally justified—or warranted, a term I use in the same way—and, relatedly, whether legal proposals on such matters must be arbitrary or conclusory. Figuring out the answer is important because the skeptics' critique has power. It is also important because their way of working on concrete questions of religion and equality actually shares much with the methods of the thinkers they criticize. What distinguishes the skeptics is not their manner of deciding cases but their grim evaluation of that method. So, if their critique is correct, it implicates a variety of familiar approaches.

My conclusion today will be that it is in fact possible to make reasoned arguments for and against outcomes, even in cases that involve the fraught relationship between religious freedom and equality law. I build up this argument in several steps in what follows. First, I describe the contemporary situation in greater detail, along with the skeptical critique. Second, I offer a method for resolving such disputes in a manner that is rationally justified, and I refer to it as a *social coherence* approach.

Finally, I give an example of how *social coherence* works in a religious freedom dispute that is at the leading edge of contemporary debates—namely, the controversy surrounding the Supreme Court's decision in *Burwell v. Hobby Lobby*.<sup>4</sup> As is well known, the Court in that case ruled that a company could refuse to provide health insurance that covered female contraception despite a requirement imposed by the Obama Administration under the Affordable Care Act.<sup>5</sup> *Hobby Lobby* argued that its religious opposition to covering contraception entitled it to an exemption, and the Court agreed.<sup>6</sup>

I argue below that the Court's opinion in *Hobby Lobby* was incoherent because of one specific problem. Namely, the *Hobby Lobby* Court was insufficiently concerned about shifting the cost of accommodating the employer's religious beliefs onto its employees who may not share those beliefs. That failure to protect against third-party harms risked violating a

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3. There are several ways to measure this influence, none of them bulletproof. One is that Steven Smith, whose work features a critique of the possibility of coherent argument on questions of religious freedom today, has been called *the* leading figure on questions of religious freedom and by a highly regarded expert in the field. Marc DeGirolami, *Review of Steve Smith's Rise and Decline of American Religious Freedom*, MIRROR OF JUSTICE (July 21, 2014), <https://perma.cc/U7JE-23TV> (calling Steven Smith "the most penetrating and thoughtful scholar of religious freedom of our generation False").

4. 134 S. Ct. 2751 (2014).

5. *Id.* at 2759.

6. *Id.* at 2775–76, 2785.

core principle of constitutional law.<sup>7</sup> While ordinarily the costs of accommodating religious citizens are born by the government or by the public, here those costs were shifted onto the shoulders of other private citizens, at least for a time. Protecting religious freedom is critically important. But, according to a longstanding principle rooted in the Religion Clauses of the First Amendment, that freedom cannot come at the cost of significant harm to third parties.<sup>8</sup> Although the *Hobby Lobby* Court reaffirmed that principle in name, it failed to observe it in practice. Nothing in the Court's decision made it *contingent* on absence of harm to third parties. And in fact, Hobby Lobby's employees were harmed—they were denied contraceptive coverage for about a year. That means the ruling cannot be squared with basic constitutional law and was unjustified. That is true even though the Court's opinion featured more familiar doctrines in religious freedom law, sidelining the imperative of avoiding harm to others. The coherence method allows this conclusion to be backed up with reasons.

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Let me begin by saying a little more about the state of religious freedom today, albeit from a particular perspective. Recently, diagnoses of incoherence in the field have taken on a different character because of two developments that have come to the foreground. Neither of these developments is without precedent, but they both are newly prominent. They have shifted the debate in ways that are independent but interrelated.

First is the development I referred to a moment ago: some skeptical thinkers have been arguing with increasing force and influence that the law of religious freedom is necessarily rudderless.<sup>9</sup> According to these skeptics, deep contradictions are endemic to western thought on the subject, particularly tensions between traditional religious thinking and secular liberal understandings.<sup>10</sup> These skeptics' background narrative also suggests that religious freedom was once grounded in theology: now that it is unmoored from that foundation, it must rely on secular justifications. Yet, secular understandings cannot offer a coherent account of the doctrine because the law of religious freedom retains remnants of the old view. Both secular conceptions and traditional convictions coexist in the law, both enjoy widespread support, and neither can be jettisoned.

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7. See, e.g., Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <http://perma.cc/A4ZTEW6S>.

8. U.S. CONST. amend. I.

9. See *supra* note 2.

10. See, e.g., STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 52 (2001) [hereinafter GETTING OVER EQUALITY]; Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1882–83 (2009); GEDICKS, *supra* note 2, at 123–24; FISH, *supra* note 2, at 1042–43.

Consequently, contemporary understandings of the Free Exercise Clause and the Establishment Clause will inevitably deploy irrational or ad hoc thinking. All we can do is muddle through, dealing with new disputes in a haphazard way that is bound to be patternless. Arguments of constitutional principle simply cannot be made using available legal resources. Put somewhat differently, these skeptics believe it is not possible to have a “theory” of religious freedom today.<sup>11</sup> Again, their position is one of the most influential academic approaches to the subject matter at the moment.<sup>12</sup>

Other thinkers do not go quite as far as the skeptics, but they too could be read to argue that protecting religious freedom will entail choices that cannot be justified and therefore will invariably cause regret or even a sense of tragedy. These scholars sometimes call themselves “tragedians.”<sup>13</sup>

Yet another version of the argument, also newly salient in the literature, is that only religious or theological justifications for religious freedom are defensible.<sup>14</sup> In sum, doubts about the very possibility of justified reasoning in religious freedom law have come to characterize one of the most prominent trends among scholars, and perhaps also among some number of judges and lawmakers.

A second development is more commonly appreciated—that is, the heightened tension between religious freedom and equality commitments in law.<sup>15</sup> In the wake of recent victories for advocates of LGBT rights and reproductive freedom for women, religious traditionalists have been pressing for robust exemptions. *Hobby Lobby* is one example of that tension manifested in a conversation over the scope of reproductive freedom for women along with their right to equal membership in society, politics, and the economy.<sup>16</sup>

Litigation over marriage equality is another example. Before *Obergefell v. Hodges*, religious citizens sought and won protection from civil rights laws concerning public accommodations, for example, so that churches can refuse to open their facilities to same-sex wedding

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11. See GETTING OVER EQUALITY, *supra* note 7, at 45–46.

12. See *supra* note 3.

13. MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 6 (2013); see also PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION xxv (2011) [hereinafter AGNOSTIC AGE] (noting that religious freedom jurisprudence will involve “tragic choices”); see also *Hobby Lobby Moment*, *supra* note 2, at 158 and n.20 (citing AGNOSTIC AGE at 303–06 as an example of a tragedian argument).

14. See, e.g., Michael Stokes Paulsen, *Is Religious Freedom Irrational?* 112 MICH. L. REV. 1043, 1053 (2014) (“[R]eligious liberty only makes entire sense on essentially religious philosophical presuppositions.”).

15. See, *Hobby Lobby Moment*, *supra* note 2, at 156, 160 (diagnosing today’s perceived tension between religious freedom and civil rights law).

16. See, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799–803 (2014) (Ginsburg, J., dissenting).

receptions.<sup>17</sup> And since *Obergefell*, some traditionalists have been arguing for other protections, such as accommodations for marriage license clerks and other public officials who have religious objections to same-sex marriage.<sup>18</sup>

Controversies like these have attracted national media attention. I will have more to say about them later. For now, I just want to highlight the standoff between religious freedom and equality commitments, particularly concerning LGBT rights and reproductive freedom for women, though other antidiscrimination measures have come into play as well.

Accompanying this second development has been a new degree of political polarization among Americans on questions of religious freedom generally.<sup>19</sup> On one side, liberals who were once focused on the plight of religious minorities, and who therefore supported strong free exercise rights, now seem more concerned about the potential for religious conservatives to use those rights to carve out meaningful exemptions from civil rights laws and other regulations protecting the common good.<sup>20</sup> On the other side, traditionalists who once aimed (*inter alia*) to win a place for religious convictions in public affairs and government decision-making have now become more inclined to see themselves as minorities who require legal exemptions to shield their communities from an overweening liberal orthodoxy.<sup>21</sup> As recently as the early 1990s, these two sides came together to enact the Religious Freedom Restoration Act, which passed with overwhelming bipartisan support in Congress and which was signed by President Clinton.<sup>22</sup> Today, religious traditionalists and egalitarians are deeply divided over the application of that same statute in cases like *Hobby Lobby*. Something has changed.

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17. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624–26 (2015) (Roberts, J., dissenting).

18. For example, Kim Davis, the elected County Clerk of Rowan County, Kentucky has argued that she should be able to exempt herself from the process of issuing marriage licenses because of her religious opposition to same-sex marriage. See, e.g., The Associated Press, *Kentucky: Defiant Clerk Loses Again*, N.Y. TIMES (Nov. 5, 2015), <https://perma.cc/6QLP-EWVZ>. North Carolina passed a law in the leadup to *Obergefell* that allows officials to decline to perform marriages because of religious opposition to same-sex marriage. See, The Associated Press, *North Carolina: Suit Filed Over Marriage Recusal Law*, N.Y. TIMES, (Dec. 9, 2015), <https://perma.cc/H8KJ-TS86>.

19. See Paul Horwitz & Nelson Tebbe, *Religious Institutionalism—Why Now?* in THE RISE OF CORPORATE RELIGIOUS LIBERTY: *HOBBY LOBBY* AND THE NEW LAW OF RELIGION IN AMERICA 209 (Micah Schwartzman et al., eds. 2015).

20. Mark Tooley, *The Future Belongs To Religious Liberals?* THE AMERICAN SPECTATOR (July 26, 2013), <https://perma.cc/3S3S-U3G5>; John Riley, *ACLU Warns of Coming Wave of “Religious Exemption” Bills*, METRO WEEKLY (Dec. 17, 2005), <https://perma.cc/KM9X-TEZS>.

21. *Id.*

22. Pub. L. No. 103-141, 107 Stat. 1488 (codified as 42 U.S.C. §§ 2000bb to 2000bb-4 (1993)).

In sum, two developments characterize the current moment on these questions—skepticism about the soundness of religious freedom law and increased political and legal tension between the First Amendment and equality law.

But I want to make a further observation, namely that these two developments are related in some ways. Although skeptics can be found all across the political spectrum, it is perhaps not completely inaccurate to say that the most influential voices today are politically conservative, at least on this question.<sup>23</sup> Some people positioned toward the right on the political spectrum tend to be pessimistic about the possibility of defending free exercise under contemporary conditions, and they criticize liberals in the judiciary (and the academy) for incoherent reasoning.

What is at stake in these claims, practically speaking? They are not only points of philosophy or jurisprudence. Traditionalists also sometimes conclude that judges should leave more of the business of protecting religious freedom to branches of government that are more responsive to popular politics, such as legislatures and executive offices.<sup>24</sup> Going further, they sometimes conclude that constitutional arguments cannot be made in *any* forum—that the matter of religious freedom should be left to policy preferences.<sup>25</sup> Of course, arguments against court intervention in democratic decision-making are also made by non-skeptics.<sup>26</sup> For both sorts of thinkers, room must be made for tradition to influence government and its lawmaking at least in some local jurisdictions, if not everywhere, in America. And, that will happen through ordinary politics, through institutions of representative democracy.

On the other side, progressives have tried to develop approaches to the subject that are capable of grounding constitutional law on such matters. It should be acknowledged that many on the left have deemphasized the

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23. Cf. Paul Horwitz, *More "Vitiating Paradoxes": A Response to Steven D. Smith—and Smith*, 41 PEPP. L. REV. 943, 945–46 (2014) (comparing Steven Smith's skepticism to a conservative version of critical legal studies). "Politically conservative" here means what it generally does in conversations about free exercise and nonestablishment, namely seeing a greater role for religion in public life, including government decision making, expression, and funding, and looking for greater protection for religious action against general laws.

24. See, e.g., SMITH, *supra* note 10, at 68 (arguing that the rejection of a principled approach to religious freedom suggests that courts should play a more modest role, generally, though acknowledging that determining how modest will require additional, complicated jurisprudential considerations).

25. See *id.* at 79 ("I have suggested that there are no satisfactory principles of religious freedom. If I am right, the most obvious consequence is that in this area courts cannot act on the basis of genuine principles. But there is another less obvious but perhaps more interesting consequence: *no one else*—not a legislature, not a school board can act on the basis of genuine principles of religious freedom either.").

26. See, e.g., Richard W. Garnett, *Judicial Review, Local Values, and Pluralism*, 32 HARV. J.L. & PUB. POL'Y 5, 6 (2009) (critiquing judicial review for "homogenizing community norms").

courts, highlighting instead the possibility and power of constitutional interpretation by other actors, not only in the legislature and the executive branch but also outside government altogether.<sup>27</sup> Yet, popular constitutionalism does not necessarily entail denying that courts play an important role, and it certainly does not require abandoning constitutional argument altogether and leaving questions of religious freedom to party politics. It should also be acknowledged that some progressives are equally skeptical that reasoned conclusions can be reached on questions of religious freedom law.<sup>28</sup> But many continue to believe that distinctively legal arguments can continue to be justified even if they do not occur exclusively or even primarily in the judiciary.<sup>29</sup> They have not been overwhelmed by doubts about whether legal actors are capable of making reasonable constitutional arguments on questions of religious freedom.<sup>30</sup>

So the newer challenge for religious freedom jurisprudence comes from those who question the very notion of justified argument on any and all legal questions surrounding free exercise and nonestablishment.

The difficulty is that the targets of this criticism have not yet offered a satisfying answer. They lack an account of why and how principles and precedents—like the prohibition on government endorsement of religious truth or the rule of equal treatment for believers and nonbelievers—can be implemented without arbitrariness or unreason.<sup>31</sup> Of course, they have

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27. For an overview of the varieties of popular constitutionalism, with citations, see Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004).

28. See, e.g., SULLIVAN, *supra* note 2, at 8 (arguing that protecting religious freedom is “arguably impossible” without intolerable inequality to nonreligious people).

29. That is not to say that people on the left have not attacked the idea of religious freedom itself. An important scholarly movement is criticizing the special solicitude that religion currently enjoys in constitutional law. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 52 (2007); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); Micah Schwartzman, *What If Religion Is Not Special?* 79 U. CHI. L. REV. 1351 (2012). Yet it is important to realize that this critique need not undermine the very possibility of reasoned approaches to this area of law. It questions the possibility of religious freedom as a distinctive constitutional doctrine, but it does not speak to the possibility of constitutional protection for liberty of conscience more generally. If this argument portends the “end of religious freedom,” as some have recently suggested, see, e.g., SMITH, *supra* note 1, it does not mean the end of principled legal approaches to the area as opposed to pure party politics.

30. None of this is to deny the pervasive influence of politics on legal interpretation. Of course interpretation is shot through with politics. Nevertheless, most people writing about religious freedom from the left implicitly believe that constitutional law, even if pervasively political, is still *relatively* autonomous from electoral strategizing or party policymaking. Legal discourse has distinctive rules, and lawyers have been trained and socialized to respect those rules. To put the point somewhat differently, constitutional politics is not *fully* reducible to party politics even if it is true that no part of constitutional law is untouched by power dynamics.

31. See, e.g., Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1144 (2010) (responding to



articulated substantive proposals for how religious freedom cases ought to be resolved generally and in one area or another. What is missing is a defense of the project itself, of its very possibility. The availability of a workable methodology is what is being questioned today, and a way of working through problems is what needs to be provided and defended.

My aim is to explore whether there is a supportable response to the skeptical challenge. That endeavor has become more imperative as I have discovered that the skeptics' ways of working on concrete cases is in fact strikingly similar to many others', including my own.

In some sense, my goal here is to supplement rather than supplant existing *theories* of religious freedom. Instead of a substantive theory of religious freedom that determines outcomes for specific disputes, I aim to provide a *method* for settling religious freedom cases in a way that is rationally justifiable. This method, though more badly needed by progressives at the moment, does not dictate conclusions and is available to everyone. So, one motivation is to discover a satisfying response to the skeptical challenge. An independent aim, however, is to provide a way of thinking through these new problems that is useful—that clarifies and conceptualizes how people are already working through such issues.

Of course, reasoned arguments will not always prevail, and they will often be influenced by power or overdetermined by interests. And courts will not provide the only, or even the most promising, institutional settings for such arguments. Power and political institutions will continue to exercise important influence and properly so. Social movements, media outlets, organizations of civic society, and various other groups and forums likewise will continue to impact constitutional thought. But arguments of constitutional principle can nonetheless carry significant power in some social and institutional contexts. Completely abandoning outcomes to the contingencies of practicalities or politics would be a mistake.

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In broad outline, the methodological solution begins with a *coherence* method inspired by moral philosophy. Because problems of legal interpretation inevitably include moral argument, and because the skeptics' objection is that those problems cannot be resolved without devolving into irrationality or *ipse dixitism*, it makes sense to look to moral philosophy for a starting point. In fact, the skeptics' argument is precisely that moral reasoning in legal interpretation cannot be accomplished without conclusoriness. (Here, all parties seem to accept that moral reasoning plays an appropriate role in legal interpretation—a position I will therefore

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critiques by the skeptic Steven Smith by saying only that "very often, reason . . . does not get us to the end of the line.").

assume rather than establish.<sup>32</sup>) So, a defense understandably begins with a better account of moral reasoning on matters of law and politics.

When people confront moral problems in everyday life, they oftentimes begin with an unreflective intuition—a kind of impulse about the proper solution. Other times, that does not happen, and they are unsure what to think about a new conundrum, or they have conflicting instincts. Whatever the case, they usually do not stop there. Instead, they subject their first thoughts and feelings to reflection. They test them. Commonly, people do that by comparing their reactions to other moral conclusions that they have drawn and about which they have confidence. Those existing commitments could exist on any level of generality. They could be judgments about particular situations and their correct resolution, or they could be general principles that are believed to fairly capture more specific judgments. Actors' instincts about the new situation appear more worthwhile if they fit together with general principles and if they resonate with other specific judgments by way of analogy.<sup>33</sup>

That method of seeking coherence—or reflective equilibrium, as it is sometimes called<sup>34</sup>—can assimilate commitments that are complex and variegated. Even in environments of great moral intricacy, a coherence method can generate conclusions that are reasonable or morally justified. In other words, the approach can provide an answer, or the beginning of an answer, to the charge that religious freedom incorporates values that are too numerous, and too often conflicting, to produce reasoned outcomes. Problems of religious freedom can be resolved without conclusoriness, *ipse dixitism*, or irrationality—and without theology. Moreover and related, the coherence approach opens up a powerful defense against charges that principled decision-making on these questions is inevitably biased or arbitrary. Finally, it speaks to the concern that religious freedom jurisprudence invariably involves tradeoffs that we should regard as tragic. Hard cases can be resolved in favor of prevailing values. As long as the resolutions are justified, rationally and morally, they should not provide occasions for regret.

That is the basic idea. Let me now offer a few clarifications or specifications—seven of them, to be precise.

First, “fitting together” means mutually reinforcing. Conclusions gain credence through this process not just because they avoid contradiction but because they support one another. If one element in this web of moral

32. It is beyond the scope of this lecture to establish that legal interpretation involves moral argument. See, RONALD DWORKIN, *LAW'S EMPIRE* 52, 65–68, 96–98 (1986). So, coherentism offers a method for resolving legal disputes that is at once normative and descriptive—it responds to arguments both for what the law is and for what it should be.

33. For a general account, see Norman Daniels, *Reflective Equilibrium*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011).

34. See JOHN RAWLS, *A THEORY OF JUSTICE* 20, 46–53 (1971).

belief is questioned, it can be bolstered by the other elements.<sup>35</sup> A conclusion about the new situation is morally justified, or rationally warranted, if it coheres with our other commitments in this way.

Second, the commitments that fit together could be on any level of abstraction. They could be principles, or they could be convictions about particular, ground-level problems.<sup>36</sup>

Third, as I use the term, coherence speaks to moral justification, not necessarily to ontology or even epistemology.<sup>37</sup> When a result reached by this method is claimed to be justified, that means that it is backed by reasons rather than conclusory or ad hoc conclusions.

Fourth, coherence or equilibrium is best understood as an ideal rather than a state that is likely to be achieved.<sup>38</sup> Emphasis should be placed on the process of deliberation that it describes rather than on the goal itself. And, harmony is more likely to be reached in local areas of law and politics rather than globally.

Fifth, a person's array of beliefs can be dynamic. No element is foundational and every element is subject to revision in light of new information or new understandings. People may find that their existing conclusions need to be revised in light of their considered position on a new problem. They work back and forth between beliefs, testing each against the others and seeking a resolution where their positions make sense taken together.

Sixth, nothing about the approach is inherently backward-looking or conservative—on the contrary, you could even say it is *designed* to generate principled critiques of arrangements that are unquestioned or inherited. At the same time, it incorporates social specificity because the principles and judgments that people bring to the table are made available and authoritative by the country's politics, culture, and history.<sup>39</sup> More on that social dimension in a moment.

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35. See Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 277–78 (1992).

36. John Rawls, *The Independence of Moral Theory*, in COLLECTED PAPERS 286, 289 (Samuel Freeman ed., 1999).

37. *Id.* at 286–87; see also Daniels, *supra* note 33, at 25 (noting Rawls's distinction between a coherence theory of truth and a coherence theory of justification).

38. John Rawls, POLITICAL LIBERALISM 97 (expanded ed. 2005) (“The struggle for reflective equilibrium continues indefinitely[.]”); T.M. SCANLON, BEING REALISTIC ABOUT REASONS 77, n.14 (2014).

39. Rawls, *supra* note 36, at 288–89 (arguing that the method of reflective equilibrium is not conservative); cf. DWORKIN, *supra* note 32, at 99 (arguing for the critical potential of his interpretive approach).

Seventh and finally, the approach is well-suited to law, and it has a recognized application there.<sup>40</sup> It resembles what judges and lawyers do when they apply the common-law method to legal problems.

Although coherence methods are familiar to philosophers, I want to foreground an element that usually remains in the background for them. Treatments of the topic in philosophy tend to undervalue an aspect of moral reasoning that is central in constitutional argument—the impact of social and political dynamics. I would like to articulate a social version of the method. *Social coherence* better appreciates that the principles and judgments informing our conclusions are made available by cultural and political dynamics even as they are also subject to examination. Our sense of whether and how elements of our worldview fit together can be shaped by events and evaluations that come to us from the zeitgeist. We are products of our culture, as the cliché reminds us, even if we also are capable of some reflective distance from it.

Moreover, with social influence comes social conflict. We can be convinced—and we can convince others—to change their conclusions by pointing out precedents that they have missed, by arguing that principles demand different results, by showing that a local solution conflicts with global principles, and by promoting new understandings that better make sense of existing conclusions. And these contests happen not just in courts but in legislatures, in executive branch offices, in political parties, in social movements, in political mobilizations, in the media, in civil society, and everywhere else that people discuss basic questions of law and justice. Those conversations are affected by power and interests, without a doubt, but they also are driven by arguments of constitutional law and principle that can be important if rarely decisive.<sup>41</sup>

None of this needs to be embarrassing to those who hold that it is possible to make warranted moral judgments in the area of religious freedom. On the contrary, appreciating the social and political dimensions of coherentism *increases* its relevance to constitutional law, which draws so much of its legitimacy from popular responsiveness and democratic engagement.

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40. See, e.g., J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *YALE L.J.* 105, 106 (1993) (“Coherence is more than a property of law; it is the result of a particular way of thinking about the law.”).

41. There are at least two reasons to emphasize a social dimension. First, doing so anticipates and deflects the criticism that legal ideas will be overtaken and overdetermined by interests and ideologies. Second, it tailors the approach to constitutional law where social and political dynamics are widely appreciated and where democratic responsiveness can bolster a certain type of legitimacy. Incidentally, none of this means that moral actors should go out of their way to incorporate social understandings into their reasoning—that happens in the background. So, this part of the account is more descriptive than prescriptive.

Moreover, a strong social dimension helps to answer the characteristic critiques of coherence approaches from within philosophy. For example, it addresses the complaint that the method justifies idiosyncratic belief systems that may seem internally consistent but are nevertheless unjust or unsuitable to American constitutionalism.<sup>42</sup> For instance, white supremacy can never count as warranted—a social perspective makes that obvious. Nor may an established church pass muster in America even though it may be acceptable in other constitutional democracies, such as Great Britain's. Social coherence can account for those convictions and answer those critiques. Emphasizing the social aspects of our reasoning therefore is worthwhile, not only for the approach's suitability for constitutional law but also for its attractiveness within philosophy and in our thinking more generally.

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Let me now illustrate the approach by applying it to a cutting-edge issue in contemporary religious freedom law. My aim in doing this is not just—or even mainly—to argue for a particular solution but to demonstrate the power of this way of thinking in practice. The proposal's truest test should be whether it provides a useful and attractive technique for solving actual problems.

Consider the Supreme Court's decision in *Hobby Lobby*.<sup>43</sup> Again, the Court ruled that employers who had religious objections to certain forms of contraception were exempt from the government's requirement that they include comprehensive contraception coverage in any health insurance plans that they offered to their employees.<sup>44</sup> Another statute, called the Religious Freedom Restoration Act (RFRA), protected religious employers from the "contraception mandate," as it has come to be known.<sup>45</sup> Several aspects of the decision have drawn controversy, including the holding that business corporations enjoy religious freedom protection.<sup>46</sup> However, I want to focus here on a different and potentially more profound problem with *Hobby Lobby*, namely the Court's violation of the principle against harming third parties.

A basic tenet of both Free Exercise Clause and Establishment Clause jurisprudence holds that although religion exemptions can and sometimes must be granted by the government to religious practitioners, those

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42. See Raz, *supra* note 35, at 280; see also Geoffrey Sayre-McCord, *Coherentist Epistemology and Moral Theory*, in *MORAL KNOWLEDGE?* 137, 170 (Walter Sinnott-Armstrong & Mark Timmons eds., 1996).

43. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

44. *Id.* at 2759 (applying 42 U.S.C. §§ 2000bb-bb4).

45. *Id.*

46. Horwitz, *supra* note 2, at 177.

exemptions may not shift meaningful costs from religious citizens to other private citizens.<sup>47</sup>

In its Establishment Clause cases, the Court has invalidated laws that accommodated religious people if the laws harmed others.<sup>48</sup> For instance, the Court struck down a Connecticut statute that required employers to allow all employees who observe a Sabbath to take that day off from work.<sup>49</sup> The Court held that the Connecticut law “contravenes a fundamental principle of the Religion Clauses, [namely that] . . . [t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”<sup>50</sup> That principle has been followed in subsequent cases.<sup>51</sup>

In its Free Exercise Clause cases, similarly, the Court has denied relief that would mean harming other private citizens.<sup>52</sup> For example, the Court refused to grant an exemption to an Amish employer who was theologically opposed to paying Social Security taxes on behalf of his employees.<sup>53</sup> The Court held that granting the exemption would impose unacceptable costs on the third-party employees.<sup>54</sup> So this legal rule is grounded in both the Establishment Clause and the Free Exercise Clause.

The principal difficulty with the Court’s landmark decision in *Hobby Lobby* is that it did not do enough to protect the company’s 13,000 employees and their dependents.<sup>55</sup> Although Justice Alito’s opinion did note that Hobby Lobby’s employees *could* be made whole by the

47. For general overviews of this doctrine, see *Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act: Hearing Before the Subcomm. On the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 36-46 (2015) (testimony of Nelson Tebbe, Prof. of Law, Brooklyn Law Sch.); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFR Act Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <http://perma.cc/A4ZTEW6S>.

48. See generally *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Cutter v. Wilkinson*, 544 U.S. 709 (2004).

49. *Caldor*, 472 U.S. at 710–11.

50. *Id.* at 710 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

51. See, e.g., *Cutter*, 544 U.S. at 720 (“Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) . . .”).

52. See *United States v. Lee*, 455 U.S. 252, 258–61 (1982).

53. *Id.* at 261.

54. *Id.* (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”).

55. See generally *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2765 (2014).

government, and although the Court arguably reaffirmed the validity of the principle against harming others, it did not *condition* relief to the company on avoidance of harm to its employees.<sup>56</sup> And in fact, the company's employees were harmed.<sup>57</sup> They went without coverage for about a year because the Obama Administration took that long to implement a solution.<sup>58</sup> During that time, Hobby Lobby's employees likely suffered harm that was irreparable, including unintended pregnancies.<sup>59</sup> Not only employees at Hobby Lobby itself but also workers for companies that denied contraception coverage in reliance on the decision were presumably without contraception coverage.

Therefore, *Hobby Lobby* itself should come to be seen as an example of a decision that is unwarranted. Others, including the Justices in the majority, have focused on other aspects of the decision, but that does not mean that ignoring or impairing the principle against harming others is justified. Moreover, jettisoning the rule against third-party harms has worrisome ramifications for coming fights over reproductive freedom and LGBT equality.<sup>60</sup> And, this is true not merely as a matter of politics or pragmatics but as a matter of principle.

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56. Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 390–391 nn. 128–129 (2015).

57. Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation*, BALKINIZATION (Oct. 16, 2014), <https://perma.cc/TW7V-RQ5W>; Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Hobby Lobby's Bitter Anniversary*, BALKINIZATION (June 30, 2015), <https://perma.cc/GRV9-5SEE>.

58. For the solution that was eventually implemented, see *Coverage of Certain Preventative Services Under the Affordable Care Act*, 80 Fed. Reg. 41318 (July 14, 2015).

59. See *Notre Dame v. Burwell*, 786 F.3d 606, 607–08 (7th Cir. 2015) (detailing the health benefits to women of inexpensive contraception coverage, including the avoidance of unintended pregnancies, which are associated with other health problems and reduced participation in economic, social, and political life); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 257–64 (D.C. Cir. 2014) (same).

60. Consider too the heated conflict between marriage equality and traditional religion. After *Obergefell*, claims for exemptions for religious traditionalists are affecting numerous areas of law and policy. People seeking religion exemptions include wedding vendors who object to serving same-sex couples, adoption agencies affiliated with churches, employers who want to deny benefits to employees married to someone of the same sex, and even marriage license clerks and judges who refuse to serve gay and lesbian couples. Assessing these claims is a perfect test for coherence approaches because advocates on both sides analogize to existing exemption regimes. Lawyers for the religious actors argue that their clients are similar to people who are conscientiously opposed to abortion and certain other medical procedures affecting female reproduction. Such objectors often receive comparatively strong protection under laws known as refusal clauses or conscience clauses. Lawyers for same-sex couples, on the other hand, compare marriage equality to civil rights for racial minorities. There, religion exemptions have been exceedingly narrow. So, whether exemptions should be awarded depends, in part, on whether they resemble refusal clauses or civil rights guarantees. See Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).

Of course, some will disagree with my reading of the case. But that is not a debilitating problem for the approach. It only means that we should now try to convince one another that the other position ignores important principles or cases or is otherwise unwarranted. It means we should engage in reasoned moral debate. Because more than one position can be supported, reasonable disagreement will be a permanent feature of that debate.<sup>61</sup> And, that is exactly what is happening with regard to *Hobby Lobby* and its many implications for religious freedom law. But, the permanency of disagreement does not mean that reasonable justification is impossible.

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In conclusion, I would like to briefly revisit the interaction of skepticism with contemporary political dynamics that I described at the outset. Constitutional actors should resist the argument that religious freedom law is necessarily unprincipled and they should resist the argument that irrationality in the field provides a reason why it should be left to political institutions and to political arguments even outside those institutions. Nothing about the method I have sketched here guarantees outcomes that favor one side or another, but it preserves the possibility for discussions of constitutional principle at a time when conflicts between religious freedom and equal citizenship have reached a new level of intensity.

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61. Cf. Micah Schwartzman, *The Completeness of Public Reason*, 3 POL. PHIL. & ECON. 191, 192–93 (2004) (following Gerald Gaus in distinguishing between “indeterminacy,” which is avoidable for particular individuals, and “inconclusiveness,” which results from rational disagreement among individuals and is “a permanent feature of liberal politics”).



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