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# God and Man in the Yale Dormitories

Michael C. Dorf Cornell Law School, michaeldorf@cornell.edu

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# ESSA Y

#### GOD AND MAN IN THE YALE DORMITORIES

Michael C. Dorf\*

# I. THE CONSTITUTIONALIZATION OF AMERICAN POLITICAL REASONING

RELATIVELY early in American constitutional history, Alexis de Tocqueville observed that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." The conventional view counts this fact as a vice of American political life, because relegating social questions to the courts purportedly saps the vitality of popular deliberation. One might challenge the conventional wisdom by noting something like the converse of Tocqueville's observation. Legal questions, especially constitutional ones, tend to catalyze and then shape public debate about social questions. For example, the Supreme Court's recent consideration of the constitutionality of laws prohibiting physician-assisted suicide<sup>3</sup> moved a simmering public discussion to the front burner of American politics. In favor of this

<sup>\*</sup>Professor of Law, Columbia University. Versions of this Essay were presented at the 1997 Georgetown Conference on the Constitution and Civil Society/The Constitution of Civil Society and at a Hofstra University School of Law faculty lunch. Sherry F. Colb, George Fletcher, Kent Greenawalt, Lance Liebman, Andrzej Rapaczynski, Laurence Tribe, and Jeremy Waldron also provided very helpful comments.

<sup>&</sup>lt;sup>1</sup> 1 Alexis de Tocqueville, Democracy in America 280 (Phillips Bradley ed., Knopf 1945) (1835).

<sup>&</sup>lt;sup>2</sup> See, e.g., Mary Ann Glendon, Abortion and Divorce in Western Law 24-25, 33-39, 45 (1987); Learned Hand, The Spirit of Liberty, *in* The Spirit of Liberty: The Papers and Addresses of Learned Hand 189-90 (Irving Dillard ed., 3d ed. 1960); Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review 1-5 (1989).

<sup>&</sup>lt;sup>3</sup> See Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (rejecting a due process challenge to Washington's prohibition); Vacco v. Quill, 117 S. Ct. 2293 (1997) (rejecting an equal protection challenge to New York's prohibition).

<sup>&</sup>lt;sup>4</sup>The phenomenon identified occurs whether the Court denies recognition to an asserted right, as it did with physician-assisted suicide, or recognizes an asserted right, as it did with abortion. See Roe v. Wade, 410 U.S. 113 (1973).

counterview, Ronald Dworkin contends that American courts, as forums of principle, render debate about divisive social issues deeper than it is in other Western democracies.<sup>5</sup>

Dworkin is surely right when he notes that constitutionalization rarely ends public debate, even or perhaps especially when basic rights are concerned. Yet the relation between legal/constitutional debate and debate about broader social questions is more complicated than either the conventional wisdom or Dworkin's counterview indicates. For even if constitutionalization sometimes invigorates public debate, it does so using the categories of constitutional law, which are not appropriate in all settings.

The basic difficulty is that constitutional law is (and in my view ought to be) "thinner" than moral and political discourse generally. According to the liberal tradition that informs so much of our contemporary jurisprudence of constitutional rights, the state must be neutral with respect to competing comprehensive conceptions of the good. One sees something very much like that Rawlsian formulation throughout the Supreme Court's rights decisions, but especially in cases involving speech, religion, or both. Whether neutrality is a desirable or even coherent aspiration of constitutional law is a much mooted question that I shall not address here.

<sup>&</sup>lt;sup>5</sup> See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 30-31, 343-47 (1996). I recently expressed mild skepticism about Dworkin's claim. See Michael C. Dorf, Truth, Justice, and the American Constitution, 97 Colum. L. Rev. 133, 177 (1997).

<sup>&</sup>lt;sup>6</sup> See Dworkin, supra note 5, at 345.

<sup>&</sup>lt;sup>7</sup> See generally John Rawls, A Theory of Justice (1971) (defending a liberal social order through a hypothetical social contract). Rawls distinguishes between full, or thick, and thin conceptions of justice. See id. at 395-99.

<sup>\*</sup>The classic statement is Justice Jackson's, speaking for the Court: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion..." West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); see also Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (invoking the concept of "neutrality" with respect to speech or religion seventeen times in the course of invalidating a state university's decision not to fund a religious student newspaper).

<sup>&</sup>lt;sup>9</sup> See, e.g., Patricia J. Williams, The Alchemy of Race and Rights 102-03 (1991); Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L.J. 1373, 1377-78 (1986). For an interesting exchange about the political consequences and historical context of the critique of neutrality, compare Suzanna Sherry, All the Supreme Court Really Needs to Know It Learned from the Warren Court, 50 Vand. L. Rev. 459 (1997) (arguing that those seeking substantive neutrality praise

For even if one assumes that constitutional law can and should aspire to neutrality between competing conceptions of the good, it hardly follows that other actors in other settings ought to do so to the same degree.<sup>10</sup>

In most settings, this point will be obvious enough. For example, few thinking persons who oppose abortion on moral grounds will infer from Roe v. Wade<sup>11</sup> and its progeny that their moral views are mistaken. They understand that they are entitled to act upon precisely the sort of comprehensive moral views that, according to the Court, constitutional law sometimes forbids the government from acting upon. To be sure, there will be those who, for political or other ends, deliberately conflate judicially mandated government neutrality with respect to some practice with judicial approval (or disapproval) of that practice; but then any view can be distorted in a variety of ways.

If constitutional doctrine need not significantly affect moral and political reasoning in settings in which comprehensive moral views play a large and open role, might constitutional doctrine nevertheless have a significant impact on decisionmaking by institutions that are themselves liberal in the sense that constitutional law is? For example, it is tempting to think that even though the First Amendment does not apply to private actors, private universities ought to adopt First Amendment principles as a matter of university policy.<sup>12</sup> The principle of free speech, on such a view, is as much a principle of a liberal education as it is a principle of a liberal democratic society, and thus a jurisprudence developed in the latter context ought to have something to say about the former.

There is much truth in this view. However, in these pages, I want to suggest that the categories of constitutional thought must be used with great care when exported to other contexts, even

the Warren Court and criticize the current Court without recognizing that both Courts embraced formal neutrality), with Barry Friedman, Neutral Principles: A Retrospective, 50 Vand. L. Rev. 503 (1997) (responding that those who praised the Warren Court valued the substantive results, not formal neutrality).

<sup>&</sup>lt;sup>10</sup> Rawls himself made this point at the outset of his project. See Rawls, supra note 7, at 8.

<sup>&</sup>quot; 410 U.S. 113 (1973).

<sup>&</sup>lt;sup>12</sup> See Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228, 230 n.3 (Ct. App. 1985) (upholding the dismissal of a faculty member while noting that the Stanford Faculty Advisory Board voluntarily committed the university to the First Amendment principles that would be applicable to a state school).

highly liberal contexts like the private nonsectarian university, which I take as a paradigmatic liberal community. I would point to at least one important difference between the government as regulator and a liberal private university. The university is a voluntary association, and while this fact hardly justifies its setting policies on a take-them-or-leave-them basis—what could be less liberal?—it does mean that the private university may legitimately affirm a thicker version of liberalism than is appropriate for a government that must remain neutral with respect to competing conceptions of the good. Under a thick or comprehensive liberalism, tolerance, pluralism, and mutual respect are not merely the background conditions for social cooperation; they are affirmative goods in themselves. To the extent that "[a] thick theory... requires substantive standards for what it is to live well," these liberal values provide the standards. A voluntarily constituted institution committed to thick liberalism may take some coercive measures to ensure that members of that institution do not lead lives characterized by intolerance or disrespect for other members.

In the free speech area, for example, current constitutional doctrine affords regulations of hate-speech no exception to the rule of content-neutrality. Yet even if we think that this approach reflects an appropriately thin conception of liberalism, we might nonetheless have doubts about applying it to speech codes at more thickly liberal institutions like private universities. I shall examine the contrast between thick and thin liberalism in the closely related context of free exercise of religion, for religion, even more than speech, poses the paradox of how to affirm liberal values for the benefit of those who reject liberalism. <sup>16</sup>

<sup>&</sup>lt;sup>13</sup> Thomas Morawetz, Persons Without History: Liberal Theory and Human Experience, 66 B.U. L. Rev. 1013, 1020 (1986).

<sup>&</sup>lt;sup>14</sup> See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

<sup>&</sup>lt;sup>15</sup> The doctrine would need to be significantly modified to take account of the different institutional context. For a concise statement of a view I find attractive, see Cynthia L. Estlund, Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment, 75 Tex. L. Rev. 687, 772-75 (1997).

<sup>&</sup>lt;sup>16</sup> See Stanley Fish, Mission Impossible: Settling the Just Bounds Between Church and State, 97 Colum. L. Rev. 2255, 2332 (1997) (arguing that the conflict is irreconcilable); Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581, 584 (1993) (arguing that the refusal to accommodate fundamentalist intolerance by eliminating tolerance is itself intolerance).

#### II. THE YALE FOUR

Unless they are married or over 21 years old, freshmen and sophomores at Yale College must live in the dormitories.<sup>17</sup> A group of Orthodox Jewish Yale students object to the policy.<sup>18</sup> They find the climate of lax sexual morality that prevails in the dormitories to be inconsistent with their religious beliefs, and prefer to live off-campus.<sup>19</sup> Yale refuses to make an exception to its housing policy for these students, who have styled themselves the "Yale Four."<sup>20</sup> Thus far, a negotiated resolution has not been forthcoming. The Yale Four filed a lawsuit,<sup>21</sup> which the district judge dismissed; the students plan to appeal.<sup>22</sup>

For reasons that will become apparent, I believe that the district court ruling will be upheld on appeal. However, my primary interest is not the legal question as such, but the question whether the familiar categories of legal and constitutional thought help us resolve the policy question: What should Yale College do? I shall, therefore, concoct a version of the Yale Four controversy that presents a difficult normative question, and then examine whether the available legal tools are adequate to the task of answering it.

The actual facts of the case raise two interesting, but for my purposes, distracting, issues. First, in one sense the case is only about money. Yale College does not actually insist that the students live in the dormitories—just that they pay the bill for the dormitory rooms.<sup>23</sup> The College justifies nonenforcement on the ground that directly enforcing the residence policy would unduly intrude on

<sup>&</sup>lt;sup>17</sup> See William Glaberson, Five Orthodox Jews Spur Moral Debate over Housing Rules at Yale, N.Y. Times, Sept. 7, 1997, at 45.

<sup>18</sup> See id.

<sup>19</sup> See id.

<sup>&</sup>lt;sup>20</sup> The original group included five members, styling itself "the Yale Five." Devon Spurgeon, 5 Jewish Students Want Release from Yale Dorms, Wash. Post, Sept. 29, 1997, at A8. Before filing suit, one of the students married, thus becoming exempt from the housing requirement on that basis. See id.

<sup>&</sup>lt;sup>21</sup> See Hack v. President & Fellows of Yale College, No. 3:97CV02212 (D. Conn. filed Oct. 15, 1997); Nicole Itano, Lawsuit Draws Little Support from Student Body, Yale Daily News Online, Oct. 31, 1997 (visited May 23, 1998) <a href="http://www.yale.edu/ydn/paper/10.31.97/t-2support.html">http://www.yale.edu/ydn/paper/10.31.97/t-2support.html</a>.

<sup>&</sup>lt;sup>2</sup> See Judge Dismisses Jewish Students' Lawsuit on Yale Housing Policy, Wash. Post, Aug. 9, 1998, at A5.

<sup>&</sup>lt;sup>23</sup> See Glaberson, supra note 17.

students' privacy.<sup>24</sup> Yale does have a generally valid interest in respecting student privacy in this way, but the privacy interest does not seem to be implicated where, as here, students openly declare that they are not living in the dormitories. Yale's willingness to accept the students' money regardless of where they actually live tends to undermine Yale's claim that the residence requirement serves important educational, as opposed to financial, objectives. On the other hand, the fact that the students can buy their way out of the residence requirement also diminishes the degree to which the Yale policy infringes upon their religious liberty. Let us therefore assume that Yale actually insists that the students occupy the dormitory rooms (and that enforcement as to these students raises no significant issues of privacy or selective enforcement).

Second, the nature of the Yale Four's religious objection is somewhat murky. As I understand it, Orthodox Jewish law imposes sexual modesty obligations and forbids premarital sexual contact as well as other forms of physical contact between men and women.<sup>25</sup> It is unclear how the dormitory residence requirement violates any of these obligations. There exist Yale dormitory rooms that are sex segregated by floor, and Yale College has expressed willingness to put in place policies that ensure that bathrooms are sex segregated while used by the Orthodox students.<sup>26</sup> Thus, the risk of unwanted physical contact seems minimal. It is true that the Orthodox students might see their classmates in states of immodest dress, but that is also true outside of the dormitories. Perhaps there is a greater risk of accidental visual encounters with the partners of sexually active roommates, although here too, one can easily imagine that roommates would take simple measures, such as closing bedroom doors or posting warnings, to avoid this risk. The principal objection of the Orthodox students appears to be that they do

<sup>&</sup>lt;sup>24</sup> See Spurgeon, supra note 20.

<sup>&</sup>lt;sup>25</sup> See Yitzhak Buxbaum, Jewish Spiritual Practices 590 (1990) (describing obligations designed "to stop the force of the sexual urge before it gathers strength," including "avoiding contact with members of the opposite sex, and avoiding things that arouse sexual desires and thoughts"). The injunctions relate to temptation, rather than association for its own sake. Thus a debate among Jewish authorities about whether it is permissible to sleep with another man focuses on the likelihood of homosexual acts actually occurring. See Basil F. Herring, Jewish Ethics and Halakhah for Our Time: Sources and Commentary 189-92 (1984).

<sup>&</sup>lt;sup>26</sup> See Glaberson, supra note 17; Itano, supra note 21.

not want to condone the "anything goes" lifestyle of their class-mates.<sup>27</sup> That objection—while clearly related to the religious belief system of the Orthodox students—is not a religious objection in the strict sense. Thus, to simplify matters, I shall assume that the Orthodox students are bound by a religious injunction of the form, "Thou shalt not share living space with persons engaged in premarital sex."<sup>28</sup>

Even with the above counterfactual assumptions in place, the case seems like an easy legal victory for Yale under federal law. First, although Yale receives considerable government funds and the state of Connecticut plays some formal role in Yale's governance, Yale probably is not a state actor. Second, the essence of the Yale Four's complaint is that Yale fails to grant them a religious exemption from its general policy. Under current law, even if Yale were deemed to be an organ of the state, its conduct would not give rise to a constitutional claim. But the constitutional law on this point is, to say the least, in flux, and therefore worth examining more closely.

### III. THE CONSTITUTIONAL LANDSCAPE

From the 1960s through 1990, Supreme Court doctrine purported to say that a generally applicable law would be subject to strict scrutiny if it imposed a substantial burden on religious freedom.<sup>32</sup> (I say purported because the doctrine had important exceptions and there are real questions as to whether, even absent one of the exceptions, the test meant what it said.<sup>33</sup>) In 1990, in *Employment Division v. Smith*,<sup>34</sup> the Court distinguished most of the earlier

<sup>&</sup>lt;sup>27</sup> See Elisha Dov Hack, College Life vs. My Moral Code, N.Y. Times, Sept. 9, 1997, at A27.

<sup>&</sup>lt;sup>28</sup> I relax the assumption below, infra Part V.

<sup>&</sup>lt;sup>29</sup> See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 840-43 (1982).

<sup>39</sup> Plaintiffs' Amended Complaint at ¶ 1, Hack v. President & Fellows of Yale College, No. 3:97CV02212 (D. Conn. filed Oct. 15, 1997) (on file with the Virginia Law Review Association).

<sup>31</sup> See infra Part III.

<sup>32</sup> See Sherbert v. Verner, 374 U.S. 398, 403-07 (1963).

<sup>&</sup>lt;sup>33</sup> See Christopher L. Eisgruber & Lawrence G. Sager, Congressional Power and Religious Liberty after *City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 98-101; Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct. Rev. 323, 352-53.

<sup>34 494</sup> U.S. 872 (1990).

cases and held that the Free Exercise Clause usually does not require exemptions from generally applicable laws.<sup>35</sup> Congress responded in 1993 with the Religious Freedom Restoration Act<sup>36</sup> ("RFRA"), imposing, as a matter of statutory law, strict scrutiny of all laws substantially burdening free exercise.<sup>37</sup> Then in 1997, in City of Boerne v. Flores,<sup>38</sup> the Court held RFRA invalid (at least as applied to the states) as beyond Congress's power under Section Five of the Fourteenth Amendment.<sup>39</sup> However, several dissenting Justices stated that they were eager to reexamine Smith,<sup>40</sup> raising the possibility that within a decade, federal law will have gone from purportedly requiring religious exemptions to not requiring them, back to requiring them, then back again to not requiring them, and finally to requiring them again.

I have argued elsewhere against the decision in *Smith* and in favor of a RFRA-type regime as a matter of constitutional law.<sup>41</sup> Rather than restate the argument here, I will offer a brief response to what I take to be the strongest argument in favor of the *Smith* approach. In *Smith* and its nineteenth century precursor, *Reynolds* v. *United States*,<sup>42</sup> the Court disavowed a program of religious exemptions on the ground that to grant such exemptions would allow every person "to become a law unto himself." This fear seems overstated for at least four reasons.

First, many laws continue to operate satisfactorily even if exemptions are granted. For example, over two decades of experience prior to *Smith* (including an opera-buffa version of *Smith* itself<sup>44</sup>)

<sup>35</sup> See id. at 878-82.

<sup>&</sup>lt;sup>26</sup> Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (1994)). <sup>27</sup> 42 U.S.C. § 2000bb-1(a) (1994).

<sup>38 117</sup> S. Ct. 2157 (1997).

<sup>39</sup> See id. at 2172.

<sup>&</sup>lt;sup>40</sup> See id. at 2176-85 (O'Connor, J., dissenting, joined in large part by Breyer, J., dissenting); id. at 2185-86 (Souter, J., dissenting).

<sup>&</sup>lt;sup>41</sup> See Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 93-95 (1991); Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1210-19 (1996).

<sup>42 98</sup> U.S. 145 (1878).

<sup>43</sup> Smith, 494 U.S. at 885 (quoting Reynolds, 98 U.S. at 167).

<sup>&</sup>quot;See United States v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968) (rejecting defendant's claim that she was a member of the Neo-American Church—headed by Chief Boo Hoo and having the motto, "Victory over Horseshit"—and thus required by her faith to ingest as well as distribute marijuana and LSD, because defendant failed to present "evidence of a belief in a supreme being, a religious discipline, a

belie any serious worry about litigants flooding the courts with spurious religious freedom challenges to the drug laws.

Second, many of the floats in the *Smith* parade of horribles<sup>45</sup> can be readily deflated by the compelling interest test. Must we allow consensual human sacrifice as an exception to the homicide law? The short answer is of course not. As I discuss below, the compelling interest test may be problematic in principle, but in practice there is no plausible alternative that is more sympathetic to religious freedom claims, and applying the test to the *reductio ad absurdum* cases readily yields the proper result.

Third, even in some hard cases, the compelling interest test has the salutary effect of focusing political attention on oppressive but constitutional laws. Consider Reynolds, which involved a claimed religious exemption from a polygamy prohibition.<sup>46</sup> What interest do polygamy prohibitions serve? Those of us who have argued for sexual freedom or sexual orientation equality have often encountered the objection that if our claim were to prevail then polygamy laws would also be unconstitutional, a result assumed to be selfevidently absurd. In response, we typically attempt to distinguish polygamy by arguing that it is inherently coercive or that its social meaning is the subjugation of women (or perhaps men in the case of polyandry). But before resorting to arguments from false consciousness to distinguish polygamy, we might pause to wonder why those on the other side of the sexual liberty or equality question invoke the practice.<sup>47</sup> I suspect that they cite polygamy, consensual nonprocreative adult sibling incest, and other taboos precisely because they know that laws prohibiting these practices in fact serve no valid purpose, and they also know that our leading constitutional organs will be unwilling to say so. RFRA-type regimes force the government to articulate the interests our laws serve, at least in the religion context. If the most that can be said on behalf of a law is that it furthers an interest in conventional morality, the law would likely fail RFRA-type scrutiny. To be sure, the law would still be valid in other contexts, because an interest in morality,

ritual, or tenets to guide one's daily existence," thus making it "clear that the desire to use drugs and to enjoy drugs for their own sake" was the organizing principle of the Church).

<sup>45</sup> See Smith, 494 U.S. at 888-89.

<sup>45</sup> Reynolds, 98 U.S. at 161.

<sup>&</sup>lt;sup>47</sup> See Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

simpliciter, is generally valid as a matter of constitutional law.<sup>48</sup> As a matter of politics, however, something like the harm principle (the requirement that a law be designed to prevent harm to persons other than the actor)<sup>49</sup> has broad public appeal, such that public acknowledgment that a law serves no interest other than enforcing a particular moral vision may undermine political support for the law—a desirable end, in my view.

Fourth, granting religious exemptions from generally applicable laws does not obligate the state to grant exemptions on other, nonreligious grounds. To begin with an easy case, the desire to attend a football game hardly warrants the same degree of solicitude as the religious obligation to avoid laboring on the Sabbath. There are, to be sure, harder cases: a (nonreligious) moral obligation to care for a sick relative or not to participate in an unjust war, for example. If one were designing a constitution, one might well conclude that exemptions ought to be granted in such circumstances under a general principle of freedom of conscience. But that does not mean that there is no principled basis for distinguishing religious from nonreligious claims. Religious obligations are obligations to submit to the norms of what Robert Cover called a nomic community—a community that is a source of norms for its members.<sup>51</sup> On this view, the religion clauses of the First Amendment recognize the dominion of another sovereign.<sup>52</sup> This dimension of plural sovereignty is absent in the case of claims based on an individual's moral or other nonreligious grounds for objecting to a generally applicable law.<sup>53</sup>

<sup>48</sup> See Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991).

<sup>&</sup>lt;sup>49</sup> For a defense of the harm principle, see 4 Joel Feinberg, The Moral Limits of the Criminal Law: Harmless Wrongdoing at ix-xx, 318-38 (1988).

<sup>&</sup>lt;sup>50</sup> In City of Boerne, only Justice Stevens understood RFRA to be constitutionally problematic on the ground that it privileged religious claims. See City of Boerne, 117 S. Ct. at 2172 (Stevens, J., concurring).

<sup>&</sup>lt;sup>51</sup> See Robert M. Cover, The Supreme Court, 1982 Term, Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 4-5, 24-33 (1983).

<sup>&</sup>lt;sup>52</sup> See id. at 32 n.94. I do not wish to imply that the nomic character of religion is the only plausible ground for supporting religious liberty, while giving less protection for nonreligious moral autonomy. One might, for example, attempt to justify a special place for religious liberty on the ground that religion is a good thing. See John H. Garvey, An Anti-Liberal Argument for Religious Freedom, 7 J. Contemp. Legal Issues 275 (1996).

<sup>&</sup>lt;sup>53</sup> But cf. Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L.

Hence, under what I consider the correct, RFRA-type, approach, if Yale were a state actor, the Free Exercise Clause would require that the application of Yale's dormitory residence requirement to the Yale Four satisfy strict scrutiny. As I argue below, it would likely fail this test. Because Yale is probably not a state actor, however, the Yale Four's constitutional claim would fail, even under RFRA's relatively expansive view of the Free Exercise Clause. Given my view that the best understanding of the Free Exercise Clause would require a state university to grant the Yale Four an exemption, I might be expected to favor that result as a matter of policy. In fact I do, but I consider the question much more difficult than the analogous constitutional question that would face a state institution.

#### IV. A LIBERAL EDUCATION

If one were deeply committed to the values of a liberal education, on what grounds might one justify denying the Yale Four an exemption? We can immediately dispose of a very bad, albeit quite common argument against an exemption. The bad argument is that the students knew about Yale's policy when they applied, they could have applied elsewhere, and thus they are estopped from complaining now. Unless tied to some account of the educational objective of the dormitory residence requirement, this argument proves far too much. Suppose Yale scheduled examinations on Saturdays and the Orthodox students, in order to observe the

Rev. 1245, 1291-97 (1994) (arguing for treating religious and other claims of conscience equally). Eisgruber and Sager make a powerful argument for the proposition that, viewed in individual terms, some nonreligious claims for exemptions are at least as strong as religious claims. See id. I too would probably favor accommodations for such claims on the basis of an unenumerated or penumbral right of freedom of conscience, but in doing so I would recognize that such a right lacks the additional, sovereignty-based support that is present in the context of claims of religious freedom.

Solution of the Sherman Act and that Yale violates the plaintiffs' constitutional rights by forcing them to witness sexual offenses and somehow blocking their reporting of these crimes, may well be sanctionable as frivolous. Plaintiffs' Amended Complaint at ¶¶ 7, 82-83, 133-38, Hack v. President & Fellows of Yale College, No. 3:97CV02212 (D. Conn. filed Oct. 15, 1997) (on file with the Virginia Law Review Association).

55 The district court relied on this argument in dismissing the Yale Four's case. See Judge Dismisses Jewish Students' Lawsuit on Yale Housing Policy, supra note 22, at A5.

Jewish Sabbath, wanted to be able to take theirs on another day. Would the fact that there are other fine colleges that do not schedule Saturday exams by itself justify Yale's refusal to make an exception? It seems fairly clear that the answer is no, unless the Yale administration has some good reason for thinking that granting exemptions (or even changing the schedule for everyone) would undermine some important aspect of Yale's mission. If Yale's policy amounts to a gratuitous infringement of the students' religious rights, the students should not be taken to have waived their rights simply by enrolling in Yale College.

Thus Yale should have to proffer some legitimate educational objective for refusing to grant the Yale Four an exemption from the policy. As an initial step, we ought to understand what purpose the policy serves in general. The Yale College Administration believes that students learn as much or more from one another in their dormitories as they do from their professors in class.<sup>56</sup> Indeed, Yale does not merely require residence in dormitories. but in residential colleges, centers of academic and social life designed to involve students in an intimate community without isolating them from the university as a whole. 57 Yale seeks an intellectually, geographically, culturally, ethnically, racially, and religiously diverse student body in no small part because the ability to respect and understand persons of very different backgrounds is an essential component of a modern liberal education. To opt out of the dormitory residence requirement is to opt out of a Yale education, because the principles Yale seeks to foster can be grasped only by living them.

These are powerful ideals, although, if the controversy were to arise at a state institution such as the University of Virginia, and were RFRA or its equivalent still controlling, the ideals would not be sufficient to override the countervailing religious claim. The enduring significance of Meyer v. Nebraska, Pierce v. Society of

≈ 262 U.S. 390 (1923).

<sup>&</sup>lt;sup>56</sup> See Samuel G. Freedman, Yeshivish at Yale, N.Y. Times Mag., May 24, 1998, at 32, 34 (quoting Yale President Richard Levin as saying that "we believe the undergraduate experience is more than just the classroom).

<sup>&</sup>lt;sup>57</sup> See Josh Benton et al., Yale's Residential Colleges are More than Random Dorms—They're a Way of Life, Yale Herald Online, Summer 1997 (visited Mar. 29, 1998) <a href="http://www.yale.edu/herald/archive/xxiii/7.8.97/frosh97/rescol.html">http://www.yale.edu/herald/archive/xxiii/7.8.97/frosh97/rescol.html</a>.

Sisters, <sup>59</sup> and, Smith notwithstanding, Wisconsin v. Yoder, <sup>60</sup> is that the state may not seek to standardize its citizens, especially not if they have religious objections to the particular form of standardization. <sup>61</sup> Each of these cases involved children, as to whom the state has an arguably greater interest in inculcating citizenship values. A fortiori, the state cannot (outside the military) insist on standardization as the price of a quality college education. Under my view of the Free Exercise Clause, the "UVA Four" ought to prevail.

Does the fact that a state institution should—under my view of the Free Exercise Clause—be required to grant religious exemptions from a dormitory residence mean that, as a matter of internal governance, Yale should grant exemptions? That answer does not obviously follow, unless we believe that the state action doctrine is a mere technical requirement of a legal claim. In my view, however, the state action doctrine rests at least partly on the claim that some objectives that are permissible or even laudable for private institutions are forbidden if undertaken by the government.

There is a critical difference between Yale and a state university (or more broadly, the state in all of its capacities). The education at institutions like Yale is appropriately thicker—i.e., contains more elements of a comprehensive moral view—than any official view-point that the state may legitimately foster through coercive means. As a private, voluntarily constituted community of scholars dedicated to principles of mutual respect amidst diversity, Yale does not present the grim specter of a latter-day Sparta. This is not to

<sup>59 268</sup> U.S. 510 (1925).

 $<sup>^{\</sup>infty}406$  U.S. 205 (1972). In *Smith* itself, the Court unconvincingly distinguished *Yoder* on the ground that the case "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with... the right of parents... to direct the education of their children." *Smith*, 494 U.S. at 881.

<sup>&</sup>lt;sup>61</sup> See *Yoder*, 406 U.S. at 232-34; *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 401-02; see also Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 785-87 (1989) (explaining *Meyer* and *Pierce* as standing for an anti-totalitarian principle).

<sup>62</sup> To be sure, a dormitory residence requirement not subject to exemptions at the University of Virginia or some other prestigious public university would not necessarily present such a specter either. Indeed, given the large governmental role in funding nominally private universities and the role of private money (through tuition, donations, and endowment) in funding nominally public ones, the line between public and private universities may often be difficult to draw. However, once a court concludes that an institution falls on the public side of the line, First Amendment norms apply. In some ways, the university context gives those norms added force. Cf. Keyishian v. Board of Regents, 385 U.S. 589, 592, 603-10 (1967) (holding

say that Yale's argument for collective life is convincing, only that it should not be ruled out as bad policy simply because we would want to deem the same policy unconstitutional if undertaken by a state institution.

#### V. RESOLUTION

Yale's refusal to grant the Yale Four an exemption serves two complementary purposes. First, Yale might worry on behalf of itself that granting religious exemptions would establish a principle that, taken to its logical conclusion, would lead to the granting of other exemptions, eventually undermining the coherence of Yale's conception of itself as a pluralistic community. Second, Yale might worry on behalf of the Yale Four themselves that the exemption would so dilute the experience of a Yale education as not to warrant the name. Both sets of concerns are legitimate, but in my view, neither quite justifies the failure to grant an exemption.

Whether Yale's fear of a slippery slope is justified is partly a question of numbers. One can readily imagine that some very religious Christians and Muslims would seek exemptions on grounds similar to those sought by the Yale Four, and if they did, surely Yale would have to treat them all the same. Nonetheless, it is difficult to believe that more than a fairly small number of the students who choose to attend Yale would in fact seek religious exemptions. Columbia College, for example, enrolls many more Orthodox Jewish students than Yale College and also has a dormitory residence requirement. Columbia's requirement, however, is subject to religious exemptions; yet very few Orthodox students actually seek exemptions.<sup>63</sup> In any event, should Yale become flooded with applications for religious exemptions from its dormitory residence

unconstitutional, on overbreadth and vagueness grounds, the application of a state prohibition on "subversive" employees to the faculty at a state university). In other ways, the educational mission may afford a state university more autonomy than would be appropriate for other state actors. Cf. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978) (treating the university's First Amendment interest in diversity of viewpoints as compelling for equal protection purposes). In any event, constitutional norms do not apply to private actors, and, as I argue in the remainder of this essay, that is appropriate, notwithstanding that Yale and UVA obviously have much more in common than either has in common with, say, a two-year technical college, whether the latter is nominally public or private.

<sup>63</sup> See Interview with Orthodox Rabbi Charles Sheer, Jewish Chaplain of Columbia University, in New York, N.Y. (Nov. 7, 1997).

policy, it would at that point become appropriate and possible to consider denying exemptions.

Yale might also worry that granting religious exemptions would open the door to exemptions for students who wish to self-segregate on other grounds. For example, Dartmouth College gives students the option of "affinity housing," special dormitories for those interested in participating in various cultures. Although one could justify Dartmouth's approach to pluralism on liberal grounds, there are also strong liberal arguments for the Yale approach. According to one Dartmouth student, affinity housing has "facilitated... separatism on campus." If one thought that granting the Yale Four a religious exemption would oblige Yale to facilitate other forms of separatism, that would count as a strong reason to deny the Yale Four an exemption. However, for the same reason that RFRA-type regimes legitimately treat religious claims as special, Yale could grant religious exemptions without incurring an obligation to grant exemptions on other, potentially more troubling, grounds.

Thus, in my view, Yale's concern that granting the Yale Four an exemption would undermine the overall character of a Yale education is not, at this time, persuasive. What about Yale's concern for the welfare of the Yale Four themselves? Quite apart from the minimal impact on the rest of the Yale community, do the Yale Four rob themselves of so much that is valuable in a Yale education as to warrant a decision by Yale to override their religious claim as a condition of membership in the Yale community? To gain insight into this question, consider a variation on Yale's policy.

Suppose that, in addition to the dormitory residence requirement, freshmen and sophomores were required to eat together in the collective dining hall. Let us suppose further that the dining hall serves non-kosher food, so that Orthodox students observing

<sup>&</sup>lt;sup>c3</sup> See Office of Residential Life, Dartmouth College, Special Residential Programs (visited Mar. 28, 1998) <a href="http://www.dartmouth.edu/~orl/affinity.html">http://www.dartmouth.edu/~orl/affinity.html</a>. Dartmouth offers separate housing arrangements for those interested in African and African-American, Asian, French, German, Italian, Portuguese, Jewish, Latino, Native American, Russian, or Spanish language and culture. See id.

<sup>&</sup>lt;sup>65</sup> Adam J. Siegel, Letter to the Editor, Folly of Separatism, N.Y. Times, Sept. 11, 1997, at A30.

kashrut are forbidden by their religious scruples from eating in the dining hall.<sup>66</sup> What sort of accommodations should Yale make?

Some very observant students would object to eating in the common dining hall at all, even if they were permitted to have kosher food prepared and served separately. In order to offer the collective prayer for grace after meals and to ensure kashrut, they might feel a need for completely separate facilities. This clash looks very much like the actual clash over the dormitory policy, at least assuming that we accept the claim that Yale's interest in fostering community through common dining is of roughly the same strength as its interest in fostering community through common housing.

There will, however, be students who observe kashrut but do not object to eating their separately prepared meals in the common dining area. Would Yale have an interest in requiring them nonetheless to eat non-kosher food as a condition of a Yale education? The argument seems far-fetched. Would it have seemed that way half a century ago, when Ivy League colleges admitted only a handful of Jews, and then only the most assimilated?<sup>67</sup>

Under a RFRA-type regime, we would attempt to resolve the actual dispute or the dining-hall variant by asking whether some compelling interest of the larger community can be achieved only by overriding the individual's religious obligation. However, the thicker liberalism of the university views the individual's end of the bargain somewhat differently. Just as we would sometimes demand accommodation by the university, we would also look for signs of accommodation by the individual. The students who are willing to eat in the common dining hall may affirmatively wish to participate in the life of the community to the maximum extent permitted by their religion, and thus we feel sympathy for their plight not only as subjects of the community norms but as members of the community. Because they seem willing to accommodate the mainstream, we feel an obligation to meet them halfway.

<sup>66</sup> In fact, "Yale allows students to use their meal plan in the kosher cafeteria of a privately financed Jewish center." Freedman, supra note 56, at 32.

<sup>&</sup>lt;sup>67</sup> For a vivid account of anti-Semitism in Dartmouth College admissions during the 1930s and 1940s, see William H. Honan, Dartmouth Reveals Anti-Semitic Past, N.Y. Times, Nov. 11, 1997, at A16 (reporting remarks of Dartmouth President James O. Freedman, who also observed that "it was the same at Harvard and Yale").

But is it fair to ask members of a religious minority to bend their religious principles? Is not the real difference between the students who want kosher food but are willing to eat it in the dining hall and those who insist on eating apart, that the two groups have different religious beliefs? I want to resist this perspective by suggesting that a feature of the constitutional law of religion distorts our analysis.

Under a RFRA-type regime, the predicate for subjecting to strict scrutiny the government's failure to grant an exemption is the finding that the claimant has a sincere religious belief. The focus is understandable. Because we do not want secular courts to make religious determinations, we do not ask them to inquire into the "truth" of religious beliefs. Sincerity, however, oversimplifies the nature of religious belief by suggesting that it is something fixed: Either the claimant has a religious belief that conflicts with a secular obligation or she does not. In fact, most individuals' religious beliefs are more complicated.

In one sense, religious liberty does not fit well within the liberal conception of the autonomous self that freely chooses its ends and means. To feel a religious obligation is to feel that one has no choice but to comply. Indeed, some critics of liberalism use the example of religious obligation to cast doubt on the liberal conception of the self. Nonetheless, our culture's strong aversion to coercing people to comply with religious obligations suggests that the right to religious freedom is at least partly a right to choose whether and how to be religious. Within a faith, individuals make choices about how religious to be. And even in the case of persons who accept the authority of some religious official, they typically choose which particular minister, imam, rabbi, priest, or doctrine to follow. (In the case of, say, the Catholic Church, which assigns

<sup>&</sup>lt;sup>65</sup> See, e.g., Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997).

<sup>&</sup>quot;See United States v. Ballard, 322 U.S. 78, 92-94 (1944) (Jackson, J., dissenting) (arguing that the question whether a person holds a particular religious belief often cannot be answered yes or no).

<sup>&</sup>lt;sup>70</sup> See Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 65 (1996).

<sup>&</sup>lt;sup>71</sup> See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) (rejecting a reading of the Free Exercise Clause that would give less protection to religious converts than to those who had adhered to the same faith since beginning employment).

<sup>&</sup>lt;sup>72</sup> See Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (finding that the fact that an individual's view of his religious obligations differs from that of other members of a sect does not disqualify the belief as religious in nature).

parish membership based on residence, individuals may choose where to live partly on this basis, or they may work within their parish to be assigned a priest who fits their community's style.) In substantial measure, religious beliefs, like other important matters of belief, are formed and re-formed in negotiation with the world.

Our legal system often attempts to ignore this fact, treating religious beliefs as simply given. Even if this is the correct approach for the law to take, the liberal private university should be permitted to take a more realistic view of religious belief—i.e., it should be permitted to view religious obligations as somewhat negotiable in the same way that other beliefs are. To be sure, negotiations ought to be conducted with the utmost respect for individuals' religious beliefs, but exposing students to new ways of thinking and living is the very essence of a liberal education, and students who wish to opt out of reexamining their beliefs, including their religious beliefs, really do seek to opt out of a liberal education.

What makes the case of the Yale Four truly difficult as a policy matter is their ambiguous relationship to the ideals of a liberal education. Recall that in order to make sense of the Yale Four's claim for a religious exemption, I hypothesized a religious prohibition on sharing living space with persons engaged in premarital sex. However, to the extent that the students' quest for an exemption actually stems from a more generalized unwillingness to treat persons they deem sinners as equal members of the Yale community, they reject an obligation of membership in that comprehensively liberal institution.

This is not to say that offensiveness ought never to be a legitimate basis for opting out of some element of a liberal education. For example, even if the principle of academic freedom entitles a professor of evolutionary biology to espouse male superiority in the classroom, it hardly follows that students majoring in biology should be required to take his class. On the whole, however, a comprehensively liberal institution should limit the occasions on which offensiveness provides an adequate basis for nonparticipation in communal life—especially when the equal status of other community members is the source of offense. Thus, if the dormitory residence requirement merely makes the Yale Four feel offended or uncomfortable, Yale would be justified in denying their exemption.

The Yale Four's objection probably combines elements of offense, discomfort, and religiosity if not strict religious obligation. Under these circumstances, it is appropriate to look for signs of accommodation and flexibility on the part of the Yale Four. Such signs exist, although they are obscured by the fact that in order to make their argument more persuasive as a legal claim, the Yale Four have chosen to portray their religious obligations as utterly nonnegotiable. Yet the fact that they seek a Yale education at all reflects a significant degree of flexibility and willingness to engage a pluralist community, as we can see by contrasting the Yale Four with some Orthodox Jewish sects that insist on virtually complete isolation.<sup>73</sup> The Yale Four's portrayal of themselves as strictly bound by religious law may be necessary to obtain relief from a court, but Yale ought to recognize that underneath the rhetoric of absolute religious obligation, these students were willing to come to Yale because they were willing to risk exposing thenselves to a liberal education. If it is at all possible to give them that education without requiring them to live in dormitories—as I believe it is— Yale would best carry out its thickly liberal mission by doing so.

### VI. STATE ACTION REDUX

My conclusion that Yale ought to exempt the Yale Four from its housing requirement appears to harmonize the result I favor as a policy matter for Yale with the result I would favor as a constitutional matter in a similar case at a state institution. But this congruence is deceptive. For although I would applaud the Supreme Court's (re-)assertion of a RFRA-type approach to claims

<sup>&</sup>lt;sup>73</sup> Consider the description of a community of Satmar Hasidim in Board of Educ. v. Grumet, 512 U.S. 687 (1994):

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers.

Id. at 691.

for religious exemptions, I would not favor legislation requiring private actors like Yale to grant religious exemptions. Recall that the Yale Four case is more difficult than the same case at a comparable state institution such as the University of Virgimia because Yale is entitled to enforce a more comprehensive, thus more controversial, conception of the good than the state may enforce. This would make application of the compelling interest test to Yale problematic—because an interest that is compelling within Yale's comprehensive liberalism might not be compelling as measured by the more dilute standards of public reason generally. Similarly, if Yale places a higher value on a particular conception of mutual respect than does the society generally, a policy that is the least restrictive means of achieving Yale's conception might be deemed overly restrictive from the broader social one.

The very sorts of reasons that underlie the validity of claims for religious autonomy against the state counsel against requiring an institution like Yale to grant religious exemptions: Private universities, like religions, are appropriately treated as nomic institutions. For government to mandate a RFRA-type regime for a nomic institution like Yale would be to deny the institution's nomic character. In short, although I believe that Yale ought to grant exemptions as a matter of its own comprehensively liberal principles, I do not believe that it ought to be required to do so as a matter of law. On the other hand, I believe that the best interpretation of the Free Exercise Clause would require a state institution to grant religious exemptions under otherwise identical circumstances.

Yet it appears perverse that I would, in principle, allow Yale greater freedom to define itself at the expense of its students than I would allow a state university. For Yale is not just any old nomic community. It is one of a handful of institutions that serve as gate-keepers for the political, economic, and social elite. Exclusion from colleges like Yale can mean exclusion from the halls of power. And inclusion at the price of religious assimilation may be the practical equivalent of exclusion for some members of religious minority groups.

We might be tempted to respond to this objection by noting that it proves too much. Large numbers of people are, as a practical matter, already excluded from the privileges that go with a Yale education by their inability to pay. Moreover, many of those who might just barely be able to afford to attend Yale through a combination of grants and loans are screened out by selection mechanisms that correlate strongly with wealth.<sup>74</sup> Yet, surely this injustice (if that is what it is), does not justify the unrelated injustice of requiring religious assimilation as the price of admission.

My position that Yale ought to have the legal right to include dormitory residence as an essential element of its community norms—even though I believe that this policy reflects a mistaken interpretation of Yale's own mission—requires me to walk a tightrope. Because Yale is not merely some nomic community on the fringes of American life, I camiot dismiss exclusion from Yale as irrelevant to American citizenship. On the other hand, Yale is not the only gatekeeper college in the country. The alternative of going to another Ivy League or comparable college may be largely irrelevant to Yale's own internal assessment of its residence policy, but that does not mean it should be irrelevant to society's assessment of whether Yale should be permitted to make the determination for itself.

The relevance of alternatives to an external assessment of the permissibility of a housing policy like Yale's suggests that alternatives might also be relevant in an assessment of what should be legally permissible for a state university system. I noted earlier that under the RFRA-type analysis I favor, a state university should be required to grant religious exemptions from a mandatory dormitory residence requirement. Suppose, however, that a single state university system includes one campus, call it "East," with a dormitory residence requirement and another campus, call it "West," without such a requirement. Is it a sufficient answer to a religious student who wishes to live off-campus while attending East that attendance at West is available? There are reasons why the answer might be no. Certainly, if there are elements of East's academic program that are unavailable at West, or are of inferior quality, or if West is a very great distance from East, attendance at West is not an adequate substitute for attendance at East.

Let us, therefore, stipulate that West is an adequate substitute for East in every way that we deem important. Might we none-

<sup>&</sup>lt;sup>74</sup> See Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953, 987-92 (1996).

theless demand that the student be permitted an exemption from East's policy? If East had an explicit rule forbidding Orthodox Jews to attend, the fact that Orthodox Jews could attend West would be unavailing. That would be a rather clear-cut case of impermissible segregation. Does it make a difference that in my hypothetical example, the segregation results from a failure to grant religious exemptions rather than an explicit religious classification?

I am uncertain how to answer this last question. I am certain, however, that, under the assumptions stated above, the government's case for denying an exemption at East is considerably stronger than its case for explicit exclusion. We might be tempted to analogize the difference to the legal distinction between de jure and de facto discrimination.<sup>75</sup> But I think this is a misleading analogy. One can be critical of the doctrinal distinction between de jure and de facto discrimination and the closely related distinction between purposeful discrimination and disparate impact.76 as I am, yet still think that perhaps the state is justified in offering West as an alternative to East. In both the de jure and the de facto segregation and discrimination cases, excluded persons claim a right to be treated the same as everyone else—to attend the same schools or to hold the same jobs-while a claim for a religious exemption is, by definition, a demand to be treated differently. In both the actual Yale case and in my hypothetical case of students who wish to attend East campus, the students seek a form of separatism. Short of abolishing the general policy entirely, there is no way to accommodate them that does not involve an alternative. The religious students can attend East while missing out on dormitory life, or they can attend West and be treated like everybody else at West, but the one thing they cannot do is attend East and be treated like everybody else at East.

Thinking about the state university version of the Yale Four drama shows that the Court was not entirely wrong in Smith.

<sup>&</sup>lt;sup>75</sup> See Milliken v. Bradley, 418 U.S. 717, 745-47 (1974) (holding that federal courts may not impose a remedy for de jure urban racial segregation on suburban school districts that were not directly responsible for that segregation, even though suburban districts were de facto segregated).

<sup>&</sup>lt;sup>76</sup> See Washington v. Davis, 426 U.S. 229, 245-48 (1976) (holding that, absent showing of purposeful discrimination, disparate racial impact does not violate equal protection).

Smith and City of Boerne correctly assume that, other things being equal, overt discrimination on the basis of religion is more pernicious than failure to grant a religious exemption from a general policy not itself directed at religion. The trouble with Smith is not its assumption that overt hostility to religion is worse than indifference to religious obligations; the trouble is Smith's assumption that indifference is invariably permissible.

#### VII. THE LIMITS OF NOMIC AUTONOMY

I began this Essay by noting how our thinking about constitutional issues shades our thinking about nongovernmental institutions that face some of the same issues. We have just seen that thinking about the nongovernmental institutions can shed light back upon the constitutional questions. But to say that analysis in these different spheres has common features is not to say it must be identical. Thus, we should be careful about imposing quasiconstitutional norms on nongovernmental nomic communities.

Indeed, even the application of straightforward prohibitions on overt discrimination to the private sphere can raise difficult questions. Title VI of the Civil Rights Act of 1964 forbids private colleges that receive federal funds from discriminating on the basis of race, color, or national origin, and the statute could easily be amended to cover religion. Moreover, although it has not exercised the power, under the Commerce Clause, Congress probably could prohibit even private colleges that do not receive federal funds from discriminating on the basis of religion or other suspect grounds. Suppose that upon losing its legal battle against admitting women, the Virginia Military Institute ("VMI") had decided

<sup>&</sup>lt;sup>77</sup> See 42 U.S.C. § 2000d (1994).

<sup>&</sup>lt;sup>78</sup> The case for the constitutionality of such a statute would be strongest if supported by congressional findings that discrimination in college admissions and other decisions have a direct and substantial effect on interstate commerce. See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). Heart of Atlanta Motel and Katzenbach would seem to be closer analogies than United States v. Lopez, 514 U.S. 549 (1995), even though Lopez nominally dealt with education. See Lopez, 514 U.S. at 551. Moreover, given the size and broad public function of most colleges, a claim that such a statute infringed on freedom of association would likely fail. See Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545-47 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984).

to "go private," foregoing state and federal funds. Assuming governmental power to prohibit sex discrimination, would it have been wise policy to exercise that power?

There is, I think, an easy answer to the question whether we ought to extend our nondiscrimination norms to all private conduct: We should not. Concern about forced association is the basis for the Fair Housing Act's exemption for some owner-occupied housing, and even those who have their doubts about that particular exemption would, I think, object to a legal norm that forbade racial or religious discrimination in the choice of, say, a spouse. 81

Of course, the hypothetical privatized VMI could not claim immunity from antidiscrimination laws on the grounds that choosing to attend VMI is identical to choosing a spouse. Instead, VMI's claim would be that the ability to constitute itself as an all-male institution is, from the perspective of VMI, essential to its nomic self-definition. To be sure, the Supreme Court rejected that claim in the equal protection context, but the Court did not—could not—view the matter from VMI's internal perspective.

What if the institution seeking an exemption from the antidiscrimination norm is itself a religious one? The closest case in the Supreme Court, Bob Jones University v. United States, involved the tax-exempt status of a religiously oriented university that prohibited interracial dating and marriage. The Court sustained the Internal Revenue Service's determination that such an institution was not "charitable" within the meaning of the Internal Revenue Code, because of the public policy against racial segregation. Suppose that Congress or a state legislature were to extend its general antidiscrimination laws to a church and not merely a religiously affiliated university. Surely the only justification for

<sup>&</sup>lt;sup>20</sup> 42 U.S.C. § 3603(b) (1994).

<sup>&</sup>lt;sup>81</sup> But cf. R. Richard Banks, The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action, 107 Yale L.J. 875, 943-47 (1998) (proposing that state-funded adoption agencies disregard adoptive parents' racial preferences).

<sup>&</sup>lt;sup>82</sup> See United States v. Virginia, 116 S. Ct. at 2279-82.

<sup>83 461</sup> U.S. 574 (1983).

<sup>84</sup> See id. at 585-602.

<sup>&</sup>lt;sup>85</sup> In *Bob Jones*, the Court found that a compelling interest in combating racial segregation in higher education justified the burden placed on the religiously affiliated university. See id. at 602-04. Note that under *Smith*, the university's claim would be

exempting a church from laws prohibiting race or sex discrimination while failing to exempt churches from, say, laws prohibiting homicide or kidnapping, would be a judgment that antidiscrimination laws are less important than prohibitions on homicide and kidnapping.<sup>86</sup>

Once again, we seem to be stuck with something like the compelling interest test. Yet whether the question is one of constitutional law, public policy, or institutional self-governance, posing the question of how to treat the minority "other" as one of compelling interests leads to the same familiar problem. Inevitably, we evaluate the relative strengths of the interests from the majority's viewpoint. But the whole point of recognizing the autonomy of the individual or the quasi-sovereignty of nomic communities is that we recognize a limitation of the jurisdictional hegemony of majority norms.

What is to be done? We are not prepared to accept everything done in the name of a nomic community's sovereignty. For example, we would not (I hope) exempt cadets at the hypothetical private VMI from criminal or civil liability for brutal batteries on the ground that this is understood as permissible hazing within the college's distinct nomos. More controversially perhaps, I am also prepared to say that some forms of inequality or subordination are sufficiently pernicious to justify the society as a whole overriding the claims of nomic communities, but even those who draw a line at physical harm must recognize that in doing so they prefer the sovereignty of the whole community to that of a subset or offshoot. And what this tells us is that although the liberalism of the whole community is thinner than the thick liberalism of an institution like Yale, it is not dimensionless. Even thin liberalism is a value system.

weaker still, as the IRS policy denies tax exempt status to all segregationist universities, without singling out religious ones. See Rev. Rul. 71-447, 1971-2 C.B. 230.

<sup>\*\*</sup>Exempting religious organizations from the prohibition on discriminating on the basis of *religion* stands on a different footing from an exemption from other antidiscrimination norms. Thus, religious organizations are exempt from Title VII's prohibition on religious discrimination in employment. See 42 U.S.C. § 2000e-1(a) (1994); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 334-40 (1987) (rejecting an Establishment Clause challenge to the application of the exemption to employees performing nonreligious, albeit nonprofit, activities).

Liberals should not try to deny this undeniable fact.<sup>87</sup> They—we—should recognize that the neutrality of which we commonly speak is not nihilism or radical skepticism. It is instead a mechanism for achieving certain substantive conceptions of human dignity, liberty, and equality.

#### CONCLUSION

Although I have described the Yale Four controversy as a difficult case, as religious accommodation cases go, it is fairly easy. The Yale Four's objective does not directly challenge deeply cherished ideals of the general society (or even of Yale) in the same way that, for example, a claim for a religious exemption from a prohibition on polygamy would. Majority institutions are most willing to accommodate minority religious practices that do not challenge deeply held beliefs of the collectivity. In contrast, truly dissident religious beliefs cannot be accommodated in the conventional sense of making an exception that leaves the general rule untouched. This is obvious in cases where the dissident belief requires an accommodation of a clearly oppressive sort: for example, public endorsement of a sectarian view, accompanied by persecution of infidels. But in some sense, all religious (or other) exemptions from general rules challenge the general practice by calling into question the validity of the shared social norm. Some questions of religious accommodation are so difficult because they pose a choice of competing paradoxes: suppress the freedom to be different in the name of a diverse community, or facilitate separatism in the name of a community of mutual respect.

It should be clear that the compelling interest test does not resolve the paradoxes. By whose standard do we answer the question whether the mainstream institution pursues a compelling interest? Certainly not the dissident's. By the dissident's standard, the religious obligation takes precedence. It appears, therefore, that the compelling interest test rules out little more than gratuitous homogenization, but allows suppression of the dissident

<sup>· 87</sup> See Dorf, supra note 41, at 165.

<sup>&</sup>lt;sup>88</sup> Cf. Lee v. Weisman, 505 U.S. 577, 629 (1992) (Souter, J., concurring) (describing, for Establishment Clause purposes, an accommodation of religion as the lifting of "a discernible burden on the free exercise of religion").

whenever the judiciary shares a political majority's belief that some objective is compelling.

Requests for religious accommodation pose a challenge for the imagination: Can the mainstream institution grant full "citizenship" to the other, accept the other's differences, recognize that this acceptance changes the conception of the institution at the margins, and still maintain its core institutional integrity? Sometimes the answer will be no, as the discussion of VMI and the *Bob Jones* case suggests.

More often, however, I suspect that our mainstream institutions err in the other direction. *Smith* itself is an obvious example. The Court characterizes as neutral a system of law that criminalizes (ritual or other) peyote use while permitting (ritual or other) alcohol consumption. This seems a failure of empathy.<sup>89</sup>

Can Yale remain true to its pluralist principles while permitting its Orthodox students to opt out of the dormitory component of the Yale program? If remaining true means retaining the principles in unchanged form, the answer is no. But let us not forget that as a Yale principle, pluralism itself is of relatively recent vintage. So too, pluralism is a relatively recent principle of the American civic religion. As our social and government institutions confront pluralism's paradoxes, pluralism itself will inevitably be transformed by experience.

<sup>&</sup>lt;sup>23</sup> Smith is not the only example of the Court treating illegal drugs as dramatically different from legal ones. For example, during an oral argument a year and a half after the decision in Smith, one Justice expressed the view that cigarette use is a malum prohibitum, while cocaine use is a malum in se. See United States Supreme Court Official Transcript at 9, United States v. Jacobson, 503 U.S. 540 (1992) (No. 90-1124), available in 1991 WL 636288; cf. Laurence H. Tribe, American Constitutional Law § 15-7, at 1326 (2d ed. 1988) (noting that such attitudes are unsurprising, given the marginalization of those who use illegal drugs, regardless of whether they are in fact more harmful than legal ones).