

9-15-2016

## Grand Theory or Discrete Proposal? Religious Accommodations and Health Related Harms

James M. Oleske Jr.  
*Lewis & Clark Law School*

Follow this and additional works at: <http://scholarlycommons.law.wlu.edu/wlulr-online>



Part of the [First Amendment Commons](#)

---

### Recommended Citation

James M. Oleske, Jr., *Grand Theory or Discrete Proposal? Religious Accommodations and Health Related Harms*, 73 WASH. & LEE L. REV. ONLINE 387 (2016), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/15>

This Response is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [osbornecl@wlu.edu](mailto:osbornecl@wlu.edu).

# Grand Theory or Discrete Proposal? Religious Accommodations and Health Related Harms

James M. Oleske, Jr.\*

## *Abstract*

*More than a quarter-century has passed since the Supreme Court decided in *Employment Division v. Smith* that religious accommodations are primarily a matter of legislative grace, not constitutional right. In that time, barrels of ink have been spilled over the merits of the *Smith* decision. But comparatively little attention has been given to the issue of how legislatures and other political actors should exercise their discretion to grant or deny specific religious accommodations. In their article *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*, Professor Hillel Levin, Dr. Allan Jacobs, and Dr. Kavita Arora aim to fill that critical gap. They propose a specific methodology for political actors to use in considering requests for religious exemptions—with the goal of bringing more consistency to the accommodation project—and their proposal has much to recommend it. This Response argues, however, that the Authors' argument for their proposal suffers by trying to do too much. Instead of offering their proposal solely as a prudential tool for policymakers, they also frame it as a constitutional tool that judges can use to enforce the Religion Clauses of the First Amendment. As detailed in this Response, the Authors' effort to have their proposal serve this second function runs into serious problems that can only distract from their primary mission. Accordingly, this Response suggests that the Authors refocus*

---

\* Associate Professor of Law, Lewis & Clark Law School. I am very grateful to the editors of the *Washington and Lee Law Review* for their invitation to participate in this discussion and to Hillel Levin for his thoughtful comments on an earlier draft of this Response.

*exclusively on that primary mission in future efforts to advance their proposal and offers a few suggestions for how the Authors might seek to operationalize their test in the political realm.*

### *Table of Contents*

I. Introduction .....	388
II. The Dangers of Going Big.....	393
III. Suggestions for Starting Small .....	399
IV. Conclusion.....	399

### *I. Introduction*

The law governing religious accommodations in the United States is currently “a confusing and rather ragtag body of law.”<sup>1</sup> After nearly three decades of reading the Free Exercise Clause to provide a floor of required accommodation,<sup>2</sup> the Supreme Court reversed course in 1990, holding in *Employment Division v. Smith*<sup>3</sup> that the Constitution does not provide a right to religious exemptions from neutral and generally applicable laws.<sup>4</sup> Congress then passed the Religious Freedom Restoration Act of 1993 (RFRA)<sup>5</sup> in an effort to reinstitute the pre-*Smith* landscape,<sup>6</sup>

1. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 (2014).

2. See *Hobbie v. Unemp’t Appeals Comm’n of Florida*, 480 U.S. 136, 144 (1987) (requiring accommodation from unemployment compensation rule and explaining that the government “sometimes must . . . accommodate religious practices”); see generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (requiring accommodation from compulsory education law); *Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring accommodation from rule requiring unemployment compensation beneficiaries to be available to work on Saturday).

3. 494 U.S. 872, 879 (1990).

4. *Id.* at 879 (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).” (internal quotation marks and citation omitted)).

5. 42 U.S.C. §§ 2000bb–bb-4 (2012).

6. See *City of Boerne v. Flores*, 521 U.S. 507, 513–16 (discussing the historical backdrop of RFRA).

but the Court held in 1997 that RFRA is invalid as applied to the states.<sup>7</sup> RFRA still provides a presumptive right to religious exemptions from federal law, but the precise strength of that presumption is unclear.<sup>8</sup> Meanwhile, twenty-one states have enacted their own RFRA,<sup>9</sup> most of which have not been enforced as vigorously as their proponents might have hoped;<sup>10</sup> twelve states without RFRA have constitutional provisions that courts have interpreted to provide more protection than *Smith*;<sup>11</sup> four states without RFRA have interpreted their constitutions to embody the *Smith* rule;<sup>12</sup> and the law is unclear in the rest of the states. On top of all that, the seemingly bright-line constitutional rule in *Smith* is not actually so bright. Lower courts have taken vastly different approaches in determining whether a law is too underinclusive to qualify as “generally applicable” for purposes of *Smith*,<sup>13</sup> and the Supreme Court has yet to address the issue in a case not involving obvious gerrymandering.<sup>14</sup>

But wait, there’s more!

---

7. See *id.* at 511, 536 (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

8. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 n.3 (2014) (“On [one] understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.”). But see *id.* at 2767 n.18 (finding it unnecessary to resolve this issue definitively).

9. See State Religious Freedom Restoration Acts, NCSL (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (last visited Aug. 8, 2016) (providing a list of state equivalents to RFRA) (on file with the Washington and Lee Law Review).

10. See Christopher C. Lund, Religious Liberty After Gonzales: A Look at State RFRA, 55 S.D. L. Rev. 466, 485 (2010) (surveying cases and concluding that “[c]ourts often interpret state RFRA in an incredibly watered down manner”).

11. See Laycock, *supra*, note 1, at 844 n.22 (citing cases).

12. See *id.* at 844 n.23 (citing cases).

13. See James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 306–14 (2013) (discussing the lower court decisions).

14. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (finding that a city had enacted ordinances constituting a religious gerrymander targeting the ritual animal sacrifices of a Santeria church).

In addition to creating general exemption rights with RFRA, legislatures have enacted thousands of issue-specific religious accommodations.<sup>15</sup> And whether an accommodation is made pursuant to a RFRA or a specific statutory forbearance, an Establishment Clause objection could be raised to the accommodation. Although the Court has held that religious exemptions “need not ‘come packaged with benefits to secular entities’” in all cases,<sup>16</sup> it has struck down exemptions that do not appropriately balance their benefits with the costs they impose on third parties.<sup>17</sup> Where exactly that balance should be struck is the subject of intense disagreement.<sup>18</sup>

Into this breach step Professor Hillel Levin, Dr. Allan Jacobs, and Dr. Kavita Arora (the Authors) with their ambitious and illuminating new article, *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties*.<sup>19</sup> In it, the Authors focus on a specific challenge—situations in which a religious exemption may “impose risks, burdens, or costs on children”<sup>20</sup>—to develop a test aimed at bringing more principle and greater consistency to the accommodation project.<sup>21</sup> From the outset, the authors note that “although the test was developed

---

15. See James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–46 (1992) (reporting over 2,000 such accommodations).

16. *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005).

17. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (striking down a statute that “command[ed] that Sabbath religious concerns automatically control over all secular interests at the workplace,” and noting that “the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath”); see also *Cutter*, 544 U.S. at 710 (“An accommodation must be measured so that it does not override other significant interests.”).

18. Compare Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014) (reading the establishment bar narrowly), with Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014) (reading the establishment bar broadly). See Levin, Jacobs & Arora, *infra* note 19, at 969 & n.262 (noting the uncertainty about when an accommodation violates the Establishment Clause).

19. 72 WASH. & LEE L. REV. 915 (2016).

20. *Id.* at 917.

21. *Id.* at 920, 966, 968.

specifically to address religious practices that may impose health related harms to children and third-parties, it also has potential implications in other contexts as well.”<sup>22</sup> The Article ends by addressing the import and challenges of “accommodationism” writ large, with the full sweep of the Authors’ proposal on display:

Our test is a step forward in that it offers a consistent and principled approach to [accommodation] questions that does not simply leave them to the interest group dynamics of the political marketplace. Instead, the test balances the needs of the state and those of religious people by simultaneously acknowledging the state’s need to protect itself and its citizens from religious practices that impose costs on others, while also respecting the values of pluralism. *It also incorporates and respects constitutional church-state doctrines and suggests a way to resolve abiding tensions between the Free Exercise and Establishment clauses. Finally, the test can serve as a valuable tool for different kinds of decision makers—legislators, administrative officials, judges, and clinicians—and is sensitive to the relative institutional strengths and weaknesses of each.*<sup>23</sup>

As the italicized sentences at the end of that passage make clear, this is no small proposal. It offers reconciliation of the Religion Clauses, a topic which itself has spawned several grand theories,<sup>24</sup> as well as the promise of a test that can transcend branches of government and even inform private-sector decisions. That said, the Authors’ central focus in developing and applying their test is on “legislators and other policymakers.”<sup>25</sup> Accommodation decisions made by the political branches, the Authors explain, are “often unmoored from consideration of underlying values”<sup>26</sup> and driven by the dynamics of interest-group

---

22. *Id.* at 916.

23. *Id.* at 1016 (emphasis added).

24. See generally Eric J. Segall, *Doctrinal Legal Scholarship and Religious Liberty: A Review of Jesse Choper’s Securing Religious Liberty*, 5 GEO. MASON L. REV. 71, 77 (1996) (referring to the various “prominent grand theories purporting to explain the Religion Clauses” that Professor Choper identified in his book before offering his own theory).

25. Levin, Jacobs & Arora, *supra* note 19, at 968.

26. *Id.* at 952; *see id.* at 950–51

[M]any of our laws seem to lack *any* principled balancing at all. That is, there seem to be no principles at play in the degree to which we

politics.<sup>27</sup> Finding this state of affairs “deeply troubling,”<sup>28</sup> the Authors offer a test that is aimed at channeling policymakers’ accommodation decisions into a principled balancing of competing interests.<sup>29</sup>

The challenge facing the Authors would be daunting enough if they kept their focus exclusively on the policymaking process and offered a reform proposal designed to “impose consistency on the accommodation and non-accommodation of religious practices that may harm children and third parties.”<sup>30</sup> Their task only becomes more overwhelming, however, by including a simultaneous effort to provide judges with a “tool for making constitutional determinations as to whether the legal treatment of a religious practice violates the Free Exercise Clause or the Establishment Clause.”<sup>31</sup> The Authors attempt to pursue both of these ambitious goals with a unified test, and the natural question that this decision prompts is whether they are trying to do too much. The answer, I fear, is “yes.” As discussed in Part II of this Response, the current constitutional landscape—which the Authors accept in making their proposal—causes considerable problems for their proposal as a constitutional tool. Those problems, however, do not cast doubt on the suitability of the Authors’ test for the task of improving non-judicial accommodations, which is clearly their core goal. Accordingly, Part III of this Response offers some suggestions for how the Authors might advance that goal by pursuing a strategy of more discrete reforms.

---

permit or limit religious freedom in individual cases. Sometimes we allow religious groups to impose significant costs and harms on third parties . . . . On the other hand, sometimes statutes or regulations prohibit the exercise of religious freedom even where there is little or no harm to anyone.

27. *See id.* at 961 (“In short, religious groups operate in the political marketplace like other interest groups. As such, whether they win or lose on a particular political issue is related less to a principled balancing of the competing underlying values than it is to the political dynamics in play.”).

28. *Id.* at 961.

29. *See id.* at 966–71 (reciting and explaining the test).

30. *Id.* at 968.

31. *Id.* at 970.

*II. The Dangers of Going Big*

In the pages leading up to the announcement of their proposed test, the Authors reassure readers that “our project is not to re-litigate the merits of *Smith*.”<sup>32</sup> That decision, they conclude, “is unlikely to be reversed in the near to intermediate term, and a serious discussion of religious accommodations must accept a legal regime in which *Smith* is good law.”<sup>33</sup> Yet, in the very next paragraph, the Authors justify their proposal with reference to a constitutional understanding that runs directly contrary to *Smith*. Specifically, in discussing how their proposal will vindicate free exercise values, they write: “to the degree that different religious groups may receive different treatment from legislatures as a result of the political power of the groups, constitutional questions arise.”<sup>34</sup> *Smith*, however, taught that while it “may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in,” that was an “unavoidable consequence of democratic government” that did not offend the Constitution.<sup>35</sup> In light of that teaching, when the Authors proceed to discuss how “competing constitutional values demand careful and principled balancing,”<sup>36</sup> and how their test “balances the competing interests . . . according to the yin and yang of the First Amendment Free Exercise and Establishment Clauses,”<sup>37</sup> they are including a “yin” that does not appear to exist under *Smith*.

---

32. *Id.* at 964.

33. *Id.* I am not as convinced as the Authors that the near-to-intermediate-term prospects for overturning *Smith* are quite so bleak. See James M. Oleske, Jr., *A Regrettable Invitation to “Constitutional Resistance,” Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. (forthcoming 2017) (manuscript at 38–39 & n.197), available at <http://ssrn.com/abstract=2837392> (discussing recent indications that some justices may be newly open to reconsidering *Smith*).

34. Levin, Jacobs & Arora, *supra* note 19, at 964–65. Notably, the case the Authors cite for this proposition concerns RFRA, not the Free Exercise Clause. See *id.* at 965 n.245 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432–34 (2006)).

35. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

36. Levin, Jacobs & Arora, *supra* note 19, at 965.

37. *Id.* at 966.

A passage from earlier in the Article nicely illustrates how much broader than *Smith* the Authors assume the protections of the Free Exercise Clause might extend:

“[L]awmakers sometimes reject requested religious accommodations and restrict religious practices for a variety of other reasons: animus, mistrust, indifference, lack of awareness, political self-interest, and so forth. . . . Lawmakers violate the Constitution when they attempt to impose restrictions on religious practices for some or all of these reasons.”<sup>38</sup>

While the *Smith* Court’s view of the Free Exercise Clause would protect against denials of accommodation for the first reason (animus) and possibly the second (mistrust, assuming it is of religion and not of exemptions generally), the *Smith* view is *not* generally implicated by failures to accommodate due to indifference, lack of awareness, or political self-interest. Indeed, those reasons are precisely why minority religions are presumed to do worse in the political process, which was a result the *Smith* Court explicitly acknowledged and accepted.<sup>39</sup>

In sum, insofar as the Authors maintain that their test “protects Free Exercise interests” by “prevent[ing] restriction of

---

38. *Id.* at 945–46.

39. *See supra* note 35 and accompanying text (quoting *Smith*). It bears noting that one of the Authors has previously challenged the presumption mentioned in the text and argued that accommodation might be better handled in the political process than in the courts. *See* Hillel Y. Levin, *Rethinking Religious Minorities’ Political Power*, 48 U.C. DAVIS L. REV. 1617, 1681 (2015)

[R]eligious groups have more potency in the majoritarian branches than is often understood as a result of their ability to work together and with others within the political system. . . . [C]ourts’ institutional structure gives them no special expertise on religious liberty questions. . . . In combination, these dynamics undermine arguments in favor of special judicial consideration for religious minority groups in the normal course of affairs.

*But see* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 172–73 (2016)

If we rely exclusively on legislatures to address these issues and resolve them in advance through particularized religious exemptions passed in the normal legislative process, we will find ourselves sorely frustrated. The situation will end up resembling the South Pacific—an archipelago of religious exemptions in a wide ocean of religious need.

religious practices on frivolous grounds,”<sup>40</sup> their test embodies a view of the Free Exercise Clause that departs from *Smith*. I happen to agree with the Authors’ view, which is why I argue elsewhere that the Court should reconsider *Smith*,<sup>41</sup> but our shared view cannot be said to represent current law.

The second complication the Authors encounter by tying their test to the Constitution and treating it as a tool for the judiciary as well as policymakers concerns the “Magnitude” prong of their test. Before turning to that prong, however, this would be a good time to review all three main provisions of the Authors’ test. The first prong, the “Bases for Possible Restriction” prong, establishes what the Authors describe as “a default rule that religious practices should be respected unless they unduly interfere with the real and measurable interests of children within the religion and others outside the religious group.”<sup>42</sup> The second prong, the “Likelihood of Effect,” provides that government should only deny an accommodation to a religious practice if its adverse impact on others is “actual” and “likely,” rather than “merely hypothetical.”<sup>43</sup> That brings us to the “Magnitude of Effect,” the final component of the Authors’ test, and the one of immediate concern here. It provides:

Notwithstanding the foregoing provisions, if society tolerates harms from comparable mainstream practices that impose harms of a similar magnitude to the harms posed by the religious practice at issue, then it should not restrict that religious practice. Conversely, if a mainstream practice that imposes severe harms is forbidden, then a comparable religious practice that imposes harms of a similar magnitude should likewise not be tolerated. Legislatures should be mindful of this provision when considering religious accommodations, and courts should be active in enforcing it.<sup>44</sup>

---

40. Levin, Jacobs & Arora, *supra* note 19, at 970.

41. See Oleske, *supra* note 33, at 39–56 (arguing that the Court should apply modestly heightened scrutiny when a generally applicable law incidentally burdens religion and should require the government to show that it has more than a *de minimis* interest in denying a religious accommodation).

42. Levin, Jacobs & Arora, *supra* note 19, at 968.

43. *Id.* at 967.

44. *Id.*

The Authors' lead explanation of the Magnitude prong is that it "captures the Supreme Court's admonition in [*Church of the Lukumi Babalu Aye v. City of Hialeah*<sup>45</sup>] that society may not target religious practices for censure when it permits comparable mainstream practices, thus enforcing Free Exercise boundaries."<sup>46</sup> The problem is that neither the language of the Authors' Magnitude prong, nor its application elsewhere in the Article, is limited to laws that "target religious practices for censure." Indeed, some passages in the Article could be read as supporting the far-reaching argument that a religious exemption must be made any time a law includes even a single comparable secular exemption, even if the law still applies to a multitude of other secular practices that are comparable to the religious practice.<sup>47</sup> Given that most laws include some exemptions, interpreting *Lukumi* this broadly would threaten to swallow *Smith*, which is one of many reasons the broad interpretation has been the subject of intense skepticism in free exercise scholarship.<sup>48</sup> The Authors do not engage that scholarship, but

---

45. 508 U.S. 520 (1993).

46. Levin, Jacobs & Arora, *supra* note 19, at 969. *See id.* at 970 ("The Magnitude prong, as noted, tracks *Lukumi*, in precluding pretextual laws that functionally, but not explicitly, *single out* religious practices for restriction." (emphasis added)).

47. *See id.* at 1011 n.497 (describing the Magnitude prong as "proposing that a religious practice not be restricted if a comparative and commonly practiced secular activity exists"); *id.* at 1012 n. 504 (explaining that "where a religious practice has a comparable mainstream practice [that is permitted], policymakers should not restrict the religious practice"); *see also id.* at 989–90 ("If society tolerates the risk for the comparable mainstream practice . . . it must treat the religious practice comparably."); *id.* at 1002 n.449 (explaining that "religious practices may be regulated when their direct or indirect effects are severe *as long as there is no comparable secular practice accepted by society*") (emphasis added).

48. *See, e.g.,* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 194–203 (2002) (arguing that there are "too many conceptual and practical problems with the [secular-exemption-requires-religious-exemption view] for it to be accepted"); Oleske, *supra* note 13, at 298–301, 326–31 (arguing that "a broad selective-exemption rule that goes beyond situations suggesting discriminatory intent cannot be reconciled with the Supreme Court's current understanding of the Free Exercise Clause"); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1539–42 (1999) (providing several reasons for rejecting the secular-exemption-requires-religious-exemption interpretation of the Free Exercise Clause); Colin A. Devine, Comment, *A Critique of the Secular Exceptions Approach to Religious*

doing so might give them pause about the “lodestar” role they assert the Magnitude prong can play in judicial administration of their test.<sup>49</sup>

The final difficulty with treating the Authors’ test as a constitutional tool concerns the issue of consistency. At times, the Authors indicate that while they do intend their test to provide more consistency in *reasoning* by policymakers, it will not require consistency of *results*. As the Authors write at one point late in their article:

With respect to our test, reasonable people may reasonably disagree about the magnitude of the risks associated with a particular religious practice. Some policymakers will consider certain costs tolerable, while others will find the same costs intolerable. Consequently, they may disagree as to how to treat the religious practice under the first prong of the test. . . . [T]erms in the first prong like “*unreasonable* burdens,” “*sufficiently* deleterious effects,” “*substantial* chance,” and

---

*Exemptions*, 62 UCLA L. REV. 1348 (2015) (same). *But see* Douglas Laycock & Steven T. Collis, *Generally Applicable Law & The Free Exercise of Religion*, 95 NEB. L. REV. (forthcoming 2016), available at <http://ssrn.com/abstract=2784336> (advocating for the secular-exemption-requires-religious-exemption view). The premise of Professor Laycock and Mr. Collis’s argument—that *Smith* and *Lukumi* are best read to mean that the Free Exercise Clause protects against more than the danger of intentional discrimination—is difficult to square with the Court’s own post-*Lukumi* description of its free exercise jurisprudence. *See* *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (describing “the free exercise of religion as defined by *Smith*” as freedom from “laws which are enacted with the unconstitutional object of targeting religious beliefs and practice”); *id.* at 531 (identifying the baseline for what constitutes a free exercise violation as “legislation enacted due to animus or hostility to the burdened religious practice”); *id.* at 534 (explaining that RFRA did not match the Free Exercise Clause because it would affect laws “without regard to whether they had the object of stifling or punishing free exercise”).

49. Levin, Jacobs & Arora, *supra* note 19, at 968. Professor Levin did address the breadth of *Lukumi* in an earlier article, observing that “[i]t can be difficult to determine whether a decision not to accommodate religious practices and beliefs should be classified as a *Smith*-type case . . . or a *Lukumi*-type case.” Levin, *supra* note 39, at 1672. Given that the Levin, Jacobs & Arora article never explicitly addresses the issue of how broadly *Lukumi* should be interpreted, one could read the Authors as trying to remain agnostic on this hotly disputed question. Abstaining from that question would not necessarily be a problem if the Authors were proposing their test solely as a prudential tool for policymakers. But such abstention does seem problematic when the Authors are also framing their test as a “tool for making constitutional determinations,” with a Magnitude prong that they assert “tracks *Lukumi*” and that “courts should be active in enforcing.” Levin, Jacobs & Arora, *supra* note 19, at 967, 970.

“objectively *severe*” require the application of judgment, and people’s judgment may differ in different cases. But this lack of certitude is not something that should concern us any more than it does in the case of any other legal test.<sup>50</sup>

The final sentence in this passage is in considerable tension with the rationale the Authors provide earlier for offering their test in the first place. In that earlier discussion, the Authors highlight the current inconsistency surrounding religious accommodations, and they set up and then knock down the very “should not concern us” rationale they rely upon in the passage above. Here is the key passage from the earlier discussion:

We can ask why, given that the vast majority of our laws are produced through the very same political dynamic as we have identified in this context, and therefore display similar inconsistencies and pathologies throughout the law, we should be especially wary of this dynamic in the context of religious accommodationism.<sup>51</sup>

The answer the Authors give to this question is that both under- and over-accommodation in the political process implicates “constitutional values” that “demand careful and principled balancing *and consistent resolution on the part of policymakers and judges confronting these cases.*”<sup>52</sup> Demanding consistent resolution makes sense if the Authors are dealing with a constitutional issue and not just a prudential one. But by the end of the Article, the Authors appear to be taking a very different tack when they argue that readers should not be concerned about different decisionmakers reaching different conclusions as to whether a particular religious practice should be accommodated.

In the end, the Authors’ decision to frame their proposal as a constitutional tool leads to more questions than answers. That need not be fatal, however, for the underlying test, which could well serve as a helpful tool for better policymaking in the accommodation area.

---

50. *Id.* at 1010.

51. *Id.* at 962.

52. *Id.* at 965 (emphasis added).

### *III. Suggestions for Starting Small*

As noted above, even if the Authors narrowed the scope of their project to the goal of making legislative and administrative accommodation decisions more principled and consistent, it would still be a very tall order. The biggest outstanding question is how to operationalize the Authors' test in the political realm, where, unlike the judicial realm, decisions are rarely bound by subject-specific tests and precedents. As the Authors consider how to overcome this challenge, and convince policymakers to subject themselves to the test, I would offer a few suggestions for discrete starting points.

The first mechanism that comes to mind is executive orders, whether presidential or gubernatorial, which could be used to advance the test in the regulatory realm. A second mechanism that might be worth considering is whether the elements of the test—or, more accurately, legislative evidence relevant to those elements—could be incorporated into official bill summaries done by nonpartisan legislative staff. If information about the asserted costs and benefits of accommodations were systematically presented to legislators along with fiscal summaries and revenue impact statements, perhaps they would become accustomed to utilizing the test in their decisions (though it still would not be binding in any real sense). The third mechanism that comes to mind is drafting model legislation specifically designed to guide accommodation decisions by the political branches. My final thought on how best to operationalize the Authors' test is to ask: Has anything like this ever been done before? If precedent exists for reforming legislative decisionmaking on a specific issue to address perceived systematic shortcomings, that precedent would be well worth studying.

### *IV. Conclusion*

Using the issue of health-related harm as a catalyst, the Authors have initiated a critical conversation about how policymakers should discern the appropriate limits of religious accommodation. The Authors come to the conversation armed with a concrete proposal aimed at delivering more principled and

consistent decisions on accommodations, and the proposal has much to recommend it. This Response has suggested, however, that the proposal suffers by trying to do too much. By going beyond the issue of improving accommodation decisions in the political realm, and trying to have their proposal do double duty as a constitutional tool, the Authors invite thorny questions that can only distract from their primary mission. Accordingly, this Response suggests that the most promising path forward for the proposal would be to divorce it from larger efforts to achieve free exercise/establishment reconciliation and focus on finding discrete ways to advance it as a good government measure.