CONFLICTS OF RIGHTS: WHEN THE FEDERAL CONSTITUTION RESTRICTS CIVIL LIBERTIES

By Ofer Raban∗

ABSTRACT

"It is elementary that States are free to provide greater protections . . . than the Federal Constitution requires," California v. Ramos, 463 U.S. 992, 1013-14 (1983), and the same goes for Congress, so far as it operates within its constitutional powers. Indeed many of our civil rights and liberties are protected by statutes or by state constitutions. But this principle has its limitations: sometimes the Federal Constitution can limit the ability of Congress or the States to expand civil liberties. In other words, sometimes the Federal Constitution is not just a floor for civil rights, it is also a ceiling. This occurs whenever civil rights conflict. Thus, conflicts among civil rights present a potentially troublesome form of judicial review since they may limit the ability of the democratic process to provide more freedom. And yet, as we shall see, courts often resolve these conflicts with little more than a flick of the wrist. This Article analyzes claims of conflicts of rights arising under the Federal Constitution and examines the argument that such conflicts do not lend themselves to rational resolution—a contention based, inter alia, on Isaiah Berlin's thesis of the incommensurability of fundamental values.

∗ Associate Professor of Law, Elmer Sahlstrom Senior Fellow, University of Oregon. The Article is based on a presentation delivered at the O'Connell Judicial Conference (2010) in Portland, Oregon.

I. INTRODUCTION

The Roberts Supreme Court, described as "the most conservative court since the mid-1930s,"[1] has curtailed a number of constitutional freedoms.[2] But those favoring extensive constitutional rights could find solace in a cardinal principle of constitutional law: judicial interpretations of federal civil rights are only the floor for such protections, not the ceiling. The Federal Constitution provides the minimum standard for civil liberties in America, and Congress or the States can always go beyond these minimum standards and provide greater protections. As the Supreme Court put it, "[i]t is elementary that States are free to provide greater protections . . . than the Federal Constitution requires"—and, in principle, the same holds for Congress as well.[3] Thus if the Supreme Court refuses to grant criminal defendants a right of access to DNA evidence, or to protect the equal rights of homosexuals, or to mandate equal schooling opportunities for African American kids, that may be unfortunate—so goes the argument—but Congress or the States can always step in and provide such remedies. Indeed this possibility is often mentioned by the Supreme Court itself when it rejects claims of constitutional protections.[4]

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1. Erwin Chemerinsky, Editorial, *Supremely Conservative*, L.A. TIMES, Oct. 4, 2010, at A17.

2. *See, e.g.*, Herring v. United States, 555 U.S. 135, 137-38 (2009) (rolling back Fourth Amendment rights); Montejo v. Louisiana, 129 S. Ct. 2079, 2085-86 (2009) (rolling back Sixth Amendment rights); Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010) (limiting Fifth Amendment rights); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007) (striking down efforts to racially integrate public schools); Salazar v. Buono, 130 S. Ct. 1803, 1820-21 (2010) (limiting Establishment Clause rights); Gonzales v. Carhart, 550 U.S. 124, 167-68 (2007) (rolling back abortion Due Process rights). The list goes on.

3. California v. Ramos, 463 U.S. 992, 1013-14 (1983). As mentioned below, Congress is more limited than the States in its ability to enact civil liberties protections because it must act pursuant to its enumerated powers and because of issues of state sovereign immunity. *See infra* and notes 8-9 and accompanying text.

4. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (refusing to recognize the right of the terminally ill to physician-assisted suicide partly because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative

That the Federal Constitution provides only the national minimum follows directly from the text and the purpose of civil rights provisions. The First Amendment, for example, reads: "Congress shall make no law . . . abridging the freedom of speech."[5] Naturally, it would make little sense to read that Amendment as setting a limit on Congress' ability to protect free expression. So while the Supreme Court determined that the First Amendment does not protect sexually obscene speech, Congress or the States are perfectly free to provide such protections.[6] And while penalizing underage sex with girls more severely than underage sex with boys is not a violation of the Equal Protection Clause, nothing in that constitutional provision prevents a state from forbidding such unequal treatment.[7] Indeed many of the civil rights enjoyed by Americans are protected by statutes (both federal and state) and by state constitutions.[8] And though the federal government may be hampered in its ability to expand civil liberties by its limited constitutional powers[9] and by States' sovereign immunity,[10] the States may expand civil liberties as they see fit.[11]

But the ability of Congress or the States to expand civil liberties has its limitations: sometimes the Federal Constitution is not just a floor for civil rights but also a ceiling. This happens whenever civil rights conflict—which may occur between different provisions of the Federal Constitution, as well as between the Federal Constitution and state constitutions or statutes. As a consequence, such conflicts constitute a particularly troublesome form of judicial review, because they may limit the ability of the democratic process to produce civil freedoms.[12]

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action").

5. U.S. CONST. amend. I.

6. *See* Roth v. United States, 354 U.S. 476, 481 (1957).

7. *See* Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 472-73 (1981).

8. When the great expansion of federal constitutional rights under the Warren Court came to an end, state constitutions began to play a larger role than they historically did in the protection of civil liberties. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1.01[1] (4th ed. 2006).

9. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (finding that the application of the Religious Freedom Restoration Act to the States exceeded Congress' power).

10. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000) (holding that a federal age discrimination statute violated the States' sovereign immunity).

11. I put aside the issue of federal *statutes* that restrict civil liberties—like federal statutes that limit the ability of states to decriminalize medical marijuana or allow for a right of assisted suicide for the terminally ill. My concern here is, first and foremost, with limitations on civil liberties imposed by judicial interpretations of the Federal Constitution.

12. *See infra* Part III.

The conflicts this Article examines include some rights that are guaranteed not only vis-à-vis the government but also vis-à-vis some private entities of a public nature (such as shopping malls or the Boy Scouts of America). After all, there is nothing in the nature of civil rights that makes them susceptible to infringement only by government. The freedom of speech or religion, or the freedom from racial or gender discrimination, can certainly be impinged by private actors as well, which is why the constitutions of various countries and of a number of American states[13] do not contain a state action requirement in regard to certain civil liberties.[14] Moreover, the civil rights provisions of the Federal Constitution *also* regulate some private action: not only because the state action doctrine allows some private action to be considered government action, or because the Thirteenth Amendment contains no state action limitation but also because all state and federal laws that regulate private action, including common law rules, are subjected to federal constitutional standards. It is thus that the First Amendment applies to defamation actions between private parties,[15] and that the Equal Protection Clause applies to certain private contractual disputes.[16] In short, there is no good analytical reason to exclude all the protections from private action from our definition of civil liberties.

Admittedly, once we allow the idea of civil rights to include guarantees against private parties, the potential for conflicts among civil rights grows exponentially: after all, whenever a civil right

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13. The constitutions of Alaska, Louisiana, New Jersey, New York, and South Dakota all contain explicit guarantees of antidiscrimination and/or collective bargaining against private actors and entities. Additionally, state constitutional guarantees against private actors in the areas of free speech, equal protection, and due process were declared by state supreme courts in Alabama, California, Delaware, New Jersey, Pennsylvania, Massachusetts, and Oregon. *See generally* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 444 & nn.253-54 (2008) (citing, *inter alia*, John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819 (1990)).

14. *See, e.g.*, Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1075-76 (2000) ("We (Americans, I mean; Germans and South Africans, e.g., appear to think rather differently) think of Bill of Rights restraints as composing primarily, if not exclusively, a code of regulation for direct exercises by state officials, upon or against persons, of the special powers of the state . . . . What accounts for American constitutional law's commitment thus to confine Bill of Rights application to cases of 'state action'? . . . It is child's play to explain how the state, as the sovereign source of the common law, is responsible for every failure of the common law to provide relief against one or another exercise of power by one member of society against another. American jurists have had not the least trouble grasping this simple, Hohfeldian point.") (internal citations omitted).

15. New York Times v. Sullivan, 376 U.S. 254, 277, 283 (1964).

16. Shelley v. Kraemer, 334 U.S. 1, 18-19 (1948) (finding State enforcement of common law covenants that exclude persons of a designated race from owning or renting property to be unconstitutional).

provision is applicable to a private actor, that actor suffers, by definition, some government limitation on her freedom of action; and such limitation may very well conflict with another constitutional guarantee. However, my references to civil rights that are applicable to private actors are few and of a very conservative nature. In truth, there are more than enough conflicts among protections from the government itself.

The Article progresses in the following way: Section II(A) provides examples of potential conflicts *between* civil rights; Section II(B) provides examples of potential conflicts *within* civil rights; Section III examines the thesis of the incommensurability of fundamental rights and its possible implications to conflicts of rights; and Section IV offers concluding remarks.

II. CONFLICTS OF RIGHTS

A. Conflicts Between Rights

1. Property Rights Versus Free Speech

One famous alleged conflict between constitutional rights arose in *PruneYard Shopping Center v. Robins*, where the California Constitution's free speech protections were challenged as a violation of the Federal Constitution.[17] Four years earlier, the U.S. Supreme Court decided that the First Amendment was not applicable to privately-owned shopping malls.[18] When political protestors were subsequently ejected from a private shopping mall in Campbell, California, the California Supreme Court held that the ejection, although not in violation of the Federal Constitution, did violate the free speech provision of California's constitution.[19] The State of California, noted the court, was free to "provid[e] greater protection than the [Federal Constitution] seems to provide."[20]

In response, the aggrieved shopping mall owner filed a lawsuit in federal court, arguing, *inter alia*, that California's constitution violated his constitutionally protected *property rights*.[21] Forbidding a private shopping mall owner to exclude political protestors from his property, said the complaint, amounted to a taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution.[22]

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17. 447 U.S. 74, 76 (1980).

18. Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976).

19. *See PruneYard*, 447 U.S. at 88.

20. Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979).

21. *PruneYard*, 447 U.S. at 79-80. He made the same claim before the California Supreme Court as well. *See Robins*, 592 P.2d at 343.

22. *PruneYard*, 447 U.S. at 82. The Supreme Court has previously recognized that government actions amounting to regulation rather than outright appropriation of property may violate the Takings Clause. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S.

The U.S. Supreme Court rejected the claim, but here was a case where the Federal Constitution could have limited the ability of a state to provide more freedom of speech to its residents.[23] And while the constitutional conflict was the very heart of the *PruneYard* case, in most cases the conflict is a mere sideshow in a larger battle—which explains why many such conflicts do not receive the serious consideration they merit.

2. Equal Protection Versus Free Exercise

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 so as to provide an exemption from antidiscrimination statutes for religious organizations engaged in employment discrimination on the basis of religion.[24] In *Corporation of the Presiding Bishop v. Amos* the U.S. Supreme Court reviewed the case of a building custodian, who was fired from a job he had held for sixteen years on the ground that he was not a member of the Mormon Church.[25] The custodian sued, claiming unlawful discrimination on the basis of religion, and the Mormon Church responded by relying on the statutory exemption, claiming that it covered religious as well as *secular* positions.[26] But in papers filed with the courts the Church went further and claimed that the statutory exemption, and its alleged applicability to secular positions, was in fact required by the Free Exercise Clause.[27] In other words, the Church argued that depriving it of the right to engage in employment discrimination on the basis of religion, even in regard to employees performing secular functions, was a violation of its religious freedom.[28] As Justice Brennan put it, here was "a confrontation between the rights of religious organizations and those of individuals"—one of several constitutional conflicts involved in the case.[29]

The Supreme Court agreed that the statutory exemption applied to the building custodian and that firing him for his religious beliefs was therefore lawful.[30] And while the Court refused to decide whether the exemption's applicability to secular positions was in fact

393, 415-16 (1922).

23. *PruneYard*, 447 U.S. at 83 ("[T]he requirement that appellants permit appellees to exercise state-protected rights of free expression . . . does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause.").

24. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (1972) (codified as amended at 42 U.S.C. § 2000e-1(a) (2006)).

25. 483 U.S. 327, 330 (1987).

26. *Id.* at 331.

27. Brief for Appellants in No. 86-179 at 17-23, *Amos*, 483 U.S. 327 (No. 86-5776) [hereinafter *Amos* Appellant's Brief]; *see also Amos*, 483 U.S. at 339 n.17.

28. *See Amos* Appellant's Brief at 17-23.

29. *Amos*, 483 U.S. at 340 (Brennan, J., concurring).

30. *See id.* at 339 (majority opinion).

required by the Free Exercise Clause, its reasoning showed much sympathy for that claim:[31]

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.[32]

The concurrence agreed:

> [D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. . . . [T]his . . . raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.[33]

And yet, as the lawyers for the fired custodian argued, the statutory exemption "offend[ed] equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers."[34] The exemption, they argued, violated the Equal Protection Clause.[35]

The Supreme Court gave the claim short shrift: "To dispose of appellees' equal protection argument, it suffices to hold-as we now do-that . . . § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[36] Discrimination between religious and nonreligious individuals or organizations, if motivated by the desire to accommodate the free exercise of religion, deserves only the minimal rational basis review.[37]

While this preference for Free Exercise over equal protection principles was uttered in the context of a statutory exemption (the Court explicitly refused to decide whether the exemption was

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31. *See id.* at 339 n.17 ("We have no occasion to pass on the argument of the COP and the CPB that the exemption to which they are entitled under § 702 is required by the Free Exercise Clause.").

32. *Id.* at 336 (footnote omitted).

33. *Id*. at 343 (Brennan, J., concurring).

34. *Id*. at 338 (majority opinion) (footnote omitted).

35. *Id.* at 338.

36. *Id.* at 339.

37. *See id.* ("[L]aws discriminating *among* religions are subject to strict scrutiny, . . . [but when] laws 'afford[] a uniform benefit to *all* religions' . . . . and [are] motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny . . . . The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end.") (internal citations omitted).

mandated by the Free Exercise Clause[38]), it soon became clear that the preference may be equally applicable to constitutional conflicts. Thus federal courts have allowed religious institutions to avoid lawsuits claiming employment discrimination on the basis of ethnicity or age or disability unrelated to any religious creed, as long as the fired employee was a "minister" of a religious institution—a term whose contours remain exceedingly vague.[39] So while everybody agrees that the Catholic Church could not be sued for discriminating against women in hiring priests, the so-called "ministerial exception" goes further and holds that it could also not be sued for discriminating on the basis of disability, or race, or age that is unrelated to its religious creed.

The ministerial exception derived from both the Free Exercise Clause and the Establishment Clause, was upheld by the U.S. Supreme Court for the first time this year in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[40] The case involved the applicability of the Americans with Disabilities Act ("ADA") to a teacher in a religious school who spent almost all her time teaching secular subjects, but also performed some religious functions and was designated a commissioned minister of the Church.[41] The Supreme Court affirmed the dismissal of the teacher's lawsuit, which alleged unlawful termination a violation of the ADA.

The decision (which arguably flew in the face of established precedent[42]) placed a federal constitutional limitation on the powers

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38. *See id.*

39. *See, e.g.*, Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 224 (6th Cir. 2007); Ogle v. Church of God, 153 F. App'x 371, 375-76 (6th Cir. 2005); Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1102-04 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 702-04 (7th Cir. 2003); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1164-65 (4th Cir. 1985); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1355 (D.C. Cir. 1990).

40. 132 S. Ct. 694, 702 (2012) ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

41. *Id.* at 709.

42. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court decided it was constitutional for Oregon to prohibit the use of peyote, a natural hallucinogen, in a Native American Church sacrament. The Court held that "laws of general applicability," which are not aimed at suppressing religion but instead have a different and legitimate purpose (like the law forbidding the use of hallucinogens), can be constitutionally applied to religious practices even if they substantially burden the exercise of religion. *Id.* at 878-82. Laws forbidding employment discrimination on the basis of race or age or disability are, of course, laws of general applicability. Chief Justice Roberts, the author of *Hosanna-Tabor*, distinguished antidiscrimination laws from laws criminalizing peyote by saying that the latter regulate an "outward physical act[]" rather than "an internal church decision that affects [its] faith and mission." *Hosanna-Tabor*, 132 S. Ct. at 707. This is the sort of potentially empty and unexplained distinction that would earn a law student a bad grade.

of Congress and the states to expand antidiscrimination protections to religious employers. And while the requirements of the ADA are not themselves mandated by the Equal Protection Clause, they certainly reflect the concerns of this important civil protection, whose equivalents are found in many state constitutions.

3. Equal Protection Versus Establishment Clause

Both *Amos v. Corporation of the Presiding Bishop*[43] and *EEOC v. Hosanna-Tabor*[44] also involved conflicts between the Establishment Clause and equal protection principles. Both the church in *Amos* and the church in *Hosanna-Tabor* claimed that their exemptions from antidiscrimination laws were also mandated by the Establishment Clause.[45]

In *Amos*, the principal argument was that absent an exemption for religion-based discrimination that also applies to secular employees, courts would be forced to evaluate theological doctrine in deciding whether an employee's position is religious or secular.[46] Such inquiries, in turn, would constitute the sort of "excessive government entanglement with religion" that has long been recognized as a violation of the Establishment Clause.[47] The district court that first decided *Amos* rejected this Establishment Clause claim,[48] but the Supreme Court had a different take on the matter.[49] Although it refused to decide this specific issue, the Court did refer to the exemption's salutary effect on this Establishment Clause concern: "the statute," said the Court, "effectuates a more complete separation [between church and state] . . . and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case."[50]

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43. 594 F. Supp. 791 (D. Utah 1984).

44. 597 F.3d 769 (6th Cir. 2010).

45. *Compare Amos*, 594 F. Supp. at 814-820 ("The defendants assert that if courts had to determine whether religious organizations were engaging in religious activities with regard to particular employees and, if not, to apply Title VII to them, excessive government entanglement would result."), *with Hosanna-Tabor*, 597 F.3d at 781 ("[C]ontrary to Hosanna-Tabor's assertions, [the teacher's] claim would not require the court to analyze any church doctrine . . . .").

46. *See Amos*, 594 F. Supp. at 814.

47. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The Sixth Circuit, whose decision was later reversed by the Supreme Court, rejected a similar claim in *Hosanna-Tabor*. *See* 597 F.3d at 781-82.

48. *See Amos*, 594 F. Supp at 825-28.

49. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 339 (1987).

50. *Id.* The concurrence heartily agreed: "What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs." *Id.* at 343 (Brennan, J., concurring) (citing *Lemon*, 403 U.S. at 613, which articulated the Establishment Clause test forbidding "an

The claim that the Establishment Clause prohibits the application of antidiscrimination principles to churches' employment relationships with their employees was explicitly adopted in *Hosanna-Tabor*, where the Supreme Court held that the Clause required the dismissal of all employment discrimination claims on the part of church "ministers."[51]

In short, the Establishment Clause forbade the application of antidiscrimination statutes to religious organizations' employment decisions regarding so-called ministerial employees, and may further forbid the application of religion-based antidiscrimination statutes to secular employees. The Establishment Clause is therefore another bar to the ability of Congress or the states to expand antidiscrimination protections.

4. Free Exercise Versus Establishment Cause

The question for which the Supreme Court granted certiorari in *Amos* was "whether applying the § 702 exemption to the secular nonprofit activities of religious organizations violat[ed] the Establishment Clause."[52] But this Establishment Clause claim clashed directly with the Free Exercise Clause rights of the custodian, whose religious beliefs cost him his job. The Supreme Court rejected the custodian's Free Exercise argument by noting, in a footnote, that although the custodian's religious freedom was infringed by the church, it was not infringed by the statute because "his discharge was not required by statute."[53] Thus there was no state action involved in the firing and therefore no violation of the Free Exercise Clause.

This is not the place for a critique of this peculiar take on the state action doctrine;[54] suffice it to say that this was a rather offhand dismissal of a serious constitutional concern.

Alleged conflicts between the Free Exercise Clause and the Establishment Clause arise most commonly in the context of laws singling out religious institutions for special treatment (not a rare statutory event), where the assertion that the special treatment is mandated by the Free Exercise Clause collides with the claim that

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excessive government entanglement with religion").

51. *Hosanna-Tabor*, 132 S. Ct. at 709.

52. 483 U.S. 327, 330 (1987).

53. *Amos*, 483 U.S. at 337.

54. The idea that the statutory exemption was not in violation of the Free Exercise clause because it merely authorized but did not require actions that would have been unconstitutional if undertaken by the government is obviously too broad a principle. It would, for example, make it constitutional for the government to exempt from legal liability private parties engaged in breaking up religious ceremonies, or public demonstrations for that matter.

the special treatment advances religion.[55] But as in *Amos*, such conflicts have been alleged in other contexts as well.

In *School District of Abington Township. v. Schempp*, the Supreme Court sustained an Establishment Clause challenge to bible reading in a public school.[56] But Justice Potter Stewart, who dissented from that decision, claimed not only that such bible reading did not violate the Establishment Clause but that the Free Exercise Clause may forbid banning the practice.[57] There was, he said, "a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible."[58] Stewart went on to explain that the constitutionally protected option of sending one's children to private parochial schools[59] does not solve the problem since "freedom of religion [is] available to all, not merely to those who can pay their own way."[60] Nor was he satisfied with the argument "that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time":[61]

> [T]his argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. . . . [P]ermission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion.[62]

In short, said Stewart, "there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support to religion. That limitation [is] compelled by the free exercise guarantee."[63]

The majority in *Schempp* rejected Justice Stewart's expansive view of the Free Exercise Clause, declaring that the Clause "has never meant that a majority could use the machinery of the State to

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55. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

56. 374 U.S. 203, 205, 226-27 (1963).

57. *See id.* at 308-20 (Stewart, J., dissenting).

58. *Id.* at 312.

59. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

60. *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting) (quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943)).

61. *Id.*

62. *Id.*

63. *Id.* at 311. In fact, Justice Stewart believed that *Schempp* posited a conflict between two Free Exercise claims—the freedom of religion of those who wished to have their children religiously instructed in public schools, and the freedom of religion of those who did not. *See id.* at 312-13.

practice its beliefs."[64] But the danger of constitutional limitations on civil liberties derives not only from sound interpretations of the Federal Constitution but also (perhaps particularly) from bad ones—as the next case also demonstrates.

5. Right to Assisted Suicide Versus Equal Protection

In 1994, Oregon voters proposed and approved the Death with Dignity Act, a citizens' initiated ballot measure that provided terminally ill patients a limited statutory right to be assisted by their physicians if they wish to hasten their death.[65] The Act was subjected to a barrage of legal challenges from the moment it passed.[66] One of these lawsuits, filed in federal district court, claimed that the Act was in violation of the Equal Protection Clause, Due Process Clause, Free Exercise Clause, and the freedom of association.[67] The federal judge who decided that case agreed that the Act violated the Equal Protection Clause.[68]

According to that court, the violation consisted in discriminating *against* terminally ill patients by failing to provide them with the same legal protections against suicide enjoyed by everyone else.[69] The court cited laws criminalizing assisted suicide,[70] laws providing that a person may use reasonable physical force to thwart a suicide attempt,[71] and laws authorizing the Board of Medical Examiners to take disciplinary action against a physician for conduct endangering the health of a patient.[72] The court also found constitutional fault with the absence of a requirement of an *expert* determination that a terminally ill patient was competent (above and beyond the determination of the attending physician),[73] as well as the statute's grant of immunity from criminal and civil liability for physicians acting in good faith under the Act.[74] These features of the Death with Dignity Act, said the court, were irrational and arbitrary and in violation of the Equal Protection Clause.[75]

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64. *Id.* at 226-27. We will see below a better conceptualized conflict between litigants claiming the protection of the Free Exercise Clause.

65. OR. REV. STAT. §§ 127.800-995 (2011).

66. *See Death with Dignity Act History*, OR. HEALTH AUTH., http://public.health.oregon.gov/providerpartnerresources/evaluationresearch/deathwithdignityact/documents/history.pdf (last visited Feb. 22, 2012).

67. Lee v. Oregon, 891 F. Supp. 1429, 1431 (D. Or. 1995).

68. *See id.* at 1437.

69. *See id.*

70. *Id.* at 1433 (citing OR. REV. STAT. § 163.125 (2011)).

71. *Id.* (citing OR. REV. STAT. § 161.205).

72. *See id.* (citing OR. REV. STAT. § 677.190).

73. *Lee*, 891 F. Supp. at 1435-36.

74. *Id.* at 1437.

75. *Id.* at 1437-38.

The rather bizarre and often murky opinion was eventually reversed—though not on the merits but on standing and ripeness grounds,[76] and not before the Act's implementation was delayed for more than two years.[77]

6. Free Exercise Versus Equal Protection

Romer v. Evans[78] was a challenge to the following amendment to the Colorado Constitution: "Neither the State of Colorado . . . nor any of its agencies . . . shall enact, adopt or enforce any statute . . . whereby homosexual, lesbian or bisexual orientation . . . shall . . . be the basis of . . . [a] claim of discrimination."[79] Soon after the Amendment was passed, a lawsuit was filed claiming it was in violation of the Federal Constitution's Equal Protection Clause.[80] Colorado responded by claiming that the Amendment safeguarded the civil liberties of its citizens: "The primary rationale . . . for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[81] The Supreme Court rejected that claim by denying its veracity: "The breadth of the amendment," said the Court, "is so far removed from these particular justifications that we find it impossible to credit them."[82] Instead, the Amendment was actually motivated by "a bare . . . desire to harm a politically unpopular group" and was therefore unconstitutional.[83] The alleged conflict between the Equal Protection Clause and religious freedom was thus read out of the case.[84]

But avoiding the issue is becoming more and more difficult. As homosexuals' struggle for recognition and equality becomes more successful—from the recent abolition of the military's "don't-ask-don't-tell" policy[85] to the partially successful struggle for same-sex marriage[86]—their ideological opponents have increasingly resorted to arguments that cast antidiscrimination requirements as

76. Lee v. Oregon, 107 F.3d 1382, 1390-91 (9th Cir. 1997).

77. *See* OR. HEALTH AUTH., *supra* note 66.

78. 517 U.S. 620 (1996).

79. COLO. CONST. art. II, § 30b; *Romer*, 517 U.S. at 624.

80. *Romer*, 517 U.S. at 624-625.

81. *Id.* at 635.

82. *Id.*

83. *Id.* at 634-35 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

84. *See id.*

85. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654 (2006)).

86. For a website tracking the same-sex marriage issue state by state, see FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last visited Feb. 22, 2012).

infringements of their own civil liberties. One such argument is that forcing religious organizations or individuals in their capacities as professionals, employers, landlords, or even government officials, to accord recognition to the marital status of gay couples is a violation of the Free Exercise Clause.[87]

In 2008, the California Supreme Court held that making it unlawful for a fertility doctor to discriminate against a lesbian woman despite his religious beliefs, did not violate the Federal Free Exercise Clause.[88] But such claims persist. In New York, a similar claim of religious freedom was made by a *government official*: In September 2011, the *New York Times* reported of an elected county clerk in an upstate New York community who refused to sign same-sex marriage licenses because these were against her religious beliefs.[89]

These alleged constitutional conflicts will sooner or later have to be resolved—hopefully in the same manner in which they were resolved in the context of racial discrimination. After all, the claim that discriminatory conduct is constitutionally protected by the Free Exercise right has been heard before.[90]

7. Right of Expressive Association Versus Equal Protection

Opponents of homosexuals' equality also claim the benefit of the First Amendment's right of association.[91] In 2000, the United States Supreme Court decided the case of James Dale, an assistant scoutmaster in the Boy Scouts of America who was expelled from the organization once it was learned he was a homosexual.[92] Dale sued the Boy Scouts for unlawful discrimination, and the Supreme Court of New Jersey agreed with his claim, finding that the organization violated New Jersey's antidiscrimination statutes.[93]

In reaching that conclusion, the New Jersey court rejected the argument that New Jersey's antidiscrimination laws violated the Boy Scouts' First Amendment right of "expressive association"—which protects some membership choices of associations engaged in

87. *See, e.g.*, *A Clash of Rights? Gay Marriage and the Free Exercise of Religion*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (May 21, 2009), http://pewforum.org/Gay-Marriage-and-Homosexuality/A-Clash-of-Rights-Gay-Marriage-and-the-Free-Exercise-of-Religion.aspx (last visited Feb. 22, 2012).

88. N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct., 189 P.3d 959, 966-68 (Cal. 2008). The doctor refused to perform a fertility procedure on the woman because of her sexual orientation.

89. Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 28, 2011, at A1.

90. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

91. *See* Kaplan *supra* note 89.

92. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

93. Dale v. Boy Scouts of America, 734 A.2d 1196, 1230 (N.J. 1999).

"expressive activities" (a broadly-read category).[94] The court first determined that the State's interest in antidiscrimination policies was "compelling," and that "[t]he right of expressive association must, therefore, be weighed against this compelling interest."[95] The court then compared the respective interests involved (the interest in protecting people from unlawful discrimination, and the interest of expressive associations in control over their membership), and concluded that applying New Jersey's antidiscrimination laws to the Boy Scouts of America did not violate the right of expressive association.[96]

The United States Supreme Court reversed.[97] The Court first determined that the Boy Scouts' expressive message included disapproval of homosexuality, and that Dale's membership in the organization would therefore significantly burden the organization.[98] Turning its gaze to the New Jersey statute, the Court then tersely pronounced that "[t]he state interests embodied in New Jersey's [antidiscrimination] law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[99]

This was a rather quick dismissal of the important interest in fighting discrimination. True, Dale's antidiscrimination right did not derive from the Federal Constitution: since the Boy Scouts of America is a nongovernmental organization, it is not bound by the Federal Equal Protection Clause.[100] But a number of state constitutions have no state action requirement attached to their equal protection guarantee;[101] and at any event, the right to be free from discrimination based on sexual orientation is clearly a concern of the Federal Constitution as well.[102] But then again, with little

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94. *Id*. at 1223.

95. *Id*.

96. *Id.* at 1219-30.

97. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

98. *Id*. at 643-61. The dissent rejected the argument that disapproval of homosexuality was part of the expressive message of the Boy Scouts. *Id*. at 666-71 (Stevens, J., dissenting).

99. *Id.* at 659.

100. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

101. *See, e.g*., MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."); *see also* ALASKA CONST. art. I, § 3; LA CONST. art. I, § 3; ILL. CONST. art. I, § 2; N.Y. CONST. art I, § 11. The Supreme Courts of New Jersey and Pennsylvania have interpreted their constitutions as protecting against private discrimination even though they contained no such explicit guarantees. Hartford Accident & Indem. Co. v. Ins. Comm'r of Pa., 482 A.2d 542, 549 (Pa. 1984); Devlin, *supra* note 13, at 847 (citing Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465 (N.J. 1978)).

102. *See*, *e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996); Lawrence v. Texas, 539

elaboration, the U.S. Supreme Court prevented a state from extending antidiscrimination protections by enforcing its own constitutional liberty.

8. Right to a Fair Trial Versus Free Speech

A different aspect of the First Amendment was involved in *Sheppard v. Maxwell*, where the Supreme Court reviewed the criminal conviction of an Ohio physician found guilty of murdering his pregnant wife.[103] The prosecution received lots of attention by the media, and it was that media coverage that stood at the center of the appeal to the Supreme Court.[104] Describing the trial as a "carnival" and "a 'Roman holiday' for the news media," the Supreme Court reversed Sheppard's conviction.[105] These were no overstatements. At one point, "[w]hen Sheppard's chief counsel attempted to place some documents in the record [during the coroner's inquest], he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience."[106] Contributing to the histrionics was a "swarm of reporters and photographers" who were given express permission to photograph the twelve jurors—whose photographs appeared prominently in the press while the trial was in progress.[107]

The Supreme Court found that the judge's failure to control the publicity surrounding the trial violated the Due Process Clause's guarantee of a fair trial.[108] The Court recognized that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism,"[109] and also that "'the framers . . . intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.'"[110] Nevertheless, the freedom of speech and of the press, said the Court, must give way in cases where there is a "threat or menace to the integrity of the trial."[111]

Sheppard thus pitted the constitutional right to a fair trial against the freedom of speech and ruled for the former. But while that preference may have been justified in *Sheppard*, the case gave

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U.S. 558 (2003).

103. Sheppard v. Maxwell, 384 U.S. 333, 335 (1966).

104. *Id.* at 335, 356.

105. *Id.* at 356, 358 (internal citation omitted).

106. *Id.* at 340.

107. *Id.* at 339, 345.

108. *See id.* at 355.

109. *Id.* at 350.

110. *Id.* (quoting Bridges v. California, 314 U.S. 252, 265 (1941)).

111. *Id.* at 350 (quoting Craig v. Harney, 331 U.S. 367, 377 (1947)) (internal quotation marks omitted).

rise to more problematic applications: there have been growing concerns over the proliferation of gag orders issued to lawyers in highly publicized trials, both criminal and civil, in reliance on *Sheppard* and the constitutional right to a fair trial.[112]

Proponents of lawyers' speech argue that zealous and effective representation often requires that lawyers speak to the press.[113] They point to the possible impact of negative media coverage on judges and juries, to the fact that such speech may help lawyers gather evidence by addressing the public, that it may cause all involved to go carefully about their jobs, and also that it may protect clients' reputations.[114] The prohibitions on lawyers' statements, they claim, constitute content-based restrictions on political speech in violation of the First Amendment.[115] But their claims have been rejected by a number of courts. This constitutional conflict between free speech rights and the right to a fair trial has produced a split among federal courts, but the Supreme Court has so far refused to weigh in.[116]

9. Right to Privacy Versus Right to Life

In *Roe v. Wade*, appellants challenged Texas' criminal abortion statute as a violation of the Fourteenth Amendment's Due Process Clause.[117] In response, Texas argued, *inter alia*, that the statute was constitutional because "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment,"[118] and is therefore protected by the Amendment's guarantee against deprivation "of life . . . without due process of law."[119] And since the constitutional right to life was of higher value than the right to liberty (which protected most pregnant women), any conflict between the two had to

112. *See, e.g.*, *In re* Morrissey, 168 F.3d 134, 139-40 (4th Cir. 1999); *In re* Dow Jones & Co., Inc., 842 F.2d 603 (2d Cir. 1988); *In re* Russell, 726 F.2d 1007, 1009-10 (4th Cir. 1984); *see generally* Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 859 (1998) ("Restrictions on lawyers' speech are increasingly common. In most high profile cases since the O.J. Simpson criminal trial, judges have imposed gag orders on the attorneys and parties precluding them from speaking with the press.").

113. Chemerinsky, *supra* note 112, at 862, 867-71.

114. *See id.* at 867-71.

115. *Id.* at 862.

116. *Id.* at 862-67. The Court did decide a related issue in 1991. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991), the Court, citing *Sheppard*, rejected a constitutional challenge to a rule of professional conduct that penalized attorneys for speech that they knew or should have known presented a substantial likelihood of materially prejudicing the trial.

117. Roe v. Wade, 410 U.S. 113, 113-14 (1973).

118. *Id.* at 156.

119. U.S. CONST. amend. XIV, § 1.

be resolved in favor of the fetus.[120]

The U.S. Supreme Court rejected the claim after concluding that the term "person" in the Constitution did not mean to include "the unborn."[121] Indeed, the claim that prenatal life qualified as a "person" under the Fourteenth Amendment was not accepted even by the Justices most opposed to the constitutional right to abort, who thought that the Federal Constitution did not protect that right—but not that it forbade it (which would have been one implication of recognizing fetuses as constitutional protected persons).[122]

For those who regard fetuses as proper depositories of civil liberties, *Roe* is another example of a federal constitutional limitation on states' abilities to expand civil rights. Conversely, recognition of prenatal constitutional rights would have imposed formidable limitations on women's right to abort.[123] This is precisely what happened in Germany when the German Constitutional Court invalidated a statute making abortions legal during the first three months of pregnancy.[124] The German court recognized a constitutional conflict between women's right to autonomy and the right to life of the fetus under a provision of Germany's "Basic Law" (its constitution) that protects every person's "right to life and physical integrity."[125] And then, evaluating the two against each other, the court concluded that the right to life should be given priority because its deprivation was final.[126] It therefore invalidated

120. *See Roe*, 410 U.S. at 152-56.

121. *Id.* at 158.

122. *See Roe*, 410 U.S. at 172-73 (Rehnquist, J., dissenting) (arguing that the right to abort is not a constitutionally protected privacy right).

123. It is worth remembering that *Roe v. Wade* did allow the government to ban abortions altogether after viability unless an abortion is necessary for the life or health of the mother. 410 U.S. 113, 163-64 (1973). In *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992), the Supreme Court went further and recognized a "substantial state interest in potential life throughout pregnancy." And while the phrase "potential life," *Casey*, 505 U.S. at 876, suggests a concern grounded in what may become a human being, rather than a concern with the inherent worth of prenatal life itself, a recent Supreme Court decision suggests otherwise. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court claimed that the interest in protecting "potential life" supported a ban on so-called "partial-birth" abortions even though alternative procedures could be used to abort these very fetuses. *Id.* at 157-58, 164.

124. *See* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605, 605 (1976) (translating Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court]).

125. GRUNDGESETZ FUR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] May 23, 1949, BGBI. art. 2 (Ger.).

126. Jonas & Gorby, *supra* note 124, at 643 ("According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Article 19, Paragraph 2, of the Basic Law; precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time.") (citation omitted).

the statute and ordered the West German state to make abortion unlawful.[127]

The United States has a large constituency pining for a similar constitutional ruling. There are persistent attempts to enact statutory and constitutional provisions that endow fetuses with civil rights—like the recent Colorado and Alabama ballot measures that would have granted fertilized human eggs a "personhood" status under these states' constitutions.[128] And despite the Supreme Court's clear decision to the contrary, the claim that fetuses enjoy a right to life under the Federal Constitution regularly recurs in American courts.[129]

B. Conflicts Within Rights

Some conflicts of rights can arise within one and the same constitutional provision.

1. Free Exercise

Recall Justice Stewart's claim that bible reading in public schools constitutes a conflict between different holders of Free Exercise rights: the right of parents wishing to have their children religiously instructed in public schools and the right of parents who object to such instruction.[130] Another alleged Free Exercise conflict was at play in *Amos*,[131] where the Mormon Church claimed the constitutional right to engage in employment discrimination on the basis of religion in regard to secular positions.[132] As discussed above, the Supreme Court agreed with the Church on statutory grounds while declining to decide whether that result was also mandated by

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127. *Id.* at 643-44.

128. Proposed Constitutional Amendment to Article II of the Colorado Constitution, COLORADO GENERAL ASSEMBLY, *available at* http://www.leg.state.co.us/lcs/initiativeReferendum/0910Initrefr.nsf/dac421ef79ad243487256def0067c1de/0c8b000aeb0ee0d3872575e7006427de/$file/2009-2010%2325.pdf ("Person defined. As used in sections 3, 6, and 25 of Article II of the state constitution, the term "person" shall apply to every human being from the beginning of the biological development of that human being."); Proposed Amendment to the Alabama Legal Code, ALABAMA STATE LEGISLATURE, *available at* http://alisondb.legislature.state.al.us/acas/actionviewframemac.asp?type=instrument&inst=sb301&docpath=searchableinstruments/2011rs/printfiles/&phydocpath=//alisondb/acas/searchableinstruments/2011RS/printfiles/&docnames=sb301-int.pdf,sb301-eng.pdf ("The term "persons" as used in the Code of Alabama 1975, shall include any human being from the moment of fertilization and implantation into the womb.").

129. *See, e.g.*, Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94 (Tex. 2004); *In re* J.D.S., 864 So.2d 534 (Fla. Dist. Ct. App. 2004); Ark. Dep't of Human Serv. v. Collier, 95 S.W.3d 772 (Ark. 2003).

130. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 312-13 (1963) (Stewart, J., dissenting).

131. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

132. *Id.* at 331.

the Free Exercise Clause.[133] However, as the district court that first decided the case had pointed out, the Free Exercise right most burdened in the case was, of course, the right of the fired custodian, whose religious beliefs cost him his job: "Abolition of the [statutory] exclusion for non-religious, secular activities," wrote that court, "enhances rather than violates the free exercise clause; it keeps religious institutions from being permitted to burden the free exercise rights of nonmembers who seek employment in non-religious jobs."[134] As we saw, the Supreme Court summarily rejected the Free Exercise claim of the fired employee.[135]

2. Establishment Clause

Amos also presented a conflict between different Establishment Clause claims. According to the federal district court, the statutory exemption *violated* the Establishment Clause because it amounted to an advancement of religion.[136] But the Church claimed that the Establishment Clause *mandated* the statutory exemption because its absence would have entailed an excessive entanglement between church and state.[137] The Supreme Court rejected the former claim while declining to decide the latter.[138] But its analysis pointed to the possibility that some Establishment Clause doctrines may place a limit on the applicability of other Establishment Clause precedents.

3. Free Speech

Another conflict between litigants relying on the same constitutional provision came up in *Pruneyard,* discussed above, where a shopping mall owner challenged applicability of the California Constitution's free speech provision to privately owned shopping malls.[139] In addition to the Takings Clause claim examined above,[140] the owner also argued that forbidding him to exclude political protestors from his private property amounted to compelled speech in violation of the First Amendment.[141] The claim was based on Supreme Court cases holding that the right to free speech encompassed the right *not* to speak—including a 1977 precedent, *Wooley v. Maynard* (1977), that found New Hampshire in violation of

133. *Id.* at 339 n.17.

134. Amos v. Corp. of the Presiding Bishop, 594 F. Supp. 791, 824 (D. Utah 1984), *rev'd*, 483 U.S. 327 (1987).

135. *See supra* Part II.A.iv.

136. *Amos*, 594 F. Supp. at 824-25.

137. *Amos*, 483 U.S. at 344.

138. *Id.* at 339-40 & n.17.

139. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); *see also supra* Part II.A.i.

140. *See supra* Part II.A.i.

141. *PruneYard*, 447 U.S. at 85-86.

the First Amendment for requiring residents to carry the motto "Live Free or Die" on state license plates.[142] The *Wooley* decision—so went the claim in *PruneYard*—barred California from forcing the shopping mall to accommodate political protestors since here, too, a State sought to compel "an individual to participate in the dissemination of an ideological message by displaying it on his private property."[143] The Supreme Court distinguished *Wooley* and rejected the claim.[144]

4. Equal Protection

One significant conflict between holders of the same constitutional right arose in *Parents Involved in Community Schools v. Seattle School District No. 1*,[145] where the Supreme Court held that school districts in Seattle, Washington, and Jefferson County, Kentucky, violated the Equal Protection Clause when they used race as a consideration in admission decisions.[146] These school districts sought to remedy the emergence, or reemergence, of racially homogenous schools—an alarming phenomenon and a threat to the ideal of equal opportunity. The Supreme Court, in a 5-4 decision, found that the use of race-based admission decisions violated the equal protection rights of white children who were denied the schools of their choice because of their race.[147]

And yet equal protection interests were also on the side of the minority children who benefited from the programs. In actual fact, it was not long ago that the Equal Protection Clause was thought to positively *require* such integration efforts! After all, *Brown v. Board of Education* declared that "[s]eparate educational facilities are inherently unequal";[148] and while that statement was made in the context of state laws that *mandated* racial separation, the Equal Protection Clause required active integrative efforts even after segregation ceased to be officially mandated or even implicitly attempted.[149] Thus, in *Board of Education v. Dowell*,[150] the Supreme Court conditioned the dissolving of a desegregation decree on "compliance with it for a reasonable period of time"[151] and a finding that "the vestiges of past discrimination had been eliminated to the

142. Wooley v. Maynard, 430 U.S. 705, 715-17 (1977).

143. *PruneYard*, 447 U.S. at 86-88.

144. In *Wooley* the forced message was the government's own, and the compelled speaker could hardly distance himself from the message. *Id.* at 87.

145. 551 U.S. 701 (2007).

146. *Id.* at 709-11.

147. *See id.* at 745-48.

148. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

149. *See, e.g.*, Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

150. 498 U.S. 237 (1991).

151. *Id.* at 248.

extent practicable."[152] Indeed the question of whether the Equal Protection Clause required racially integrated schools even when racial segregation resulted from private ("*de facto*") rather than public ("*de jure*") action remained open for many years after *Brown*.[153] As late as 1973, the Supreme Court expressly reserved judgment on that issue—over the objection of two Justices who thought that the Equal Protection Clause clearly required racial integration irrespective of the public or private source of the segregation.[154] And in 1976, the California Supreme Court relied on United States Supreme Court cases to hold that affirmative school integration efforts were required by the California Constitution even if segregation resulted from *de facto* discrimination[155] (a decision later overturned by constitutional amendments approved by ballot measures[156]). Needless to say, such judicial interpretation, like similar legislative measures, is now barred by the *Parents Involved* decision—another limitation imposed by federal civil liberties on the civil liberties of Americans.[157]

III. DEMOCRACY AND INCOMMENSURABILITY

Although here to stay, judicial review remains a subject of some

152. *Id.* at 250.

153. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 212 (1973).

154. *Id.* at 211-12 ("The respondent School Board invoked at trial its 'neighborhood school policy' as explaining racial and ethnic concentrations within the core city schools, arguing that since the core city area population had long been Negro and Hispano, the concentrations were necessarily the result of residential patterns and not of purposefully segregative policies. We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive . . . ."). *See also id.* at 219-20 (Powell, J., concurring in part and dissenting in part) ("In my view we should abandon . . . . the distinction between de jure and de facto segregation."); *id.* at 214-5 (Douglas, J., concurring) ("I agree with my Brother Powell that there is, for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between de facto and de jure segregation.").

155. Crawford v. Bd. of Educ., 551 P.2d 28, 34 (Cal. 1976) ("[I]n this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin."). *Id.* at 34 n.4 (*citing* Keyes v. Sch. Dist. No. 1, 413 U.S. at 220-33 (1973) (Powell, J., concurring); Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968)).) ("T]he approach taken by the United States Supreme Court in school desegregation cases . . . cannot be easily reconciled with a constitutional doctrine which differentiates de jure and de facto segregation.").

156. A 1979 amendment to the California Constitution pegged the equal protection obligations of California schools to the federal constitution, while a 1996 amendment forbade race conscious affirmative action in public education, employment, or contracting. *See* CAL. CONST. art. I, §§ 7(a), 31(a).

157. 551 U.S. 701 (2007).

controversy. Some find it "inappropriate . . . in a free and democratic society[,]"[158] while others see it as an essential guarantor of democracy—a counter-majoritarian measure that *protects* the rights that guarantee democracy and the rights produced by the democratic process.[159] But whatever one thinks about the relationship between judicial review and democracy, that relationship gets much trickier when judicial review *limits* civil liberties. And so it is only fitting to ask whether conflicts between civil rights call for some specialized methodology of judicial review: do we need a specially crafted constitutional doctrine or judicial philosophy for resolving conflicts among civil rights?

Such a proposal appeared in recent European literature on the subject.[160] The issue of conflicts of rights seems to loom larger on the Continent, perhaps because of greater concerns over the sovereignty of European Union member states, and the relatively recent vintage and expanding scope of European human rights norms. Accordingly, some scholars began calling attention to the issue and have offered critical evaluations of the European Court of Human Rights' "balancing" approach for resolving conflicts of rights.[161] The most critical of these European commentaries relied on Isaiah Berlin's celebrated thesis of the "incommensurability of fundamental values" to launch a radical critique of judicial resolutions of conflicts of rights.[162]

Isiah Berlin has famously argued that "human goals are many, not all of them commensurable, and in perpetual rivalry with one another."[163] "To assume that all values can be graded on one scale," said Berlin, "seems to me to falsify our knowledge . . . . In the end, men choose between ultimate values."[164] He concluded that "the possibility of conflict—and of tragedy [in resolving conflicts between

158. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006).

159. *See, e.g.*, RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 32-38 (1990) (arguing that democratic principles would be furthered if judges in Great Britain could invalidate laws on the basis of their inconsistency with an enumerated set of fundamental rights).

160. *See generally* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Eva Brems ed., 2008) (providing an overview of conflict among fundamental rights in Europe).

161. *See* Evelyne Maes, *Constitutional Democracy, Constitutional Interpretation and Conflicting Rights*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 69, 84 (Eva Brems ed., 2008).

162. *See* Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19, 28-31 (Eva Brems ed., 2008).

163. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 171 (1969).

164. *Id.*

ultimate values]—can never wholly be eliminated."[165] Thus, what makes conflicts between values like equality or liberty "tragic" is the inability to resolve them by simply opting for the smaller loss: there can be no "smaller loss" since there is no common measure between them. And this presumably means that no resolution can be more justified than its alternative.[166] Accordingly, said Berlin, the resolution of conflicts among fundamental values cannot be the subject of "rational choice" and is ultimately "without possibility of rational arbitration."[167]

Some scholars argue that Berlin's thesis carries directly to the resolution of conflicts among fundamental constitutional rights: resolving such conflicts, they say, is at bottom not a rational decision but is little more than a naked value preference.[168] This claim implies that resolving conflicts among civil rights may be the proper business of democratic politics rather than courts. At the very least, such a view suggests that courts should defer to legislatures (or perhaps to state courts interpreting their own constitutions) when they encounter such conflicts; or that they should exercise some form of judicial minimalism, by resolving such disputes without settling issues of principle or value but instead grounding their decisions in shallow reasoning that explains little but allows maximum future flexibility.[169]

Yet the claim that conflicts among constitutional rights are "without possibility of rational arbitration"[170] seems to me utterly

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165. *Id*. at 169.

166. *See id*. at 167-72.

167. ISAIAH BERLIN, THE PROPER STUDY OF MANKIND 320 (Henry Hardy & Roger Hausheer eds., 1949).

168. Zucca, *supra* note 162, at 19-20 ("[C]onflicts of fundamental rights may entail constitutional dilemmas. In these cases, we are left with no guidance as to what to do. Legal reasoning, I suggest, is not capable of producing a single right answer in these cases; more importantly, these cases cannot be resolved rationally."). For an attack on the rationality of legal resolutions writ large, including conflicts of rights, see PIERRE SCHLAG, THE ENCHANTMENT OF REASON 32 (1998) ("It can, of course, seem outrageous to suggest that the relative standing of the First Amendment and the Equal Protection Clause is no more susceptible to reasoned analysis than a choice between vanilla ice cream and strawberry ice cream. . . . [But] the fact is that for all the ethical and political thought heaped on the constitutional question as opposed to the ice cream question, for all the doctrinal complexity that mediates legal conflicts as opposed to ice cream choices, the former is no more tractable or susceptible to rational resolution than the latter. In the end, . . . we are left talking about preferences for freedom of speech as opposed to preferences for equality.").

169. For a suggestion that the European Court of Human Rights is indeed engaged in such judicial minimalism, see Aagje Ieven, *Privacy Rights In Conflict: In Search of the Theoretical Framework Behind the European Court of Human Rights' Balancing of Private Life Against Other Rights*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 39-67 (Eva Brems ed., 2008).

170. BERLIN, *supra* note 167, at 320.

exaggerated. Whatever one thinks about conflicts of values in the abstract, in the context of constitutional adjudication—where we have before us concrete facts, litigants with identified interests, and doctrinal definitions of constitutional rights—there is much for rational deliberation to sink its teeth into. Constitutional rights are not mere abstract values: the freedom of speech does not protect all types of speech, the Equal Protection Clause does not protect all forms of equality, and the Free Exercise Clause does not protect all exercises of religious beliefs. Constitutional rights have definitions far more precise and limited than the abstract values they embody, so that a conflict among fundamental values may not produce a conflict between the constitutional rights embodying them.

Even when genuine conflicts among constitutional rights actually arise, rational deliberation has much to say on their proper resolution. Consider, once again, the *PruneYard*[171] decision (where a shopping mall owner challenged a California constitutional decision forcing him to accommodate political protestors), which involved a conflict between the two fundamental constitutional liberties of free speech and private property.[172] This conflict may threaten to produce the "tragic" scenario contemplated by Berlin—where prioritizing free speech rights over private property rights would be no more justified than the reverse.[173] But once we consider the factual circumstances in the case, what may have been—in the abstract—a potentially irredeemable clash of values becomes far less difficult. After all, the principal consideration in the case was the owner's own opening of his property to the general public—indeed, his encouragement to the public to enter it.[174] The burden of which the owner complained was brought about by his own voluntary conversion of his private property into public use.[175] This important fact was decisive for the courts' resolution of the case.[176] When we take our deliberations away from abstract philosophical ruminations and into concrete interests and concrete constitutional guarantees, denying the "possibility of rational arbitration" becomes far less plausible.[177] Perhaps we could retain something of Berlin's insight—like the understanding that in such conflicts something valuable must give, and that conflicts of rights are tragic in that they require that we turn away from something we cherish and respect. But these recognitions are a far cry from denying the rationality of settling

171. 447 U.S. 74 (1980). *See supra* Part B.iii.

172. *Id.* at 85-87.

173. Berlin, *supra* note 163, at 167-72.

174. *PruneYard*, 447 U.S. at 87; Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 346-47 (Cal. 1979).

175. *PruneYard*, 447 U.S. at 87.

176. *Id.*; *Robins*, 592 P.2d at 346.

177. *See* BERLIN, *supra* note 167, at 320.

such constitutional disputes.

Ronald Dworkin has criticized Berlin's incommensurability thesis on related grounds.[178] Dworkin—whose "right answer thesis" naturally leads to a position incompatible with Berlin's—has long claimed that our values may be reconcilable in a grand edifice of coherent and mutually accommodating moral and political principles.[179] This idea has been described as "value monism," in contradistinction to Berlin's value pluralism.[180]

Dworkin, who edited a book on Berlin's philosophy and penned one of its chapters, begins by pointing out the ambitious nature of Berlin's thesis.[181] Berlin—says Dworkin—has argued that "the ideal of harmony [among fundamental values] is not just unobtainable but 'incoherent' because securing or protecting one value necessarily involves abandoning or compromising another."[182] The "idea . . . that a conflict in important values involves some genuine and important damage . . . is central to Berlin's idea."[183] Whenever we have conflicts of fundamental values we "must choose, that is, not whether to wrong some group, but which group to wrong."[184]

According to Dworkin, Berlin fails to realize that what we *mean* by values like liberty or equality includes the various ways with which these values qualify and limit each other.[185] Thus, forbidding people to smash each other's heads is not some tragic compromise or partial abandonment of the value of liberty, because we do not understand that value to include the freedom to kill.[186] And similarly, when we limit the liberty of people to rent or sell their property on a racially discriminatory basis, that limitation is best seen not as an injury to liberty but as a more refined understanding of what liberty is.[187] In other words, when we speak of equality or of liberty we do not speak of some Platonic ideals but of contextualized values shaped by real-life concerns, including the demands and requirements of other values.[188] The resolution of conflicts among

178. Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, 43 ARIZ. L. REV. 251, 255-56 (2001).

179. *Id.*; *see* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 364-68 (2011).

180. *See, e.g.*, Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90 B.U. L. REV. 975, 1001 (2010); Matthew H. Kramer, *When Is There Not One Right Answer?*, 53 AM. J. JURIS. 49, 60 (2008).

181. Ronald Dworkin, *Do Liberal Values Conflict?*, *in* THE LEGACY OF ISAIAH BERLIN 73, 74-77 (Mark Lilla et al. eds., 2001).

182. *Id*. at 78.

183. *Id*. at 79.

184. *Id*. at 80.

185. *Id.* at 87-88.

186. *Id*. at 88-89.

187. *Id.* at 87-88.

188. *Id.*

values depends, to a large extent, on how we understand those values in light of each other, and such understanding requires lots of rational footwork.

The same holds, *a fortiori*, to conflicts among legally protected civil rights. When we resolve such conflicts, we refine the content of those legal rights and liberties in light of each other. We do not simply pick winners or losers but decide how our civil liberties should hang together in light of the various purposes they serve, the actual interests at stake, and the particular burdens imposed by the challenged action. These decisions are not much different than resolving any other legal dispute.

IV. CONCLUSION

If resolving a conflict between civil rights is as rational an undertaking as resolving any other constitutional case, then the legitimacy of these judicial decisions may be no different than the legitimacy of any other form of judicial review. And yet, there should be no doubt that conflicts of rights present particularly delicate and difficult cases, because such cases not only protect civil liberties but may also curtail them.

Unfortunately, as we saw, many of the opinions dealing with such potential conflicts seem more interested in sweeping them under the rug than in engaging with their difficult and often controversial issues. Such evasions undermine the rationality of these resolutions and with it their legitimacy. Moreover these evasions are particularly deplorable given the inevitable value judgments that are often involved in such constitutional decisions. We must not forget that conflicts among civil liberties implicate deep and well known ideological divides: American conservatives and liberals are famously divided over the different importance they accord to different civil liberties—from property rights, to equality rights, to rights of association, to individual autonomy, to gun rights. All these have their predictable supporters and detractors. And so liberals and conservatives may be inclined to give starkly different solutions to conflicts among civil rights. And this means that judicial interpretations of the Federal Constitution, if unduly ideological, may not only limit the ability of legislatures or state courts to expand civil liberties but may also do so in a way that privileges an entire vision of civil liberties while suppressing another.

This point brings us back to the characterization of the Roberts Court as "the most conservative court since the mid-1930s."[189] As discussed above, the Roberts Court has already encountered some conflicts of rights, and is likely to encounter more.[190] And when it

189. Chemerinsky, *supra* note 1, at A17.

190. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S.

does, it may very well place some civil liberties beyond the reach of Congress or the States. This may be unfortunate, but it is inevitable: given the possibility of conflict among civil rights, judicial review necessarily includes the power to prohibit legislative expansion of some of those such.

And so liberals may justifiably find cause for alarm. But the solution cannot be judicial deference and minimalist, thinly theorized cases: mere ideological preferences are more likely to carry the day in thinly theorized opinions than in deep ones. To the contrary: it is important to raise awareness over these constitutional conflicts, and to insist that their resolutions be fully explained. Such important decisions should be made carefully and deliberately, their analysis fully exposed to the light of substantive criticism. Additionally—and this recommendation goes primarily to the academic audience—it may be a good idea to hold back criticism of the ever-shrinking docket of the Roberts Court.[191] After all, we may get less civil liberties not only when the Roberts Court *refuses* to recognize a constitutional right but also when it does.

701 (2007); Allred v. Superior Court, 127 S. Ct. 80 (2006) (denial of certiorari); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012).

191. *See, e.g.*, Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH. L. REV. 13, 13-15 (2010) ("This trend [toward an ever-smaller docket] has enormous implications for lawyers, judges, and the nation. More major legal questions must wait a longer time before being settled. More conflicts among the circuits and the states go a longer time before being resolved.").