OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 48 SUMMER 2024 NUMBER 2

ARTICLE

RIGHTS MEDIATION: CONTRACTS LAW AND THE FIRST AMENDMENT

D.A. Jeremy Telman[*]

[*] Professor of Law, Oklahoma City University School of Law. Thanks to my former students, Don Dechert, Alexis Garner, and Todd Williams, for their assistance in researching issues relating to vaccine exemptions in the military.

I. INTRODUCTION

Hitherto existing approaches to our constitutional jurisprudence have only interpreted the law in various ways; the point is, however, to change it.[1] Almost from the Founding, our courts have treated constitutional adjudication as a zero-sum game, with clear winners and losers. Litigators try to fashion "test-cases"[2] that will present the legal issues in a posture well-suited to enable a court to articulate a broad rule that will be maximally protective of the rights or interests that the litigants seek to vindicate. The process arrogates to adjudication a quasi-legislative function and compresses the common law process through which the slow accretion of precedents allows the law to develop as the consequences of legal rules come into focus. Although the subject of this Article is the interaction of contracts rights and the First Amendment, it proposes to

1. KARL MARX, *Theses on Feuerbach XI*, *in* KARL MARX SELECTED WRITINGS 171,173 (David McLellan 2d ed., 2000).

2. *See* Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 8-10 (2023) (Thomas, J., concurring) (arguing that the case should not have been dismissed as moot and that the court should have addressed Laufer's standing as a "tester").

change the whole of our constitutional jurisprudence in three fundamental ways. The last two follow from the first.

Following Jamal Greene,[3] the Article proposes supplanting the rights absolutism[4] that currently informs constitutional adjudication in the United States with the rights-mediation approach favored in other constitutional democracies.[5] An adjudicatory body engaging in rights mediation does not treat any particular right as fundamental, nor does it give equal weight to all claims to rights and interests. Rather, the adjudicator considers all rights and interests at issue in the case, accords them the appropriate weight, and resolves the legal claim in the specific factual context presented. Bodies engaged in rights mediation offer no sweeping statements of the meaning of the Constitution's "majestic generalities."[6] They establish binding precedents only to the extent that future cases present facts that are not legally or factually distinguishable from the decided case.

Second, as a consequence of rights mitigation, courts must adopt a more modest approach to adjudication. Rights-mediating courts eschew the jarring swings associated with impact litigation. They return to the modesty of common law constitutionalism,[7] which involves a slow accretion of outcomes in particular dispute resolutions to eventually approach asymptotically a state of legal equilibrium and stability. We eventually can predict how an adjudicator will decide a case, not because of one landmark decision, but because of dozens of similar cases that have arisen over decades.

Finally, because rights mitigation is not a winner-takes-all affair, the parties have more to gain through settlement than through litigation. Rights mitigation facilitates both compromise and the restoration of local control. If parties cannot rely on courts to treat their rights as absolute, they may be more inclined to work out their problems through local political

3. JAMAL GREENE, HOW RIGHTS WENT WRONG (2021).

4. *See id.* at xix (defining "rightsism" as the compulsion to discriminate between rights that are deemed fundamental and those deemed insubstantial).

5. *See, e.g.*, *id.* at xxix-xxx (discussing Germany's approach to reproductive rights); *id.* at 92-93 (praising German adjudication of the right to feed pigeons); *id.* at 99-103 (holding up India's Supreme Court as a model of rights mediation in connection with education); *id.* at 108-109 (summarizing the South African approach to race); *id.* at 187-93 (covering Canadian courts' approaches to disability rights).

6. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

7. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (describing and defending the common-law approach to constitutional adjudication).

processes. This outcome better corresponds to the Framers' understanding of how rights and government regulation were to interact.[8]

Because contracts law and the First Amendment can interact in myriad ways, in order to make the subject matter manageable, this Article focuses on four cases decided by the U.S. Supreme Court in its last three terms. Part II begins with a brief review of the fate of contracts rights in the Supreme Court beginning with the *Lochner* Era.[9] That Era was also a period of rights absolutism, but in that version of rights absolutism, contracts rights were treated as fundamental.[10] All of that changed remarkably swiftly after 1937. The Supreme Court downgraded contracts rights from fundamental to inconsequential in a matter of years.[11] To this day, the Court gives little to no consideration to contracts rights in constitutional adjudication involving First Amendment rights.

In the cases discussed in Part III, contract-based interests are treated as too insubstantial to consider in light of the more weighty protections granted to counterposed First Amendment rights. In the most extreme of

8. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that the Constitution did not contemplate judicial supremacy and expected popular constitutionalism to be the main check on unconstitutional laws); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253 (2017) (arguing that, while natural rights shaped the Founders' thoughts about government, "they were not legal 'trumps' in the way that we often talk about rights today"); *see* Jud Campbell, *Constitutional Rights Before Realism*, 2020 ILL. L. REV. 1433, 1433 (2020) (arguing that, prior to the advent of legal realism, courts tended to treat what we now call "fundamental rights" as part of "general law," and they did not really distinguish as we now do between rights arising under state constitutions and those arising under the federal Constitution); Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMM. 85, 86 (2017) (contending that "natural rights" were not viewed at the Founding as determinate legal privileges or immunities but entailed a "mode of reasoning").

9. The *Lochner* Era, which spans from roughly 1890-1937, takes its name from Lochner v. New York, 198 U.S. 45 (1905).

10. *See* Allgeyer v. Louisiana, 165 U.S. 578, 579, 593 (1897) (striking down, as violative of constitutional protections of contracts rights, a provision of the Louisiana Constitution that prohibited out-of-state entities from doing business in the state without having a place of business or an authorized agent in the state).

11. *See, e.g.*, United States v. Carolene Prods., 304 U.S. 144 (1938) (upholding a federal prohibition on the sale of products that use fats or oils to make skimmed milk resemble cream); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding Washington State's minimum wage law for women and allowing states to regulate economic actors in the public interest). The scope of the Court's new-found commitment to legislative regulation of economic affairs is best illustrated in Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (upholding a law designed to protect ophthalmologists from competition from opticians).

these cases, the Supreme Court ordered a party into a contractual relationship with a counterparty that claimed that it could not comply with its contractual obligations or with its obligations under a municipal ordinance without violating its free exercise rights. The Part begins by acknowledging that there are at least three discrete areas in which courts enforce contractual restrictions on constitutional rights. It next examines a recent Supreme Court case in which contracts rights come up against free expression rights. Next, it covers a case illustrating the Court's indifference to contractual rights when faced with a free exercise challenge. Finally, the Part discusses two cases which raised both free exercise and freedom of expression issues. In these cases, First Amendment rights render contractual obligations or discrimination in connection with contractual formation legally irrelevant.

Part IV suggests that these cases might well come out differently under a rights-mediation approach. Perhaps more importantly, under a rights-mediation approach, they might not arise at all. A rights-mediating adjudicator decides only the issues presented based on the facts of the case. The implications of such an adjudicator's decisions are limited. The stakes of adjudication are lower when adjudicators follow a rights-mediation approach. Lowering the stakes eliminates the motivation of public interest law firms in pursuing cases that they hope will establish broad rules protecting the rights for which they advocate.[12] Those firms will not want to invest their resources in cases with such limited payoffs, and the parties will likely settle or allow the matter to be handled by local authorities whom the public can hold accountable through democratic processes. Those democratic processes will result in a range of decisions, including some shocking outliers, but their effects will be localized, and each outcome will become a data point on a trajectory that will eventually establish national or regional consensuses.

Part IV also addresses three significant objections to the rights mediation model. The model concedes that the Constitution assigns to

12. A few public-interest law firms dominate the Supreme Court's First Amendment docket. The Alliance Defending Freedom recently celebrated its fifteenth win at the U.S. Supreme Court in the past twelve years. *See Securing Freedom's Future at the Supreme Court*, ALLIANCE DEFENDING FREEDOM (2023), https://drupal-files-delivery.s3.amazonaws.com/2023-10/SCOTUS%20Wins%20Book-web%20(3).pdf.
Other major players include the First Liberty Institute and the Institute for Justice. *See Supreme Court Victories*, FIRST LIBERTY INST., https://firstliberty.org/supreme-court-cases/ [https://perma.cc/CTJ4-R3ZA] (detailing victories in eight Supreme Court cases); *Supreme Court Cases*, INST. FOR JUST., https://ij.org/cases/supreme-court-cases/ (last visited Mar. 4, 2024) (boasting eight victories in the U.S. Supreme Court).

courts a special role as guardians of the Constitution's Due Process and Equal Protection Clauses. Heightened scrutiny is still necessary to safeguard due process and equal protection rights where necessary to protect minority interests against majoritarian tyranny. Similarly, courts must safeguard the democratic processes that the First Amendment facilitates. The government may not be permitted to curtail core political speech through the imposition of unconstitutional contractual conditions. Finally, I acknowledge the dangers associated with asymmetries in bargaining power. Courts ought to enforce only those contractual obligations that are the product of knowing consent to terms. However, courts do not do so. Because, absent fraud, coercion, or unconscionability, courts generally enforce the "duty to read," and they should give the same force to contractual obligations in the First Amendment context as they do in others. Part V concludes.

II. THE TREATMENT OF ECONOMIC RIGHTS IN TWENTIETH CENTURY CONSTITUTIONAL JURISPRUDENCE

This Part sets the stage for a discussion of the status of contracts rights in constitutional jurisprudence today. From the late nineteenth century until 1937, the Supreme Court was nearly as committed to the protection of economic rights as it is committed to the protection of so-called "fundamental rights" today.[13] Although the Court had not yet articulated its doctrine of "tiers of scrutiny,"[14] it reviewed both state and federal legislation that burdened contracts rights with a jaundiced eye. It regarded freedom of contract as "the general rule" and permitted governments to abridge it only in exceptional circumstances.[15] That reverence for freedom of contract vanished in 1937.

13. *See* PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL 98-110 (1998) (tracing the origins of economic substantive due process doctrine from Thomas Cooley's 1868 treatise up to the *Lochner* case); Munn v. Illinois, 94 U.S. 113 (1877) (recognizing for the first time that economic regulation could violate due process); Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1055-57 (1997) (describing twenty or so cases in which the Supreme Court struck down legislation based on economic substantive due process). Others put the number of cases as high as 212. *Id.* at 1057.

14. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007) (arguing that the doctrines of tiers of scrutiny did not emerge until the 1960s).

15. Adkins v. Children's Hospital, 261 U.S. 525, 545-46 (1923), *overruled by* West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937).

A. The Lochner Era

Courts during the *Lochner* Era zealously protected contractual rights against encroachments from state and federal governments. On the federal level, courts struck down economic regulations, contending that Congress's Commerce Clause powers did not extend to the area of manufacturing or labor.[16] Courts thus invalidated laws in the areas of labor regulation generally, child labor, and women's labor.[17] They also struck down consumer protection legislation as interfering with consumers' rights to purchase the goods of their choosing.[18] With respect to state legislation, the courts could not claim that states had no power to regulate economic activities within their own sovereign control. They instead relied on the principle of freedom of contract to strike down state regulation as exceeding the states' police powers.[19]

At the end of the *Lochner* Era, the courts came to adopt a much more capacious view of Congress's Commerce Clause powers.[20] Justice

16. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935 as exceeding Congress's Commerce Clause powers); United States v. E.C. Knight, 156 U.S. 1, 9 (1895) (invalidating a provision of the Sherman Antitrust Act on the ground that Congress's Commerce Clause powers did not permit it to regulate manufacturing).

17. *See Adkins*, 261 U.S. 525 (striking down, as a violation of the due process right to freedom of contract, a federal minimum wage requirement for women and child laborers in the District of Columbia).

18. *See, e.g.*, Williams v. Standard Oil Co. of La., 278 U.S. 235 (1929), *overruled by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941) (invalidating state legislation establishing fixed prices for gasoline sold in the state); Tyson & Bro. v. Banton, 273 U.S. 418 (1927), *overruled by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941) (holding that New York State exceeded its police powers and violated the Due Process Clause in regulating the prices at which theater tickets could be re-sold); Weaver v. Palmer Bros, Co., 270 U.S. 402 (1926) (finding Pennsylvania's prohibition on the use of second-hand scraps of garments for use in making bedcovers an arbitrary and unreasonable restriction on freedom of contract).

19. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936), *overruled by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941) (striking New York's minimum wage for women law as a violation of freedom of contract that exceeded the state's police powers); Lochner v. New York, 198 U.S. 45, *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (striking a New York safety regulation limiting regulating the hours of bakers).

20. *See, e.g.*, Wickard v. Filburn 317 U.S. 111 (1942) (upholding limitations on wheat production under the Agricultural Adjustment Act as permissible pursuant to Congress's Commerce Clause powers); United States v. Darby, 312 U.S. 100 (1941) (upholding a Fair Labor Standards Act Claim under the Commerce Clause and declaring the Tenth Amendment to be but a truism); NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937)

McReynolds, writing for the four dissenting Justices in 1937 remarked that under the majority's view, Congressional power would extend "into almost every field of human industry."[21] There followed nearly sixty years during which the Supreme Court refrained from striking any act of Congress as exceeding Congress's Commerce Clause powers. The subsequent limitations on those powers have been narrow[22] and are easily circumvented through the Constitution's other grants of legislative power to Congress.[23]

B. The Switch in Time

The dramatic shift in the Court's constitutional jurisprudence in 1937 was remarkable and multi-dimensional. All at once, the Court expanded the scope of Congress's Commerce Clause dramatically while also curtailing the powers of the states to engage in intra-state economic regulation. The result was an extraordinary expansion of federal power and a corresponding narrowing of states' rights. The move paved the way for an expansion of individual rights other than economic rights.[24] While scholars disagree about the extent to which the vital shift in 1937 was a product of politics or of more subtle shifts of doctrine as Justices retired, all are agreed on the revolutionary change that came about.[25]

(rejecting a challenge to the National Labor Relations Act which alleged that the Act constituted an "attempt to regulate all industry" and thus exceeded Congress's Commerce Clause powers).

21. NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 94 (1937) (McReynolds, J., dissenting).

22. The limitations include NFIB v. Sebelius, 567 U.S. 519 (2012) (holding that Congress could not use its Commerce Clause powers to impose penalties on people who refused to purchase health insurance); United States v. Morrison, 529, U.S. 598 (2000) (finding no adequate basis in the Commerce Clause for the imposition of federal civil penalties for gender-motivated violence in the Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (striking down a restriction on carrying guns near a school zone as inadequately related to commerce).

23. *See Sebelius*, 567 U.S. at 575 (finding the Affordable Care Act constitutional because it can be reasonably read as a tax); Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, 110 Stat. 3009, enacted September 30, 1996 (amending the Gun Free Schools Act after the *Lopez* decision, by adding language to make clearer the connection between guns in schools zones and interstate commerce).

24. *See* GREENE, *supra* note 3, at 69-79 (detailing the "rights explosion" during the Warren and Burger Courts).

25. *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993);

However, one remarkable element of this sudden transformation of our constitutional jurisprudence has been neglected: contracts rights were not just down-graded. They went from being protected under something akin to our jurisprudential regime's strict scrutiny to being awarded no regard at all—the kind of rational basis review in which any imaginable justification suffices. In upholding a clearly anti-competitive statute with no imaginable health or welfare benefits, the Court conceded that the regulations "may exact a needless, wasteful requirement in many cases"[26] and yet observed, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[27]

The Switch in Time was remarkable because it was such a sudden shift in our constitutional jurisprudence. Rejecting the jurisprudence of the *Lochner* Era, the New Deal Court went from protecting contractual rights to disregarding them as a constitutional matter. Such over-corrections tend to be short lived, but this one has proven long-lasting. Notably, even as the Rehnquist and Roberts Courts have hacked away at the constitutional jurisprudence of the Warren and Burger Courts,[28] there has been no movement in the constitutional valuation of contractual rights. A minimalization of contracts rights has been treated as a necessary corollary of the expansive view of Congress's powers, but it need not be so.

WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

26. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955).

27. *Id.* at 488.

28. *See, e.g.*, Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 323-24 ("The popular notion that the Roberts Court represents a break in the development of [the jurisprudence of the] religion clauses is amply supported by the data."); David A. Logan, *Still Standing After All These Years: Five Decades of Litigation Under the Fair Housing Act and the Supreme Court Still Can't Say for Sure Who Is Protected*, 23 ROGER WILLIAMS U. L. REV. 169, 200-01 (2018) (characterizing the practice of the Roberts Court with respect to precedents form the Warren and Burger Courts as "stealth overruling"); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 880 (2008) (remarking on the irony that the Roberts Court will adopt a position on standing doctrine similar to that of the Warren Court, "the very Court whose historical legacy it seeks to counteract").

III. THE ROBERTS COURT'S OTHER SHADOW DOCKET

Much has been made in recent years of the Supreme Court's "shadow docket,"[29] that is, the decisions that the Court makes on an emergency basis, without full briefing and without oral argument. Will Baude coined the term, but Stephen Vladeck has provided the first monograph explaining the development of the Court's practice of deciding cases on an emergency basis.[30] Contracts law now lurks in the Supreme Court's other shadow docket. The Court hears First Amendment cases, both on the merits and on the shadow docket, in which contractual obligations govern the parties' relationships, at least in part. And yet, the Court often pays scant attention or no attention to the contract and decides the case as though the fact that the parties exchanged promises should have no impact on the resolution of the constitutional issues at hand.

That inattention to contractual rights is a product of rights absolutism. The Court treats a limited number of individual rights as sacrosanct and applies heightened scrutiny to state action that imposes limits on those rights,[31] blasting all competing interests with their irradicating radiation. Interests not expressly mentioned in the first Eight Amendments barely register on the Court's Geiger counter of rights. Four decisions discussed below illustrate the Court's near complete indifference to contracts rights in the First Amendment context.

This Part will proceed in three sections. First, I need to account for what I cannot explain. In at least three contexts, courts uphold contractual rights, even if they burden constitutional rights. I can offer only tentative explanations for why they do so. I then look at recent Supreme Court cases that pit contracts rights directly against free expression rights. Next, I look at recent Supreme Court cases that pit contracts rights against free exercise rights. In these cases, the Court gives pretty much no weight to contracts rights. Finally, I review two cases at the intersection of free exercise and free expression rights, *Fulton v. City of Philadelphia*[32] and *303 Creative,*

29. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. OF L. & LIBERTY 1, 1 (2015) (describing the shadow docket as consisting of "a range of orders and summary decisions that defy its normal procedural regularity").

30. STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

31. *See* GREENE, *supra* note 3, at 58 (observing that Americans discriminate between the rights that count and those that the government may ignore).

32. Fulton v. Philadelphia, 593 U.S. 522 (2021).

LLC v. Elenis.[33] Although the Court decided the first as a free exercise case and the second as a free expression case, plaintiffs raised claims sounding in both provisions in each case.[34] The cases are extraordinary in that in the first, the Court ordered a city to form a contract with a religious entity that discriminated against same-sex couples, and in the second, the Court refused to order a religious entity into contractual relations with a same-sex couple. The cases thus bookend the force with which the Court assists in the vindication of First Amendment rights while writing the law of contractual obligation out of existence.

A. When Contracts Rights Matter

Courts do not always disregard contractual rights and obligations, even if that means curtailing some constitutional rights. Courts enforce non-disclosure agreements (NDAs) so long as they are not unreasonable and do not violate public policy.[35] However, private NDAs are unlikely to give rise to First Amendment issues, as private NDAs do not entail a restriction of free expression rights by the government.[36] A long line of losses for the Trump Administration and the Trump Campaign gives us a sense of when courts find NDAs unreasonable in both the private[37] and the public

33. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

34. *See Fulton*, 593 U.S. at 540-43 (determining, that having decided the case on free exercise grounds, there was no need to consider plaintiff's free expression claims). Plaintiff in *303 Creative* presented the following as its first question presented in its Petition for a Writ of Certiorari: "Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment." Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476), 2021 WL 4459045, at *1. The Supreme Court, in granting the petition, narrowed the question as follows: "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." 303 Creative, LLC v. Elenis, 600 U.S. 570 (2022).

35. *See* Perricone v. Perricone, 972 A.2d 666, 685 (Conn. 2009) (finding that the public policy in favor of freedom of contract weighs in favor of enforcement of NDAs in the private sector); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (addressing non-disclosure agreements involving sexual misconduct).

36. *See Perricone*, 972 A.2d at 685 (quoting Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984) for the proposition that "[t]here is nothing in the history of [the Connecticut declaration of rights or the federal constitution's bill of rights] to suggest that they were intended to guard against private interference with [free speech] rights").

37. *See, e.g.*, Denson v. Donald J. Trump for President, Inc., 530 F. Supp. 3d 412 (S.D.N.Y. 2021) (holding that the Trump NDA was not enforceable under New York's test for restrictive covenants and that the scope of both the non-disclosure provision and the

contexts.[38] Courts are far more likely to look at NDAs carefully when the government is demanding silence of government employees outside of the national security context.[39]

The Hatch Act[40] is another significant law that curtails free expression rights. The Hatch Act restricts political campaign activities by federal employees. They may not engage in political activities while on duty, in a federal building or vehicle, or in uniform.[41] It prohibits officials paid with federal funds from using the positions to coerce either campaign contributions or political support. Even lower-level federal employees must abstain from any "active part" in political campaigns.[42] The Hatch

non-disparagement provision were insufficiently definite to be enforceable); Alison Durkee, *Trump NDAs Scrapped: Hundreds Of 2016 Campaign Staffers Can Now Publicly Criticize Him As Court Finalizes Settlement*, FORBES (Oct. 12, 2023, 12:52 PM) https://www.forbes.com/sites/alisondurkee/2023/10/12/trump-ndas-scrapped-hundreds-of-2016-campaign-staffers-can-now-publicly-criticize-him-as-court-finalizes-settlement/?sh=1c6dafe63a6b (reporting on a settlement in the *Denson* case in which Trump Campaign agreed not to enforce its NDAs and agreed to pay $450,000 to settle the case, which involved 422 former staffers); *cf.* Trump v. Trump, 69 Misc.3d 285 (N.Y. Sup. Ct. 2020) (rejecting, on public policy grounds, Robert Trump's attempt to enjoin publication of Mary Trump's book *Too Much and Never Enough* based a confidentiality agreement entered into by family members).

38. *See, e.g.*, Complaint at 3, Sims v. Trump, Case 1:19-cv-00345 (D.D.C. Feb. 11, 2019), https://s3.documentcloud.org/documents/5735171/Cliff-Sims-v-Trump-Complaint.pdf [https://perma.cc/AV238NXU] (seeking to enjoin, on First Amendment grounds, President Trump from stopping publication of plaintiff's memoire of his time in the Trump White House, *Team of Vipers*). The suit was dropped when the parties reconciled and Mr. Sims rejoined Mr. Trump's 2020 Presidential campaign. Jonathan Karl et al., *Former Trump staffer who penned tell-all book and sued the president, back working on Republican Convention*, ABC News (Aug. 24, 2020, 1:13 PM), https://abcnews.go.com/Politics/trump-staffer-penned-book-sued-president-back-working/story?id=72568745 [https://perma.cc/SP8L-EN48]. *Cf.* Spencer S. Hsu & Josh Dawsey, *Justice Dept. drops John Bolton book lawsuit, won't charge the ex-security aide who became Trump's scathing critic*, WASH. POST (June 16, 2021, 5:04 PM), https://www.washingtonpost.com/local/legal-issues/bolton-book-lawsuit-dismissed/2021/06/16/e16e367a-ced4-11eb-8cd2-4e95230cfac2_story.html [https://perma.cc/ASL9-WZU9] (explaining the Justice Department's decision to give up its attempt to prevent the publication of John Bolton's memoir recounting his experiences as Donald Trump's National Security Adviser).

39. *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. Rev. 449, 520 (2014) ("Since 1983, all government employees and contractors with access to national security information have been required to sign nondisclosure agreements.").

40. An Act to Prevent Pernicious Political Activities, 5 U.S.C. §§ 7321-26.

41. 5 U.S.C. § 7324.

42. 5 U.S.C. § 7323.

Act is striking because it curtails political speech, which goes to the core of freedom of expression.[43] The statute was enacted in 1939 due to concerns about perceived abuse by the Democratic Party of the Works Progress Administration during the 1938 congressional elections.[44]

In response to the Trump Administration's shameless violations of the Hatch Act,[45] one might expect partisan calls for its repeal on First Amendment grounds. But courts have long viewed the Hatch Act as a necessary limitation "on the political influence of federal employees on others and on the electoral process."[46] Absent a reversal of precedent

43. *See, e.g.*, Fed. Election Comm'n v. Cruz, 596 U.S. 289 (2022) (striking down a provision of the Bipartisan Campaign Reform Act as unduly burdening "core political speech"); Buckley v. Am. Const'l L. Found., 525 U.S. 182, 186–87 (1999) (agreeing with prior precedents holding that First Amendment protection is "at its zenith" when applied to "core political speech").

44. *See* United States Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565-66 (1973) (citing concerns expressed in the legislative history underlying the Hatch Act that the government was "using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns"); Priscilla Ferguson Clement, *The Works Progress Administration in Pennsylvania, 1935 to 1940*, 95 THE PENN. MAG. OF HIST. AND BIOGRAPHY 244, 255-56 (1971) (summarizing the findings of the Senate's Sheppard Committee, which included allegations that Democrats had used the WPA in Pennsylvania and other states to coerce campaign contributions and pressure workers to vote for Democratic candidates).

45. *See,* e.g., U.S. OFFICE OF THE SPECIAL COUNSEL, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT OSC FILE NOS. HA-19-0631 & HA-19-3395 (KELLYANNE CONWAY) (May 30, 2019), https://osc.gov/Documents/Hatch%20Act/Reports/Report%20of%20Prohibited%20Political%20Activity%2c%20Kellyanne%20Conway%20%28HA-19-0631%20%26%20HA-19-3395%29.pdf?csf=1&e=aMNhry (calling on President Trump to remove Ms. Conway from her White House position due to an unacceptable pattern of conduct); U.S. OFFICE OF THE SPECIAL COUNSEL, INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION (Nov. 9, 2021), https://osc.gov/Documents/Hatch%20Act/Reports/Investigation%20of%20Political%20Activities%20by%20Senior%20Trump%20Administration%20Officials%20During%20the%202020%20Presidential%20Election.pdf [https://perma.cc/385M-CF5J] (detailing complaints against thirteen senior officials in the Trump Administration who violated the Hatch Act either by supporting or opposing political candidates while acting in an official capacity or by using their offices to further the goals of the Republican National Convention); Richard W. Painter, *Separation of Politics and State in the Aftermath of Donald Trump*, 47 O.N.U. L. REV. 509, 525-42 (2021) [hereinafter Painter] (detailing Hatch Act violations by Attorney General William Barr, Secretary of State Mike Pompeo, and President Trump).

46. United States Civil Serv. Comm'n v. Nat'l Ass'n. of Letter Carriers, 413 U.S. 548, 557 (1973).

dating to 1947,[47] one would expect the Hatch Act to survive First Amendment challenges.

Such a reversal may well loom, given that the earlier decisions upholding the Hatch Act spoke the language of rights mediation.[48] In rejecting a union challenge to the Hatch Act in 1947, Justice Reed, writing for the majority, noted that First Amendment rights "are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."[49] Exhibiting a deference to the political branches wholly alien to the attitude of the crusading Roberts Court, Justice Reed advised that courts should question enactments such as the Hatch Act "only when such regulation passes beyond the general existing conception of governmental power."[50] It should come as no surprise that Justice Black, the First Amendment absolutist,[51] dissented in both cases.[52] When the Court reaffirmed its position on the Hatch Act in 1973, Justices Brennan, Marshall, and Douglas dissented on grounds that echoed Justice Black's concerns.[53] The general existing conception of governmental power has shrunk considerably in 2024 from what it was in 1947 or 1973.

Prosecuting people who violate the Hatch Act has proved difficult. The Act provides only for various professional disciplinary measures, including a ban from holding federal office for up to five years,[54] and civil

47. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) (upholding the Hatch Act in the face of a challenge by union members who alleged that the Act violated the First, Fifth, Ninth and Tenth Amendments); Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947) (rejecting a challenge to the Hatch Act brought by the state of Oklahoma on behalf of France Paris, who had served simultaneously as a state official whose position was funded through federal loans and grants and as the chair of the Democratic Party's state central committee).

48. *See Mitchell*, 330 U.S at 96 (observing that the Court must balance constitutionally protected rights against Congress's concerns about federal employees engaged in the "evil of political partisanship").

49. *Mitchell*, 330 U.S. at 95.

50. *Id.* at 102.

51. *See* HUGO BLACK, A CONSTITUTIONAL FAITH 45 (1969) (arguing that the phrase "Congress shall make no law" means that Congress has no power to abridge any speech or writing).

52. *Mitchell*, 330 U.S. at 112 (Black, J., dissenting) ("No statute of Congress has ever before attempted so drastically to stifle the spoken and written political utterances and lawful political activities of federal and state employees as a class."). In the Oklahoma case, Justice Black dissented without opinion.

53. *See* United States Civil Serv. Comm'n v. Nat'l Ass'n. of Letter Carriers, 413 U.S. 548, 595 (Douglas, J., dissenting) (urging that Section 9(a) of the Hatch Act be struck down as inconsistent with the First Amendment).

54. 5 U.S.C. § 7326(1).

penalties not to exceed $1000.[55] There is a provision for criminal penalties for threatening or coercing federal employees into supporting a particular candidate or working for a particular campaign.[56] There have been allegations that Donald Trump, while President, violated this criminal statute,[57] but no action has been brought against Mr. Trump on that basis.

The Biden Administration has also been guilty of violations of the Hatch Act, but those guilty of violations have acknowledged wrongdoing, apologized, and avoided further infractions.[58] That may be the best we can hope for. Notable for our purposes, the people whose speech is curtailed by the Hatch Act should not really object that they are being denied the freedom to express their political views. They can do so in myriad ways without running afoul of the Act. The Act aims to curtail the ability of federal employees to use their offices to influence political campaigns. The difficulty of enforcing the Act turns on the challenge of drawing the line between federal employees acting in their official capacities as members of an administration and those same people acting in a private capacity as representatives of a political campaign.

The Hatch Act played a significant role in the Georgia prosecution of Donald Trump and eighteen co-conspirators, including Mark Meadows. Mr. Meadows attempted to remove the case from state to federal court,[59] where he hoped to assert a defense of executive immunity. Mr. Meadows claimed that his conduct, allegedly part of a criminal conspiracy to commit voter fraud, was pursuant to his official duties as Chief of Staff in the Trump Administration.[60] However, the Eleventh Circuit recognized that, under the Hatch Act, Mr. Meadows could not have been acting as Chief of Staff in connection with the alleged criminal conspiracy. The Hatch Act would not permit him to support Mr. Trump's re-election campaign as part of his official duties as a federal employee.[61] He had to be acting as a

55. 5 U.S.C. § 7326(2).

56. 18 U.S.C. § 610.

57. Painter, *supra* note 45, at 534-43.

58. *See* Brian Bennett, *Biden Is Resetting the Ethical Norms Trump Trampled as President*, TIME (July 10, 2023, 6:00 AM), https://time.com/6292975/biden-trump-white-house-ethics-hatch-act/ (noting occasional missteps but also contrasting the Biden Administration's attempts to avoid Hatch Act violations with the Trump Administration's cavalier attitude towards the Act).

59. *See* State v. Meadows, No. 23-12958, 2023 WL 8714992 (11th Cir. Dec. 18, 2023) at *1 (describing Meadows' motion to remove his state criminal case to federal court based on the federal-officer removal statute, 28 U.S.C. § 1442(a)(1)).

60. *See id.* at *1-3 (detailing the criminal allegations against Mr. Meadows and laying out his factual defenses).

61. *Id.* at *11 ("Electioneering on behalf of a political campaign is incontrovertibly

member of the non-governmental Trump Campaign.[62] The denial of Meadows's removal motion demonstrates that the Hatch Act does have some legal relevance—teeth, if no fangs.

Finally, Courts also enforce mandatory arbitration agreements, even though such agreements entail a forfeiture of the Seventh Amendment right to a jury trial in civil suits.[63] The matter was discussed when Congress adopted the Federal Arbitration Act (FAA),[64] but the drafters of the FAA persuaded members of Congress that the problem was minor, as the parties involved in arbitration were sophisticated business people who happily embraced the efficiency of arbitration over the procedural niceties of litigation.[65] That claim might have been accurate in the 1920s, when the FAA was enacted, but it certainly is not true today, as arbitration provisions are now routine in employment and consumer contracts.[66] Recently, the Pennsylvania Superior Court struck down Uber's arbitration provision because it deprived Uber's customers of their right to a jury trial without adequate notice,[67] but that remains an outlier case.

I cannot offer here a fully worked-out theory for why contracts rights prevail over free expression rights in the context of NDAs and the Hatch

political activity prohibited by the Hatch Act.").

62. *Id.* at *12 ("The district court did not err in ruling, based on the Hatch Act and Meadows's own testimony, that activity on behalf of the Trump reelection campaign was unrelated to Meadows's federal duties.").

63. *See* U.S. CONST., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]").

64. *See* IMRE SZALAI, AN ANNOTATED LEGISLATIVE RECOVER OF THE FEDERAL ARBITRATION ACT 63-71 (2021) (reprinting Judge Cardozo's opinion in Berkovitz v. Arbib Houlberg, 230 N.Y. 261 (N.Y. 1921) rejecting challenges to New York's arbitration act based on the deprivation of a right to a jury trial).

65. *See id.* at 11-12 (citing statutory language and arguing that "employment disputes were specifically carved out and not covered by the [FAA]"); *id.* at 172 (reflecting the FAA's proponents assumption that it would affect only "contracts relating to interstate subjects and contracts in admiralty"); Margaret L. Moses, *Statutory Misconstruction: How The Supreme Court Created A Federal Arbitration Law Never Enacted By Congress*, 34 FLA. STATE U. L. REV. 99, 146-52 (2006) (contending that the Supreme Court in 2001 ignored clear language in the FAA and expanded its scope to cover employment contracts); *id.* at 106 ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations.").

66. *See* Judge Craig Smith & Judge Eric V. Moye*, Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEXAS TECH L. REV. 281, 286-95 (20120) (detailing the U.S. Supreme Court's expansion of the FAA's reach); SZALAI, *supra* note 64, at 9 ("Millions of American consumers and employees are bound by arbitration agreements and blocked from the courthouse.").

67. Chilutti v. Uber Techs., Inc., 2024 PA Super 126, 300 A.3d 430 (Pa. Super. Ct. 2023).

Act. In the case of the latter, the future is uncertain, but if a case arises challenging existing precedent, courts may well continue to recognize that free expression rights have to be balanced against the need to protect the electorate from electioneering by federal officials. My working hypothesis as to NDAs is that the Roberts Court upholds them not because it is solicitous of contracts rights even if they burden free expression rights, but because it is solicitous of property rights, and NDAs protect private enterprises. The Roberts Court has a well-earned reputation as a protector of property rights.[68] The Roberts Court's general pro-business stand[69] also explains its indifference to the erasure of Seventh Amendment rights in the context of mandatory arbitration.

B. Contracts and Free Expression

In *Mahanoy Area School District v. B.L.*,[70] a public school district disciplined a cheerleader for her profane Snaps directed at the school and at cheerleading.[71] In finding that the school district had violated B.L.'s free speech rights,[72] the Court gave no weight or consideration to the agreement that both she and her mother had signed,[73] specifically pledging that B.L.

68. *See* Julie A. Cohen, *The Zombie First Amendment*, 56 WM & MARY L. REV. 1119, 1126-29 (2015) (arguing that the Court has used the First Amendment to protect property rights); Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587 (2023) (noting the Roberts Court's special interest in cases involving property rights); John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 19 (2016) (noting that five Justices viewed any judicial decision that eliminates or substantially changes even a minor property as a constitutional violation in at least in some circumstances).

69. *See* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471-72 (2013) (noting the business-friendly patterns of the Roberts Court and its propensity of granting certiorari in cases in which lower courts have rules against businesses in order to reverse them).

70. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021). For a more detailed discussion of the case, *see* D. A. Jeremy Telman, *Our Dumb First Amendment: The Case of the Foul-Mouthed Cheerleader*, 126 W.VA. L. REV. 102 (forthcoming, 2024).

71. *See B.L.*, 14 S. Ct. at 2043 (noting that B.L. had been suspended from the junior varsity cheerleading squad for one year). The offending Snap read, "Fuck school fuck softball fuck cheer fuck everything." *Id.* at 2043.

72. *See id.* at 2048 (affirming the Third Circuit's judgment in favor of the plaintiff).

73. B.L. v. Mahanoy Area Sch, Dist., 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019) ("B.L. and her mother reviewed the Rules prior to tryouts, and signed a document acknowledging that B.L. would be bound by them."); *See also* Testimony of Nicole Luchetta-Rump at Preliminary Injunction Hearing October 2, 2017, Joint Appendix, Mahanoy Area Sch. Dist. v. B.L., No. 20-255, 2021 U.S. S. Ct. Briefs Lexis 392, at *23 (Aug. 28, 2020) (explaining that "the cheerleaders were required to read and sign a form saying that they [would] abide by the cheerleading rules" as a prerequisite to trying out for the team, and that B.L. was

would not post anything on social media that disparaged the school or cheerleading.[74] Rather, once the Court determined that B.L. was engaged in expression protected by the First Amendment, the only question, provided in the *Tinker*[75] case, was whether her Snaps materially disrupted classwork or involved "substantial disorder or invasion of the rights of others."[76] The Court adopted the district court's factual finding that there had been no classroom disruption,[77] notwithstanding clear record evidence that such disruption had in fact occurred.[78] It made no mention of invasion of the rights of others, notwithstanding the cheerleading coaches' conclusion that B.L.'s Snaps and the other girls' response was harmful to team morale[79] in an activity that, as B.L. testified, depends on mutual trust.[80]

For the reasons given above, the case may have been wrongly decided under existing law, but the real problem is that the Court mechanically applied the *Tinker* standard, derived from a case about harsh punishment for students engaged in core political speech,[81] to a case about speech that did not merit the same level of constitutional protection. In addition, of the utmost relevance here, B.L. was distinguishable from *Tinker* in that B.L. and her mother signed an undertaking that she would not disparage the school or cheerleading on social media. The Tinkers never promised not to protest the Vietnam War.

present when the rules were explained at tryouts).

74. *See id.* at *15 ("There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.").

75. Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503 (1969).

76. *B.L.*, 141 S. Ct. at 2044 (*quoting Tinker*, 393 U.S. at 513).

77. *Id.*

78. *See* Deposition Testimony of Nicole Luchetta-Rump October 10, 2018, Joint Appendix, Mahanoy Area Sch. Dist. v. Levy, Case No. 20-255, 2021 U.S. S. Ct. Briefs Lexis 392, at *83–84 (Aug. 28, 2020) (describing the disruption of her math class as "continuous over several days" and lasting five-to-ten minutes).

79. *See B.L.,*141 S. Ct. at 2047-48 (finding insufficient evidence that that the Snaps had an impact on team morale).

80. *See* Deposition Testimony of B.L., October 24, 2018, Joint Appendix, Mahanoy Area Sch. Dist. v. Levy, Case No. 20-255, U.S. S. Ct. Briefs Lexis 392, at *97–98 (Aug. 28, 2020) (listing the stunts that cheerleaders do and acknowledging that cheerleaders depend on each other to do what they are supposed to do in order to avoid injury).

81. *See Tinker*, 393 U.S. at 504 (recounting that the Tinkers were suspended indefinitely from their public school for having worn black armbands as a symbolic protest of the Vietnam War).

C. Contracts and Free Exercise

Rights absolutism protects the free exercise of religion to an even greater degree than it protects freedom of expression. In determining whether religious exercise has been burdened, courts do not assess the accuracy of any particular belief so long as it is sincerely held.[82] The test is whether religious exercise has been "substantially burdened," but academics have offered multiple models for understanding how that test is to be applied,[83] and courts err on the side of treating almost any burden on a sincerely-held religious belief as substantial.[84] As a result, courts have grown solicitous of free exercise claims almost regardless of the context in which they arise.

The Court used to recognize a play in the joints between the Establishment Clause and the Free Exercise Clause,[85] such that courts could elect to provide state funding or withhold that funding for certain religious practices without running afoul of either clause.[86] More recently, the Establishment Clause rarely bars the flow of state funding into

82. *See* United States v. Ballard, 322 U.S. 78 (1944) (upholding a district court's instruction to a jury that they should disregard all questions of truth or falsity and focus only on the sincerity of defendants' professed beliefs).

83. *See e.g.*, Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755 (2020) (providing a taxonomy of eight kinds of substantial burdens on religion); Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1793-1815 (2022) (proposing an "adequate alternative principle" as a test for whether government regulation "substantially burdens" religion); Michael A. Helfland, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771 (2016) (advocating a focus on the civil penalties imposed on religious exercise rather than on religious or theological burdens).

84. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (upholding an agency rule created to address concerns that religious organizations' free exercise rights were substantially burdened by a requirement that they certify that the insurance programs that they provided for their employees would not cover contraception); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (finding a substantial burden of religion in a federal requirement that corporations that provide health insurance for their employees cover forms of contraception that might interfere with the implantation of an embryo).

85. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]").

86. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970) (holding that tax exemptions for religious organizations do not violate the Establishment Clause); Locke v. Davey, 540 U.S. 712, 719 (2004) ("There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

religious institutions,[87] and the Court regards any burden on religious exercise as a violation of the Free Exercise Clause.[88] Certainly, contractual obligations present no barrier to the vindication of the Free Exercise Clause.[89]

In *Austin v. U.S. Navy SEALs*, the plaintiff SEALs refused to comply with the Navy's COVID vaccination program on religious grounds.[90] The program penalized SEALs who refused to be vaccinated by declaring them "disqualified," meaning that they were ineligible for deployment. Even if such a religious exemption were granted, and none had been in the past seven years, the SEALs would still be non-deployable absent a medical exemption.[91] The SEALs' religious objections included: opposition to use of vaccines that were developed using cell lines derived from aborted fetuses; objection to any bodily modification as an affront to the Creator; communication from God directing them not to be vaccinated; and objection to having even trace amounts of animal cells injected into their bodies.[92] The district court, consistent with existing practice, accepted as indisputable the sincerity of plaintiffs' beliefs,[93] and noted, consistent with

87. *See* Carson v. Makin, 596 U.S. 767 (2022) (finding that Maine's requirement that public funds available to students who needed to attend private schools be used only for "non-sectarian" schools violated the Free Exercise Clause); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020) (applying strict scrutiny to Montana Department of Revenue rule that excluded religiously affiliated private schools from state scholarship program for students attending private schools and striking the rule on free exercise grounds); Trinity Lutheran Church of Columbia v. Comer, 582 U.S. 449 (2017) (holding that state violated the church's free exercise rights by holding it ineligible to compete for state funding for the refurbishment of its school's playground).

88. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (holding that a school district burdened the rights of the high school's football coach under the Free Exercise Clause when it directed him to cease holding prayer sessions at the fifth-yard line immediately following games).

89. *Kennedy*, like *Fulton*, discussed in Section III.D., *infra*, is a recent case in which the Court ordered a public entity into a contract. Ironically, after the Court ordered the Bremerton School District to renew Coach Kennedy's contract, he "retired" after coaching one game. *See* Virginia Allen, *In His Own Words: Why Coach Kennedy "Retired" After Just One Game*, THE DAILY SIGNAL (Sept. 10, 2023), https://www.dailysignal.com/2023/09/10/in-his-own-words-why-coach-kennedy-retired-after-just-one-game/ [https://perma.cc/G942-KMTF] (explaining that he "it seemed like the right thing" to retire on his own terms).

90. *See* U.S. Navy SEALs 1-26 v. Biden, 578 F. Supp. 3d 822, 826 (N.D. Tx. 2022) (citing the First Amendment and the Religious Freedom Restoration Act as the ground for the SEALs' objection to the vaccination requirement).

91. *Id.* at 827-28.

92. *Id.*

93. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1257-

our rights absolutism, that "it is not the role of this Court to determine their truthfulness or accuracy."[94]

The district court determined that because the Navy required plaintiffs to decide whether to violate their religious beliefs or face possible separation from the military, the Navy imposed a substantial burden on plaintiffs' religious beliefs.[95] Although the court conceded the Navy's compelling interest in stemming the spread of COVID, it did not find the denial of the plaintiffs' requests for exemptions justified in the circumstances.[96] Because the Navy granted medical exemptions, the court rejected the Navy's contention that it had a compelling interest in enforcing its vaccination program without granting religious exemptions.[97] The recognition of a right to medical exemption rendered the Navy's denial of religious exemptions discriminatory against religious beliefs. The district court enjoined the Navy from enforcing its vaccination policies and from taking any adverse actions against the plaintiffs based on their request for accommodations.[98]

The Navy filed an interlocutory appeal in the Fifth Circuit, asking the court to stay the injunction, insofar as it prevented the Navy from considering plaintiffs' vaccination status in making deployment, assignment, and other operational decisions.[99] That motion was denied.[100]

In an expedited proceeding, the Supreme Court granted the Navy's requested stay of a district court's injunction order, insofar as it prevented the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions.[101] The Court set out its opinion in one paragraph that did not comment on the merits of the case.[102] Justice Kavanaugh wrote a brief concurrence observing that he

58 (5th ed. 2015) (noting Justice Jackson's dissenting view that courts cannot assess the sincerity of religious belief and observing that "the Supreme Court has given little guidance in how to determine the sincerity or what constitutes a 'religious belief.'").

94. *U.S. Navy SEALs 1-26*, 578 F. Supp. 3d at 828.

95. *Id.* at 836.

96. *See id.* at 836-38 (finding that plaintiffs are entitled to an individualized assessment of the merits of their requests for exemptions, either because they had been performing their duties without incident, they had evidence of natural immunity to COVID, or because the 99.4% of the force was already vaccinated and that was, in the court's view, sufficient to achieve its compelling interest).

97. *Id.* at 838.

98. *Id.* at 840.

99. U.S. Navy SEALs 1-26 v. Biden, 27 F.4th 336, 345 (5th Cir. 2022).

100. *Id.* at 353.

101. Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022).

102. *Id.* at 1302.

saw "no basis in this case for employing the judicial power in a manner that military commanders believe would impair the military of the United States as it defends the American people."[103] Justice Alito and Justice Gorsuch dissented, largely agreeing with the district court's determination that the Navy did not need to deny the plaintiffs' applications for exemptions in order to meet its compelling need to safeguard the health of its personnel.[104] No opinion made any mention of the SEALs' contractual agreement with the Navy.

D. Putting It All Together: Freedom of Contract

As I explore in Part IV, cases like *Austin* and *B.L.* pose acute challenges, and rights mediation provides the best approach to situations where an adjudicator must consider multiple, significant rights and interests on both or all sides. Courts ought to be wary of allowing the government to order people to do or say things or to refrain from doing or saying things. Before doing so, the adjudicatory body ought to consider all of the relevant rights and interests in their relevant context and with all their fine-tuned particularities.

On the other hand, it is hard to imagine a situation in which a court could order a party to enter into a contract. Courts have paid scant attention to the Contracts Clause since *Blaisdell*,[105] but a rights-mediating adjudicator might think it significant that the Framers took the time to specify that no state should impair an "obligation of contracts."[106] Freedom of contract entails the right to contract with whomever one wants about whatever one wants, unless illegal or in violation of public policy.[107] It also entails a right not to contract[108] with a person or entity unless the reason for refusal is race.[109]

103. *Id.*
104. *Id.*
105. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
106. U.S. CONST. art. I, § 10, cl. 1.
107. *See* Hurley v. Eddingfield, 59 N.E. 1058 (Ind. 1901) (holding that a doctor did not have to tend to a dying man to whom he had tended in the past, even though no other doctor was available); Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 BOST. U. L. REV. 263, 282-83 (1999) (defining freedom of contract as a right to exchange property or labor without interference from others).
108. Omri Ben-Shahr, *Freedom From Contract*, 2004 WISC. L. REV. 261 (2004).
109. *See* 42 U.S.C. § 1981 (prohibiting discrimination in contractual relations based on race).

And yet, in *Fulton v. City of Philadelphia*,[110] the Court ordered the City of Philadelphia to renew its contractual relationship with Catholic Social Services (CSS), notwithstanding the latter's refusal to comply with the city's non-discrimination policy.[111] The facts of the case are as follows: Philadelphia's Department of Human Services (DHS) takes custody of children who cannot remain in their homes and seeks to place them with foster families.[112] DHS then contracts with private entities, including CSS, to place those children in foster homes.[113] The first step of placement is certifying that the foster family is eligible to receive foster children, and DHS contracts with various agencies to conduct home studies and certify families as suitable to serve as foster families.[114]

Because CSS believes that "marriage is a sacred bond between a man and a woman," it would not certify unmarried couples or same-sex couples as foster parents, although it would certify single gay men or women as foster parents.[115] It would refer unmarried or same-sex couples to one of the twenty other agencies that had contracts to perform certification for DHS.[116] After learning that CSS would not certify same-sex married couples, DHS announced that it would no longer contract with CSS, citing a non-discrimination provision in CSS's contract with the City, as well as the non-discrimination requirements of the city's Fair Practices Ordinance.[117] CSS sued, alleging that Philadelphia's refusal to continue to partner with CSS violated its free exercise rights and free speech rights.[118]

CSS sought a religious exemption from both the contract and the ordinance, claiming the state burdened its free exercise rights by forcing it to choose between "curtailing its mission or approving relationships inconsistent with its beliefs."[119] Prior to *Fulton*, the governing precedent in such cases was provided by Justice Scalia's opinion in *Employment Div. v. Smith*.[120] In that case, the Court held that there can be no religious

110. *Fulton*, 593 U.S. 522 (2021).

111. *See id.* at 542-43 (holding that Philadelphia had violated the Free Exercise Clause by refusing to renew its license with CSS).

112. *Id.* at 529-31.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 531-33.

119. *Id.*

120. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

exemption from neutral laws of general application, so long as the burden on religion is an incidental effect of the regulation.[121]

Chief Justice Roberts, writing for the Court, held in *Fulton* that *Smith* did not apply, because the contract at issue was not a neutral law of general application.[122] Rather, the contract gave DHS's Commissioner discretion to provide exemptions from its non-discrimination policy.[123] The Court focused on the Commissioner's refusal to waive that provision to benefit CSS rather than on the fact that it had never waived the policy in any case[124] (and likely never would). DHS provided the Court with four of its own precedents, all standing for the proposition that a governmental entity commands "heightened powers when managing its internal operations."[125] Those arguments were of no use, however, once the Court had determined that the contract was not neutral, because it allowed DHS to exercise its discretion so as to discriminate against religion.[126]

The Court found that the city's public accommodation law, which prohibited discrimination based on sexual orientation, simply did not apply.[127] The Court found that providing certification services is not a public accommodation, notwithstanding the trial court's finding that it is.[128] The Court thus dodged the need to overrule *Smith* but created an exception to it so capacious as to render *Smith* inapplicable in almost every case. Until *Fulton*, courts treated laws as neutral absent evidence of an anti-religious animus.[129] CSS did not allege that the purpose of DHS's anti-discrimination provision was to burden CSS's religious practice. Such an allegation would have been hard to square with the parties' past collaboration in placing children with foster families.

121. *Id.* at 878.

122. *Fulton*, 593 U.S. at 533-34.

123. *See id.* at 534-36 (quoting from the DHS contract, which provides that exemptions from its prohibition on discrimination against same-sex couples can be granted "by the Commissioner or the Commissioner's designee, in his/her sole discretion"). Another provision of the contract barred discrimination against same-sex couples and provided for no exemptions from its applicability. The Court read the two provisions together and deemed the exemption in the first clause to also apply to the second. *Id.* at 536-38.

124. *Id.*

125. *Id.* at 534-36.

126. *Id.*

127. *Id.*

128. *Id.* at 538-41.

129. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (ruling that "the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs").

There are good reasons why courts should not order parties into contracts.[130] Parties that don't want to work together tend not to work together well. Their lack of harmony just leads to new lawsuits.[131] In any case, DHS can easily rewrite its contract to remove the provision for agency discretion. Then the Court will have to confront the nagging question of what to do about *Smith*.[132]

In *303 Creative v. Elenis*,[133] the Court had to address an as-applied challenge to Colorado's public accommodations law, which prohibits discrimination by businesses that offer goods or services to the general public.[134] Lorie Smith created 303 Creative to provide graphic design and web services. Ms. Smith challenged Colorado's public accommodations law on the ground that, if asked to make a wedding website for a same-sex couple, the law would force her to express views, in violation of free expression rights, that would contradict her belief that marriage is a union of one man and one woman.[135] The Court upheld the right of Ms. Smith's for-profit corporation to discriminate against same-sex couples on the ground that the government cannot compel corporate speech.[136] Robert Post has noted that the Court did not undertake to reconcile the

130. *See* Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 NOTRE DAME L. REV. 1323 1326-27 (2023) (noting the unacceptable harm to autonomy interests if courts were to order the specific performance of employment contracts or contracts for personal services).

131. The parties may have reached that conclusion on their own. Philadelphia has made its non-discrimination policy very conspicuous on its website, and the highlighted language allows for no exercise of discretion by the Commissioner. *Birth, marriage, and life events: Become a foster parent*, CITY OF PHILA. (Apr. 14, 2023) https://www.phila.gov/services/birth-marriage-life-events/birth-adoption-and-parenting/become-a-foster-parent/ [https://perma.cc/G3Q4-VC8Q]. DHS no longer lists Catholic Social Services among the agencies that certify foster families. *Foster Care Licensing Agencies*, CITY OF PHILA., OFFICE OF CHILD. AND FAMILIES, DEP'T OF HUMN. SERVS., https://www.phila.gov/media/20220915154821/DHS_Philadelphia_Foster_Care_Agencies091422.pdf [https://perma.cc/DZ27-WNNJ].

132. *Fulton* generated a three-three-three division on the Court. Justice Roberts, writing for the majority, dodged *Employment Div. v. Smith* entirely. *See Fulton*, 593 U.S. at 533-34 (concluding that the case "falls outside *Smith*"); *id.* at 542-45 (Barrett, J., concurring) (agreeing that the case falls outside *Smith* and noting that it is not clear what should replace *Smith*); *id*. at 543-627 (Alito, J., concurring) (urging the Court, at great length, to overrule *Smith*).

133. 303 Creative v. Elenis, 600 U.S. 570 (2023).

134. *Id.* at 577-78.

135. *Id.* at 578-79.

136. *See id.* at 588-89 (disagreeing with the Tenth Circuit and holding that Colorado requiring Ms. Smith to create websites for same-sex marriages would constitute compelled speech inconsistent with the First Amendment).

fundamental values in play, not even through the mechanism of strict scrutiny, because the government is categorically prohibited from compelling speech.[137] As Justice Sotomayor observed in dissent, it was the first time that the Court had granted to "a business open to the public a constitutional right to refuse to serve members of a protected class."[138]

Putting the two cases together, the Court will have created a world in which some corporations can be compelled to contract with entities whose rights the Court cares about. However, natural persons cannot compel corporations into contracts that the government deems to be a public accommodation if doing so might burden those same sacrosanct rights. Even in our post-*Lochner* Era, one would think there would be considerable discomfort at the prospect of federal courts ordering parties to enter into or maintain contracts against their will, as the Court did in *Fulton*. And since the civil rights cases of the 1960s,[139] one would have thought that non-discrimination interests would outweigh at least some interests in free expression.

Taking the two cases, we have an interesting doctrinal puzzle. Because the Court was not yet ready to resolve the status of *Smith*, it treated *303 Creative* as a free expression case. Is it conceivable that Ms. Smith's policy against creating websites for same-sex weddings was motivated by something other than religion? Is it conceivable that any secular foster-home-certifying entity would refuse to certify same-sex couples? If the answer to these questions is no, then the free expression claim is really just a vehicle for vindicating free exercise rights. If the answer is yes, then the only issue is free expression, because refusing to allow organizations to discriminate against same-sex couples has no anti-religious animus.

If *303 Creative* is just about Ms. Smith not wanting to have anything on her website that does not represent her views, that claim really needs to be put to the test. Assume that someone approached Ms. Smith to create a website for the L.A. Dodgers that said, "The Dodgers are the best!" Assume also that Ms. Smith believes that, in fact, the L.A. Dodgers are not the best because the Atlanta Braves are better. The hypothetical raises

137. Robert Post, Public Accommodations and the First Amendment: 303 Creative and "Pure Speech" 3 (Sept. 13, 2023) (unpublished manuscript).

138. *See 303 Creative*, 600 U.S. at 603-04 (Sotomayor, J., dissenting).

139. *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding the Civil Rights Act as applied and finding that Congress had reason to believe that racial discrimination in restaurants has an adverse effect on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding the Civil Rights Act as applied and finding that Congress had reason to believe that racial discrimination in the hotel industry has an adverse effect on interstate commerce).

no issues regarding discrimination, as L.A. Dodgers fans are not a protected class. But if Ms. Smith would agree to create the Dodgers website, then her claim is not about her desire to exclude content from her website that does not represent her views.[140] Her claim is about her religious beliefs and should have been decided on that basis.[141]

IV. BRINGING CONTRACTS OUT OF THE SHADOWS: RIGHTS MEDIATION

This Part attempts to imagine a world without rights-based trump cards, a world in which the weight accorded to competing rights depends on the totality of the circumstances. The Supreme Court cases discussed in Part III provide illustrations of what rights mediation might look like in practice. The world herein imagined departs from our wonted expectation of rights adjudication, and so it is not hard to imagine that objections will be raised. Answering objections to an alternative reality poses certain challenges. Nonetheless, I endeavor in the second section of this Part to anticipate and respond to foreseeable obstacles to the realization of the alternative adjudicatory model proposed in this Article.

A. Imagining Mediating Rights and Interests

A rights-mediation approach to adjudication applied to B.L. would not grant a rant on Snapchat the same level of protection as it would political expression protesting one of the most controversial government policies of the time. One teenager's disappointment at not making the varsity cheerleading squad does not merit the same level of constitutional protection as does a group protest of the Vietnam War.

When a court engages in rights mediation, it considers all matters relevant to the speech and the governmental response to that speech including: the nature of the expression; the level of disruption or foreseeable disruption; whether the disruption was to curricular or extra-curricular programs; whether the expression was profane, abusive, or otherwise merited lesser protection; whether the expression violated school rules or an undertaking of the student and/or their parents; the effect

140. *See* Post*, supra* note 137, at 22 (articulating his intuition that "the vast majority of those encountering Smith's websites would interpret them as expressing the views of Smith's clients, rather than those of Smith herself").

141. *See id.* at 23 (arguing that the Court in *303 Creative* confused free speech and free exercise doctrines, making a "hash of basic First Amendment principles").

of the expression on other students, teachers, or other employees; whether remedies other than school discipline suffice; the student's disciplinary history; the school's past history of discipline for similar expressive activity; and the nature of the discipline imposed, given all of the surrounding circumstances, including the student's intent. Where the speech occurred may matter, but the focus of the inquiry turns on whether the expression caused disruption in school, regardless of its original source.[142]

A rights-mediating court might reach the same conclusion as did the Supreme Court in the *B.L.* case, but that is not really the point. Rather, the Court likely would not hear the case at all. It would defer to the local authorities who are, after all, far better positioned to weigh all the facts within the appropriate legal rubric than are nine Justices who have never coached a cheerleading squad. A local authority, free from the pollution of rights absolutism, might well conclude that common sense should prevail over the sacred cow of free expression, and that a person who has signed an agreement to refrain from action X might be subject to some form of appropriate discipline when they perform action X. Or it might conclude that the discipline was excessive and that some lesser punishment, or a mere warning, would suffice. Given the unique facts and relatively inconsequential nature of the case, judicial resources are better utilized elsewhere. After all, even with the Court's rights-absolutist approach, its decision in the case really clarifies very little, as each subsequent case will raise unique questions relating to disruption of classroom activities or interference with the rights of others. The case is less than three years old, and it has received negative treatment from nine courts.[143]

142. *See* Telman, *supra* note 70, at 141-48 (considering these factors based on the record of the *B.L.* case).

143. *See, e.g.*, McClelland v. Katy Indep. Sch. Dist., 63 F.4th 996, 1006 (5th Cir. 2023) (finding in *Mahanoy* no guidance on whether a school can discipline a high school football player for sending a text containing a racial epithet to a rival player from the school parking lot); Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 506 (1st Cir. 2021) (finding the case distinguishable from *B.L.* because it involved bullying); McElhaney v. Williams, 627 F. Supp. 3d 911, 920 (M.D. Tenn. 2022) (upholding suspension of parent of high school athlete from attending games after disagreement with coach because school officials have a duty to prevent disruptions); R.W. v. Columbia Basin Coll., 572 F. Supp. 3d 1010, 1025-27 (E.D. Wash, 2021) (declining to extend *B.L.*'s framework to a university setting); Cheadle *ex rel.* N.C. v. North Platte R-1 Sch. Dist., 555 F. Supp. 3d 726, 733-34 (W.D. Mo. 2021) (finding that *B.L.* does not apply where student posted a video of herself engaged in illegal conduct—underage drinking—rather than in expression); Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-cv-01595, 2023 WL 4848509,

In the *Navy SEALs* case, a rights-mediation approach would have the advantage of providing for the plaintiffs the individualized adjudication that the Navy SEALs claimed they wanted.[144] However, because the plaintiffs (and the law firm that backs them) are interested in bringing test cases, without the prospect of a sweeping decision, the cases might have never been brought.

If they were brought, a rights-mediating adjudicator might have the ability to press on the obvious logical gaps in the plaintiffs' professed beliefs. How consistently does your typical Navy SEAL insist on the right to life, and how does that square with the principle of proportionality, which allows for certain collateral harms in targeting decisions, including the killing of non-combatants, so long as the collateral harms are not disproportionate to the military objective to be obtained?[145] On what basis do they raise specific religious objections to the injection of animal cells into one's body? Does their religion prohibit eating meat? Is there a theological basis for distinguishing among the manners in which animal cells can be introduced into the human body? Is the argument that there is a "God told me not to" defense to following orders only in the vaccine context, or are we to believe that a Navy SEAL can always object to a lawful order based on the "God told me not to" defense? A rights-mediation approach does not take leave of its senses or of its litigation instincts. It can be mindful of the fact that if you allow a party to make allegations that the court dare not question, a party will allege anything that serves its interests.

A rights-mediation approach would also want to know something about which of the various opinions in the *Navy SEALs* case provide absolutely

at *17-18 (S.D. Ohio, July 28, 2023) (noting that *B.L.* did not address off-campus speech that particularly targeted other students, nor did it strip schools of the ability to "police student speech off-campus where it is related to school activities").

144. *See* Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301, 1305 (Alito, J., dissenting) (faulting the Navy for not providing the plaintiffs with an individualized adjudication of each of their requests for exemptions).

145. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 ILM 1391 (1977) (calling an attack "indiscriminate" if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"); *id.* at art. 57(2)(a)(iii) (calling on combatants to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

no insight: what did the Navy SEALs agree to when they volunteered to serve in the miliary? The case poses significant challenges for a rights-balancing approach. Despite my skepticism as to these particular religion-based claims, the case raises the general problem of weighing the legal significance of sincerely-held religious beliefs against the interests of military discipline and the military's responsibility for the health and well-being of military personnel. Courts should candidly confront that challenge rather than dodge it by pretending, as did every federal court that touched the *Navy SEALs* case, that no contractual obligations are at issue. The Navy SEALs might have made some very specific promises relating to vaccines when they volunteered for military service.[146] Those promises should carry some weight, and we cannot even begin to think about how much weight they might carry when no court even bothers to acknowledge their existence.

In *Fulton*, a rights-mediating court would recognize that CSS was facing a choice between two parts of its mission. Helping children find foster homes is one part of its mission; not endorsing same-sex marriage is another. Which is more important to CSS? Absent rights absolutism, courts would not need to make that decision for CSS. CSS could decide on its own. It is hard to see how any great injustice is done if CSS is not granted a contract to provide certification services for DHS. CSS can no doubt find other ways to serve and support foster families. Note that the *Fulton* Court did not allow DHS the same freedom of choice. DHS also wants to help children find foster homes, but it wants to do so on a non-discriminatory basis. One can understand the Court's decision to indulge CSS's discriminatory policies while paying no mind to contract terms and a city ordinance only if one accepts our uniquely American system of rights absolutism.

Here too, however, one cannot predict the outcome of rights mediation without knowing the full context. Rights mediation entails a careful weighing of the interests at stake, and there could be no pretending that

146. The standard enlistment/re-enlistment form provides that the applicant understands that they will be "[r]equired to obey all lawful orders and perform all assigned duties." DEP'T OF DEF., DD FORM 4: ENLISTMENT/REENLISTMENT DOCUMENT – ARMED FORCES OF THE UNITED STATES (May 2020), https://www.esd.whs.mil/portals/54/documents/dd/forms/dd/dd0004.pdf [https://perma.cc/SE8W-TGH7]. *Compare* THE JAG SCHOOL, U.S.A.F., THE 2023 MILITARY COMMANDER AND THE LAW 252 (19th ed. 2023) (stating that an "order to comply with a vaccine mandate is a lawful order enforceable under the UCMJ," and providing that "a member's refusal to take a required vaccine may result in adverse administrative actions, up to and including involuntary administrative discharge").

the tension between the city's interests and CSS's interest are easily resolved. As in *B.L.* and *Austin*, the rights-mediating adjudicator would have to give serious consideration to the question of whether, under what circumstances, and to what extent people ought to be permitted to waive constitutional rights by taking on contractual obligations.

It is hard to imagine what a rights-mediation approach would make of *303 Creative*. Colorado stipulated to numerous matters, both factual and legal, so that all of the really challenging issues disappeared from the case.[147] Unfortunately, the matters to which Colorado stipulated are the very stuff of rights mediation. How do we know whether there really was a likelihood of an enforcement action against her when she had never been asked to design a website for a same-sex wedding, or indeed, for any wedding? The business entity, 303 Creative, may have had only notional existence.[148] How are we to know whether Ms. Smith was engaged in expressive activity when we cannot see the web designs she was being asked to create? It is hard to know whether a same-sex couple is experiencing a hardship or even a stigma when there is no couple that can testify as to what they have experienced. While these problems arise in any test case, they were especially acute in *303 Creative* where the affected party's interest in engaging in potentially protected activities was so many steps removed from actuality. Rights mediation cannot operate in situations where both the facts and the legal interests are so amorphous. And because rights mediation, unlike rights absolutism, has no interest in broad pronouncements of abstract rights divorced from context, a rights-mediating adjudicator simply would have declined to hear *303 Creative*. A rights-mediating adjudicator might have more interest in preserving resources than in making broad legal pronouncements based on hypotheticals. It might instruct the parties to return when they've got a problem, or perhaps even a case or controversy.[149]

147. *See 303 Creative*, 600 U.S. at 581-82 (noting the parties' stipulation to, *inter alia*: the sincerity of Ms. Smith's belief that marriage is a union between one man and one woman; Ms. Smith's web designs were all "expressive," original, custom, tailored, and involve "close collaboration with individual couples"; all of Ms. Smith's wedding designs involve "celebrating and promoting" her view of marriage; and viewers would know that the wedding websites that 303 Creative makes are Ms. Smith's and 303 Creative's original artwork).

148. *See id.* at 578-81 ("While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans.").

149. *See* U.S. CONST. art. III, § 2, cl. 1 (enumerating cases and controversies over which the federal judiciary has jurisdiction); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937) ("A justiciable controversy is . . . distinguished from a difference or dispute of a

B. Anticipating Criticisms

The criticisms thus far received of this version of rights mediation fall into three categories. First, we have come to regard the judiciary as a guardian of individual rights against encroachments by the State. If we replace rights absolutism with rights mediation, courts will not be able to protect vulnerable groups from abuse by state agencies and majoritarian legislators. Second, government entities ought not to be empowered to impose unconstitutional conditions on the natural and legal persons with whom they work through contractual means. Finally, we should be wary of allowing powerful entities and institutions to use their superior contractual bargaining power to erase constitutionally protected rights. These are all valid concerns to which I cannot do full justice, but I attempt to address each briefly in what follows.

1. Due Process and Equal Protection

Rights mediation generally assumes the adequacy of democratic mechanisms for holding local authorities accountable. Given the complexities involved in rights adjudication, courts should be hesitant to second-guess the resolutions of such conflicts achieved through local institutions. However, courts need to step in where procedural due process or equal protection violations lead to discriminatory or heavy-handed treatment by local officials. Absent such violations, courts ought to defer to local decision-making processes and accord their decisions the presumption of validity.

The test for procedural due process is contextual.[150] Everyone facing adverse action by a state agency is entitled to notice and an opportunity to be heard. Failure to provide such procedural due process protections voids the presumption of validity to which state action would otherwise be entitled.

In cases involving unrepresented groups who cannot protect themselves through democratic processes and may in fact be the victims

hypothetical . . . character"); Osborn v. Bank of the United States, 22 U.S. 738, 819 (1824) (holding that the judiciary is capable of acting "only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law").

150. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (creating a three-factor weighing test to determine the quantum of process that is due).

of majoritarian biases, courts have a special role.[151] As John Hart Ely explained, heightened scrutiny is appropriate not to protect certain favored rights. Rather, heightened scrutiny is concerned with participation in the political processes. Courts must intervene when "the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[152] Even under rights mediation, failures of democratic process still trigger heightened scrutiny from courts whenever they burden the rights of those whose voices are drowned out by populist impulses.

2. Unconstitutional Conditions

The basic notion behind the doctrine of unconstitutional conditions seems straightforward. If the government is constitutionally prohibited from engaging in some conduct, it may not condition some government benefit on to the demand that it be allowed to engage in that same prohibited conduct.[153] The doctrine had its heyday in the 1980s and has since featured very rarely in constitutional adjudication.[154] Part of the problem is that the doctrine is notoriously hard to apply.[155] But I come to praise the unconstitutional conditions doctrine, not to bury it.

The government should not ordinarily condition a benefit on the waiver of a constitutional right. Sometimes, however, the tradeoff is unavoidable.

151. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

152. JOHN HART ELY, DEMOCRACY AND DISTRUST 77 (1980).

153. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RSRV. L. REV. 97, 100 (1989) (offering two descriptions of the doctrine, one of which absolutely prohibits unconstitutional conditions, while the other permits them only if the government has a compelling interest).

154. *See* Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 62 (2013) (questioning the judgment of any legal scholar who puts the words "unconstitutional conditions" in the title of an article or essay); *but see* Michael A. Helfand, *There Are No Unconstitutional Conditions on Free Exercise*, 98 NOTRE DAME L. REV. REFLECTION S50 (2023) (arguing that, while it is tempting to revive the doctrine given recent jurisprudential developments, the Free Exercise Clause is robust enough to withstand limitations without the unconstitutional conditions doctrine).

155. *See* Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1168 (2019) (noting that the doctrine has been called "complex," "convoluted," "inconsistent," and "incoherent").

Government contractors should enjoy freedom of expression, as should all persons protected by the Constitution. But that freedom of expression must be exercised consistent with the protection of national security secrets. As the confusion of the unconstitutional conditions doctrine illustrates, how to draw the line between lawful and unconstitutional conditions poses considerable challenges. My argument here is simply that those challenges are best met through rights mediation, which acknowledges the existence of contractual obligations as well as constitutional rights, and seeks a reasonable accommodation of interests in the relevant context.

3. Meaningful Consent

Peggy Radin helpfully distinguished between contracts formed through mutual agreement (what she calls "World A" contracts) and boilerplate contracts ("World B").[156] In World A, parties negotiate the terms or at least have an opportunity to give meaningful assent to them.[157] World B covers the vast majority of contracts.[158] In this world, one party dictates the terms to a party with little or no bargaining power.[159] The latter party does not know the terms, has no meaningful opportunity to review them, could not understand many of them if she could read them, and cannot negotiate in any case.[160] In general, I share Professor Radin's concern that the movement from World A contracts to World B contracts degrades democratic processes, deletes rights, and eliminates legal recourse.[161]

There would seem to be some tension between questioning the enforceability of contracts of adhesion that do not involve knowing and voluntary acceptance of terms and the advocacy of the enforcement of contractual obligations that are in tension with constitutional rights. After all, governmental power dwarfs the power of the parties with whom it contracts. Neither individuals nor business entities very often possess the power to negotiate the terms on which they interact with government

156. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 3-18 (2013).

157. *Id.* at 3-4.

158. *Id.* at 8-9.

159. *Id.*

160. *Id.* at 3-18.

161. *Id.* at 33-51; *see also* Nancy S. Kim & D. A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723 (2015) (arguing that private companies' terms-of-service agreements are contracts of adhesion that deprive consumers of privacy protections without their knowing and voluntary consent).

entities. If I am critical of the contracts of adhesion that private entities impose on employees and consumers, I ought to be equally skeptical of government-imposed contracts of adhesion.

But there really is no contradiction here. The law should treat contractual obligations as equally weighty regardless of the context in which they arise. Rights mediation can consider the circumstances in which contractual obligations arise and thus is, once again, better positioned than is the absolutist approach to address problems associated with the lack of meaningful consent to contractual terms in form contracting.

V. CONCLUSION

We conclude where we began. The aim of legal scholarship should not be simply to describe legal doctrine but to change it. This Article presents an alternative model for the adjudication of rights. The aim of rights mediation is three-fold. First, it re-introduces common sense balancing and pragmatism into rights adjudication. Second, because rights-mediating adjudicators decide only the cases before them based on the facts presented, the stakes of rights mediations are far lower than the stakes for impact litigation. No one court's decision is going to transform constitutional jurisprudence because the holding of any particular case is decidedly narrow. Third, as a consequence, rights mediation eliminates the incentive for scorched-earth litigation in which the parties pour nearly limitless resources into an effort to win a watershed victory. Most cases can be resolved locally through political processes and political compromises, thus reducing resort to the federal courts to resolve controversies better worked out through our more democratically-accountable institutions.