

**SYMPOSIUM:  
LAW AND RELIGION IN AN INCREASINGLY  
POLARIZED AMERICA**

**THE DISAPPEARANCE OF RELIGION FROM DEBATES ABOUT  
RELIGIOUS ACCOMMODATION**

by  
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*In recent years the escalating polarization among Americans over lesbian, gay, bisexual and transgender rights and reproductive choice has spawned bitter conflicts over religious accommodation. Opposition to the recognition of same-sex marriage has been followed by resistance to exemptions from laws prohibiting discrimination on the basis of sexual orientation, and religious believers and government officials have fought over exemptions from government rules designed to facilitate reproductive choice. A number of scholars have argued that the very idea of religious accommodation in conflicts between believers and the state is now being contested. However, few scholars are actually challenging the principle of accommodation itself. Rather, scholars are increasingly envisioning protections for religious practice very modestly, and there is growing support for a much more privatized vision of the religious exercise that accommodations should protect. Along with these shifts has come much scholarship that focuses on the costs of accommodation, but there has been less attention to the harms that accommodation is designed to alleviate and the state's interests in accommodating religious practice. This essay explores the latter side of the ledger. I will argue that an approach to exemptions that takes into account both the costs and benefits of accommodation will afford robust protection for religious exercise while also*

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*providing for carefully defined limits. Indeed, the best approaches to religious accommodation will encourage religious believers and government officials to work together to find mutually acceptable solutions to their disagreements whenever possible. Behind our disagreements about exemptions in culture war contexts are important considerations on both sides, but even when this is the case, compromises are often possible that substantially address the needs of both parties. We need an approach to exemptions that pushes religious believers and government officials to reach such agreements even when they have a lot at stake.*

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In recent years, debates about religious liberty have become embroiled in the culture wars, and legal scholars have been telling a familiar story about the impact of these divisions on our understanding of religious freedom. The escalating polarization among Americans over lesbian, gay, bisexual and transgender (LGBT) rights and reproductive choice has undermined a central and longstanding feature of America's church-state settlement. When religious exercise is burdened by state laws serving secular public purposes, Americans have, until recently, been broadly supportive of religious accommodation. Exemptions for religious believers in such situations have been a feature of American law since the founding,<sup>1</sup> and today federal and state laws include thousands of religious exemptions.<sup>2</sup>

For much of the twentieth century, the Supreme Court also construed the Free Exercise Clause of the First Amendment to afford protections when neutral, generally applicable laws impinge on religious practice. When the Court first construed the substance of the Free Exercise Clause's guarantees in *Reynolds v. United States*,<sup>3</sup> the Supreme Court had drawn a distinction between religious belief and action. The Free Exercise Clause protects religious opinion, not practices that implicate the public good.<sup>4</sup> However, in the 1940s, the Supreme Court rejected this belief-action distinction, and began to expand protections to situations where burdens on religious exercise are the incidental effect of neutral

<sup>1</sup> See *infra* notes 82–88 and accompanying text.

<sup>2</sup> James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

<sup>3</sup> 98 U.S. 145 (1879).

<sup>4</sup> *Id.* at 164.

laws not aimed at religion.<sup>5</sup> The Supreme Court formulated its new approach in 1963 in *Sherbert v. Verner*.<sup>6</sup> According to *Sherbert*, when government laws or regulations substantially burden religious practice, the religious believer is entitled to an exemption unless the government can show that the application of the law to the believer is necessary to achieve a compelling state interest.<sup>7</sup> While the Court reversed course in 1990 in *Employment Division v. Smith* and rejected a right of exemption for all but a few categories of cases,<sup>8</sup> the *Smith* Court still envisioned and approved legislative accommodation.<sup>9</sup> According to Justice Scalia in *Smith*, the Free Exercise Clause protects religion from discrimination; it does not require affirmative accommodation. However, “a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”<sup>10</sup>

Indeed, the Court’s decision to roll back constitutional protections for religious exercise in *Smith* precipitated the passage of religious freedom legislation modeled on the compelling state interest test in *Sherbert*. *Smith* was deeply unpopular at the time it was decided, and in 1993 members of Congress overwhelmingly passed the Religious Freedom Restoration Act (RFRA), which restored the *Sherbert* rule legislatively.<sup>11</sup> In 1997, the Supreme Court struck down the Act insofar as it applied to state and local law,<sup>12</sup> but RFRA continues to apply to federal law.<sup>13</sup> A narrower federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), was passed in 2000 and restores the *Sherbert* rule to cases involving claimants residing in or confined to government institutions such as prisons.<sup>14</sup> A number of state governments also passed state RFRA, and now 21 states have RFRA.<sup>15</sup> More than a dozen states also

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<sup>5</sup> See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). In *Murdock*, the Court exempted the door-to-door distribution of religious literature from a general nondiscriminatory license tax. *Id.* at 115–17.

<sup>6</sup> 374 U.S. 398 (1963).

<sup>7</sup> *Id.* at 406–07.

<sup>8</sup> 494 U.S. 872, 878–85 (1990).

<sup>9</sup> *Id.* at 890.

<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

<sup>12</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court held that Congress had exceeded the scope of its power under Section 5 of the Fourteenth Amendment. *Id.* at 532–36.

<sup>13</sup> 42 U.S.C. § 2000bb-3a (2012).

<sup>14</sup> 42 U.S.C. §§ 2000cc to 2000cc-5 (2012). RLUIPA was passed under Congress’s spending and commerce powers. § 2000cc-1 (b).

<sup>15</sup> Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 & n.26 (2014) (listing 19 states in 2014). In addition to the 19 states listed by Laycock, Indiana and Arkansas passed RFRA in 2015. See ARK. CODE §§ 16-123-401 to 407 (2015); IND. CODE §§ 34-13-9-0.7 to 11 (2015).

provide for some type of right of exemption as a matter of state constitutional law.<sup>16</sup>

In the years following *Smith*, the views of religion clause scholars regarding religious accommodation evolved. The *Smith* decision received increasing support among scholars who became persuaded by the Court's concerns regarding the feasibility and administrability of the *Sherbert* rule. Scholars also became increasingly troubled by the fairness of special protections for religious, but not secular, conscience. Scholars also debated what form legislative and administrative accommodations should take. Some argued that accommodations should be tailored to specific conflicts, while others argued that a general standard like the rule in federal and state RFRA is also necessary.<sup>17</sup> Until recently, however, few challenged the principle of accommodation itself.<sup>18</sup>

Now, all this has changed, scholars argue. Bitter fights over culture war issues have divided Americans not only over changing public norms but also over accommodations for religious believers who adhere to traditional values regarding same-sex marriage, abortion, and contraception. Catholics and evangelical Protestants have fought the application of the contraceptive mandate under the Patient Protection and Affordable Care Act (ACA) to church organizations, and government officials and religious leaders have fought about the adequacy of the accommodations that have been offered.<sup>19</sup> Businesses owned and operated by individuals with religious objections to facilitating access to contraceptives that they view as abortifacients have challenged the application of the contraceptive mandate to them. Litigation under RFRA involving both religious

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<sup>16</sup> Laycock, *supra* note 15, at 844 & n.22 (listing case law in 14 states). Laycock added an additional state to his list in Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 3 n.8 (2016).

<sup>17</sup> See, e.g., Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 285, 293–96 (Micah Schwartzman et al. eds., 2016).

<sup>18</sup> See, e.g., ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 5 (2013); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 159 (2014).

<sup>19</sup> The contraceptive mandate requires that group health plans include coverage for women's contraceptive services at no cost to plan participants. Health Resources and Services Administration, *Women's Preventative Services Guidelines*, <http://www.hrsa.gov/womensguidelines/> (last visited Dec. 17, 2016). Implementing regulations finalized in early 2012 by the U.S. Department of Health and Human Services, together with the Departments of Labor and of the Treasury, provided for a narrow exemption designed for churches and their integrated auxiliaries, but this exemption left out many religious nonprofits. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130(a)(1)(iv)(2012); 29 C.F.R. § 2590.715-2713(a)(1)(iv)(2012); 26 C.F.R. § 54.9815-2713(a)(1)(iv)(2012)). For subsequent modifications and additional discussion, see *infra* notes 146–150 and accompanying text.

nonprofits and for-profit businesses has reached the Supreme Court.<sup>20</sup> Religious pharmacists have also sought relief from state requirements that they dispense contraceptives that they view as abortifacients.<sup>21</sup> In a blow to religious conservatives, the Supreme Court recently denied certiorari in a case involving a family-owned pharmacy required by Washington state regulations to stock and sell these contraceptives.<sup>22</sup>

The bitterest battles over religious accommodation have been in the context of same-sex marriage. Traditional believers have fought with proponents of gay rights over the recognition of same-sex marriage, and as same-sex marriage has been recognized, they have fought each other over exemptions from antidiscrimination laws benefiting LGBT individuals. Religious groups have sought exemptions from rules that may prohibit or penalize them for refusing to perform, facilitate, promote, or recognize same-sex marriages.<sup>23</sup> Accommodations have also been sought for small business owners who do not want to facilitate same-sex marriage through the services they offer, such as wedding photography, planning, catering or marriage counseling.<sup>24</sup> Opposition to same-sex marriage has met with opposition to religious accommodation, and opposition to religious accommodation has further hardened the battle lines in the culture wars.

Recent battles over new RFRA proposals in state legislatures illustrate the new fissures and escalating tensions. As an increasing number of states recognized same-sex marriage legislatively, and the Supreme Court considered constitutional arguments for requiring such recognition,<sup>25</sup> religious conservatives championed state RFRA as a mechanism to protect religious believers who object to facilitating same-sex marriage through

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<sup>20</sup> *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (involving religious nonprofits); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (involving for-profit businesses).

<sup>21</sup> See *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) *cert. denied*, 136 S. Ct. 2433 (2016); *Morr-Fitz, Inc. v. Quinn*, 2012 IL App (4th) 110398, 976 N.E.2d 1160.

<sup>22</sup> *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016). Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented from the denial of certiorari. *Id.* (Alito, J., dissenting).

<sup>23</sup> For model legislation advocated by scholars seeking a middle ground position regarding religious exemptions in the context of same-sex marriage, see Letter from Edward McGlynn Gaffney, Jr., Professor, Valparaiso Univ. Sch. of Law, et al. to Rosalyn H. Baker, Senator, Haw. (Oct. 17, 2013), <http://mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13-1.pdf>.

<sup>24</sup> See *id.*

<sup>25</sup> In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court held that same-sex couples have a fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 2604–05.

businesses providing wedding-related services.<sup>26</sup> RFRA opponents opposed the bills for the same reason,<sup>27</sup> and in the bitter fight over Indiana's RFRA in 2015, the criticism of RFRA reached a fevered pitch. RFRA were portrayed as a "license to discriminate" with dangerous consequences for other minorities as well.<sup>28</sup> Some of the RFRA bills considered by state legislatures have been enacted, sometimes after being significantly weakened, and some have not.<sup>29</sup> Now, as Douglas Laycock notes, RFRA "have become toxic, politically impossible to enact in any but the reddest states, and maybe not even there."<sup>30</sup> While religious freedom legislation had widespread support in the academy in the years after *Smith*, numerous legal scholars joined the fray to oppose state RFRA.<sup>31</sup>

Many law and religion scholars surveying these developments have concluded that the principle of religious accommodation is now being

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<sup>26</sup> See Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, *supra* note 17, at 231, 248–49; Lund, *supra* note 17, at 287–89, 303.

<sup>27</sup> See Lund, *supra* note 17, at 303; see also Letter from Ira C. Lupu, Professor, George Washington Univ. Law Sch., et al., to Philip Gunn, Speaker, Miss. House of Representatives, et al. (Mar. 10, 2014), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2014/03/legal-scholars-urge-rejection-of-proposed-mississippi-rfra.html>.

<sup>28</sup> See Laycock, *supra* note 26, at 247–50.

<sup>29</sup> For example, shortly after its passage, Indiana's RFRA was amended to exclude religious exemptions from antidiscrimination laws. IND. CODE § 34-13-9-0.7 (2015).

<sup>30</sup> Laycock, *supra* note 26, at 248.

<sup>31</sup> See, e.g., Letter from Katherine Franke, Professor, Columbia Law Sch., et al., to Ed DeLaney, Representative, Ind. House of Representatives (Feb. 27, 2015), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law\\_professors\\_letter\\_on\\_indiana\\_rfra.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf); Letter from Ira C. Lupu et al. to Philip Gunn et al., *supra* note 27.

Over time, RFRA and the compelling state interest test it adopts had been subject to much criticism. The federal RFRA has frequently been criticized as ineffective. See, e.g., Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 576 (1998). State RFRA are also narrowly construed. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA*, 55 S.D. L. REV. 466, 479–82, 484–89 (2010). The rule in RFRA, like *Sherbert*, has been criticized as vague, subjective, easily manipulated and, thus, susceptible to unfair and discriminatory decision making. See KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* 197 (2015) (discussing these criticisms of the compelling state interest test). RFRA has also been criticized for unfairly privileging religious convictions over secular commitments. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452 (1994). In addition, both before and after the enactment of the federal RFRA, a number of scholars argued that the law was an unconstitutional exercise of congressional power. See, e.g., Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793, 795–98 (1998). However, relatively few scholars objected to the protective purpose of religious freedom legislation, and they had never before engaged in a concerted effort to block it.

contested.<sup>32</sup> As the culture wars have spilled over into fights over religious exemptions, support for the idea of accommodation is fading.<sup>33</sup>

This version of the story overstates our growing disagreements about the scope and demands of religious liberty. While the culture wars have precipitated fights over religious exemptions that are increasingly bitter and polarizing, few scholars are actually contesting the idea of religious accommodation itself. Most still affirm the value of religious liberty, including the importance of protecting religious believers when state laws impinge upon religious exercise. However, an increasing number of scholars envision protections for religious practice very modestly, and the scope of protection continues to contract. Thus, while the *Sherbert* Court envisioned a robust compelling state interest test that mandates accommodation unless accommodation demonstrably imperils a “paramount” state interest,<sup>34</sup> increasingly scholars are reading the same standard under RFRA much more narrowly. The compelling state interest test in federal and state RFRA has been described as “modest”<sup>35</sup> and “deferential.”<sup>36</sup> In fact, the Supreme Court had often watered down the compelling state interest test in its free exercise decisions prior to *Smith*,<sup>37</sup> and lower federal and state courts have frequently applied something much less than strict scrutiny in cases under federal and state RFRA.<sup>38</sup> However, until recently, scholars had usually been critical of these decisions. While prominent supporters of RFRA have advocated moderate interpretations of the compelling state interest test and approaches that calibrate the level of protection to the level of burden on conscience,<sup>39</sup> now scholars

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<sup>32</sup> See Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 106 (2016); Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 501–02 (2015); Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301, 1309–10 (2016); Horwitz, *supra* note 18, at 159; Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 655–56 (2015).

<sup>33</sup> See DeGirolami, *supra* note 32, at 106 (stating that “[i]t is the evening of religious accommodation”); Horwitz, *supra* note 32, at 1302 (stating that “[s]tock in accommodationism is selling fast and cheap”).

<sup>34</sup> *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

<sup>35</sup> Andrew Koppelman & Frederick M. Gedicks, *Is Hobby Lobby Worse for Religious Liberty than Smith?*, 9 U. ST. THOMAS J.L. & PUB. POL’Y 223, 228 (2015).

<sup>36</sup> *Id.* at 226, 228; Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 167 (2015).

<sup>37</sup> I discuss the Court’s pre-*Smith* case law in BRADY, *supra* note 31, at 190–91.

<sup>38</sup> See *id.* at 189–90, 197, 250.

<sup>39</sup> See Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 425–26 (1999) (supporting a “moderate” interpretation of RFRA); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 28, 30 (1994) (same);

are increasingly defending significantly weaker readings in the culture war context.

In addition, scholars are increasingly advocating broad limits on religious accommodation where exemptions would place burdens on third parties. The Supreme Court has recognized that the Establishment Clause places some limits on what legislators and administrators can do to accommodate religious exercise including limits where accommodations place burdens on others. The Court has said that accommodations must “take adequate account” of the burdens they place on others,<sup>40</sup> and the Court has also said that judges applying RFRA must take adequate account of third-party costs.<sup>41</sup> However, the Court has left the meaning of “adequate account” largely undefined, and it has never developed a general framework or clear set of rules for evaluating the constitutionality of accommodations that impact third parties.<sup>42</sup> Its holdings are few, and they have been narrow.<sup>43</sup> In scholarship addressing culture war issues, scholars are increasingly advocating limits on religious accommodations whenever they place “significant” or “material” costs on an identifiable group of third parties who do not share the religious beliefs or practices involved.<sup>44</sup> Some have used more restrictive language. Unproblematic accommodations have costs that are “minimal and widely shared.”<sup>45</sup> Limits are appropriate where burdens on third parties are “nontrivial.”<sup>46</sup>

Moreover, scholars increasingly view relevant third-party harms very broadly. In addition to concrete harms suffered by individuals, a variety of dignitary harms may also count. These may include the insult and hurt that same-sex couples experience when being denied wedding-related

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Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 151–52 (2009) (advocating an interpretation that allows “less weighty government interests [to] justify burdens on less weighty religious practices”).

<sup>40</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

<sup>41</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014).

<sup>42</sup> For further discussion, see BRADY, *supra* note 31, at 265–68.

<sup>43</sup> *See id.*

<sup>44</sup> *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2521, 2528, 2587 (2015); Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html>. In her dissent in *Hobby Lobby*, Justice Ginsburg adopted this interpretation of the Court’s requirement that accommodations take “adequate account” of the costs they place on others. *See Hobby Lobby*, 134 S. Ct. at 2790–91, 2790 n.8, 2801 (Ginsburg, J., dissenting).

<sup>45</sup> NeJaime & Siegel, *supra* note 44, at 2520.

<sup>46</sup> Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL’Y REV. 63, 87 (2015).



services because of a negative moral judgment about their unions;<sup>47</sup> the message such exclusion sends about the standing of gay and lesbian couples within the community;<sup>48</sup> and other demeaning effects associated with accommodating religious conduct that labels others as sinners.<sup>49</sup> Relevant harms may also include broader messages and social meanings. An accommodation may undermine the expressive function of the law by undermining the message of the law,<sup>50</sup> or otherwise impair the values promoted by government policies.<sup>51</sup> For example, in the view of some scholars, denying women health care coverage for contraceptives may stigmatize women who use contraception and deter them from using this mechanism to balance work and family.<sup>52</sup>

Other scholars have argued that religious accommodations should not extend to commercial settings, or at least not fully.<sup>53</sup> When religious believers enter commerce, they should abide by the same rules as nonreligious actors. Justice Ginsburg took this position in her dissent in *Burwell v. Hobby Lobby Stores, Inc.* when she repeated an earlier statement of the Court, in dicta, suggesting that Free Exercise Clause protections do not cover the commercial activities of religious believers. Repeating from the Court's opinion in *United States v. Lee*, Justice Ginsburg argued that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, . . . the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>54</sup> Until recently few scholars had drawn such a sharp distinction between religious accommodations in commercial and noncommercial settings, and indeed, few had addressed the matter at length.

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<sup>47</sup> See NeJaime & Siegel, *supra* note 44, at 2576–77.

<sup>48</sup> See Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 189–90 (2015); Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 158 (2015); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 38–39 (2015).

<sup>49</sup> See NeJaime & Siegel, *supra* note 44, at 2576–78.

<sup>50</sup> See Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 475, 481–82, 485–86, 495, 500–01 (2014). For a discussion of this argument, see Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 21 J. CONTEMP. L. ISSUES 449, 466, 469 (2013).

<sup>51</sup> See NeJaime & Siegel, *supra* note 44, at 2580–81; Sepper, *supra* note 48, at 162–65.

<sup>52</sup> See Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, 1037–39 (2015).

<sup>53</sup> See James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142 (2015); Sepper, *supra* note 48; see also Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24 (2014).

<sup>54</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804 (2014) (Ginsburg, J., dissenting) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).

Thus, today's culture wars have not so much precipitated the contestation of the idea of religious accommodation as they have shifted how robustly scholars envision such accommodation. Our divisions are between those who continue to advocate strong protections for religious exercise in conflicts with the state and those who envision these protections much more modestly or even very narrowly. With this shift has come substantial support for a much more privatized vision of the religious exercise that accommodations should protect. When the effect of religious group activity is limited to members and others who share the same values, protections are appropriate. Thus, there is broad support for the right of religious organizations to select their own ministers without interference from the state,<sup>55</sup> and few would argue that clergy should be compelled to solemnize same-sex marriages. Likewise, the narrow exemption that the government originally provided from the contraceptive mandate under the ACA had few detractors from the left. It seems broadly reasonable to exclude churches and other religious organizations from the requirement to include contraception in their health plans if they hire and serve primarily those of their own faith.<sup>56</sup>

Similarly, when religious individuals request accommodations that have little effect on others, there is little resistance to the accommodation. The Court's unanimous decision in *Holt v. Hobbs*<sup>57</sup> is illustrative. In *Holt*, a Muslim prisoner requested an exemption from his prison's no-beards policy for a one-half inch beard.<sup>58</sup> When the prison denied his request, he sued under RLUIPA.<sup>59</sup> The Court held that the government had not shown why the proposed accommodation would undermine its security interests.<sup>60</sup> The *Holt* decision has had widespread support in the academy. As Justice Ginsburg observed in her concurrence, "accommo-

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<sup>55</sup> The Supreme Court unanimously upheld the "ministerial exception" from employment discrimination laws in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

<sup>56</sup> The exemption, as originally written, covered religious employers that hire and serve primarily those of their own faith, have the inculcation of religious values as their purpose, and are nonprofit entities described by the Internal Revenue Code's reference to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of a religious order. For the original version of this exemption, see 45 C.F.R. § 147.130(a)(1)(iv)(B) (2012). A later simplification of the exemption was not designed to change its substance. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–74 (July 2, 2013). For the new version of the exemption, see 45 C.F.R. § 147.131(a) (2015). For further discussion of this exemption and the government's later accommodation for other religious nonprofits, see *infra* notes 147–150.

<sup>57</sup> 135 S. Ct. 853 (2015).

<sup>58</sup> *Id.* at 859, 860–61.

<sup>59</sup> *Id.* at 861.

<sup>60</sup> *Id.* at 859, 865–66.

dating [Holt's] religious belief . . . would not detrimentally affect others who do not share [his] belief."<sup>61</sup>

However, support for religious accommodation becomes much more fractured when religious groups and individuals reach out into the larger community and challenge public values. Thus, for example, Nelson Tebbe has argued that religious groups should be free to reserve facilities that are not open to the public for opposite-sex weddings, but when they make their facilities open to the public, they must abide by nondiscrimination rules.<sup>62</sup> Discrimination in such a context undermines the equal standing of gays and lesbians in the community.<sup>63</sup> Douglas NeJaime and Reva Siegel are troubled when conservative believers who advance exemption claims in culture war contexts also seek to change laws to reflect traditional sexual morality.<sup>64</sup> These are not "simple claims to withdraw," they observe,<sup>65</sup> and they are also troubled any time that accommodating religious exercise creates effects and social meanings that undermine the values the law promotes.<sup>66</sup> On the other hand, if an accommodation can be made in a way that "block[s]" harmful messages, it may be permissible.<sup>67</sup> James Oleske draws a "public-private distinction."<sup>68</sup> Religious exercise is strongly protected in private contexts, such as the internal affairs of religious groups, but when religious adherents enter public realms such as the commercial marketplace, secular rules should govern.<sup>69</sup>

When religious groups run hospitals, schools, and universities, and offer adoption and other social services, their activities affect those outside the faith. Those affected include employees, patrons, and clients as well as those in the broader community whose lives are affected by the values that public actors help to shape. Likewise, when religious believers enter commerce or operate public accommodations and conduct their businesses on the basis of religious principles, their faith reaches out into the larger society and affects customers, employees, and the broader world. All religion clause scholars agree that there must be limits on religious accommodation where exemptions would result in public harms. However, they disagree about whether only concrete harms count and

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<sup>61</sup> *Id.* at 867 (Ginsburg, J., concurring).

<sup>62</sup> *See* Tebbe, *supra* note 48, at 37–38.

<sup>63</sup> *See id.* at 38–39.

<sup>64</sup> *See* NeJaime & Siegel, *supra* note 44, at 2520, 2552–53, 2556, 2563.

<sup>65</sup> *Id.* at 2520.

<sup>66</sup> *See id.* at 2580–83.

<sup>67</sup> *Id.* at 2586.

<sup>68</sup> Oleske, *supra* note 53, at 143–44.

<sup>69</sup> *Id.* at 144–45, 151–53; James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 128–32 (2015). Religious exemptions in the commercial context "will almost always impose burdens on third parties," he argues. *Id.* at 132.

about how substantial the negative effects must be. In culture war contexts, costs that may have seemed minor in the past are becoming much more salient, and there is increasing concern about the social messages and meanings associated with religious exercise.

As religion clause scholarship increasingly tilts in the direction of less religious accommodation, attention to the harms that religious accommodation is designed to alleviate has been diminishing. Religious freedom is an important value, indeed a fundamental value, we read, but often little is said about religion and religious liberty. There is a great deal of scholarship focusing on the costs of religious accommodation, and this work has helped give a fuller picture of these costs. However, an analysis of the appropriate scope and limits of religious exemptions must also take into account the harms that religious accommodations are designed to mitigate and the function of religious exemptions within our broader understanding of religious freedom.

In this short Essay, I will explore this side of the ledger. My goal is to provide a clearer picture of what religious belief and practice entails for religious believers and what is at stake when the demands of religious conscience conflict with the commands of the state. I will also examine the state's interests in accommodating religious practice. My discussion will include illustrations from our current culture war battles. I will not be defending specific proposals for negotiating the various considerations that are raised by claims for religious exemptions. I have offered proposals in a recent book.<sup>70</sup> My purpose here is to broaden the scope of relevant considerations. I will argue that an approach to exemptions that addresses these considerations will afford robust protection for religious conscience in conflicts with the state, including protections for faith that is publicly manifested and practiced. Such an approach should not minimize the effects of accommodations on others, and it does not need to. Both the costs and benefits of accommodation must be taken into account. Religious accommodation should be robust, but there will be limits.

Indeed, I will argue that the best approaches to religious accommodation will encourage religious believers and government officials to work together to find mutually acceptable solutions to their disagreements whenever possible. Behind our disagreements about accommodation in the contexts of same-sex marriage, abortion and contraception are important considerations on both sides. Indeed, this is often the case when religious believers and government officials clash over religious accommodation. However, even when there are important considerations on both sides, compromises are often possible that substantially address the needs of both parties. Our approach to exemptions should push the parties to reach such agreements. Culture wars are unfortunate for many

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<sup>70</sup> BRADY, *supra* note 31.

reasons. They strain our community and collective life, and polarization prevents us from hearing what each other has to say and from learning from those with whom we disagree. A political community that allows for the continual renegotiation of its public values by making room for multiple views is more stable than one that marginalizes dissent, and it is more progressive and more true.

#### WHAT RELIGIOUS FREEDOM PROTECTS

A number of scholars who have sought a middle-ground position with respect to religious accommodation in the context of same-sex marriage have argued that proponents of same-sex marriage and those seeking religious exemptions are essentially making parallel claims.<sup>71</sup> Both gays and lesbians and religious believers are seeking the freedom to live their lives in accordance with an identity that is constitutive of who they are.<sup>72</sup> As Thomas Berg writes, religious conviction and sexual orientation are both “core aspect[s] of identity,”<sup>73</sup> and they are both “impossible to change or very difficult to change without substantial costs to one’s sense of integrity.”<sup>74</sup> Religious freedom protects the ability of religious believers to live their lives in accordance with their deepest commitments and identity, and protections for same-sex couples allow gays and lesbians to do the same. Thus, the experiences of religious believers and gays and lesbians are analogized, and gay rights and religious accommodation both become imperatives of a larger liberal commitment to personal autonomy and integrity. Both freedoms reduce human suffering and help

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<sup>71</sup> See Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 115 (2015) [hereinafter Berg, *Religious Accommodation*]; Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 212 (2010) [hereinafter Berg, *Same-Sex-Marriage*]; Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 399–400 (2010); Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY* 189, 189 (Douglas Laycock et al. eds., 2008); Laycock, *supra* note 15, at 877.

<sup>72</sup> See Berg, *Same-Sex-Marriage*, *supra* note 71, at 212; Brownstein, *supra* note 71, at 401–02; Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 3–4 (2013), <http://www.virginialawreview.org/sites/virginialawreview.org/files/LaycockBerg.pdf>.

<sup>73</sup> Berg, *Religious Accommodation*, *supra* note 71, at 116 (quoting *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1853 (2014) (Kagan, J., dissenting)); see also Brownstein, *supra* note 71, at 401.

<sup>74</sup> Berg, *Religious Accommodation*, *supra* note 71, at 115; see also Brownstein, *supra* note 71, at 401.

to minimize social conflict.<sup>75</sup> Thus, battles regarding gay rights and religious accommodation require “live-and-let-live solutions.”<sup>76</sup>

For Thomas Berg and Douglas Laycock, a live-and-let-live solution means the recognition of same-sex marriage as a civil institution as well as narrow exemptions from antidiscrimination rules for small business owners who object to facilitating same-sex marriages and broader exemptions for religious organizations. The religious exemptions for small business owners that they propose would be overridden if same-sex couples are unable to obtain similar services from willing providers without substantial hardship.<sup>77</sup> Professors Berg and Laycock recognize that those turned away from service may experience dignitary harms even if they are able to obtain comparable goods and services elsewhere, but they argue that these harms should not outweigh the substantial concrete burdens that religious believers would experience if they were forced to choose between their occupations and facilitating a relationship that they believe is religiously prohibited.<sup>78</sup> Alan Brownstein is more troubled by these dignitary harms, and he argues that the government should seek to mitigate them by, for example, making information available regarding willing providers.<sup>79</sup> His proposal is to evaluate exemption claims in the same-sex marriage context according to the standards that would apply if comparable exemptions were sought from laws banning discrimination on the basis of religion.<sup>80</sup>

These scholars offer important insights about the nature of religious belief and the importance of protecting religious practice in conflicts with the state. However, there is more to say. Religious freedom is about a particular type of identity. To fully appreciate the position of religious believers seeking exemptions from state laws, it is important to say more about this particular type of human commitment.

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<sup>75</sup> Laycock, *supra* note 15, at 842.

<sup>76</sup> Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 429 (2011); *see also* Berg, *Same-Sex-Marriage*, *supra* note 71, at 208; Brownstein, *supra* note 71, at 390.

<sup>77</sup> *See* Letter from Thomas C. Berg, Professor, Univ. of St. Thomas Sch. of Law, et al., to Democratic Representatives, Minn. Legislature (May 3, 2013), <http://mirrorofjustice.blogs.com/files/mn-short-letter-pdf—d-1.pdf>; Letter from Thomas C. Berg, Professor, Univ. of St. Thomas Sch. of Law, et al., to Republican Representatives, Minn. Legislature (May 3, 2013), <http://mirrorofjustice.blogs.com/files/mn-short-letter-pdf—r.pdf>; Letter from Thomas C. Berg, Professor, Univ. of St. Thomas Sch. of Law, et al., to Representatives, Minn. Legislature (May 2, 2013), <http://mirrorofjustice.blogs.com/files/mn-main-letter-pdf-1.pdf>.

<sup>78</sup> *See* Berg, *Same-Sex-Marriage*, *supra* note 71, at 229; Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J. F. 369, 376–77 (2016); Laycock, *supra* note 26, at 246.

<sup>79</sup> *See* Brownstein, *supra* note 71, at 420–21, 435–36.

<sup>80</sup> *See id.* at 422–33.

In recent work, I have observed that religious belief and practice is rooted in our common human experience of creatureliness or finitude.<sup>81</sup> We find ourselves in a world that we have not made and can barely control. We ask questions about this world and about human purposes, and our reflections lead to a further question. From whence do we come? What is the source of our lives and all that is, and how is the answer to this question related to other questions about human goals and purposes? As we ask these questions, we confront the ground or source of all that is as a question or concern. For the religious believer, this ground is not just an idea or question. The ultimate reality by which everything exists is present to them as a very real part of their lives, and the believer experiences the divine as something good and trustworthy. The believer worships, yields, bows down, loves. The believer is in a relationship with the divine, and salvation, liberation or fulfillment inheres in some form of union or communion with the divine.

This relationship with the divine has implications for the believer's life in the world. Religion concerns itself with ethics, and these ethical standards are informed by how the divine is understood. For the believer, all of life is lived in light of this relationship, and it reaches deep into the many aspects of human life and experience. Different religious traditions understand the divine in different ways. The divine may be understood personally or impersonally, as a transcendent power, or as an immanent principle underlying all things. It may be plural in nature or unitary, though many faiths with multiple deities are, in fact, at root monotheistic. Different religious traditions also differ with respect to how one acquires knowledge of the divine, how much we can know, how individuals attain the communion or union with the divine that is humanity's highest end, and how the divine-human relationship is understood. However, regardless of how it is understood, this relationship makes demands on religious believers, and when religious practices are integral to the believer's connection with the divine, following conscience becomes imperative.

When founding-era Americans exempted religious pacifists from compulsory military service<sup>82</sup> and Quakers from oath requirements,<sup>83</sup> they did so for a number of reasons. Most importantly, they respected the ca-

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<sup>81</sup> My discussion here is drawn from Chapter 3 of BRADY, *supra* note 31.

<sup>82</sup> In the founding era, most states exempted conscientious objectors from military service as long as they secured a substitute, paid a financial equivalent or performed alternative service. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1808 (2006); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468–69 (1990).

<sup>83</sup> Most states accommodated those who objected to oath-taking by permitting alternatives such as an affirmation. McConnell, *supra* note 82, at 1467–68; see also Laycock, *supra* note 82, at 1804–05.

capacity of persons to seek the divine and their desire to follow conscience where it leads.<sup>84</sup> Religion, wrote James Madison in his famous *Memorial and Remonstrance Against Religious Assessments*, involves “the duty which we owe to our Creator,” and the believer enters society with a higher “allegiance” to the divine.<sup>85</sup> “[T]he relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being,” Thomas Jefferson said in theistic terms.<sup>86</sup> Respect for religious conscience in the founding era extended to situations where the costs were high.<sup>87</sup> Exemptions for religious pacifists from compulsory military service during and after the Revolutionary War implicated critical state interests. So did exempting Quakers from oath-taking requirements that were viewed as necessary for the integrity of the legal system and, thus, for justice between and among citizens.<sup>88</sup>

Those in the founding era also knew that forcing religious believers to betray their consciences undermines moral dispositions necessary for self-government.<sup>89</sup> As Thomas Jefferson wrote, coercion in religious matters “beget[s] habits of hypocrisy and meanness,”<sup>90</sup> and these habits weaken moral integrity and the commitment to truth especially in public life. In addition, founding-era Americans recognized that America’s religions are an important source of public virtue and public values and, thus, that accommodations for believers play an important role in protecting the vibrancy of America’s religious traditions and their moral resources.<sup>91</sup> They knew that religious conscience can be in error and that religion can teach what is bad as well as good.<sup>92</sup> However, those in the founding era did not fear misguided conscience. They believed that “mu-

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<sup>84</sup> See BRADY, *supra* note 31, at 118–21, 166–67.

<sup>85</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland & William M.E. Rachal eds., 1973). When describing religion as “the duty which we owe to our Creator,” Madison quotes from the Virginia Declaration of Rights. See VA. CONST. art. I, § 16.

<sup>86</sup> ROBERT M. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 219 (1962) (quoting *Report of the Board of Visitors of the University of Virginia* (Oct. 7, 1822)). Jefferson was Rector of the Board at the time.

<sup>87</sup> See BRADY, *supra* note 31, at 216.

<sup>88</sup> Oaths were viewed as essential to ensuring truthful testimony. As Michael McConnell has written, “[a]t a time when perjury prosecutions were unusual, extratemporal sanctions for telling falsehoods or renegeing on commitments were thought indispensable to civil society.” McConnell, *supra* note 82, at 1467.

<sup>89</sup> See BRADY, *supra* note 31, at 119, 169–70.

<sup>90</sup> THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, 1777 TO 18 JUNE 1779, illus. facing 305 (Julian P. Boyd ed., 1950).

<sup>91</sup> See BRADY, *supra* note 31, at 106–11, 169–71.

<sup>92</sup> See *id.* at 109–10, 169–70.



tual emulation and mutual inspection” would help to sort out truth from error,<sup>93</sup> and they recognized the value of religious diversity for deepening human understanding.<sup>94</sup> Exemptions make room for practices that challenge prevailing norms and present new possibilities that can help us refine and rethink our commitments.

Those in the founding era knew as well that suppressing religious dissent undermines civic peace.<sup>95</sup> The importance of religious matters to believers means believers have a strong interest in following religious conscience, and forcing believers to violate conscience with respect to practices that are essential to their relationship with the divine is especially likely to provoke resistance, resentment and strife. It also undermines respect for political authority more generally.

In today’s battles over religious accommodation, all of these values are at stake. Oftentimes, the believer’s claim in culture war contexts is characterized as a moral judgment about conduct that others wish to engage in. Religious objections to providing contraceptive coverage or to photographing or catering same-sex weddings are described as moral objections to participating in or facilitating wrongful moral conduct. For example, Douglas NeJaime and Reva Siegel have recently described claims for exemptions in culture war contexts as objections to complicity in the sinful conduct of others.<sup>96</sup> In this view, religious claims begin to seem like attempts to avoid a kind of moral taint, and not surprisingly some writers have extrapolated from these claims a moral judgment about the worth of those who engage in the disapproved conduct.<sup>97</sup>

To be sure, religious opposition to same-sex marriage, abortion and contraception involves moral evaluations, and those seeking exemptions believe that facilitating these forms of conduct involves morally culpable actions of their own. However, moral culpability is only part of their experience. The other part involves their relationship with the divine. They believe that same-sex marriage, abortion and contraception are religiously prohibited, and they resist acting in ways that they believe affirm these behaviors and, in the case of abortion, contribute to the loss of innocent

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<sup>93</sup> Letter from James Madison to William Bradford, Jr. (Apr. 1, 1774), *reprinted in* 1 THE WRITINGS OF JAMES MADISON, 1769–1783, 22, 23 (Gaillard Hunt ed., 1900). According to James Madison, “rival sects, with equal rights, exercise mutual censorship in favor of good morals.” Letter from James Madison to Edward Everett (March 19, 1823), *reprinted in* 9 THE WRITINGS OF JAMES MADISON, 1819–1836, 124, 127 (Gaillard Hunt ed., 1910). Thomas Jefferson also argued that “[d]ifference of opinion is advantageous in religion” because “[t]he several sects perform the office of a Censor morum over each other.” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 160 (William Peden ed., Univ. N.C. Press 1955) (1787).

<sup>94</sup> See BRADY, *supra* note 31, at 144–45, 170–71.

<sup>95</sup> See *id.* at 111–13, 170.

<sup>96</sup> See NeJaime & Siegel, *supra* note 44, at 2518–19, 2542.

<sup>97</sup> See Melling, *supra* note 48, at 189–90.

human life. When religious conservatives say that they do not want to assist or participate in these wrongs, they are also saying that they do not want to betray their relationship with the divine. Facilitating same-sex marriage, abortion or access to contraception promotes what God has forbidden. It feels duplicitous. The message of their actions does not match the confessions on their lips and in their hearts. A betrayal like this changes the heart. It involves a turning away from God's requirements for human relationships and, in so doing, a turning away from God. Conservative believers do not object to serving gays and lesbians generally. They do not shun those who have had an abortion. They are commanded by God to love them. What they object to is taking actions that affirm what God has forbidden.

An additional dimension is involved where religious organizations seek exemptions from requirements that they facilitate or recognize same-sex marriage or assist with access to contraception and abortion. Religious groups are formed to transmit, model and live out the commitments of the faith. The internal organization and structure of the group are meant to reflect and express the group's values. The religious group is the embodiment of these commitments (although all too often a very imperfect one). Thus, legal rules that require the group to assist prohibited conduct and relationships interfere with the ability of the group to model and express the group's beliefs. Recent litigation by religious organizations challenging the contraceptive mandate under the ACA, discussed further below, reflects this concern with church autonomy.<sup>98</sup>

Forcing religious believers to violate their consciences involves harms that go beyond these individuals and their communities. When an individual is forced to act in ways that they view as deeply wrong, indeed as prohibited by the ultimate power responsible for everything that exists, moral habits essential for democratic citizenship are undermined. Thomas Jefferson's warning that coercion in religious matters "beget[s] habits of hypocrisy and meanness"<sup>99</sup> is relevant here. Requiring religious individuals to engage in conduct that they view as religiously prohibited forces a form of dishonesty, and it does so about matters that are of ultimate importance to the individual. Democratic government depends on public virtues, including honesty and integrity. Religious accommodation helps to strengthen these moral habits, and denying accommodation weakens them.

Accommodating religious exercise also benefits the larger community by protecting one of the nation's most important moral resources. Throughout our history religious believers and their communities have contributed to the development of America's public values, and they

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<sup>98</sup> See discussion *infra* pp. 1121–24.

<sup>99</sup> JEFFERSON, *supra* note 90, at *illus.* facing 305.

have helped us to rethink what our values require. Religious ideas and motivations inspired abolitionism in the nineteenth century and the Social Gospel movement in the late nineteenth and early twentieth centuries. They played a role in the New Deal. They were an essential aspect of the Civil Rights movement. Today they inspire religious groups to care for the needy and neglected and to seek freedoms at home and across the globe. One of the most unfortunate consequences of the culture wars is that too many people are conflating religion with a particular form of faith that they may dislike rather than taking a broader view. Some of today's culture warriors do not make it easy to take this broader view. Religious commands to love unconditionally have too frequently become obscured, and sometimes even neglected, in ever more strident efforts to shore up traditional sexual morality in the public sphere.

Too often in American history, when our moral divisions have followed along religious lines, religious liberty has become vulnerable. The belief-action distinction that the Court adopted in *Reynolds v. United States* was in the context of a case denying Free Exercise Clause protection to a Mormon believer who sought an exemption from a law prohibiting polygamy.<sup>100</sup> To allow religious exemptions from legal requirements would "permit every citizen to become a law unto himself," the Court said in *Reynolds*.<sup>101</sup> The Court pointed to the example of believers whose faith requires human sacrifice and the religious belief that wives must burn themselves on the funeral piles of their dead husbands.<sup>102</sup> Polygamy, the Court wrote, is "odious,"<sup>103</sup> an "offence against society."<sup>104</sup> The Court's rule, however, prohibited exemptions for all forms of faith, good and bad.

In *Minersville School District v. Gobitis*, the Court also rejected religious exemptions under the Free Exercise Clause,<sup>105</sup> and its holding forced Jehovah's Witnesses children from the public schools by denying an exemption from compulsory flag salute laws in the year before America entered World War II.<sup>106</sup> The state's interest in the promotion of "national cohesion" is "inferior to none in the hierarchy of legal values," Justice Frankfurter wrote for the Court,<sup>107</sup> and "an exemption might introduce

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<sup>100</sup> 98 U.S. 145, 161–62, 167 (1879).

<sup>101</sup> *Id.* at 167.

<sup>102</sup> *Id.* at 166.

<sup>103</sup> *Id.* at 164.

<sup>104</sup> *Id.* at 165.

<sup>105</sup> 310 U.S. 586, 594–95 (1940).

<sup>106</sup> *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (overruling *Gobitis* and stating that "[c]hildren of this faith have been expelled from school and are threatened with exclusion for no other cause" than refusing to salute the flag). The *Gobitis* children were expelled from their public school for refusing to salute the flag, and their parents placed them in private school. *Gobitis*, 310 U.S. at 591–92.

<sup>107</sup> *Gobitis*, 310 U.S. at 595.

elements of difficulty into the school discipline, might cast doubts in the minds of other children which would themselves weaken the effect of the exercise."<sup>108</sup> It is not surprising that the scope of religious liberty is viewed narrowly at times of great social change or national uncertainty when religious dissenters challenge what the majority views as essential public values and policies. However, narrow understandings of religious liberty have the effect of restricting manifestations of faith that advance the public good as well as detract from it.

Indeed, an important lesson of American history is that we should never be too sure that we know which dissenting views are harmful and which are not. The Civil Rights movement and the fight for gay rights provide important examples. Not infrequently in American history it has been the dissenter who has foreseen the progressive path. Government has a legitimate and important role in transmitting and reinforcing shared national values, but values transmission does not need to be coercive and we should be careful about restricting or suppressing dissent.

Thus, in today's culture wars, rejection of religious accommodation because the exempted activity challenges developing public norms is short-sighted, even if the religious believer is simultaneously seeking to change these norms. Nor should an exemption be denied just because the religious believer is communicating a message of moral disapproval of conduct engaged in by others. Moral pluralism is inevitable in a free society, and it is an important good even when some of the viewpoints expressed are misguided, deeply mistaken or even repugnant.

Many of the dignitary harms that have been associated with exemptions in culture war contexts can be mitigated by the government in ways that do not restrict dissenting views. For example, any stigmatizing messages associated with an exemption for religious organizations from the contraceptive mandate can be countered by the government with alternative messages in its schools and through other mechanisms. Indeed, the message that women should be able to participate fully in the social and economic world has been sent effectively by a variety of social actors, including churches, and as I will discuss below, the real disagreements about contraceptives are about something different.

In the context of same-sex marriage, the insult and hurt that same-sex couples experience when being turned away by wedding vendors who view these relationships as sinful can be mitigated by requiring religious objectors to provide notice of their policies<sup>109</sup> or by providing gay couples with information about willing providers.<sup>110</sup> Such mechanisms would also eliminate the possibility of surprise and reduce the anxiety associated with this possibility. If exemptions from antidiscrimination rules are lim-

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<sup>108</sup> *Id.* at 600.

<sup>109</sup> See Koppelman, *supra* note 32, at 646–47.

<sup>110</sup> See Brownstein, *supra* note 71, at 436.

ited to religious organizations and to small businesses in situations where same-sex couples can readily find comparable wedding-related services from other willing providers, the infrequency of religious refusals should also lessen any message that gays and lesbians are not full and equal members of society. Conservative believers do not necessarily think that they are sending such a message when they refuse to provide wedding services to same-sex couples or to recognize same-sex marriages within their churches. Indeed, most conservative believers do not object to serving LGBT individuals or same-sex couples in general. Their objections are to assisting or participating in conduct that they view as religiously prohibited. The antidote for dignitary harms should not, and need not, be the removal of moral dissent.

Nor should it be privatized religion. Accommodation of private faith but not public faith does not protect the ability of religious believers to follow the ethical standards that are integral to religious belief. It also deprives the whole community of the moral resources that religious faith, including dissenting faith, provides. When religious believers live out their convictions in the public sphere, including the commercial sphere, their religious witness can be a source of great social good. It can help us to rethink our obligations to one another and our shared norms for public and economic life. It does not have to take unwelcome forms.

To be sure, there must be limits on religious freedom and religious accommodation. For example, the question of limits comes into play when accommodating religious exercise involves concrete harms borne by a discrete segment of society. However, the values supporting religious freedom mean that the answers that we give must be more nuanced than simply denying accommodations whenever these costs are material or significant. An analysis of limits in the context of legislative and administrative accommodations should consider a range of relevant factors including the foreseeability and avoidability of the harm, the expectations of the parties, and the nature and substantiality of the burden, as well as whether the burden is shouldered by an individual or corporate entity.<sup>111</sup> Also relevant are whether the accommodation relieves a government burden on religious exercise or regulates the relations between private parties, and if the latter, what type of private setting is involved. If the government has placed a similar burden on others for secular reasons, the accommodation should usually be permissible. Also relevant is the nature of the religious harm that the accommodation is designed to alleviate. I have argued in past work that practices that are essential to the believer's relationship to the divine should receive stronger protection (indeed, constitutional protection under a right of exemption under the

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<sup>111</sup> I discuss these and other factors at greater length in BRADY, *supra* note 31, at 270–73.

Free Exercise Clause) than practices that do not,<sup>112</sup> and distinctions like this will be relevant to an analysis of limits as well. However, limits are not appropriate just because religious exercise expresses unpopular or offensive ideas even in public settings. We must also be careful not to allow the estimation of concrete costs to be colored by negative judgments about the silliness, incomprehensibility or offensiveness of the religious exercise involved.

In *West Virginia State Board of Education v. Barnette*, the Supreme Court overruled *Gobitis*,<sup>113</sup> and when it did so, it stated that “freedom to differ is not limited to things that do not matter much.”<sup>114</sup> According to the Court, “[t]he test of [freedom’s] substance is the right to differ as to things that touch the heart of the existing order.”<sup>115</sup> The *Barnette* Court also worried that coercing uniformity produces civil strife, and “[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.”<sup>116</sup> This is an important lesson during our current culture wars. A few decades ago, the term “culture wars” was a metaphor for deep disagreement and social contestation, but now it seems to be approaching a literal description of our current social life and interactions. As religious conservatives and their opponents battle one another over the shape of public norms, efforts to close off avenues of dissent have escalated the tensions and further polarized the opposing sides. Americans on different sides of the culture wars do not understand one another, and they often do not even know one another.<sup>117</sup> Increasingly they do not mind vilifying one another and one another’s views. Today we should not need reminders about the consequences of such deep social fissures. There is plenty of resentment and bitterness over contested issues in America, and some of this resentment has turned into violence. Americans in the founding era knew the tendency of repressing religious dissent to provoke civil strife. Forcing religious believers to act in ways that jeopardize their relationship with the divine will

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<sup>112</sup> See *id.* at 230, 259. For the limits that I envision under such a right, see *id.* at 235–51.

<sup>113</sup> The Court held that a compulsory flag salute compels speech in violation of the First Amendment. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635–36, 642 (1943). While the Court in *Barnette* did not reach the religious exemption issue addressed in *Gobitis*, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), decided the same term, the Court exempted door-to-door distribution of religious literature by Jehovah’s Witnesses from a general nondiscriminatory license tax.

<sup>114</sup> *Barnette*, 319 U.S. at 642.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 641.

<sup>117</sup> See PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 12 (2014), <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf> (describing polarization between liberals and conservatives).

not produce the unified opinion that proponents of LGBT rights and reproductive choice want. It will provoke resistance and more fighting.

### LIBERTY VERSUS EQUALITY

Scholars who have argued that gay rights proponents and religious conservatives seeking exemptions in culture war contexts are making parallel claims have had limited success in persuading their interlocutors to move to middle-ground positions such as the ones they propose. Part of the reason for this limited success may be that those who favor only narrow accommodations do not agree that the claims on both sides are parallel. Religious believers are making liberty claims, but gay rights advocates are making equality arguments.<sup>118</sup>

Same-sex relationships are a constitutive aspect of gay and lesbian identity, scholars argue, and, thus, differential treatment of same-sex marriages in public life is equivalent to discrimination on the basis of gay or lesbian status.<sup>119</sup> Conservative Christians say that they are not discriminating against gays and lesbians based on their sexual orientation identity when they refuse to furnish wedding-related services or to recognize same-sex marriage, but, in fact, they are. Gay and lesbian identity is a “performative identity,” Douglas NeJaime writes;<sup>120</sup> “[s]exual orientation by its very nature includes an active, relational component.”<sup>121</sup> Thus, exemptions from nondiscrimination laws that require equal treatment of same-sex and opposite-sex unions violate our fundamental commitment to equal citizenship for all Americans. When the arguments of those who oppose religious exemptions are framed as equality arguments, they become very powerful. As Steven Smith has written, equality, not liberty, is the “master political concept of our age.”<sup>122</sup>

Likewise, opponents of exemptions from the ACA’s contraceptive mandate cast their arguments in terms of gender equality. The contra-

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<sup>118</sup> See, e.g., Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1226–29 (2012). Conflicts over religious exemptions in culture war contexts are frequently characterized as pitting religious liberty claims against equality claims. See, e.g., Horwitz, *supra* note 32, at 1301–03; Nan D. Hunter, *Pluralism and Its Perils: Navigating the Tension Between Gay Rights and Religious Expression*, 15 GEO. J. GENDER & L. 435, 435, 438, 470 (2014); Melling, *supra* note 48, at 177; Jennifer C. Pizer, *Navigating the Minefield: Hobby Lobby and Religious Accommodation in the Age of Civil Rights*, 9 HARV. L. & POL’Y REV. 1, 1 (2015); Tebbe, *supra* note 48, at 25.

<sup>119</sup> NeJaime, *supra* note 118, at 1226–29.

<sup>120</sup> *Id.* at 1196 (drawing on KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006)).

<sup>121</sup> *Id.* at 1197–98.

<sup>122</sup> Steven D. Smith, *Equality, Religion, and Nihilism 1* (San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 14–169, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516400](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516400).

ceptive mandate is designed to equalize the costs of contraception for men and women, and it also facilitates full participation of women in the nation's social and economic life by enabling them to balance work and family through family planning.<sup>123</sup> Depriving women of contraception coverage has concrete and symbolic effects for women; it sends a message that women are second-class citizens, and it entrenches their inequality.<sup>124</sup>

However, claims for religious exemptions can also be cast in terms that are similar to the equality claims made in culture war contexts. Human persons are by nature oriented to the divine. As we reflect upon our lives and the larger world and ask moral questions about how we ought to live, we confront the source or ground of all that is as a question or concern. The existence of the divine may be denied. Perhaps there is no greater reality or power grounding our world and the order we encounter. Perhaps our moral questions have no referent beyond ourselves and our experiences. However, the question remains, and for many people in America and across the globe, the divine is more than a question or idea. The ultimate power or reality by which everything exists is present to them in a relationship that shapes how they think, feel, and act, and this relationship promises to resolve the existential threats of meaninglessness, guilt and death by taking human finitude into the infinite. For those who are in a relationship with the divine, action is a constitutive part of faith. The religious person worships or yields, and their life is lived in light of their connection with the divine. This connection makes demands on them in private and in public settings. Religious identity is a performative identity, and because it is a performative identity, religious liberty encompasses protections for both belief and practice.

Indeed, the failure to accommodate the performative aspects of religious faith has at times been described as discrimination against religion. For example, Title VII's prohibition against discrimination on the basis of religion in employment includes the failure to make reasonable efforts to accommodate religious practice.<sup>125</sup> In addition, some scholars interpreting the Court's antidiscrimination reading of the Free Exercise Clause in *Employment Division v. Smith*,<sup>126</sup> and subsequently in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>127</sup> have argued that laws are not generally applicable when they accommodate secular interests but not religious practices that are no more detrimental to the government's

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<sup>123</sup> See Siegel & Siegel, *supra* note 52, at 1036–39.

<sup>124</sup> See *id.* at 1037–39; see also NeJaime & Siegel, *supra* note 44, at 2581–83.

<sup>125</sup> For the relevant provisions of Title VII of the Civil Rights Act of 1964, see 42 U.S.C. §§ 2000e(j), 2000e–2(a) (2012).

<sup>126</sup> 494 U.S. 872 (1990).

<sup>127</sup> 508 U.S. 520 (1993).



purposes.<sup>128</sup> The Court has held that laws that are not neutral or generally applicable receive strict scrutiny,<sup>129</sup> and, thus, these scholars argue that, if the government makes a secular exception to its laws, it must make religious exemptions that involve no greater costs or justify its failure to do so with a compelling state interest.<sup>130</sup> The failure to accommodate religious practices in such circumstances devalues religious concerns,<sup>131</sup> and it discriminates against religion.<sup>132</sup> This interpretation of the Free Exercise Clause has support in lower court cases, including in important decisions authored by then-Third Circuit Judge Alito.<sup>133</sup> Justice Alito echoed his reasoning this past term in his dissent from the Court's denial of certiorari in *Stormans, Inc. v. Wiesman*,<sup>134</sup> and his dissent was also joined by Chief Justice Roberts and Justice Thomas. Thus, religious liberty claims can often be cast as equality claims too.

Nor would it be accurate to distinguish sexual orientation identity and religious identity on the ground that the former is given but the latter is chosen. Both are at once given and chosen. To be gay or lesbian involves an orientation that can be either embraced or rejected. Human persons are reflective beings; we are never the equivalent of our inclinations or dispositions. In the past, gay and lesbian orientations were sup-

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<sup>128</sup> See Laycock & Collis, *supra* note 16, at 10–11, 19, 21–22; Laycock, *supra* note 39, at 144; see also Thomas Berg, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1277, 1294–95 (2005).

<sup>129</sup> *Lukumi*, 508 U.S. at 546.

<sup>130</sup> See Laycock & Collis, *supra* note 16, at 10–11, 19, 21–22; Laycock, *supra* note 39, at 144.

<sup>131</sup> See Berg, *supra* note 128, at 1294–95.

<sup>132</sup> See Laycock & Collis, *supra* note 16, at 26–27.

<sup>133</sup> *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363–66 (3d Cir. 1999); see also *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (stating that a “law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated”).

<sup>134</sup> 136 S. Ct. 2433, 2438–39 (2016). At issue in *Stormans* were Washington state regulations requiring pharmacies to stock and sell emergency contraceptives. *Id.* at 2434–36. The Washington State Board of Pharmacy drafted the regulations to include numerous secular exceptions but excluded an exemption for pharmacies with religious or moral objections to dispensing these or other drugs. *Id.* at 2434. The claimants in *Stormans* included a family-owned pharmacy whose owners had religious objections to dispensing contraceptives that they viewed as abortifacients. *Id.* at 2433. Justice Alito noted that the state's regulations were substantially underinclusive and left unprohibited refusals that would undermine the government's purposes to at least the same degree as religious refusals would. *Id.* at 2439. Justice Alito also emphasized that “[a]llowing secular but not religious refusals . . . ‘devalues religious reasons’ for declining to dispense medications ‘by judging them to be of lesser import than nonreligious reasons,’ thereby ‘singl[ing] out’ religious practice ‘for discriminatory treatment.’” *Id.* at 2438 (quoting *Lukumi*, 508 U.S. at 537–38).

pressed from the outside and often from the inside. Today, many gays and lesbians openly embrace their sexual orientation and pursue intimate relationships and family building with those of the same gender. Gay and lesbian orientation is embraced as good; actions consistent with this orientation are viewed as conducive to human flourishing.

Religious faith is a response to an openness to the spiritual that is part of human nature. It grows out of common experience and has roots in the human propensity to seek the divine. Not all people seek the divine, and some reject its existence. However, the religious believer embraces this propensity and the divine when it is found.

One of the reasons that we protect religious freedom is that we respect the capacity and desire of humans to pursue the divine. Not all Americans are religious, but religious faith is an aspect of our identity as humans, and religious freedom respects and accommodates it. American constitutional law has also long protected the capacity and desire of persons to form intimate relationships and to build families.<sup>135</sup> In *Obergefell v. Hodges*, the Court held that this protection includes the fundamental right of same-sex couples to marry.<sup>136</sup> Gay and lesbian relationships can participate in the goods we associate with marriage, the Court argued.<sup>137</sup> They can build loving and supportive unions and families.<sup>138</sup> Thus, religious freedom and marriage equality are both fundamental liberties.

The argument that the contraceptive mandate under the ACA promotes gender equality also involves a liberty claim. The contraceptive mandate does not treat men and women the same. It seeks to equalize the costs of contraceptives for men and women in view of the fact that male and female contraceptives are necessarily different, and it seeks to make contraceptives readily available to women so that they can build families (or not) in ways that allow them to participate fully in society and the economy.<sup>139</sup> The contraceptive mandate is designed to promote the freedom of women to make and follow varied life plans in the public world. It allows women to realize their different identities, which yield diverse visions for work and family life.

In conflicts over the provision of contraception coverage under the ACA, there are, at bottom, few disagreements about the freedom involved. Conservative believers might prefer to say that women, like men,

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<sup>135</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>136</sup> 135 S. Ct. 2584, 2604–05 (2015). The Court held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” *Id.* at 2604.

<sup>137</sup> See *id.* at 2599–60.

<sup>138</sup> See *id.*

<sup>139</sup> See *supra* notes 123–124 and accompanying text.

should have the freedom to use their varying gifts to serve God and others. Whatever the terminology, religious women, including conservative believers, are used to making choices about participation in the workforce and about balancing work and family life. They also share widespread concerns about the difficulties of achieving such balances regardless of how many children they have. The real disagreements in this context are different. Catholics and evangelical Protestants view some forms of contraceptives as abortifacients, and they do not want to pay for or facilitate coverage for devices or drugs that they believe can cause the destruction of innocent human life. In addition, the Catholic Church also adheres to its traditional teaching that the use of artificial conception is immoral. (Natural family planning is permitted under Church teaching.<sup>140</sup>) This teaching is followed by relatively few Catholic women, but Catholic institutions naturally seek to model their own employment relationships and other affairs on current Church doctrine.

The divide is deeper in the conflict over same-sex marriage. In this context, gay rights advocates and religious conservatives disagree about the morality of the performative aspects of gay and lesbian identity. While gays and lesbians who have sought the right to marry have argued that their relationships can participate in the goods of marriage, religious conservatives have adhered to the traditional understanding of marriage as a union between a man and a woman. However, even here there can be areas of agreement. The gay person who seeks to marry and form a family with someone of the same sex is making a moral decision. They see same-sex marriage as integral to a life of human flourishing. Marriage and family are not libertine choices. While religious conservatives may strongly disagree about the morality of same-sex marriage, they can respect the moral agency of the gay couples who make this choice. We should all seek the good through careful and informed reflection and follow our conscience. Religious freedom respects and protects our capacity to seek the divine and to follow religious conscience. Respect for our capacity for moral decision making will also leave space for moral freedom.

The culture wars have perpetuated a very polarized and divisive approach to our current disputes about same-sex relationships, but this is not the only option. A very different approach is to try to respect and accommodate the sincere beliefs of those on both sides of our moral disagreements. Both sides could try to better understand one another and to see the controversy from their opponents' viewpoint. Both sides could try in good faith to reach compromises that allow each other to follow their conscience.

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<sup>140</sup> See Natural Family Planning, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/index.cfm> (last visited Dec. 17, 2016).

What compromises might emerge from such joint efforts are hard to predict in advance. Scholars seeking a middle ground position in conflicts regarding same-sex marriage have offered a possible blueprint. Some of these scholars support the recognition of same-sex marriage as a civil institution while leaving decisions about its recognition as a religious institution to America's diverse religious groups.<sup>141</sup> This makes sense as a way to respect both religious and moral freedom. Their proposals also include an accommodation for small business owners with religious objections to facilitating same-sex marriages through the provision of wedding-related services and marital counseling.<sup>142</sup> This proposal covers a situation where many conservative religious believers are likely to feel that nondiscrimination rules force them to take actions that affirm support for same-sex marriage. The proposed accommodation balances the interests of same-sex couples by protecting them in situations where they experience substantial difficulty in obtaining comparable services from willing providers. I have suggested above that the government might go further and either require notice from objecting businesses to potential patrons or develop resources for same-sex couples to identify willing providers. Some form of narrow accommodation for this kind of conflict makes sense. So do broader protections for religious organizations that object to facilitating or recognizing same-sex marriages through their facilities, services or employment relationships. Religious groups play a unique role in transmitting and modeling religious commitments, and our understanding of religious freedom should reflect this role. Thus, solutions that protect the freedoms of both same-sex couples and religious believers will ensure the access of gay couples to public goods but will not insist that every public actor recognize these relationships or participate in the provision of marriage-related services all the time.

Over time, the parties could move closer together. For example, religious conservatives might decide not to fight about extending health care or other benefits to the spouses of gay and lesbian employees, even church employees. Spousal benefits seem like a natural area of conflict between gay rights advocates and religious conservatives, and, in fact, they have been. For example, in 2010 after Washington, D.C. passed legislation recognizing same-sex marriage, Catholic Charities of the Archdiocese of Washington stopped providing health care benefits for the spouses of new employees or new health plan enrollees altogether in order to avoid being penalized for denying benefits to the spouses of gay

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<sup>141</sup> See Letter from Thomas C. Berg et al. to Democratic Representatives, *supra* note 77; Letter from Thomas C. Berg et al. to Republican Representatives, *supra* note 77.

<sup>142</sup> See Letter from Thomas C. Berg et al. to Representatives, *supra* note 77.

employees.<sup>143</sup> However, the extension of such benefits to the spouses of gay employees need not be viewed as an endorsement or recognition of same-sex marriage. It could also be viewed as an implication of Christian charity and supported as part of a larger responsibility to care for employees and those that these employees support. Compromise on culture war issues would be an ongoing process, and its endpoints are not fully foreseeable.

#### THE PROMISE OF COMPROMISE

At the outset of this Essay, I noted that I would not be defending specific proposals about the proper scope and limits of religious accommodation. The formulation of specific proposals is a complex task involving a variety of factors, including practical considerations and constitutional principles under both the Free Exercise and Establishment Clauses. I have tried my hand at this task in a recent book.<sup>144</sup> However, what I have said indicates that specific proposals should provide for robust accommodation for religious exercise while recognizing that there will be limits on religious accommodation when critical state interests and the rights of others are also involved. In addition, what I have said also suggests that the best proposals will be ones that provide strong incentives for religious believers and government officials to work together in good faith to reach mutually acceptable compromises whenever possible. Such compromises can often be achieved even when important government interests are at stake, but frequently the parties need external incentives to make these efforts. Compromise requires mutual understanding, good will and creative thinking. Solutions to the legal battles over religious accommodation in today's culture wars are possible, but the polarized environment means that the parties need to be pushed.

The Court's recent rulings in *Zubik v. Burwell* are illustrative.<sup>145</sup> Disputes over the contraceptive mandate under the ACA have been ongoing for more than five years. The contraceptive mandate requires that group health plans include coverage for women's contraceptive services at no cost to plan participants.<sup>146</sup> Implementing regulations finalized early in 2012 by the U.S. Department of Health and Human Services, together with the Departments of Labor and of the Treasury, provided a narrow

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<sup>143</sup> See William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, WASH. POST (Mar. 2, 2010), [http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345_pf.html).

<sup>144</sup> See BRADY, *supra* note 31, at 228–78 (chapters 8 and 9).

<sup>145</sup> 136 S. Ct. 1557 (2016) (per curiam); *Zubik v. Burwell*, 136 S. Ct. 1557, 2016 WL 1203818 (Mar. 29, 2016) (order to file supplemental briefs).

<sup>146</sup> Health Resources and Services Administration, *Women's Preventative Services Guidelines*, <http://hrsa.gov/womensguidelines/> (last visited Dec. 17, 2016).

exemption designed for churches and their integrated auxiliaries,<sup>147</sup> but this exemption left out many religious nonprofits, including hospitals, schools, and social services organizations. The government's decision to finalize an exemption that provided no protection for many religious organizations with objections to covering some or all contraceptives sparked an immediate outcry from religious leaders and lay people from across the political and theological spectrum, and President Obama soon announced a compromise to retain contraceptive coverage for plan participants but shift the provision and cost of contraceptives to insurance providers where religious nonprofits object to offering the coverage.<sup>148</sup> The new rule was finalized in 2013,<sup>149</sup> and in 2015 the government modified its accommodation to address the concerns of some religious groups regarding the notice they must give of their objections.<sup>150</sup> While the government's 2013 accommodation was acceptable to many religious nonprofits, others found both the accommodation and its subsequent modification unsatisfactory.

Last term in *Zubik* the Court granted certiorari in a set of cases brought by a variety of religious nonprofits challenging the sufficiency of the government's accommodation.<sup>151</sup> The religious groups argued that the government's notice rule requires them to assist the provision of contraceptives to their workers through the infrastructure of their health plans.<sup>152</sup> The groups also objected to contracting with any insurance company that was required, authorized, or incentivized by the government to provide contraceptives to their employees in connection with their health plans.<sup>153</sup> The religious claimants argued that these aspects of

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<sup>147</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130(a)(1)(iv) (2012); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2012); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2012)). The exemption was simplified in 2013, 78 Fed. Reg. 39,870, 39,873–74 (July 2, 2013), but these simplifications were not intended to make substantive changes. For the new version of the exemption, see 45 C.F.R. § 147.131(a) (2015).

<sup>148</sup> See Helene Cooper & Laurie Goodstein, *Rule Shift on Birth Control Is Concession to Obama Allies*, N.Y. TIMES (Feb. 10, 2012), <http://nyti.ms/1Oq3dB7>.

<sup>149</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013). See 26 C.F.R. § 54.9815-2713A (2016); 45 CFR § 147.131 (2015); 29 C.F.R. § 2590.715-2713A (2015).

<sup>150</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,322–23 (July 14, 2015); see 45 C.F.R. § 147.131(c)(1) (2015).

<sup>151</sup> *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam).

<sup>152</sup> See Brief for Petitioners at 39, 42–45, 76, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 15-35, 15-105, 15-119, 15-191).

<sup>153</sup> See Brief for Petitioners at 19, 48, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505).

the contraceptive mandate place a substantial burden on their religious exercise and violate RFRA.<sup>154</sup>

When Justice Scalia died suddenly in February 2016, the prospects of victory for the religious claimants in *Zubik* dimmed significantly, and the possibility of a 4–4 split would mean leaving in place lower court judgments that mainly favored the government. Oral argument in *Zubik* was held in March and shortly thereafter the Court issued an unusual order directing the parties to file supplemental briefs addressing “whether and how contraceptive coverage may be obtained by petitioners’ employees through petitioners’ insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees.”<sup>155</sup> The Court’s order made it clear that neither side was assured of victory and that the Court wanted a resolution that would accomplish the government’s purposes without requiring them to rule against the religious nonprofits and thereby expose them to heavy fines if they failed to comply with the government’s rule.

The incentives for compromise were strong, and the religious claimants came forth with a proposal for separate contraception coverage plans that would be offered to their female employees by their insurers through “a separate enrollment process, a separate insurance card, and a separate payment source, and . . . through a separate communication . . . .”<sup>156</sup> The government indicated that it strongly preferred the current accommodation but stated that a compromise along the lines envisioned by the Court was workable.<sup>157</sup> In its supplemental reply brief, the government disagreed with the adequacy and feasibility of the claimants’ proposal,<sup>158</sup> but the Court found that the prospects for a mutually satisfactory compromise were sufficiently encouraging to issue a per curiam ruling vacating the judgments of the lower courts and remanding the cases to afford the parties “an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive

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<sup>154</sup> See *id.* at 1–3; Brief for Petitioners at 2–3, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 15-35, 15-105, 15-119, 15-191).

<sup>155</sup> *Zubik v. Burwell*, 136 S. Ct. 1557, 2016 WL 1203818, at \*2 (Mar. 29, 2016) (order to file supplemental briefs).

<sup>156</sup> Supplemental Brief for Petitioners at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191). The organizations also argued that these plans could be made available to employees of religious organizations that self-insure or use self-insured church plans. *Id.* at 2.

<sup>157</sup> See Supplemental Brief for Respondents at 14–15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

<sup>158</sup> Supplemental Reply Brief for Respondents at 3–6, 8–10, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

full and equal coverage, including contraceptive coverage.”<sup>159</sup> Both sides had made significant concessions. The religious claimants offered a proposal that came close to the type of arrangement that the government wanted, and they abandoned their argument that they could not contract with any insurance company that was required by the government to provide contraception coverage to its employees. For its part, the government abandoned its insistence that the religious groups provide notice to the government of their objections or use the self-certification procedure provided in the original accommodation.<sup>160</sup> While disagreements remain, strong incentives to compromise pushed the parties much closer together.

The Court’s rulings in *Zubik* were very unusual, but they suggest a promising pathway for resolving many of even the bitterest and most intractable fights over religious accommodations. If legal rules are structured to push the parties to work together to seek mutually acceptable solutions wherever possible, many conflicts between religious believers and the state can be resolved by the parties themselves. The weakness of the compelling state interest test in lower federal and state court decisions has prevented it from serving this function. While in theory a strong right of exemption should give the government incentives to compromise, the compelling state interest test has often been quite weak, and the standard has proved vague and manipulable in the hands of judges.<sup>161</sup> An effective approach must give both parties strong incentives to work together to reach compromises while providing robust protection for religious exercise and a coherent set of limits. I have offered my suggestions in recent work,<sup>162</sup> but there will be multiple possibilities.

If the disputes over the contraceptive mandate at issue in *Zubik* are successfully resolved through compromise, the smoke will clear around one of the bitterest of our recent fights over religious accommodation. However, much has already been lost. Culture war battles and related fights over religious accommodation have deepened our civic tensions and undermined core values on both sides. Prior commitments to strong protections for religious believers in conflicts with the state have weakened. The value of pluralism has been challenged. The Christian command to engage others in mercy and love has been pushed into the background. I think that we will regret these developments, but I do not think we should be surprised by them. Religious liberty has always been vulnerable when deep moral divisions follow along religious lines. When deliberating about religious accommodation, we need to keep this in

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<sup>159</sup> *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam) (quoting Supplemental Brief for Respondents, *supra* note 157, at 1).

<sup>160</sup> See Supplemental Brief for Respondents, *supra* note 157, at 14–15.

<sup>161</sup> See BRADY, *supra* note 31, at 190–92, 197.

<sup>162</sup> See *id.* at 251–57.



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THE DISAPPEARANCE OF RELIGION

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mind, but we should also keep in mind the promise that compromise has for resolving many of our conflicts in mutually acceptable ways.