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U.S. COMMISSION ON CIVIL RIGHTS

PEACEFUL COEXISTENCE:

RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES

BRIEFING
REPORT

SEPTEMBER 2016

U.S. COMMISSION ON CIVIL RIGHTS

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- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
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Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties

A Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC

Briefing Report

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

President Barack Obama
Vice President Joe Biden
Speaker of the House Paul Ryan

The United States Commission on Civil Rights ("the Commission') is pleased to transmit our briefing report, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties. The report is also available in full on the Commission's website at www.usccr.gov.

The report examined the balance struck by federal courts, foremost among them the U.S. Supreme Court, in adjudicating claims for religious exemptions from otherwise applicable nondiscrimination law.

The Commission heard testimony from experts and scholars in the field and a majority of the Commission made findings and recommendations. Some of those findings were that:

1. Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence.

2. Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights.

3. The First Amendment's Establishment Clause constricts the ability of government actors to curtail private citizens' rights to the protections of non-discrimination laws and policies. Although the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act (RFRA) limit the ability of government actors to impede individuals from practicing their religious beliefs, religious exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis.

4. With regard to federal government actions, RFRA protects only First Amendment free exercise rights of religious practitioners and not their Establishment Clause freedoms. Prior to RFRA's enactment, the U.S. Supreme Court had held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the First Amendment "had never been held to excuse [an individual's religiously motivated conduct] from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." This holding strengthened nondiscrimination laws and policies against actors who asserted religious justification for civil rights discrimination. RFRA now supersedes *Smith* as a controlling source of

federal authority. Some states have enacted statutes modeled after RFRA which impact state-level nondiscrimination civil liberties and civil rights protections.

Recommendations included:

1. Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.

2. RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause.

3. In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct.

4. Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.

5. States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.

The Commission is pleased to transmit its views in order to help ensure to all Americans both protection against discrimination and the constitutional guarantee of civil liberties.

For the Commission,

Martin R. Castro
Chairman

Table of Contents

ACKNOWLEDGMENT

The U.S. Commission on Civil Rights acknowledges Lenore Ostrowsky of the Office of the General Counsel for researching and writing this report. The Commission also acknowledges Professor Roderick Hills of New York University Law School, a member of the Commission's New York State Advisory Committee, for his helpful editorial review of the draft.

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EXECUTIVE SUMMARY

The United States Commission on Civil Rights held a briefing on March 22, 2013, to hear the views of scholars and legal advocates on the scope of constitutional and statutory guarantees of free exercise of religion. The Commission sought to learn how best to reconcile the conflict which in certain cases may exist between those seeking to practice religious faith and those seeking compliance with or protection of nondiscrimination laws and policies.

The main focus of the Commission's briefing was the uncertain boundaries of religious freedom under the Free Exercise and Establishment Clauses of the First Amendment and under some federal statutes, although judicial decisions have clarified the boundaries in some areas.

The appropriate balance between religious liberty and nondiscrimination principles in some conflicts arises as a concern when religious institutions and organizations claim the freedom under constitutional and statutory law to choose leaders, members or employees according to the tenets of their faith, even if the choice would violate employment, disability, or other laws. It arises also when individuals claim the freedom to adhere to religious principles regardless of otherwise applicable law governing their conduct.[1]

This freedom is grounded in the Free Exercise and Establishment Clauses of the First Amendment to the Constitution,[2] federal statutes such as the Religious Freedom Restoration Act[3] (RFRA), the Religious Land Use and Institutionalized Persons Act[4] (RLUIPA), and common law. Other than statutory exemptions in federal and state RFRAs or other laws, several First Amendment doctrines govern such claims. One such doctrine is the ministerial exemption, a long-recognized doctrine[5] that allows religious organizations to determine their own teachings and rituals and to decide for themselves who will and will not serve as ministerial employees.

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[1] Notable cases involved military service. *See* Universal Military Training and Service Act, 50 App. U.S.C. Section 456(g)(1) (establishing ministerial exemption from military service); *see also* U.S. v. Brown, 338 F.Supp. 409 (N.D. Ill., 1972) (mere congregation member not due selective service ministerial exemption); Dickinson v. United States, 346 U.S. 389 (1953) (registrant working largely but not entirely as minister was entitled to ministerial exemption under Universal Military Training and Service Act); Gillette v. U.S., 401 U.S. 437 (1971) (conscientious objector provision requiring opposition to all wars based on religious belief not unconstitutional); *see also* Memorandum for Secretaries of the Military Departments Chiefs of the Military Services from Clifford L. Stanley (September 30, 2011), *available at* http://www.washingtonblade.com/content/files/2011/09/Signed-Chaplains-Memo.pdf (military chaplains permitted but not required to perform ceremonies that are at variance with the tenets of their religion or beliefs).

[2] U.S. CONST. amend. I, cl. 1.

[3] 42 U.S.C. § 2000bb et seq., Pub.L. 103-141 (2012).

[4] 42 U.S.C. § 2000cc et seq., Pub.L. 106-274 (2012).

[5] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 704 (2012) (discussing history of religious and ministerial exceptions; held, that employment discrimination law does not apply to dismissed church school employee engaged in religious instruction).

Another doctrine is the freedom of association, or expressive association, under which certain organizations both nonreligious and religious enjoy a First Amendment right to choose their leaders, associates, members and messages.[6] Assertions of such freedom are judicially reviewable, however, meaning that they do not operate as a bar to suit.[7]

The third major analytical framework that may apply is a public-forum or limited-public-forum free speech enquiry. This analysis examines the government's power under state or federal law to control or condition speech or expressive conduct in certain public spaces, such as sidewalks, streets, parks, or college campuses or programs.[8]

The Supreme Court majority relied upon this speech doctrine in *Christian Legal Society v. Martinez* (*Martinez*)[9] in affirming the University of California Hastings law school's imposition of an "all-comers" policy compelling student groups seeking school recognition - and resources - to accept any voting member or leader regardless of views. This was the Supreme Court's most important recent decision regarding the limited-public-forum doctrine.[10]

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[6] The decisions in the area of associational freedom have been uneven. *Compare* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (Boy Scouts of America had an associational right to bar homosexuals from serving as troop leaders as inconsistent with the values it seeks to instill), *with* Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 620, 621 (1984) (striking down Jaycees' refusal to allow admission of women: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . . Factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent . . . The local chapters of the Jaycees are large and basically unselective groups."); *see also* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149 (2010) and Richard Epstein, Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right, 66 Stan. L. Rev. 1241, 1266 (2014).

[7] *See*, for example, Bob Jones University v. U.S., 461 U.S. 574 (1983) (held, the government has a compelling interest in eradicating racial discrimination at private colleges; this interest outweighs the burden of loss of tax-exempt status for such colleges); *see also* Romer v. Evans, 517 U.S. 620 (1996) (held, that State constitutional amendment precluding government protection of homosexual orientation violated Equal Protection Clause).

[8] In recognition of the government's power "to preserve the property under its control for the use to which it is lawfully dedicated," the Court has permitted governmental restrictions on access to a limited public forum with the key caveat that any access restriction must be reasonable and viewpoint neutral. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800, 806 (1985) (internal quotation marks omitted).

[9] Christian Legal Society v. Martinez, 561 U.S. 661 (2010).

[10] *But see* Widmar v. Vincent, 454 U.S. 263 (1981) (once university establishes an open public forum it must accord First Amendment speech rights) and Healy v. James, 408 U.S. 169 (1972) (university may not deny recognition based on disapproval of group's purpose or philosophy).

The application of a limited-public-forum analysis in *Martinez* was controversial. The Court upheld the law school's denial of recognition and the related provision of resources[11] to the Christian Legal Society (CLS or Society), a faith-based student organization, because the Society violated this "all-comers" policy by excluding as leaders and associates those who declined to affirm and adhere to the group's religious beliefs.[12]

Scholars and legal advocates who agree with the *Martinez* Court's application of the limited public forum doctrine understand that the "all comers" policy does not violate the First Amendment.[13] In addition, some scholars argue that any exception to nondiscrimination laws is an unwarranted expansion of a freedom that illegitimately penalizes those whom society has determined to protect as most vulnerable.[14] They posit that carving out exceptions from civil rights laws for religious groups elevates some rights over others and diminishes the equal standing of some in our society.[15]

Scholars and legal advocates disagreeing with *Martinez* believe that religious speech or conduct in school public forums is entitled to as much protection under the Constitution as secular or other speech or conduct that expresses a group identity, including protection of the right to associate with like-minded others.[16] They also contend that "all comers" policies are not, in fact, neutral - that is, that they discriminate against certain mission-oriented associations and are not rationally

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[11] In this context, "recognition" means that Hastings extended official recognition to a student group through its "Registered Student Organization" (RSO) program. Several benefits follow from this school-approved status. RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also communicate with students by placing announcements in a weekly Office-of-Student-Services newsletter, advertising events on designated bulletin boards, send e-mails using a Hastings address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. Hastings allows officially recognized groups to use its name and logo. Student groups that lack RSO status do not receive these privileges. Christian Legal Society v. Martinez, 561 U.S. at 669-70.

[12] Christian Legal Society v. Martinez, 561 U.S. 661 (2010) (appropriate test under First Amendment for public university campus was viewpoint-neutral/limited-public-forum enquiry; Hastings' "all-comers" policy deemed viewpoint neutral and enforceable against all student groups without exception for religion).

[13] *See* Leslie C. Griffin, Statement, *infra*; Alan Brownstein, Statement, *infra*; Ayesha N. Khan, Statement, *infra*; Daniel Mach, Statement, *infra*.

[14] *See* Marsha B. Freeman, What's Religion Got to Do With It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption, 16 U. Pa. J. L. & Soc. Change 133 (2013); *see also* Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 Fordham Law Review 1966 (2007); and Leslie C. Griffin, The Sins of Hosanna-Tabor, 88 Ind. L. J. 981 (2013).

[15] *See* Marci Hamilton Statement, *infra*. (sincerity of beliefs should be examined).

[16] *See* Michael Stokes Paulsen, Disaster: The Worst Religious Freedom Case in Fifty Years, 24 REGENT U. L. REV. 283 (2012); *see also* Chapin Cimino, Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle, 20 WM. & MARY BILL RTS. J. 533 (2011). Some scholars argue that this should be viewed as the "right of a people peaceably to assemble" under the First Amendment to the Constitution. *See also* Inazu, 43 Conn. L. Rev. 149, 196 (2010) ("CLS wasn't arguing that association is nothing more than speech but that association is itself a form of expression - who it selects as its members and leaders communicates a message.").

related to the government's interests.[17]

Eleven scholars and legal advocates presented the Commission with a wide range of views. The experts were Alan Brownstein of the University of California at Davis Law School, Kimberlee Colby of the Christian Legal Society, Marc DeGirolami of St. John's Law School, Leslie Griffin of the University of Nevada at Las Vegas Law School, Marci Hamilton of Cardozo Law School, Michael Helfand of Pepperdine University Law School, Ayesha Khan of Americans United for Separation of Church and State, Daniel Mach of the American Civil Liberties Union, Edward Whelan of the Ethics and Public Policy Center, and Lori Windham of the Becket Fund for Religious Liberty. Invited expert John D. Inazu of the Washington University Law School (St. Louis) was unable to attend but submitted a written statement which appears in the Panelists' Statements section, *infra*.

[17] *CLS's* argument on remand that "all comers" policies are a pretext for discriminating against religious groups was ruled not preserved. CLS v. Wu, 626 F.3d 483, 486 (2010).

DISCUSSION

From the beginning of our nation's history, religious freedom has been fundamental to its Constitution and common law. But the law allowing religious exemptions from otherwise applicable laws has not followed an even course. From before the framing and ratification of the Constitution and continuing up to 1878, courts did recognize constitutionally based exemptions, but only in rare circumstances.[1] In 1878, however, the Supreme Court held that there was no right to a religious exemption from anti-polygamy laws[2] and other cases denying exemptions followed.[3]

Thereafter, for nearly a century, religious adherents wishing protection for religiously motivated conduct or actions were entitled to claim religious exemptions chiefly under statutory or common law rather than the Free Exercise Clause of the First Amendment,[4] and the Court distinguished between beliefs (almost always protected) and practices based on those beliefs (largely unprotected).[5]

In 1963, however, the Warren Court adopted a constitutional standard regarding exemptions for religiously motivated conduct based chiefly on the Free Exercise Clause. This standard was not dependent on statutory or common law, and was more favorable to protecting religious exercise.[6] The case was *Sherbert v. Verner*,[7] and presented the question of whether the Free Exercise Clause prohibited conditioning government unemployment benefits on an applicant's willingness to work

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[1] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990*)* (arguing that courts have insufficiently recognized that religious movements of the colonial period pushed for primacy of religious conscience over secular laws and that the framers chose "free exercise of religion" over "rights of conscience" to protect religiously motivated but not secular conscience-motivated conduct); *see* pp. 1502-13 for a discussion of early exemption cases. For a contrary view *see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that the early understanding of the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws, and as a result, exemptions have been granted in only a few circumstances).

[2] Reynolds v. U.S., 98 U.S. 145 (1878) (bigamy unlawful despite Mormon religious views).

[3] *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws prevailed against minor who wanted to distribute religious tracts); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (public university's suspension of students refusing to serve in ROTC on religious grounds upheld); Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws upheld against Orthodox Jews observing Saturday Sabbath).

[4] The relevant portion of the First Amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I; s*ee also* Reynolds v. U.S., 98 U.S. 145 (1878) (Admitted Utah bigamist conforming to religious precepts ruled not exempt from criminal law prohibition on plural marriage, despite First Amendment).

[5] *See* Employment Division v. Smith, 494 U.S. 872 at 878-879 (1990) (discussing the history of Free Exercise precedents); *see also* Reynolds v. U.S., 98 U.S. 145 (1878) (upholding criminal law prohibiting polygamy; First Amendment not offended by criminal laws punishing conduct rather than beliefs).

[6] *See* http://www.firstamendmentcenter.org/free-exercise-clause for a concise history of Free Exercise law up to the year 2011. (Accessed Nov. 4, 2014).

[7] Sherbert v. Verner, 374 U.S. 398 (1963).

on a Sabbath day, if working on a Sabbath day violated the applicant's religious faith. The Court ruled that such burdens on religious exercise - even when imposed by generally applicable laws - had to be justified as the least restrictive way of advancing a compelling government interest and by showing that the government had failed to satisfy this requirement. *Sherbert* was followed by *Wisconsin v. Yoder*,[8] which invalidated on First Amendment grounds the application of compulsory ninth- and tenth-grade school-attendance laws to the Amish whose religious faith dictated that young people stop formal schooling before then. Even so, those seeking religious conduct exemptions under the First Amendment's Free Exercise Clause rarely prevailed.[9] By contrast, the question of what constituted establishment of religion (state sponsored promotion or encouragement of a particular religion or religions, prohibited under the First Amendment) received more consistent judicial development.[10]

Then in 1990 in *Employment Division v. Smith* (*Smith*), the Supreme Court in a 5-4 vote returned to the 1878-era statutory and common law interpretation against judicially created religious exemptions.[11] The Court reasoned that the First Amendment had never been "held to excuse [an individual's religiously motivated conduct] from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[12] Religious exemptions from valid laws could be permitted, the *Smith* Court ruled, but such accommodations were up to the legislature to allow. Of course, a law had to be neutral to avoid burdening Free Exercise rights.[13]

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[8] Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the long-established Amish religious order had not produced children who became a burden on society, nor had the state shown that the two years of additional schooling after eighth grade made the children more likely to succeed either within or outside the Amish order).

[9] Employment Division v. Smith, 494 U.S. 872, 876-884 (1990) (describing the Court's Free Exercise jurisprudence and listing successful and failed Free Exercise claims).

[10] *See* Healy v. James, 408 U.S. 169 (1972) (a university may not deny recognition to groups merely on account of disagreement with its viewpoint);Widmar v. Vincent, 454 U.S. 263 (1981) (a school may not deny recognition to campus religious groups seeking recognition based on the Constitution's prohibition on establishment of religion); Cutter v. Wilson, 544 U.S. 709 (2005) (Section 3 of RLUIPA does not on its face exceed the limits of permissible government accommodation of religious practices in prison); Town of Greece v. Galloway, 134 S.Ct. 1811 (2014) (prayer before opening of town board meetings did not have to be nonsectarian to comply with Establishment Clause and did not constitute compulsion to engage in religious observance). There are some inconsistencies in the way the Court has come out on the issue, *see* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (posting of Ten Commandments on courthouse walls violated Establishment Clause).

[11] Employment Division v. Smith, 494 U.S. 872 (1990) (This involved the use of a controlled substance, peyote, prohibited by Oregon's criminal codes. The Court held that if the code was neutral, meaning not specifically directed at a religious practice and was otherwise valid, the First Amendment did not bar its application).

[12] *Id.* at 878-79.

[13] *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1992) (City ordinance prohibiting animal sacrifice was not neutral, was intended to burden the church's religious practices, and therefore violated the church's Free Exercise rights).

The *Smith* decision was very unpopular across the political spectrum. Congress reacted by enacting the Religious Freedom Restoration Act[14] (RFRA) in 1993 in an effort to counter the effect of the ruling. RFRA passed by a unanimous vote in the House, and a huge bipartisan majority (97-3) in the Senate. It addressed only Free Exercise doctrine, not the Establishment doctrine. As passed, RFRA applied to both federal and state law, but following another Supreme Court decision striking down a large portion applicable to the states,[15] was held to apply only to federal law and the statute amended to so reflect. In the years following that decision, about half the states either passed their own RFRA statutes or interpreted their state constitutions to favor exemptions in certain circumstances.

The federal RFRA reinstated the compelling interest test used in *Sherbert* and *Yoder*. It provides that those who object to being governed by a federal statute because it violates their faith, regardless of what faith it is, have a presumptive entitlement to exemption if the law substantially burdens the religious objector's practice or sincerely held beliefs. To overcome this claim, the government must show that forcing compliance is the least restrictive means of serving a compelling government interest.[16] This is the strictest standard of judicial review, and has the effect of placing the burden of proof on the government, forcing it to articulate publicly a rationale for denying the exemption.

The term "substantial burden on religious exercise" can include a broad range of burdens, impositions, and hardships. It is not limited to requirements that a claimant act in a way that he or she believes is forbidden or sinful, or refrain from a practice that the claimant believes is commanded or obligatory.[17] The term "least restrictive" means that the government may use no more than the minimum directive or prohibition to achieve its purpose and less restrictive

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[14] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to bb-4 (2012).

[15] City of Boerne v. Flores, 521 U.S. 507 (1997). After this decision, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to cc-5 (2012) (RLUIPA) to protect religious assemblies from discriminatory land use regulations or zoning codes and to allow institutionalized persons increased rights to engage in conduct required of adherents to a religion.

[16] *See* Holt v. Hobbs, 135 S.Ct. 853, 864 (2015) (state failed to show that denying request by Muslim prisoner to maintain one-half-inch-length beard was least restrictive way to maintain prison security).

[17] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (government's refusal to allow sect to import and use hallucinogenic plant in communion ritual constituted a substantial burden on religious exercise); U.S. v. Rutherford Cnty., Tenn., No. 3:12-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012) (county's refusal to grant mosque certificate of occupancy constituted a substantial burden on religious exercise).

alternatives are unavailable.[18] "Compelling governmental interest" generally involves furthering an overriding goal such as mandatory participation in and contribution to the Social Security system.[19] The interpretation of these concepts as they apply to RFRA draws both on existing legal precedents and a growing body of law interpreting RFRA and RLUIPA.

Smith has never been overturned by the Court, however, and might still apply to Free Exercise controversies between private parties[20] or in some cases between an individual and a state in the absence of state law providing otherwise.[21] Claimants have challenged such restrictions on the exercise of religious conduct, with varying results.[22]

Subsequent to its Free Exercise rulings, the Supreme Court has addressed religious freedom under free speech doctrines such as viewpoint discrimination or neutrality, and reaffirmed the ministerial exemption. Rarely dispositive although frequently asserted by claimants is the doctrine of expressive association, which says that the First Amendment protects the rights of persons to

[18] *Holt*, 135 S.Ct. 853 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2782 (2014) ("[we] conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."); McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 475-76 (5th Cir. 2014) ("In the context of these cases, 'least restrictive means' is a severe form of the 'narrowly tailored' test ... The very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive means could exist ... Furthermore, the Department must provide *actual evidence*, not just conjecture, demonstrating that the regulatory framework in question is, in fact, the least restrictive means.").

[19] U.S. v. Lee, 455 U.S. 252 (1982) (government has overriding interest in social security program that outweighs religious rights of Amish employers seeking exemption for their employees); *see also Holt*, 135 S.Ct. 853 (2015) (government must show compelling interest as applied to the particular person; in this case the showing as applied to petitioner was not compelling).

[20] *Smith* does not interfere with the ministerial exemption of religious organizations, which are generally treated as private organizations even though qualifying for various tax exemptions.

[21] *See* Richard Schragger, The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the 'War on Terror,' and Religious Freedom, 32 CARDOZO L. REV. 2009 (2011).

[22] *Compare* Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014) (holding New Mexico's State RFRA not applicable to suits between private litigants where government is not a party even if enforced by a government agency, therefore nondiscrimination law prevailed over the State RFRA) *with* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1998) (then-Judge Samuel Alito writing, holding Sunni Muslim police claimants entitled to wear beards despite police policy because city had no compelling reason to deny religious exemption).

associate with like-minded others. Judicial opinions turning chiefly on expressive association have been inconsistent and the doctrine undeveloped.[23]

Viewpoint Discrimination

Two important Supreme Court free speech cases decided the question of impermissible viewpoint discrimination against religious groups. *Rosenberger v. Rector* concerned an action brought against the University of Virginia by a Christian student newspaper challenging denial of funds for printing costs.[24] The Court found for the newspaper, holding that the school's denial was impermissible viewpoint discrimination under the First Amendment. Another, *Good News Club v. Milford Central School,*[25] involved a Christian club for children that was refused permission to use school facilities after hours. The Court again held that this constituted impermissible viewpoint discrimination.[26] In both cases, the Court's reasoning was that the schools were singling out the Christian groups because of the groups' views.

Viewpoint Neutrality

Christian Legal Society v. Martinez[27] (*Martinez*) was a narrowly decided case concerning the limits of religious expression and association rights within a public university. This involved the University of California Hastings law school's refusal to grant official recognition to the Christian Legal Society as a recognized, on-campus student organization, because it violated the school's viewpoint-neutral "all-comers" policy. The "all-comers" policy said that no student could be

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[23] *Compare* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (Boy Scouts of America had an associational right to bar homosexuals from serving as troop leaders as inconsistent with the values it seeks to instill) *with* Roberts v. U.S. Jaycees, 468 U.S. 609, 618-621 (1984) (striking down Jaycees' refusal to allow admission of women: "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State ... factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent ... [but] the local chapters of the Jaycees are large and basically unselective groups." *See also* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149 (2010).

[24] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[25] Good News Club v. Milford Central School, 533 U.S. 98 (2001); *accord* Badger Catholic, Inc. v. Walsh, 620 F.3d 775 (7th Cir. 2010) (holding university could not refuse to fund a religious student organization's speaker since it funded other student group speakers).

[26] *Good News Club*, 533 U.S. 98 (2001) (The Court rejected the school's Establishment Clause claims); *accord* Badger Catholic, Inc. v. Walsh, 620 F.3d 775(7th Cir. 2010) (Judge Easterbrook held his opinion pending release of the Court's *Martinez* decision and held that the university could not refuse to fund a religious student organization's speaker since it funded other student group speakers).

[27] Christian Legal Society v. Martinez, 561 U.S. 661, 130 (2010).

denied admission to or a leadership role in any school-sponsored or school-recognized group based on viewpoint or beliefs, even if those beliefs contradicted or conflicted with the tenets of the group.

The school claimed that the Christian Legal Society violated this all-comers policy by denying those who did not sign a Statement of Faith[28] the opportunity to be voting members and leaders of the group, thus discriminating against non-believers although the group's activities were open to all as participants. The Society viewed this as a pretext for discriminating against it because of its views, since in viewpoint discrimination cases the schools' refusals to pay for religious student group activities had, for the most part, gone against the schools.[29]

The Society alleged that the school's refusal violated its First and Fourteenth Amendment rights to free exercise of religion, expressive association and free speech.[30] The Society lost in lower federal courts and ultimately also at the Supreme Court in a 5-4 decision. The Court majority declined to credit the Society's claims that the school's refusal of recognition violated its Free Exercise or expressive association rights.

Instead, the majority reasoned that the school's recently adopted "all-comers" policy that applied to all groups was the proper basis for a less exacting form of review, known as limited-public-forum speech review. This review receives a lower level of judicial scrutiny and requires only that the restriction on speech or conduct be reasonable and viewpoint-neutral. The Court accepted the school's rationale and held that the restriction was both reasonable and viewpoint-neutral, since

[28] The Society's Statement of Faith included such tenets as an affirmation of trust in Jesus Christ as Savior, belief that marriage is only between a man and a woman, and that non-marital sexual intercourse is sinful. *Id*. at 672 n. 3.

[29] The fact of a subsidy or funding is often not dispositive. Religious institutions that accept exemptions from federal and state taxes do not thereby relinquish their ministerial exemptions from antidiscrimination employment laws, for example. *See Badger Catholic*, 620 F.3d at 778-79 (7th Cir. 2010) (citing Widmar v. Vincent, 454 U.S. 263, 265 (1981) (holding university may not deny rent-free room to religious student group if others allowed it; in-kind subsidies no different from cash subsidies)); *see also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (finding presence of government funding for religious school tuition not decisive in Establishment Clause claim). But government funds or exemptions have been allowedly withheld from groups the Court deems discriminatory. *See* Bob Jones Univ. v. U.S., 461 U.S. 574 (1983).

[30] "All noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles. For Hastings College of the Law to force the Christian Legal Society chapter to admit non-adherents into its leadership and voting ranks - on pain of exclusion from an otherwise open speech forum - violates Petitioner's rights of speech, expressive association, and free exercise of religion." Brief for Petitioner at 2, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) (No. 08-1371).

the school's stated purpose was to foster inclusion, exposure to different views, and nondiscriminatory selection standards.[31]

The *Martinez* petitioners (the Christian Legal Society) argued that even given the school's power to withhold recognition, it still had to justify its decision by showing a compelling governmental interest by looking at the relative costs to the Society compared to the benefits to students who did not adhere to the Society's credo but wished to be voting members or leaders. The Society argued that the school was in fact exercising viewpoint discrimination based on the school's disapproval of the Society's principles, since Hastings did not prohibit political or ideological discrimination by other student groups until this issue arose.[32] The danger as seen by the Society was that of forced theological drift or total exclusion of religion from the public square; the danger as seen by those claiming nondiscrimination rights was a retreat from such rights.

The *Martinez* decision regarding the limited-public-forum doctrine and religious exemptions is limited in certain important respects. First, because it concerned university governance, the Court cautioned restraint in substituting judicial views of appropriate educational policy for those of school administrators and individual states, even though the policy touched on religion.[33] The Court also reasoned that having a nondiscrimination policy avoided the school's having to pass judgment on a student group's reasons for excluding applicants. Third, the Court accepted the school's rationale that encouraging tolerance among students of different backgrounds was

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[31] The Court's dissenters agreed with the Christian Legal Society that the all-comers policy was enacted as a pretext for otherwise prohibited viewpoint discrimination against CLS's beliefs. *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties: Before the U.S. Comm'n on Civil Rights* (March 22, 2013) (hereafter *Briefing Tr.*) at 10 (statement of Kimberlee Wood Colby, Senior Counsel, Center for Law & Religious Freedom of the Christian Legal Society), *available at* http://www.usccr.gov/calendar/trnscrpt/Peaceful-Coexistence-Briefing-Transcript_03-22-13.pdf; *Martinez*, 561 U.S. 661, 706 (2010); s*ee also* Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames,* 38 HASTINGS CONST. L.Q. 569 (2011) (a viewpoint neutrality analysis may unreasonably burden Free Exercise); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1964-65 (2006) (arguing that although judicial guidance is murky, the government may not have a compelling reason to withhold a subsidy to a campus faith group that discriminates against nonbelievers since circumstances may show a substantial burden on religious expression and the harm to students excluded as non-believers is likely minimal). John D. Inazu has suggested that the Court turn analytically to a right of assembly to preserve religious association rights. Inazu, *supra* note 6.

[32] Justice Alito in dissent wrote: "In fact, funding plays a very small role in this case. Most of what CLS sought and was denied — such as permission to set up a table on the law school patio — would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration. As CLS notes, [t]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen." (internal quotations omitted). *See Martinez*, 561 U.S. 661, 718 (2010).

[33] *Id*. at 686-88.

important, and fourth, deferred to state nondiscrimination law in view of state subsidies to the school.[34]

In its reasoning, the *Martinez* Court viewed as significant that the Society had access to school facilities for meetings, the use of bulletin boards for notices of events, and private social media methods of communication; that the prospect of students seeking to undermine the Society's functioning was hypothetical with no basis in school history; and that students who exploited the all-comers policy to destroy the group's mission would be grounds for the school to revise its policy. The Court declined to address the issue of selective enforcement of the policy and sent *Martinez* back to the Ninth Circuit to consider the Society's pretext argument.[35]

The scope of the power of government to use nondiscrimination rules that collide with religious expression and association continues to be debated.[36] On one hand, to be able to express a religious group ideal, belief, or identity unavoidably means selection of leaders who are compelled by their religion to express those beliefs.[37] Religious beliefs by their nature often, but not always, set limits that exclude other beliefs.[38] In addition, some adherents feel that government should not impede campus religious group speech on an issue specifically addressed in the Constitution ("Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof").[39] The *Martinez* Court held otherwise, however.

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[34] Not specifically addressed, but an undercurrent in cases involving deference to states' control over their public universities, is the federalism-based view that states ought to have some leeway in regulating their schools and picking their way between the Free Exercise and Establishment Clauses. *See* Locke v. Davey, 540 U.S. 712 (2004) (holding Washington State's refusal to fund a theology program did not violate the Free Exercise Clause of the U.S. Constitution).

[35] The Society lost on remand. *See* Christian Legal Society v. Wu, 626 F.3d 483 (9th Cir. 2010) (holding Society did not initially raise the selective enforcement issue and thus failed to preserve its pretext claim for appeal).

[36] *See* Michael Paulson, *Colleges and Evangelicals Collide on Bias Policy*, N.Y. TIMES (June 9, 2014), *available at* http://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html?hpw&rref=us&_r=1; *see also* Will Creeley, *'NY Times' on Lasting Impact of 'CLS v. Martinez'*, THE FIRE (June 10, 2014), *available at* https://www.thefire.org/ny-times-on-lasting-impact-of-cls-v-martinez/.

[37] *See* Brief for American Center for Law and Justice et al. as Amici Curiae Supporting Petitioners 19, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661(2010) (No. 08-1371) ("In contrast to the government's legitimate interest in ensuring racial equality, the government simply has no legitimate interest whatsoever in seeing to it that Jewish groups admit Hindus to membership or leadership positions, that Protestants admit Catholics, that Baha'i admit Eastern Orthodox, or any other conceivable example.").

[38] *Volokh*, *supra* note 31 at 1951-52, "A substantial burden [from denying an exemption] clearly exists . . . for a Christian students' group that sincerely feels a religious compulsion to gather only with like-minded members who behave consistently with what the group sees as Christian morality . . . ."

[39] U.S. CONST. amend. I. This is different from denying subsidies to groups who may wish to admit members for marginally related pursuits, such as social fraternities or sororities who have a preponderance of single-religion members and try to keep it that way, *see* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1743 (2012) (finding school nondiscrimination policy prohibiting sorority/fraternity religion requirement did not violate First Amendment).

The *Martinez* holding does not bar public colleges from recognizing student faith groups that restrict the right to vote or hold office in the organization to those subscribing to the organization's statement of faith and some, in fact, do grant such recognition.[40] At least one other, however, has instituted an all-comers policy statewide, denying recognition to all the Society's chapters.[41]

A very recent case that extended the Court's jurisprudence on viewpoint neutrality is ***Reed v. Gilbert***[42] in which a town restricted the size of signs erected by a church to direct worshippers to various temporary locations near the town but did not restrict the size of political signs erected during election season. The Court held that this restriction of church sign dimensions failed the content-neutrality strict scrutiny test and was therefore content-based regulation that the First Amendment prohibits.[43]

Ministerial Exemption

Compared to the all-comers policy and limited-public-forum speech analysis, the ministerial exemption is less controversial. The Court unanimously endorsed this exemption, applied for decades in the lower courts, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*[44] (*Hosanna-Tabor*). This case involved the dismissal of a teacher responsible for instructing children in both secular and religious subjects when she attempted to return to work after a long absence because of narcolepsy. The Equal Employment Opportunity Commission (EEOC) brought suit against the church on the teacher's behalf for violation of the retaliation and disability provisions of the Americans with Disabilities Act (ADA).[45]

All nine justices of the U.S. Supreme Court found that the teacher was a minister of religion for the purposes of the First Amendment using a multi-factor test largely specific to the circumstances, and rejected the EEOC's claim that the nondiscrimination provisions of the ADA took precedence over a church's freedom to choose its ministers. Since the teacher was deemed a minister under

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[40] Briefing Tr. at 13 (statement of Kimberlee Colby, Christian Legal Society); *see also* briefing slide presentation, Speaker Kimberlee Colby (Christian Legal Society) (University of Texas at Austin New Student Organization Registration Application: "An organization created primarily for religious purposes *may* restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith.") (emphasis added.)

[41] *See* Memorandum from Charles B. Reed, Chancellor, California State University (Dec. 21, 2011), *available at* http://www.calstate.edu/eo/EO-1068.html; *see also* Kimberly Winston, *InterVarsity, College Christian Group, 'De-Recognized' At California State University Campuses,* HUFF. POST (Sept. 10, 2014, 11:59 AM), *available at* http://www.huffingtonpost.com/2014/09/09/intervarsity-sanctioned-california-state-university_n_5791906.html.

[42] Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).

[43] *Id.* at 2231-32.

[44] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012).

[45] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

the Court's analysis, the Court rejected the EEOC's assertion that someone other than the religious institution had the right to sit in judgment over the teacher's suitability or that any specific test such as the amount of time spent by the teacher on religious subjects was determinative.[46] The Court held that the ministerial exemption applied in this case and was grounded in the special solicitude the Constitution grants to religious organizations under the First Amendment.[47]

Religious Accommodation in Employment under Title VII

Title VII of the Civil Rights Act of 1964[48] prohibits an employer from refusing employment to someone to avoid having to grant a religious accommodation, as long as it can grant such accommodation without undue hardship. In *EEOC v. Abercrombie and Fitch Stores, Inc.* (*Abercrombie*),[49] the petitioner was a practicing Muslim who applied to an Abercrombie store wearing a headscarf. The store had a policy dictating the appearance of its sales personnel, which the store manager believed would not allow headgear of any kind. The Court reasoned, however, that mere neutrality of policy was immaterial since Title VII accords favored treatment to religious practices.[50] The Court observed that Abercrombie either knew, or at least suspected, that her headscarf was worn for religious reasons, which was enough to invoke the protection of Title VII.[51]

As a result, the Supreme Court unanimously held that because Title VII is silent on the question of whether an employer must have actual knowledge of the need for religious accommodation, a job applicant may prove a disparate treatment claim by showing that his or her need for religious accommodation was a motivating factor in not being offered a job, regardless of the employer's actual knowledge that the applicant's practice was religious and required an accommodation.[52]

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[46] *Hosanna-Tabor*, 132 S.Ct. at 709.

[47] The Court held (in a footnote) that the ministerial exemption is an affirmative defense that allows a religious organization to dismiss a suit brought against it, not a jurisdictional bar. *Id.* at n. 4.

[48] "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

[49] EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028 (2015).

[50] *Id.* at 2034.

[51] *Id.* at 2031, 2034.

[52] *Id.* at 2033.

Federal Religious Freedom Restoration Act

The Court has interpreted the federal RFRA in two relatively recent cases. In *Gonzales v. O Centro Espirita Beneficente*,[53] the government sought to ban a sect's religious use of a hallucinogenic tea under the Federal Controlled Substances Act. The Court overturned lower court holdings and unanimously found that the government had failed to show that it had a compelling interest in the application of a ban that allowed for no exceptions.[54] The Court emphasized that the very existence of RFRA reflected Congress's determination that exemptions and accommodations are sometimes appropriate.[55]

Burwell v. Hobby Lobby Stores, Inc.,[56] a Supreme Court case decided after the Commission's briefing, asked whether, in the context of the Affordable Care Act's (ACA)[57] contraceptive mandate, RFRA's religious exemptions are available to for-profit corporations that are closely held and whose owners' sincerely held religious beliefs would be substantially burdened by compliance with the mandate. The contraceptive mandate of the ACA required that insurance plans available to businesses for their employees provide contraceptives, some of which Hobby Lobby Stores viewed as abortifacients, and also other reproductive services at no out-of-pocket cost to employees.[58]

The Court decided 5-4 in favor of Hobby Lobby Stores, holding that Hobby Lobby Stores and by implication other closely-held, for-profit secular entities, may invoke RFRA's protections. The *Hobby Lobby* holding was the first time the Court had squarely held that RFRA applies to a for-profit secular corporation, and it has already had an effect on lower courts' rulings in related areas.[59]

The *Hobby Lobby* Court looked at the ACA's burden on religious adherents and concluded that the coercive nature of the burden requiring Hobby Lobby Stores to provide contraceptives was substantial. The Court assumed that there was a compelling governmental interest, but held that the government did not use the least restrictive means of furthering the ACA requirement that the

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[53] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

[54] *Id.* at 439.

[55] *Id.* at 434.

[56] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

[57] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

[58] *See* Coverage of Certain Preventive Services Under the Affordable Care Act 78 Fed. Reg. 39870 (Dep't of Health and Human Services July 2, 2013), 45 C.F.R Part 147 and 156 (2015).

[59] *See* Eternal Word Television Network, Inc. v. Sec'y, United States HHS, 756 F.3d 1339 (11th Cir. 2014) (enjoining HHS from enforcing certain Affordable Care Act provisions); *see also* McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014) (government failed to show compelling reason to impose restriction on American Indians not federally recognized as members of a tribe from owning bald eagle feathers for religious purposes).

employer provide certain reproductive products and services since other means of providing the products and services were readily available. The Court found substantial coercion from both the cost burden to the stores from refusing to provide the reproductive products and services - hundreds of millions of dollars of fines per year[60] - and substantial coercion in requiring the owners of the corporation to violate their religious beliefs.

Many view the *Hobby Lobby* decision as diminishing the rights of female employees employed by certain businesses to control their own care and receive essential medical insurance coverage. Some consider this to be a reminder of an era in which women's concerns were not considered as important as, and indeed were subrogated to, those of men. In addition, opponents saw the ruling as violating the rights of those who were merely third parties (the insured employees) by denying coverage[61] and removing some of the protections of antidiscrimination law.

Those who supported the right of private, for-profit entities to religious exemptions instead viewed the decision as striking a reasonable balance between an individual's right to coverage under a generally applicable law and protection of religious liberty, since the government had other means available to provide the contraceptives in question and employees were still able to buy them.

Following the *Hobby Lobby* decision, the Court took up the question of whether same-sex couples have a right under the Constitution to marry, regardless of any State law prohibiting recognition of such marriage. In *Obergefell v. Hodges (Obergefell)*[62] the Court in a 5-4 decision found that petitioners do have the constitutional right to marry and also the right to have their marriages recognized in all other States of the Union.[63] This decision will likely provide a rationale for future tests of limits to religious exemptions under RFRA and the Constitution.

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[60] At issue in *Hobby Lobby* were HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA). The ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage," 26 U.S.C. §§ 5000A(f)(1)-(f)(2), §§ 4980H(a), (c)(2)(A). Any covered employer that does not provide such coverage must pay a substantial fee. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's group-health-plan requirements, the employer may be required to pay $100 per day for each affected individual, §§4980D(a)-(b). And if the employer decides to stop providing health insurance altogether and at least one full - time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees, §§ 4980H(a), (c)(1). For Hobby Lobby, the bill was estimated to amount to $1.3 million per day or about $475 million per year; for Conestoga, Hobby Lobby's co-respondent, the assessment was $90,000 per day or $33 million per year, *Hobby Lobby,* 134 S.Ct. at 2775-76.

[61] *See* Griffin Statement, *infra*.

[62] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

[63] Based on the *Obergefell* decision, the Fifth, Sixth, and Eighth Circuit Courts of Appeal have struck down other state-law, same-sex marriage prohibitions (similar to those at issue in *Obergefell*) and held that states cannot refuse to recognize same-sex marriages lawfully performed in other states, *see* Robicheaux v. Caldwell, 791 F.3d 616 (5th Cir. 2015); Campaign for Southern Equality v. Bryant, 791 F.3d 625 (5th Cir. 2015); De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015); Chevalier v. Estate of Barnhart, 803 F.3d 789 (6th Cir. 2015); Waters v. Ricketts, 798 F.3d 682 (8th Cir. 2015); Jernigan v. Crane, 796 F.3d 976 (8th Cir. 2015); Rosenbrahn v. Daugaard, 799 F.3d 918 (8th Cir. 2015).

Obergefell petitioners, in a cluster of consolidated cases, argued that state prohibitions against recognition of same-sex marriage violated the Equal Protection and Due Process Clauses of the U.S. Constitution. Justice Kennedy, writing for the majority, held that the right to marry is fundamental under the Constitution; that same-sex couples have the same right to marry and have their marriages recognized in all other States as do persons of the opposite sex; that the Due Process Clause of the Fourteenth Amendment protects individual liberty; that such liberty includes the freedom to marry a person of one's own choosing; and that excluding gays and lesbians from marriage demeans them and bars them from entering into a central institution of society.

The opinion also stated that those who adhere to religious or other doctrines that do not condone same-sex marriage are protected by the First Amendment, and may "continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."[64]

Justice Kennedy concluded with the words, "[no] union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family…[petitioners'] hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

Pros and Cons As Seen By Legal Scholars

Legal scholars and advocates participating in the Commission's briefing represented well the often-stark differences in views of religious rights held not only by scholars but also by the public.

Pro-Religious Exemption

A pro-religious-exemption view of the Free Exercise debate is that the "all-comers" policy passing muster with the Court in *Martinez* should have been held unconstitutional on its face, regardless of any subsidy or non-subsidy.[65] From this point of view, the policy eviscerates both the right of assembly and the free exercise of religion, since it prevents the formation of group worship and activities. The statements of experts Kimberlee Colby, Ed Whelan, Lori Windham and John Inazu support this view for multiple reasons.

Their reasons for requiring state actors to carve out exceptions for religiously motivated discrimination from generally applicable laws are that such laws, despite being generally

[64] *Obergefell* at 2607.

[65] *See generally* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); *see also* U.S. v. Rutherford Cnty., Tenn., No. 3:12-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012).

applicable, 1) interfere with the constitutionally important right to associate with others holding similar religious views, 2) discriminate against the viewpoints of religious persons using the pretext of nondiscrimination policy, 3) block disfavored groups from school benefits accorded all other groups, 4) deny freedom to choose leaders who can be effective in the organization, 5) fail to weigh the benefits and harms of denial, so that even a virtually nonexistent harm outweighs religious freedom, 6) force participation in actions identified as sinful, 7) deny the right to live according to deeply held beliefs, and 8) deny the right to dissent from majoritarian politics.

Kimberlee Colby of the Christian Legal Society (CLS) emphasized the importance of the freedom to associate with like-minded others to pursue religious ideals. As did many of the other speakers, she discussed the policy conflicts over religious freedom in *Martinez*[66] (viewpoint neutrality rules) and *Hosanna-Tabor*[67] (ministerial exemption).

Ms. Colby said that because of *Martinez*, increasingly colleges are telling religious students that they cannot meet on campus if they require their group's leaders to agree with the group's religious beliefs.[68] Ms. Colby's view is that *Martinez* should have been decided in line with earlier cases such as *Healy v. James*, which held that the First Amendment required a public college to stop exercising viewpoint discrimination against the campus Students for a Democratic Society, and *Widmar v. Vincent,* which held that student group recognition was not endorsement. She stated that it is impossible for a student group to function on campus without university recognition, since only recognized groups may reserve meeting space, communicate with other students using mass e-mails, and apply for funding.[69] According to Ms. Colby, once the Court held in *Healy* that a state university's disagreement with a group's beliefs did not justify denial of recognition, and in *Widmar* that the Establishment Clause was not a justification for denying recognition, colleges turned to misusing university nondiscrimination and speech policies as a pretext for denying recognition to religious groups and excluding them from campus, as Vanderbilt University did in 2011.[70]

Lori Windham of the Becket Fund for Religious Liberty, which protects religious freedom for believers in all religious traditions, expressed similar views. Her organization has for example defended a mosque facing discrimination from its neighbors, a Santeria priest banned from performing animal sacrifice, and Amish home builders facing imprisonment for refusing to adhere to building codes that violate their religious beliefs. Ms. Windham stated that a church should have a right to decide who will guide it without the involvement of the government. She invoked

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[66] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010).

[67] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694 (2012).

[68] Briefing Tr. at 8-9 (statement of Kimberlee Colby, Christian Legal Society).

[69] Briefing Tr. at 9-10 (statement of Kimberlee Colby, Christian Legal Society).

[70] Briefing Tr. at 11 (statement of Kimberlee Colby, Christian Legal Society).

the Supreme Court's view that "the interests of society in enforcement of employment discrimination statutes is undoubtedly important, but so too is the interest of religious groups in teaching who will preach their beliefs, teach their faith, and carry out their mission."[71] Ms. Windham noted the success of the Becket Fund in successfully representing the Lutheran church before the Supreme Court in *Hosanna-Tabor v. EEOC* based on these religious principles.[72]

Ed Whelan of the Ethics and Public Policy Center offered a guide to thinking through how nondiscrimination principles should apply. He distinguished between rules governing governments and those governing private citizens since unlike individuals, governments do not have civil liberties that can be burdened. Mr. Whelan opposed the federal Health and Human Services Department's regulation requiring many employer-provided health insurance plans to include forms of contraception that may operate as abortifacients or sterilization.

He offered three reconciliation principles for nondiscrimination and civil liberties: 1) traditional liberalism distinguishes between the rules that the government must follow and the rules that apply to the conduct of ordinary citizens, which in this case means that intrusion on civil liberties must pass a much higher bar as applied to nongovernmental organizations; 2) the paradigmatic and strongest case of a wrongful basis of discrimination is race; and 3) other bases of discrimination commonly prohibited under federal law are qualitatively different from race, such as sex-segregated restrooms.

John Inazu of the Washington University Law School (St. Louis) discussed the constitutional importance of groups; the importance of specifying the benefits or harms caused by groups, and the dangers of the "all-comers" logic endorsed by *Martinez*. He believes that the First Amendment allows groups to secure self-realization, self-governance, and to dissent from majoritarian politics, all of which are valuable in a pluralistic society in support of "the right to differ as to things that touch the heart of the existing order."[73] As to the possible harms caused by groups, he noted that the *Martinez* Court failed to explain either the harm caused by exclusion from the Christian law student group, or why that harm approximated the political, economic, and social harms addressed by civil rights laws. As to the benefits, he stated that *Martinez* also failed to account for the value of recognizing the constitutional importance of the Christian group's right to exist on its own terms in the public forum, including communicating with fellow students via university group email. He concluded that the Court had ignored those constitutional values, failed to apply the appropriate analysis, and allowed an all-comers policy to act as a classic prior restraint that excluded the religious group from the public forum.

Briefing speakers also generally sympathetic to protection for religious expression included Marc DeGirolami and Michael Helfand. As did Professor Inazu, both preferred to look at cases by

[71] Briefing Tr. at 25 (statement of Lori Windham, Becket Fund for Religious Liberty).

[72] Briefing Tr. at 20-21 (statement of Lori Windham, Becket Fund for Religious Liberty).

[73] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-642 (1943).

balancing the interests at stake. Marc DeGirolami of St. John's University Law School recommended acknowledging conflicts in this area as inevitable and acceptable under our legal system, and refraining from attempts to make blanket rules that prevent doing justice in particular situations. He also posited that there could be no large-scale solution or consensus in this area. He approved of the Court's approach in *Hosanna-Tabor* that declined to adopt a rigid formula for deciding when an employee qualifies as a minister.[74]

Michael Helfand of Pepperdine Law School supported the doctrine of church autonomy and the larger philosophical questions that inform the legal analysis of competing claims, which included 1) the important constitutional value of religious institutions in a liberal democracy, 2) appropriate limits on churches' constitutional protections, 3) the relationship between punishing religious adherents' misconduct and discrimination against religion, and 4) balancing the value of religious institutions against the difficulty of adjudicating conflicts.[75]

Against Religious Exemption

Other briefing speakers largely opposed such exemptions, preferring the ostensibly clearer and easier-to-apply solution expressed in *Smith*, which protected belief but not conduct. This no-exemption view avoids having to define "religion" or "religious views," something that is almost impossible except on a case by case basis, and even then, often difficult.

The exemption opponents' reasons were 1) schools must be allowed to insist on inclusive values, 2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly, 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate, 4) a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply, 5) third parties, such as employees, should not be forced to live under the religious doctrines of their employers, 6) a basic right as important as the freedom to marry should not be subject to religious beliefs, and 7) even a widely accepted doctrine such as the ministerial exemption should be subject to review as to whether church employees have religious duties.

Ayesha Khan of Americans United for Separation of Church and State stated that universities have a strong interest in barring exclusionary practices by recognized on-campus student organizations because a principal purpose of providing facilities and money is to enable students to participate in groups with others of different beliefs to further the school's educational purpose. She therefore agreed with the outcome in *Martinez*, and noted that *Hosanna-Tabor* turned on case-specific

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[74] For his views on the Roberts Court and Free Exercise, *see* Marc O. DeGirolami, *Constitutional Contraction: Religion and the Roberts Court*, STAN L. & POL'Y REV., *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491538.

[75] For his view on church autonomy, *see* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141510.

grounds and did not adopt any legal test for deciding when employment decisions would fall under the ministerial exception.

She also pointed out that throughout history, religious doctrines that were widely accepted at one time came to be deemed highly discriminatory, such as slavery, homosexuality bans, and unequal treatment of women, and that what is considered within the purview of religious autonomy at one time would likely change. Her conclusion was that the law should not grant exemptions rather than defer to religious beliefs.

Marci Hamilton of Cardozo Law School largely disagreed with the analysis and outcome in *Hosanna-Tabor*. She emphasized that an important holding of *Hosanna-Tabor* was a rejection of the ministerial exception as a jurisdictional bar to suits against religious institutions, but accepted that the case allowed a church to hire and fire religious teachers without being subject to nondiscrimination law.

In Ms. Hamilton's view, the evidence showed that the church's actions were pretextual and retaliatory, and that the teacher's categorization as a religious teacher was unwarranted since her duties before and after her licensing as a called teacher were identical. She disagreed strongly that religious institutions should be allowed to decide for themselves who falls under a ministerial exception or that they should not be subject to nondiscrimination laws. She disagreed that there is a church autonomy doctrine.[76]

Leslie Griffin of the University of Nevada at Las Vegas Law School argued that religious liberty under the First Amendment should not be protected if expressed in conduct rather than belief, and that religious institutions should be subject to the same nondiscrimination laws as everyone else. She cited with approval the Supreme Court's rejection of Bob Jones University's nonprofit status under IRS rules because of its religious ban on interracial relationships.[77] She also opposed any exemption that allowed an employer's religious views to be imposed on employees, an issue before the Supreme Court in *Hobby Lobby*, and disagreed with the provisions of RFRA that support such exemptions.[78]

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[76] The "church autonomy doctrine" is the umbrella term for the principle that religious institutions may direct their own internal affairs free from government interference.

[77] None of the briefing speakers however, regardless of views, suggested that racial bias by a religious organization could be protected under an exemption pursuant to the First Amendment or RFRA.

[78] Briefing Tr. at 91-92 (statement of Leslie Griffin, Univ. of Nevada Las Vegas Law School), citing United States v. Lee, 455 U.S. 252, 261 (1982) (Upholding social security against religious objections: "When 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.").

Two speakers, Daniel Mach of the American Civil Liberties Union (ACLU) Program on Freedom of Religion and Belief, and Alan Brownstein of the University of California Davis Law School, expressly supported the applicability of the *Martinez* Court's limited-public-forum analysis.

Daniel Mach viewed the *Martinez* holding as answering the question of whether such groups have the right to receive subsidies from the government if they select leaders for their views, not whether they have the right to do so under other circumstances. He agreed with the *Martinez* Court that they do not.[79] He viewed *Hosanna-Tabor* as legitimizing the use of the ministerial defense by a church to hire and fire for religious reasons based on its authority as a religious institution. He agreed with the Court's decision but asserted the view that not every employee of a church can be considered a minister under this doctrine, only those who have doctrinal duties. He opposed any effort to expand the doctrine.

Alan Brownstein argued that the Supreme Court increasingly construes both the Free Exercise Clause and the Establishment Clause narrowly and claims that might have previously been decided under the Religion Clauses are instead decided as free speech claims. He argued that treating these claims as free speech rather than free exercise may ultimately undercut religious liberty by reducing it to merely a species of speech entitled to no more or less protection than secular speech, rather than a distinctive liberty interest that receives heightened protection.[80] He considered the recognition of same-sex marriage as a moral necessity for States and advocated treating religious freedom as an accommodation that in certain circumstances allows discrimination on religious grounds.[81] Under his proposal, this would protect nonprofits more than commercial businesses.

Public Comments

The Commission received 110 written comments, an unusually large number for a Commission briefing. The comments originated from the United States, Canada, and Europe, and included individuals, religious groups, schools, professors and interest groups. Over one hundred comments generally supported religious exemptions and the right of religious institutions and groups to direct their own affairs regardless of otherwise applicable laws. A comment from Europe discussed and objected to five European laws that severely restrict religious exemptions from nondiscrimination laws, including Austria/EU, Spain/EU, Ireland, United Kingdom, and the European Union generally. Comments from religious groups that provide services to those in need (including child welfare networks) described the collision between government directives based on

[79] As to what constitutes a subsidy: The IRS takes the view that a tax exemption is a subsidy, *see* Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."). By this definition, private universities also receive subsidies, as do most businesses and individuals who claim deductions, a question unexplored in *Martinez*.

[80] Briefing Tr. at 103-105 (statement of Alan Brownstein, Univ. of California Davis Law School).

[81] *Id*.

nondiscrimination requirements (usually relating to abortion, abortifacients, unmarried and/or same-sex couples seeking to adopt or foster) and the foundational principles of the charity. A comment from a public interest litigation group that has defended Free Exercise on over a hundred campuses stated that colleges use nondiscrimination regulations as a pretext for viewpoint discrimination against orthodox Christianity, since actual cases of exclusion of nonbelievers from campus religious leadership are rare. Other comments supported some or all of these views.

A smaller number of submitted comments (seven) supported the primacy of nondiscrimination laws. An organization advocating on behalf of lesbian, gay, bisexual and transgender (LGBT) people objected to the expansion of religious liberty exemptions because of their pervasive and harmful effect, and recommended going back to the 1990 *Employment Division v. Smith* era prior to the enactment of RFRA. A comment from a litigation and advocacy group protecting LGBT rights stated that nondiscrimination laws do not impinge on religious liberty. A task force comment on LGBT rights agreed. An interest group promoting secular/atheist views also objected to allowing religious exemptions. A university comment defended its nondiscrimination requirement for recognized student groups as not interfering with the expression of religious faith because any group refusing to open its membership to any student regardless of views is still allowed to meet on campus, recruit, and organize. The university stated that the sole disadvantage to such group is that it does not have official university recognition.

Public comments submitted for the briefing are available from the Commission by writing to foia@usccr.gov.

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FINDINGS AND RECOMMENDATIONS

Findings

1. Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence.

2. The U.S. Supreme Court has recently reaffirmed the foremost importance of civil liberties and civil rights, including non-discrimination laws and policies, in three significant cases.

In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the U.S. Supreme Court applied the limited public forum and viewpoint neutrality doctrines in upholding the University of California Hastings Law School's denial of recognition - and provision of public resources to - a student group which failed to comply with school policy preventing recognized groups from discriminating on the basis of religion. Under *Christian Legal Society v. Martinez*, public colleges still may choose to recognize religiously-based student groups which practice discriminatory policies, but they are not required to do so.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015), when it held that, under Title VII of the Civil Rights Act of 1964, employers may not refuse to hire an individual in order to avoid needing to provide a religious accommodation which would not impose undue hardship upon the employer. This case recognizes the tenet that religious freedom is, in itself, a civil liberty.

In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the U.S. Supreme Court recognized that the Fourteenth Amendment grants the civil liberty of full marriage equality to same-sex couples throughout the nation. Prior to this ruling, during the Commission's briefing, panelist and University of California Davis Law School professor Alan Brownstein referred to governmental recognition of marriage equality as a "moral necessity."

3. Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights.

4. The First Amendment's Establishment Clause constricts the ability of government actors to curtail private citizens' rights to the protections of non-discrimination laws and policies. Although the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act (RFRA) limit the ability of government actors to impede individuals from practicing their religious beliefs, religious exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis.

5. With regard to federal government actions, RFRA protects only First Amendment free exercise rights of religious practitioners and not their Establishment Clause freedoms. Prior to RFRA's enactment, the U.S. Supreme Court had held in *Employment Division v. Smith*, 494 U.S.

872 (1990), that the First Amendment "had never been held to excuse [an individual's religiously motivated conduct] from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." This holding strengthened nondiscrimination laws and policies against actors who asserted religious justification for civil rights discrimination. RFRA now supercedes *Smith* as a controlling source of federal authority. Some states have enacted statutes modeled after RFRA which impact state-level nondiscrimination civil liberties and civil rights protections.

6. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), the U.S. Supreme Court recently affirmed the narrowness of the analytical framework within which claims of government interference with the free exercise of religion must be construed under RFRA. The Court also affirmed that meticulous factual inspection is necessary in the process of adducing - or rejecting - RFRA exceptions to civil liberties and civil rights protections.

7. The Commission endorses the briefing panelists' statements as summarized at page 21 of the Report in support of these Findings.

(1) schools must be allowed to insist on inclusive values; 2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly; 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate; 4) a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply; 5) third parties, such as employees, should not be forced to live under the religious doctrines of their employers [unless the employer is allowed to impose such constraints by virtue of the ministerial exception]; 6) a basic [civil] right as important as the freedom to marry should not be subject to religious beliefs; and 7) even a widely accepted doctrine such as the ministerial exemption should be subject to review as to whether church employees have religious duties.

Further, specifically with regard to number (2) above, religious doctrines that were widely accepted at one time came to be deemed highly discriminatory, such as slavery, homosexuality bans, and unequal treatment of women, and that what is considered within the purview of religious autonomy at one time would likely change.

Recommendations

1. Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.

2. RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause.

3. In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct.

4. Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.

5. States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.

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COMMISSIONERS' STATEMENTS AND REBUTTALS

Chairman Martin R. Castro Statement

"The government of the United States is not, in any sense, founded on the Christian religion." —*John Adams*

The phrases "religious liberty" and "religious freedom" will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.

Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. In our nation's past religion has been used to justify slavery and later, Jim Crow laws. We now see "religious liberty" arguments sneaking their way back into our political and constitutional discourse (just like the concept of "state rights") in an effort to undermine the rights of some Americans. This generation of Americans must stand up and speak out to ensure that religion never again be twisted to deny others the full promise of America.

Commissioners Achtenberg, Castro, Kladney, and Yaki Statement

I. The U.S. Commission on Civil Rights has spoken forcefully about the paramount importance of nondiscrimination laws and the imperative that religious exemption, to the extent required under law, be narrowly crafted.

Progress toward social justice depends upon the enactment of, and vigorous enforcement of, status-based nondiscrimination laws. Limited claims for religious liberty are allowed only when religious liberty comes into direct conflict with nondiscrimination precepts. The central finding which the Commission made in this regard is:

> Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights.[1]

Because religious exemption places a significant burden upon status-based civil liberties, the Commission cautioned that

> "Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level

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[1] "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties," United States Commission on Civil Rights, (hereinafter USCCR Report), Finding #4, 2016, *supra* at 25.

Also, as concluded in Finding #7:

The Commission endorses the briefing panelists' statements in support of these Findings as summarized at p. 26 of the Report:

> 1) schools must be allowed to insist on inclusive values; 2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly; 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate; 4) a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply; 5) third parties, such as employees, should not be forced to live under the religious doctrines of their employers [unless the employer is allowed to impose such constraints by virtue of the ministerial exception]; 6) a basic [civil] right as important as the freedom to marry should not be subject to religious beliefs [*footnote omitted*]; and 7) even a widely accepted doctrine such as the ministerial exemption should be subject to review as to whether church employees have religious duties.

Further, specifically with regard to number (2) above, religious doctrines that were widely accepted at one time came to be deemed highly discriminatory, such as slavery, homosexuality bans, and unequal treatment of women, and that what is considered within the purview of religious autonomy at one time would likely change.

Id. *supra* at 26.

> must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires."[2]

The fight to make religious-based exemptions to nondiscrimination laws preeminent over status-based civil liberties protections is characterized often as a battle being waged by some Christians who purport to speak for all Christians. On the contrary, many Christian denominations and individuals support the notion that religious freedom can and should be expressed through principles and actions geared toward inclusion and toward the recognition and expansion of the rights of others.[3] Dr. Martin Luther King, Jr., recognized the critical role that religion should fill in furthering, rather than hindering, secular, status-based civil liberties protections. When addressing racial discrimination in federal contracting, he declared

> Precisely because we cannot endure in love or justice the erosion and demoralization to minority groups that spring from discrimination in employment, the Church must be the first segment in the nation to stand firmly, not merely for the enunciation of the moral principle of non-discrimination, but it must also encourage and stand behind the Government when it carries out its obligation in refusing or withdrawing Federal contracts from those employers who do not in fact live up to the letter and

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[2] *Id*. Recommendation #1, *supra* at 26.

The Commission also endorsed the following key principles:

> Recommendation #2: RFRA [the Religious Freedom Restoration Act] protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause.
>
> Recommendation #4: Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.
>
> Recommendation #5: States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.

Id. *supra* at 26-27.

See also "A Blueprint for Reclaiming Religious Liberty Post-*Hobby Lobby*," Center for American Progress, June 2014, p. 13, *available at* https://cdn.americanprogress.org/wp-content/uploads/2014/07/ReligiousLibertyReport.pdf; "Restoring the Balance: A Progressive Vision of Religious Liberty Preserves the Rights and Freedoms of All Americans," Center for American Progress, October 2015, *available at* https://cdn.americanprogress.org/wp-content/uploads/2015/10/20070051/HobbyLobby2-reportB.pdf; *and* "*Striking a Balance:* Advancing Civil and Human Rights While Preserving Religious Liberty," The Leadership Conference Education Fund, January 2016, *available at* http://civilrightsdocs.info/pdf/reports/2016/religious-liberty-report-WEB.pdf.

[3] For example, the United Church of Christ provides a designation of "Open and Affirming" to "congregations, campus ministries, and other bodies in the UCC which make a public covenant of welcome into their full life and ministry to persons of all sexual orientations, gender identities, and gender expressions." United Church of Christ, "Open and Affirming in the UCC," *available at* http://www.ucc.org/lgbt_ona.

> spirit of the non-discrimination clause. The Church must have the courage and the resoluteness to support the Government when it determines to make examples of industries in dramatically cancelling large contracts where the principle of brotherhood is violated. For, in refusing to operate strictly within the framework of the contract, employers violate and degrade human personality - and our most sacred trust.[4]

II. Threats to civil liberties, cloaked as "religious freedom" protection bills, are emerging in dozens of states and localities across the nation.

In 2015, twenty-eight state legislatures were already considering more than eighty-five anti-LGBT bills by mid-March.[5] By early 2016, approximately two dozen state legislatures were considering at least that many bills which aim to limit Americans' access to marriage rights, other government services, commercial services, health care services, adoption and foster care services, and other aspects of daily life based upon "religious exemption."[6] Some of these far-reaching proposals specifically target nondiscrimination protections for lesbian, gay, bisexual, and transgender ("LGBT") Americans and some seek to limit women's rights to reproductive freedoms. Many proposals are moving very quickly, and advocacy groups are monitoring them on an almost-daily basis.

The extent to which these proposals represent a backlash to the U.S. Supreme Court's June 2015 recognition of a right to marriage equality for same-sex couples[7] and President Obama's Executive

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[4] King, Jr., Dr. Martin Luther, "Address at the Religious Leaders Conference on May 11, 1959, Washington, D.C.," The Martin Luther King, Jr. Papers Project, p. 201, *available at* https://swap.stanford.edu/20141218225541/http://mlk-kpp01.stanford.edu/primarydocuments/Vol5/11May1959_AddressattheReligiousLeadersConferenceon11May1959.pdf.

[5] *See, e.g.,* "Anti-LGBT Bills Introduced in 28 States," Human Rights Campaign, March 24, 2015, *available at* http://www.hrc.org/blog/anti-lgbt-bills-introduced-in-28-states and "Wave of Anti-LGBT Bills in 2015 State Legislative Sessions," Human Rights Campaign, *available at* http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/2015_StateLegislation-Document_3_23.pdf. For a summary of 2015 state bills in related areas, *see* "Anti-LGBT Religious Refusals Legislation Across the Country: 2015 Bills," American Civil Liberties Union, *available at* https://www.aclu.org/anti-lgbt-religious-refusals-legislation-across-country-2015-bills.

[6] *See, e.g.,* "Anti-LGBT Religious Exemption Legislation Across the Country," American Civil Liberties Union, *available at* https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country#rfra16. For a summary of 2016 bills to date, *see* "LGBT Nondiscrimination and Anti-LGBT Bill Across the Country," American Civil Liberties Union, *available at* https://www.aclu.org/lgbt-nondiscrimination-and-anti-lgbt-bills-across-country. *See also* "1 Year After Hobby Lobby, 5 Ways Religion has Been Used to Discriminate," American Civil Liberties Union, June 30, 2015, *available at* https://www.aclu.org/blog/speak-freely/1-year-after-hobby-lobby-5-ways-religion-has-been-used-discriminate *and* "Can States Protect LGBT Freedom Without Compromising Religious Freedom?," The Atlantic, Jan. 16, 2016, *available at* http://www.theatlantic.com/politics/archive/2016/01/lgbt-discrimination-protection-states-religion/422730/.

[7] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

Order which prohibits federal contractors from discriminating upon the basis of gender identity or sexual orientation[8] is quite clear. Most are thinly-veiled attempts to turn back the clock, and will fall to constitutional challenge as overbroad and motivated by animus.

A. First Amendment Defense Acts purport to elevate sweeping protections for religious freedom above status-based nondiscrimination laws and policies. Observers on the left and right doubt their constitutionality.

The federal government and state governments are considering so-called "First Amendment Defense Acts." In most relevant part, the June 2015 federal proposal would forbid the federal government from taking

> any discriminatory action against a person (defined to include for-profit corporations), wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.[9]

It is critical to note that some important conservative analysts oppose these acts. Among others, both the Cato Institute and The Volokh Conspiracy have voiced serious concerns about their fairness and constitutionality. Walter Olson, Senior Fellow at the Cato Institute, exposed the hypocrisy of the First Amendment Defense Act by highlighting that

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[8] Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

[9] H.R. 2802, sec. 3(a), 114th Cong. (2015), *available at* https://www.congress.gov/bill/114thcongress/house-bill/2802. *See also* S. 1598, *available at* https://www.congress.gov/bill/114th-congress/senate-bill/1598/text.

> Although the reference to "discriminatory action" is vague, the Act then specifies several examples of such action, including revoking "an exemption from taxation under section 501(a) of the Internal Revenue Code," and denying "any Federal grant, contract . . . license, certification, accreditation, employment, or other similar position or status from or to such person." The specificity of what religiously motivated actions are insulated from federal sanction and which punitive measures by government are barred is in quite sharp contrast to the sweeping and vague generalities of a scheme like RFRA or its state counterparts. [footnotes omitted.]

Lupu, Ira C., "Moving Targets: *Obergefell, Hobby Lobby,* and the Future of LGBT Rights," 7 Alabama Civ. Rts. & Civ. Lib. L. Rev 1, pp. 32 - 33 (2015), GWU Law School Public Law Research Paper No. 2015-15; GWU Legal Studies Research Paper No. 2015-15, *available at* http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2373&context=faculty_publications.

During the Presidential primary season for the 2016 election cycle, some Republican candidates either signed or swore fealty to following statement: "If elected, I pledge to push for the passage of the First Amendment Defense Act (FADA) and sign it into law during the first 100 days of my term as President." The American Principles Project and Heritage Action for America proffered the pledge to all Republican candidates for consideration. *See* Schweppe, Jon, "Six Candidates Pledge to Sign First Amendment Defense Act Within First 100 Days," The Pulse, Dec. 17, 2015, *available at* http://thepulse2016.com/jon-schweppe/2015/12/17/six-candidates-pledge-to-sign-first-amendment-defense-act-within-first-100-days/.

> Astoundingly, the protection would run in one direction only: It would cover those who favor traditional definitions of marriage, while leaving those who might see merit in same-sex marriage or cohabitation or non-marital sex perfectly exposed to being fired, audited or cut off from public funds in retaliatory ways.
>
> … The bill would also protect trad-values folk even when they are *not* religiously motivated, while denying protection to their opposite numbers even when they *are* religiously motivated. Despite its own avowals, this isn't actually a bill framed to protect religious exercise.[10]

Volokh Conspiracy affiliate and law professor Dale Carpenter built carefully upon Olson's analysis and concluded that

> By offering government support and protection to only one set of "beliefs" (and necessarily to speech expressing those beliefs) in the debate over same-sex marriage (and the morality of sex outside such marriages), the FADA draws an explicit distinction based on viewpoint. Such distinctions are among the most disfavored ones in constitutional law because they involve government partisanship in favor of a particular set of ideas.
>
> … *The First Amendment Defense Act has the special property of assailing the thing it purports to defend.* [emphasis added.][11]

State-level First Amendment Defense Act proposals have arisen as well. The dangers inherent in these proposals, which generally mirror the federal Act, are insidious. Targets of the discrimination which they seek to legitimize are not only LGBT people. Such laws could

> Shield those who would refuse service not only to same-sex couples but to anyone they disapprove of, including interracial, interfaith or remarried couples.
>
> … For instance, [these state Acts could] offer a blanket defense to a domestic-violence shelter that might reject a single mother and her child because of her marital status. Georgia has no state laws protecting gays and lesbians against discrimination in housing or employment, but even in Atlanta, which does have

[10] Olson, Walter, "Gay Marriage and Religious Rights: Say Nada to FADA," Newsweek, Sept. 10, 2015, *available at* http://www.newsweek.com/gay-marriage-and-religious-rights-say-nada-fada-370860.

[11] Carpenter, Dale, The Volokh Conspiracy, "More Criticism of the First Amendment Defense Act From the Right," The Washington Post, September 10, 2015, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/10/more-criticism-of-the-first-amendment-defense-act-from-the-right/.

> such protections, the bill would allow a hospital to prohibit a gay man from visiting his sick husband based on its religious views.[12]

Georgia passed such a measure in March 2016.[13] That same month, the Republican-controlled Missouri Senate adopted its version after a Democratic filibuster of approximately thirty-seven hours.[14] Hawaii, Illinois, Oklahoma, and Washington State are considering similar measures.[15]

B. Some states are actively considering adopting or strengthening laws modeled after the federal Religious Freedom Restoration Act in an effort to eviscerate nondiscrimination protections.

The federal Religious Freedom Restoration Act of 1993 ("RFRA") reinforces First Amendment protections from government intervention by clarifying that, in order to pass constitutional muster, a federal law impacting religious Free Exercise Clause rights must be narrowly tailored to further a compelling government interest. RFRA does not protect American's Establishment Clause freedoms.[16]

Proponents of new attempts to place religious liberty above other nondiscrimination laws and principles on a wholesale basis are certainly emboldened by an overly broad interpretation of the U.S. Supreme Court's holding in Burwell v. Hobby Lobby.[17]

As the Commission found,

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[12] "A Georgia Bill Shields Discrimination Against Gays," The New York Times, Feb. 26, 2016, *available at* http://www.nytimes.com/2016/02/27/opinion/a-georgia-bill-shields-discrimination-against-gays.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0.

[13] *See, e.g.,* "Georgia Legislature Passes Controversial Religious Freedom Bill," Jurist, March 18, 2016, *available at* http://jurist.org/paperchase/2016/03/georgia-legislature-passes-controversial-religious-freedom-bill.php.

Whether or not Republican Governor Nathan Deal will sign the bill is unclear at the time of this writing. Governor Deal "has made clear that he will not sign a bill that allows discrimination," but the parameters of what he considers to be discrimination for this purpose are unclear. *See, e.g.,* "Georgia Lawmakers Pass Anti-Gay 'Religious Liberty' Bill," The Huffington Post, March 17, 2016 *available at* http://www.huffingtonpost.com/entry/georgia-religious-liberty-bill_us_56ea4d96e4b0b25c91847e5e.

[14] "Missouri Religious Exemption Measure Advances," ABC News, March 9, 2016, *available at* http://abcnews.go.com/US/wireStory/democrats-blocking-missouri-religious-objections-measure-37511652. *See also* "Missouri Senators Filibuster 'Religious Freedom" Bill," CNN, March 9, 2016, *available at* http://www.cnn.com/2016/03/08/politics/missouri-religious-freedom-bill-filibuster/index.html.

[15] "Anti-LGBT Religious Exemption Legislation Across the Country," American Civil Liberties Union, *supra* note 6.

[16] Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. sec. 2000bb - bb-4; *see also* USCCR Report, *supra* note 1, Findings 5 and 6, at 26.

[17] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

> In … *Hobby Lobby Stores, Inc.*, … the U.S. Supreme Court recently affirmed the narrowness of the analytical framework within which claims of government interference with the free exercise of religion must be construed under RFRA. The Court also affirmed that meticulous factual inspection is necessary in the process of adducing - or rejecting - RFRA exceptions to civil liberties and civil rights protections.[18]

In 2015, seventeen states addressed legislation aimed at creating or modifying religious exemption laws modeled after RFRA.[19] As of early 2016, twenty-two states have anti-discrimination laws that cover LGBT people, twenty-one states have RFRAs, and only four have both. [footnotes omitted.][20] As of the first quarter of 2016, at least thirteen states were considering adding or amending RFRA-style laws.[21]

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[18] USCCR Report, Finding #7, *supra* at 26.

> In an ironic twist, however, Hobby Lobby may turn out to be a friend of the LGBT rights movement. The decision provides a principled reason to oppose statutory exceptions to new anti-discrimination laws for any and all religious objectors; if LGBT rights advocates give an inch, they may lose a RFRA-pushed mile. Indeed, Hobby Lobby gives LGBT rights advocates strong grounds to assert the necessity of a generic exclusion from antidiscrimination laws of RFRA claims and defenses. [footnote omitted].

Lupu, *supra* note 9 at 44.

[19] For summary charts, *see, e.g.,* "2015 State Religious Freedom Restoration Legislation," National Conference of State Legislators, September 3, 2015, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx; "LGBT Policy Spotlight: State and Federal Religious Exemptions and the LGBT Community," Movement Advancement Project, *available at* http://www.lgbtmap.org/file/policy-spotlight-report-RFRA.pdf; *and* "Anti-LGBT Religious Refusals Legislation Across the Country: 2015 Bills," American Civil Liberties Union, *supra* note 5.

[20] In parsing out the complicated and confusing national picture, Professor Lupu went on to say that

> The arithmetic is simple - thirty-nine states have one or the other but not both (22 + 21, minus the overlap of 4). That means eleven states have neither a RFRA nor a state-wide LGBT anti-discrimination law. … In March 2015, in Utah, the prominent and influential Church of Jesus Christ of Latter Day Saints joined with LGBT rights groups to present a compromise package, which soon became law. [footnotes omitted.]

Lupu, *supra* note 9 at 50 - 51. *See also* "State Religious Exemption Laws," Movement Advancement Project, *available at* http://www.lgbtmap.org/equality-maps/religious_exemption_laws.

For more information on the particularly contentious fight in Indiana, *see* "Live Updates: How the LGBT Rights Debate Played Out," IndyStar, Jan. 28, 2016, *available at* http://www.indystar.com/story/news/politics/2016/01/27/live-updates-lgbt-rights-take-center-stage-statehouse/79359738/; "Indiana's LGBT Civil Rights Debate is Far From Over Despite Failure of Senate Bill 344," The Elkhart Truth, Feb. 16, 2016, *available at* http://www.elkharttruth.com/news/politics/Indiana-Buzz/2016/02/16/Indiana-s-LGBT-civil-rights-debate-is-far-from-over-despite-failure-of-Senate-Bill-344.html.

[21] "Anti-LGBT Religious Exemption Legislation Across the Country," American Civil Liberties Union, *supra* note 6.

C. Some states are attempting to limit the ability of same-sex couples to adopt and to provide foster care for children by using questionable "religious freedom" rationales.

As of early 2016, at least five state legislatures - AL, FL, NE, OK, and UT - were considering limiting the rights of LGBT people's rights to adopt children and/or to provide foster care based upon the religious beliefs of the child-placing agencies.[22] Some legislators are asserting, in the name of the newly-minted concept of "marriage sovereignty,"[23] that while Obergefell requires the state to give same-sex couples civil marriage licenses, it does not mandate that the state allow permanent or temporary placement of children with LGBT families.[24] The timing of these claims, and the rhetoric being used to advocate for them, bolster the conclusion that they are suspect and will be viewed as constitutionally infirm if enacted.

III. Wholesale religious exemptions threaten reproductive freedoms and endanger women's lives.

In October 2015, the ACLU of Michigan sued Trinity Health Corporation. Trinity, a public funding recipient, is a large Catholic health system. It allegedly "requires that all of its facilities abide by the Ethical and Religious Directives promulgated by the United States Conference of Catholic Bishops"[25] which

> prohibit a pre-viability pregnancy termination, even when there is little or no chance that the fetus will survive, and the life or health of a pregnant woman is at risk. They also direct health care providers not to inform patients about alternatives

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[22] *See*, e.g., "Anti-LGBT Religious Exemption Legislation Across the Country: 2016 Bills," American Civil Liberties Union, *available at* https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country#adoptfost16*;* "Utah Panel Blocks Bill to Ensure LGBT Equality in Adoption, Foster Care," The Salt Lake Tribune, Feb. 24, 2016, *available at* http://www.sltrib.com/home/3577298-155/utah-panel-blocks-bill-to-ensure; *and* "Utah House Panel Rejects Gay Couples Adoption, Foster Care Bill," KSL.com, Feb. 24, 2016, *available at* https://www.ksl.com/?sid=38635124&nid=148.

[23] "GOP Lawmaker Pushes 'Religious Freedom' to Kill Bill Allowing Gays Equal Adoption Rights," The New Civil Rights Movement, Feb. 24, 2016, *available at* http://www.thenewcivilrightsmovement.com/davidbadash/gop_lawmaker_continues_assault_on_same_sex_couples_blocks_bill_allowing_gays_equal_adoption_rights.

[24] *See, e.g.,* "Utah Lawmakers Use Religious Freedom Argument to Kill Same-Sex Adoption Bill," Fox13 Salt Lake City, *available at* http://fox13now.com/2016/02/24/utah-lawmakers-use-religious-freedom-argument-to-kill-same-sex-adoption-bill/.

[25] "ACLU announces Lawsuit Against Catholic Hospital System for Failing to Provide Emergency Medical Care to Pregnant Women," American Civil Liberties Union of Michigan, Oct. 1, 2015, *available at* http://www.aclumich.org/article/aclu-announceslawsuit-against-catholic-hospital-system-failing-provideemergency-medical.

> inconsistent with those directives even when those alternatives are the best option for the patient's health.[26]

The refusal to provide reproductive health services such as medically necessary abortions or tubal ligations violates the Emergency Medical Treatment and Active Labor Act.[27] As noted below, Members of Congress recently wrote to the Attorney General regarding the 2007 DOJ OLC memorandum addressing RFRA exemptions referred to instances in which it is being used to argue for the supremacy of religious exemptions over access to reproductive health care. One can only hope that Congress cannot have intended RFRA to justify suffering and to endanger human life.

IV. The Religious Freedom Restoration Act, which was born of a strongly bipartisan effort, has become highly politicized and a source of discriminatory overreach which must be curtailed.

A coalition of progressives and conservatives led the charge for the passage of the initial version of RFRA in response to U.S. Supreme Court decisions limiting the religious freedom rights of Native Americans.[28] At the Commission noted in its Report, RFRA passed the Senate by 97-3 and garnered no "nay" votes in the House.[29]

However, subsequent conservative manipulation of RFRA's intent set the stage for the undermining of its bipartisan support and for turning what was intended to be a shield into a sword. In 2007, President George W. Bush's Department of Justice Office of Legal Counsel ("OLC") authored a memorandum encouraging an overbroad interpretation of RFRA - one which favored religious liberties in hiring over other civil rights considerations.[30] This interpretation is in strong contravention to the Commission's findings and recommendations.

Almost five dozen widely diverse non-governmental organizations ("NGOs") wrote to President Obama's Attorney General Eric Holder in 2009 requesting withdrawal of that memorandum.[31] In

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[26] "Tamesha Means v. United States Conference of Catholic Bishops," American Civil Liberties Union, June 30, 2015, *available at* https://www.aclu.org/cases/tamesha-means-v-united-states-conference-catholic-bishops?redirect=reproductive-freedom-womens- rights/tamesha-means-v-united-states-conference-catholic-bishops.

[27] *Id*.

[28] *See, e.g.,* Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988), *and* Employment Division v. Smith, 494 U.S. 872 (1990).

[29] USCCR Report, *supra* note 1 at 7.

[30] "Application of the Religious Freedom Restoration act to the Award Of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," Memorandum Opinion for the General Counsel Office of Justice Programs, U.S. Department of Justice Office of Legal Counsel, June 29, 2007, *available at* http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf.

[31] "Request for Review and Withdrawal of June 29, 2007 Office of Legal Counsel Memorandum Re: RFRA," American Civil Liberties Union, et al., Sept. 29, 2009, *available at* https://www.aclu.org/files/images/asset_upload_file539_41040.pdf.

2015, 130 NGOs wrote directly to President Obama requesting the same.[32] Four Members of Congress issued the most recent plea for the Administration's assistance in recognizing the dangers of this Memorandum, and "undertak[ing] a review and reconsideration" when they wrote to U.S. Attorney General Loretta Lynch on February 22, 2016. They express being "deeply concerned that the OLC opinion is being cited with increasing frequency to protect discriminatory employment practices…."[33]

The calls for review and reconsideration of the 2007 OLC memorandum must be heeded. The Administration should withdraw the memorandum which is used to justify attempts to allow religious freedoms to step too heavily on other nondiscrimination laws and policies. That the

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[32] "Request for Review and Reconsideration of June 29, 2007 Office of Legal Counsel Memorandum Re: RFRA," American Civil Liberties Union, et al., Aug. 20, 2015, *available at* https://www.au.org/files/2015-08-20%20-%20OLC%20Memo%20Letter%20to%20President-FINAL_2.pdf.

[33] The Members went on to state that

> Although the OLC opinion is now more than eight and half years old, it remains problematic because it continues to be cited to justify blanket exemptions to nondiscrimination provisions in federally-funded programs. Just in the last year, it has been cited to justify a number of religion-based exemptions to nondiscrimination provisions, including beyond the employment context:
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> > LGBT Hiring Discrimination: The U.S. Conference of Catholic Bishops (USCCB) cited the OLC opinion to argue that federal contractors with religious objections should be permitted to fire and refuse to hire LGBT people - in direct defiance of President Barack Obama's historic Executive Order barring such discrimination - and continue to be awarded contracts from the government. [footnote omitted.]
> >
> > Refusal to Provide Government-Funded Healthcare Services: The National Association of Evangelicals (NAE), World Vision, USCCB, and other organizations cited the OLC opinion to argue that recipients of certain federal grants are not required to provide access to reproductive health care services and referrals, as required by law, to unaccompanied minors who have suffered sexual abuse. [footnote omitted.]
> >
> > Refusal to Serve Certain Patients: The Ethics & Religious Liberty Commission of the Southern Baptist Convention, USCCB, NAE, and others cited the OLC opinion to argue that RFRA guarantees them an exemption from the provision of the Affordable Care Act that prohibits sex discrimination - a nondiscrimination provision that protects women and LGBT patients - in the provision of healthcare programs and activities. [footnote omitted.]
>
> Each of these religion-based exemptions, if granted, threatens to undermine the Administration's own work in important policy areas and would seem to be contrary to the Administration's own position against discrimination in federally-funded programs. The OLC opinion appears to be at odds with these commitments.

Conyers, Jr., Hon. John, Scott, Hon. Robert C., Cohen, Hon. Steve, and Nadler, Hon. Jerrold, "Letter to the Honorable Loretta E. Lynch, Attorney General of the United States," Feb. 22, 2016, *available at* http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/Letter-%20AG%20Lynch%20%20re%20OLC%20%20RFRA%202.22.16.pdf.

Administration would seek to give protections and services with one hand while potentially allowing them to be compromised with the other is of concern.

V. Once the current tide of legislative proposals ebbs, vigilance still will be needed.

Regardless of the pace at which American religious institutions do or do not embrace the reality of civil rights and liberties of LGBT families and of women, religious exemptions to them are, and must remain, few and narrow.

Laws which permit discrimination, even if enacted on the basis of religious freedom, are unlikely to be successful when challenged on Constitutional bases. Professor Ira C. Lupu of the George Washington University Law School posits that

> it is hard to imagine a federal court … find[ing] any constitutionally legitimate basis for any formal policy of exclusion, based on sexual orientation, from state created opportunities. Whether the policy is based on prejudice, animus, or sincere religious belief, it rests on reasons that the state is forbidden to pursue. [footnotes omitted.][34]

Some of the many overly-broad religious freedom legislative proposals discussed above will be enacted, some will be defeated, and some will languish in committee. Many will face constitutional challenge and will be overturned by the courts. Nonetheless, the fervent ideological disagreements will continue. Therefore, government officials, advocacy groups, and concerned individuals, as well as persons of faith and of good will,[35] must remain alert and ready to combat future efforts. Nondiscrimination laws stand as a bulwark against the assaults of intolerance and animus. May it always be so.

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[34] *Id*. at 6 - 7.

[35] Despite Obergefell's nod to the existence of good faith religious opinion against same sex marriage, religious objections to same sex intimacy will ultimately retain no more respect than religious objections to racial integration and inter-racial intimacy. In a nation committed to a more Perfect Union, the arc of the religious universe is long, but it too bends toward justice. [footnotes omitted.]

Lupu, *supra* note 9 at 69 - 70.

Commissioner Karen K. Narasaki Statement

Enshrined in the First Amendment to our Constitution, the right to exercise one's religion free from government interference is an essential civil and human right firmly embedded in the core of our country's DNA.

Also enshrined in our Constitution is the fundamental principle that all persons are guaranteed equal protection under the law. Life, liberty and the pursuit of happiness, inalienable rights proclaimed by our founders in the Declaration of Independence, are unattainable if one cannot live free from discrimination and be treated fairly under the law.

While many people of faith have been an inspirational force for change and equality in our country, others hold to religious practices that may result in continued prejudice and discrimination against others. The First Amendment is a shield that ensures a diversity of religious views are allowed to flourish in the U.S. However, there are some seeking to make the right to exercise their religion a sword that can be used against others who do not conform with their interpretation of their faith.

As a report by the Leadership Conference Education Fund notes, "Freedom of religion, like freedom of speech and other constitutional rights, is not absolute: one person's religious liberty does not give him or her the right to harm another person or impose their religious beliefs or practices on someone else."[1] Great care must be taken to ensure that claims of religious liberty, however sincerely held, do not become a license to discriminate.

Recent advances in the recognition of the rights of LGBT individuals, such as the Supreme Court's marriage equality decision in *Obergefell v Hodges*, have prompted some lawmakers and individuals to seek and expand religious exemptions to allow individuals and businesses to continue to discriminate against LGBT individuals at the marriage license office, in the workplace, and in places of public accommodations like businesses, hotels and restaurants. This development is a step backwards in the effort to guarantee equal access and opportunity for all Americans.

The findings and recommendations in this report reflect the consideration needed to ensure that any religious exemption does not unduly burden nondiscrimination laws and policies. Religious freedom is a fundamental value, and so is the ideal that all persons should live free from discrimination.

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[1] Leadership Conference Education Fund, *Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty 3* (2016), *available at* http://civilrightsdocs.info/pdf/reports/2016/religious-liberty-report-WEB.pdf.

Commissioner Peter Kirsanow Statement

The subject of this briefing was the tension between nondiscrimination principles and religious liberty. The majority has resolved this tension resoundingly in favor of nondiscrimination.

I will address five prominent issues that involve this tension: secularism and religion, *Hosanna-Tabor v. EEOC*, same-sex marriage, the HHS mandate, and Christian student groups. An additional commonality among the latter three issues is that they all involve issues of sexual behavior or sexual identity. I will address the majority's findings and recommendations separately.

The conflict between religious liberty and nondiscrimination principles is profound. The passions involved may be fiercer than in any civil rights struggle since the 1960s, as both sides' ultimate commitments are implicated. This debate will likely dominate civil rights discourse for at least a generation. And regardless of the outcome, we may emerge a very different country than the one we have been.

This statement will primarily focus on conflicts between Christian beliefs, believers and nondiscrimination principles because the conflicts mentioned above have primarily involved Christians.[1] However, there is no reason why similar conflicts between other religious beliefs and nondiscrimination principles could not arise. Oddly enough, it is possible that Christianity is particularly vulnerable because it is both the majority religion *and* espouses certain principles about sexuality that are unpopular among both committed secularists and the population at large. Some secular elites seem to frown on any criticism of minority religions that adhere to many of the same moral standards as Christianity, yet despise much of what is associated with the religion of their forebears.

The tension between nondiscrimination principles and religious liberty is based on the assumption that the rights in conflict are of equal weight, or even that nondiscrimination is of greater weight.[2] This assumption is erroneous. Religious liberty is an undisputed constitutional right. With the exception of racial nondiscrimination principles embedded in the Thirteenth, Fourteenth, and Fifteenth Amendments, nondiscrimination principles are statutory or judicially-created constructs.[3]

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[1] Gudrun Kugler, *Opinion to the U.S. Commission on Civil Rights: Equality or Anti-Discrimination Legislation vs. Civil Liberties* (Apr. 22, 2013) (on file with the Commission), at 2 ("Equal treatment legislation is phrased in an impartial way. But experience shows it is very often Christians who are taken to court.").

[2] *See* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123-24 (Douglas Laycock, Anthony R. Picarello, and Robin Fretwell Wilson, eds., 2008).

[3] David E. Bernstein, You Can't Say That: The Growing Threat to Civil Liberties from Antidiscrimination Laws 14 (2003).

The tension between religious liberty and nondiscrimination principles appears most acute when religious liberty and sexual liberty conflict. There are at least two ways of conceptualizing the conflict. The first is as a conflict between two rights-the right to be served without discrimination based on one's sexual orientation, and the right to manifest one's religious beliefs by choosing whom to serve. The second is whether religious believers should receive exemptions from neutral laws of general applicability.

But the conflict goes deeper. It is a conflict between two worldviews, both held with the intensity generally associated with religious belief.[4] The first, which is secularism, holds an individual's unfettered sexual self-expression as a preeminent concern because it is an aspect of their self-creation.[5] This interest in the individual is now construed as a positive responsibility to ensure that

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The Civil War amendments do not purport to guarantee substantive equality, much less to override the First Amendment. The Thirteenth Amendment abolished slavery, the Fourteenth Amendment required states to provide all persons with equal protection of the laws (not equality per se), and the Fifteenth Amendment guaranteed African Americans the right to vote. None of the Civil War amendments established a right to be free from private-sector discrimination.

[4] Most Reverend Philip Egan, Bishop of Portsmouth in the United Kingdom, *Irrelevant? Should Christianity Still Have a Voice in the Public Square?*, Kings College London, Mar. 6, 2014, at 1, 2, *available at* http://www.portsmouthdiocese.org.uk/bishop/docs/BoP-140306-talk.pdf.

[S]ecularism is more an attitude or atmosphere than fully worked-out system of thought. Yet essentially, secularism means a concern with the *saeculum*, the world, this world rather than the next. It is about living, at least in public, without religion and its 'sacred canopy.' Secularism has a political dimension: the principle that Church and state, religion and politics, must be strictly separated. In other words, to protect the equality of every citizen in a pluralist society, politicians and policy makers adopt a neutral attitude toward religious groups and personal life-style choices, as long as behaviour remains within the law. Religion - beliefs about the meaning of life, the morally good, God and life after death - are strictly ring-fenced as matters of public opinion. …

… Yet essentially, perhaps surprisingly, secularism is a Christian heresy. It is a deconstructed version of Christian morality, a set of second-order Christian values shorn from their theological moorings, a form of post-Christian ethics that thrives because its values continue to derive their vitality from the Christian patrimony … If religion is defined as belief in a deity, with a moral code based on that belief, and a theology that interprets it, then secularism is a reversed religion. Its core belief is doubt; its moral code is a way of life as if God does not exist; its theology is about being human. It even has its own theological terms such as equality, diversity, freedom, respect, tolerance, non-discrimination, multiculturalism, social cohesion, ethnic communities, inclusivity, quality of life, sustainable development and environmentalism. All of these values are derived from fundamental Christian values. Thus, the secular concern for tolerance comes from the biblical 'love of neighbour' but, disconnected from Christian practice and belief, it has become a soft value, free-wheeling, expanded with new meaning, now permitting what formerly was unlawful.

[5] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 851 (1993).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State [citations omitted].

everyone has the ability to engage in sexual conduct without cost or consequence, whether in money, unwanted children, or hurt feelings. An individual's sexual behavior is considered an act of self-creation and something that goes to the deepest level of their identity.[6] Criticism of an individual's behavior is considered an attack on the dignity of the person. Naturally, this worldview is at odds with many aspects of traditional morality grounded in sexual restraint.[7]

The second worldview holds that individuals are not their own judge, but rather are subject to divine law and divine judgment. The morality of a person's conduct does not ultimately depend upon whether he thinks it is right, or whether it accords with his desires, but whether it conforms to divine law. Moral standards of behavior are external to a person, not internal. Therefore, even though people, including religious believers, fall short of these standards, they do not have the authority to change the standards.[8] Furthermore, it is a sin to assist another person in

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Ironically, in the realm of abortion, the justices conflate "belief" and "conduct," the very thing the partisans of nondiscrimination urge the justices *not* to do in the case of religious liberty. After all, the law at issue in *Casey* restricted the individual's right to *believe* whatever he wanted about abortion and defining one's own concept of existence was completely untouched. The law only affected conduct.

[6] U.S. Commission on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties, Mar. 22, 2013, at 100 [hereinafter "Transcript"] ("sexual orientation is a fixed and core aspect of a gay or lesbian person's identity. . . . Neither gays, nor lesbians, nor devoutly religious individuals can reasonably be required to separate their conduct from their identity").

[7] John M. Finnis, *Religion and State: Some Main Issues and Sources*, 51 AM. J. OF JURISPRUDENCE 107, 113-14 (2006), *available at* http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1862&context=law_faculty_scholarship.

[S]elf-determination is now regarded, not least among our constitutional lawyers, as a form, not so much of shaping up as best one can to what one judges in conscience to be reason's demands on one, but rather as the bundling of one's *strong desires*, one's "deep concerns," most considerable when most *passionate*. In such a line of thought (formalized within a year or two of *Casey*), religion is doubly discredited, first by the casual assumption that it is outside the domain of reason, and then by its hostility to its unwelcome critiques of and constraints upon "deep" desires. Its place in the constitution can be accepted only grudgingly as a historical relic and a monument to the threat that religions characteristically have posed to each other as well as to everyone's "conscience" (reconceptualized as the articulation of their "deep concerns").

[8] Alvin Plantinga, Where the Conflict Really Lies: Science, Religion, and Naturalism 154 (2011).

Once you have established, as you think, what God is teaching in a given passage, what he is proposing for our belief, that settles the matter. You do not go on to ask whether it is true, or plausible, or whether a good case for it has been made. God is not required to make a case.

See also John Finnis, NATURAL LAW AND NATURAL RIGHTS 404-05 (2011).

But those who claim to know what God wills in some human context, and that that will should be obeyed, are (as I have said) going beyond what can be affirmed about D on the basis of philosophical argumentation. They are claiming (like Plato, but relying unlike him upon some definite revelation) that God positively favours both the basic goods and human adherence to the principles and requirements of practical reasonableness in the pursuit of those goods; that the evils and disorders of this world are not favoured so, but are merely tolerated by God for the sake of some positive good (what, and how attained, we do not know); and that friendship with God, some sharing in God's life and knowledge and love-of-goods, is available to those who positively favour what God positively favours. In the context of such beliefs-and it is only in such a context that claims about the authoritativeness of God's will for man are plausibly made-the question 'Why should God's will be obeyed?' has no bite.

breaking the moral law, or to applaud breaking the moral law. In a predominantly Judeo-Christian society, this worldview is most closely reflected in the Ten Commandments. Although believers realize that they break the Ten Commandments both through what Christians often call "sins of omission" and "sins of commission," they are not free to change "Thou shalt not bear false witness" to something more congenial. Instead, they are told to repent of their sin and to try to avoid repeating it.

This is the nub of the conflict between the proponents of nondiscrimination norms and proponents of constitutionally-protected religious liberty.

I. Secularism and Religion

In *The Rise and Decline of American Religious Freedom*, Steven Smith argues that the American project has been subject to two interpretations - the secular and the providentialist.[9] Both interpretations commanded the allegiance of various statesmen. Madison and Jefferson adhered to the secularist view (though as Smith points out, both inclined more to the providentialist view than do many of their ideological heirs) and Washington and Lincoln adhered to the providentialist view.[10] During America's first century and a half of existence, both sides accepted the other's legitimacy and accepted that in some times and places one interpretation or the other would dominate. There was no definitive determination, Smith says, as to which interpretation was correct, but that was both the purpose and the genius of the First Amendment.

Smith argues that this settlement ended, however, with the Supreme Court's decisions in *Engel v. Vitale* and *Abington School District v. Schempp*.[11] Part of the reason for the settlement's demise was because the meaning of terms had shifted without anyone really noticing.[12] Another reason was the increasing cultural divide between secularists and providentialists. The academy and the courts became increasingly committed to the secular interpretation, but large portions of the American public remained committed to the providentialist interpretation. Additionally, the secularists had arguably become more secular, if not outright hostile to religion, since the days of Jefferson.[13] The disagreement between the current views of secularists and providentialists is deep, but the extent of the disagreement probably was not recognized by either side until after *Engel v. Vitale*.[14]

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[9] Steven D. Smith, The Rise and Decline of American Religious Freedom 9 (2014).

[10] *Id.* at 9, 85-94.

[11] *Id.* at 114.

[12] *Id.* at 111-113.

[13] *Id.* at 117. Smith notes that it was Jefferson who wrote "Almighty God hath created the mind free."

[14] *Id.* at 120-21.

Not only do the secularists believe the providentialists are wrong, but, Smith says, they regard the providentialist view as a heresy.[15] Naturally, the heretics vehemently disagree.

One reason for the bitterness surrounding the debate is that the secularists tend to make their interpretation mandatory for society. Because they consider the providentialist view a heresy, and often regard the non-elite adherents of the providentialist view with disdain, they are unwilling to allow different views to exist in different places. Thus, the cases of secularists suing local governments to force them to remove a crèche, or end a town's legislative prayer, or forbid student prayers before graduation, are legion. On the other hand, the idea that a Baptist preacher would sue a town council to force it to institute legislative prayer is risible. Neither do the committed secularists accept that it might be constitutionally acceptable for the people of Burlington, Vermont not to have school prayer and the people of Jackson, Mississippi to have school prayer - and that if you live in either city and are so bothered by the local practice that you simply cannot tolerate it, you should either move to a more congenial city or put your child in private school.

Furthermore, although the secularist project has intellectual roots that go back to the country's Founding, the realization of its vision entails a radical transformation of American society. This was well-expressed in the Obama administration's position in *Hosanna-Tabor* that there was no "ministerial exception" to the nondiscrimination laws. It is also exemplified in the decades-long crusade to remove the Mount Soledad cross from a California veterans memorial (in that case, the Department of Justice has weighed in on the side of the cross).[16] It requires purging the public

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Bruce Dierenfield reports that the first of these decisions, *Engel v. Vitale*, provoked "the greatest outcry against a U.S. Supreme Court decisions in a century" (a century that had included *Brown v. Board of Education*). . . .

And yet, revealingly, this reaction evidently came as a surprise to the justices themselves. . . . The justices who joined in the decisions, as well as many of their supporters, evidently viewed the decisions not only as continuous with long-standing constitutional principles but as relatively narrow in their implications. . . .

Conversely, impassioned critics, including many ordinary Americans citizens, saw the decisions as radical and transformative. Here the understandings of the cultural elite and less privileged Americans parted: thus John Jeffries and James Ryan observe that "the controversy over school prayer revealed a huge gap between the cultural elite and the rest of America.

[15] *Id.* at 123.

[T]he elevation of the secularist interpretation was a change - and a momentous one at that. . . .

[Previously], Americans could believe and assert either secular or providential interpretations of the Republic, as seemed to them right, and they could elaborate and act on those interpretations with respect to whatever the local issues might be: school prayer, Sunday mail delivery, whatever. Both kinds of interpretations were *constitutional* (in the soft sense); neither was *Constitutional* (in the hard sense). . . .

The modern Supreme Court seemingly failed to understand this complex strategy; in any case, the Court tacitly repudiated it. In effect, by elevating the secularist interpretation to the status of hard Constitutional orthodoxy, the Court placed the Constitution itself on the side of political secularism and relegated the providentialist interpretation to the status of a constitutional heresy.

[16] Chelsea J. Carter, *Obama attorneys: Cross atop California war veterans memorial is 'appropriate'*, CNN, Apr. 10, 2014, *available at* http://www.cnn.com/2014/04/10/justice/california-cross-battle/.

square of religious symbols, denying the validity of public policy with religious origins, and ending long-standing public religious practices.

In some cases, the Court has proved unwilling to force Americans to abandon traditional practices. In *Town of Greece v. Galloway*, the Court held that it did not violate the Establishment Clause for people giving a prayer before a town meeting to use language specific to their religious tradition.[17] The Court had previously ruled that legislative prayer is constitutional[18], and requiring all prayer-givers to use non-sectarian language was neither constitutionally required nor feasible.[19] Nor was the town required to engage in religious bean-counting to avoid having predominantly Christian prayer-givers since it had a nondiscrimination policy.[20] Even if you have a nondiscrimination policy, if your town is overwhelmingly peopled by Christians, most of your prayer-givers will probably be Christians, and you can still open your meetings with a prayer.

Still, the providentialists are embattled. The secularists have been the aggressors and often use the courts, corporations, public officials from other jurisdictions, the news media, and social media mobs to impose policies that lack democratic support in the affected communities, either through court orders or by bullying public officials into submission. Many Americans would simply like to be left alone to follow their traditional practices regarding the public expression of religious sentiments, but are stymied by collaboration between secularist elites who enforce a sort of "heckler's veto" against the majority in an unfashionable community. Yes, the Constitution protects the rights of minorities, but it also protects the rights of the majority. It may be far better to minimize the number of disputes that are elevated to Constitutional confrontation, and instead allow the democratic process to work out compromises at the local level.

Religious believers have also been put at a disadvantage by the secularist contention that religious reasons for supporting particular policies are *per se* inadmissible. This represents an embrace of Rawls' idea that only "public reason," that is, reasons that are not based on a comprehensive doctrine such as religion, may be used in political discourse.[21] Only public reason may be used, Rawls says, even if appealing to reasons rooted in a comprehensive doctrine would persuade fellow citizens to share your position,[22] unless appealing to reasons rooted in religion advances preferred policies.[23] This disingenousness is characteristic of much public discourse today. Political positions

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[17] Town of Greece, N.Y. v. Galloway, 134 S.Ct. 1811 (2014).

[18] Marsh v. Chambers, 463 U.S. 783 (1983).

[19] Town of Greece, 134 S.Ct. at 1822-23.

[20] *Id.* at 1824.

[21] John Rawls, POLITICAL LIBERALISM 224-25 (2005).

[22] *See id.* at 216-220.

[23] *Id.* at 251.

rooted in moral judgments opposed by secularists are invalid, especially anything to do with sexual liberty, but it is perfectly fine if moral judgments are invoked to support their favored political positions, such as amnesty for illegal immigrants.

A version of this approach seems to have been adopted by political and cultural elites. This of course tips the scales in their favor. Defining public reason as encompassing only "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial" while explicitly excluding reasons based in religion means that what seems like "common sense" to the secular and what seems like "common sense" to the religious can be two very different things. Yet only the former is regarded as legitimate in public debates. For example, a devout Christian may regard it as "common sense" that marriage is between a man and a woman, in large part because that is the pattern laid out in the Bible. A secularist may consider it "common sense" that marriage is between two people who share a deep emotional attachment, and point to the benefits of having someone to care for you in illness, etc. And indeed, as mentioned above, secularism has its own commandments and shibboleths, though it is rarely viewed that way by its adherents.[24] Yet only one of these two versions of "common sense" is regarded as legitimate by our political system, even if the former would be persuasive to a large number of people.[25] In some cases, courts have even implied that because some people favored a particular policy for religious reasons, the entire enterprise is tainted by animus and thus is unconstitutional.[26] In fact, there are really two clashing moralities in

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On this account the abolitionists and the leaders of the civil rights movement did not go against the ideal of public reason; or rather, they did not provided they thought, or on reflection would have thought (as they certainly could have thought), that the comprehensive reasons they appealed to were required to give sufficient strength to the political conception to be subsequently realized. . . . The abolitionists could say, for example, that they supported political values of freedom and equality for all, but that given the comprehensive doctrines they held and the doctrines current in their day, it was necessary to invoke the comprehensive grounds on which those values were widely seen to rest. Given those historical conditions, it was not unreasonable of them to act as they did for the sake of the ideal of public reason itself.

[24] *See supra* note 4.

[25] Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015).

[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

[26] Perry v. Schwarzenegger, 704 F.Supp.2d 921, 973, 985 (N.D. Cal. 2010).

Whether the Evidence Shows that Proposition 8 Enacted a Private Moral View Without Advancing a Legitimate Government Interest . . .

77. Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians. . . .

e. Tr. 395:14-18 (Chauncey: Many clergy in churches considered homosexuality a sin, preached against it and have led campaigns against gay rights.);

play, especially in regard to same-sex marriage, but the courts choose one over another while pretending to be neutral.[27] It is permissible for a pro-same-sex marriage campaign to be animated by the belief that same-sex marriage is morally good, but it is impermissible for a pro-traditional marriage campaign to be animated by the belief that same-sex marriage is morally wrong.[28]

As Steven Smith notes, religious believers have tried to adapt to this change in public discourse, but realize that many of their beliefs defy glib secular rationalization.[29] "Finding these secular rationales implausible, advocates on the secular side often respond by accusing their opponents of obscurantism and hypocrisy: the ostensible secular rationales are dismissed as mere pretexts for religious reasons or motivations. Justices themselves sometimes join in the demonizing and the mockery."[30] Naturally this leads to resentment and a sense that the game is rigged.

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g. PX2853 *Proposition 8 Local Exit Polls—Election Center 2008,* CNN at 8: 84 percent of people who attended church weekly voted in favor of Proposition 8;

r. Tr. 2676:8-2678:24 (Miller: Miller agrees with his former statement that "the religious characteristics of California's Democratic voters" explain why so many Democrats voted for Barack Obama and also for Proposition 8.).

[27] *Id.* at 1002.

A Private Moral View That Same-Sex Couples are Inferior to Opposite-Sex Couples is Not a Proper Basis for Legislation

In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus toward gays and lesbians or simply a belief that a relationship between a man and woman is inherently better than a relationship between two men and two women, this belief is not a proper basis on which to legislate. [citations omitted]

[28] Perry v. Schwarzenegger, 704 F.Supp.2d 921, 937-38 (N.D. Cal. 2010). *See also* U.S. v. Windsor, 133 S.Ct. 2675, 2692-96 (2013) (Kennedy, J.) (characterizing New York's decision to permit same-sex marriage as "a proper exercise of its sovereign power" that "For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. . . . deemed by the State worthy of dignity," whereas Congress and President Clinton's decision to, for federal purposes, define marriage as opposite-sex was intended to "impose a disadvantage, a separate status, and so a stigma" because its purpose was 'protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" [citations omitted]).

[29] Smith, *supra* note 9, at 126.

And indeed, it seems likely that religious citizens, at least when in litigating posture, are sometimes less than forthcoming about their deeper reasons. This reticence occurs under duress, however, because under current constitutional understandings, it is only by adopting a secularist vocabulary that these citizens are able to participate in the constitutional conversation at all. And even as they attempt to defend their positions in constitutionally admissible terms, believers in the providential conception often feel beleaguered and alienated. How can it be, they wonder, that the Constitution somehow forbids officials and citizens today to assert and act on the same sorts of openly religious rationales that are so evident on the face of the celebrated writings, speeches, and enactments of Jefferson, Madison, and Lincoln? Thus Harvard law professor Noah Feldman observes that 'constitutional decisions marginalizing or banning religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project."

[30] *Id.* at 125.

This sense of resentment is fed by the memory that for much of American history, religious reasons and arguments were freely used in political discourse. Rawls argues that during the Founding, Reconstruction, and the New Deal, "all three seem to rely on, and only on, the political values of public reason."[31] Yet earlier, Rawls himself says that "the limits of public reason" do not "apply only in official forums," but rather to all political discourse by citizens.[32] Using that definition, how can one claim that public reason alone was used during the Civil War and Reconstruction? Reconstruction would not have taken place absent the Civil War, and absent a consensus formed in the North during the Civil War that slavery was evil. This consensus likely would not have existed absent the leadership of Abraham Lincoln, who not only invoked religious imagery in his oratory, but made theological arguments. Unwilling to cede much ground here, but also unwilling to distance himself from Lincoln, Rawls argues that Lincoln's many actions referencing or appealing to God either "[do] not violate public reason . . . since what he says has no implications on constitutional essentials or matters of basic justice. Or whatever implications it might have could surely be supported firmly by the values of public reason.."[33] Rawls is a dean of modern liberalism. Yet even his attempt to explain why American public discourse must now be secularized when it was not so in the past collapses in an unconvincing mess that amounts to, "Religion can only legitimately be invoked when it is helpful to my positions." In this respect he has many devout disciples among the American legal caste. Furthermore, an objective reading of Lincoln's actions and speeches does not support Rawls' position that those actions and speeches did not affect "constitutional essentials [nor] matters of basic justice." For example:

> [A]t about the same time that Lincoln wrote this meditation, he offered a specific reading of providence to guide a course of action, evidently something he had not done before and would not do again. In September 1862, after the battle of Antietam provided just enough good news for Lincoln to move against slavery in the Confederate states, he explained to his cabinet how he was confirmed in this decision. Here are the notes that Secretary of the Navy Gideon Wells recorded at the time: "He had made a vow, a covenant, that if God gave us the victory in the approaching battle, he would consider it an indication of divine will and that it was his duty to move forward in the cause of emancipation. It might be thought strange that he had in this way submitted the disposal of matters when the way was not clear to his mind what he should do. God had decided this question in favor of the slaves. He was satisfied that it was right, was confirmed and strengthened in this action by the vow and results."[34]

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[31] Political Liberalism at 234.

[32] *Id.* at 217-218.

[33] *Id.* at 254.

[34] Mark A. Noll, The Civil War as Theological Crisis 89 (2006).

Lincoln's decision to free the southern slaves should not be considered as distinctly separate from the establishment of the 13th Amendment. In that respect, the decision affected both constitutional essentials and basic justice. His September 1862 decision to free the Confederate slaves, ultimately resulting in the Emancipation Proclamation - which he must have known would likely make it impossible to come to a peaceful rapprochement with the Confederacy - was a sharp departure from his August 1862 letter to Horace Greeley. In that letter, he wrote, "If I could save the Union without freeing *any* slave, I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that."[35] Perhaps this was simply Lincoln's effort to pacify the public. Yet in making a momentous decision that would in some way signify that the war would be a fight to the death, Lincoln gave his Cabinet a providential explanation for his decision. This was not just a discussion between two citizens as to the right course of action (and Rawls thinks even that should be governed by public reason). This was a decision made by the highest elected official in the land in his official capacity - the paradigmatic example of when public reason should be used. It involved a matter of basic justice and would affect constitutional essentials. In Rawls's mind, Lincoln should have relied upon public reason. And Lincoln did not. Surely the fact that perhaps the greatest American president relied on a divine explanation for a decision that began to commit the United States to emancipation for all is as significant as what senators said or did not say during debates over the 13th Amendment.

Furthermore, Lincoln did not limit his meditation on the relationship between God and political decisions to private conversations. An inaugural address is as public an exercise of political discourse as one can imagine. But Lincoln's Second Inaugural Address does not limit itself to common sense and generally accepted scientific beliefs. It is an explicitly theological meditation on the evil of slavery and the mystery of divine will and divine judgment. Especially when addressed to a deeply religious people who searched for a theological explanation for the bloodshed[36], Lincoln's words could not fail to move his listeners.

Rawls appears to be somewhat at a loss in regard to the Second Inaugural, and eventually throws up his hands and essentially says, "It didn't matter." But was that the case? Although the 13th Amendment had been passed by Congress when Lincoln gave his Second Inaugural Address, it had not yet been ratified by three-quarters of the states, including several states that at the time of the speech were still members of the Confederacy and at war with the Union. Ratification would not be announced until December 18, 1865. Under the circumstances, it strains credulity to think that Lincoln was not both offering a meditation on the horror of war and trying to convince Americans, using explicitly theological language, that slavery must be abolished.

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[35] Letter from Abraham Lincoln to Horace Greeley, Friday, August 22, 1862, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mal&fileName=mal2/423/4233400/malpage.db&recNum=0.

[36] *See generally* Mark A. Noll, THE CIVIL WAR AS THEOLOGICAL CRISIS (2006).

Why expend so much ink discussing Rawls, public reason, and American history? First, because the clash between religious belief and secularism underpins many of the conflicts discussed in this report. Second, because delegitimizing the use of religiously-based moral beliefs in legislation and public discourse is used as a trump by secularists to achieve their policy goals when they lack majority support. Third, because even the primary proponent of public reason is unable to convincingly demonstrate that public reason as he initially defined it is standard in American history, and thus demonstrates that it is only an exercise of political will to be used as suits his ideological heirs.

II. Hosanna-Tabor v. EEOC

A primary area of recurring conflict between nondiscrimination norms and religious liberty involves employment discrimination.

In 2012, the Supreme Court issued a decision in *Hosanna-Tabor v. EEOC*.[37] The case involved a Lutheran church and school, called Hosanna-Tabor, and a former teacher named Cheryl Perich. Perich had been a "called" teacher at the school, which meant that she had to engage in theological studies, pass an examination, be approved by the Lutheran Church-Missouri Synod [LCMS] (the denomination to which Hosanna-Tabor belonged) and be "called" by a church congregation. After being "called," "called teachers" are referred to as "Minister of Religion, Commissioned."[38] Her duties included leading prayer in her classroom, teaching religion, and occasionally leading chapel services. Unfortunately, after serving as a called teacher for several years, Perich developed narcolepsy and was unable to work from June 2004 through February 2005. In the meantime, the school had been forced to hire another teacher to take Perich's place. Perich refused to resign and threatened to sue, despite the school having no position for her and the congregation having agreed to pay part of her health insurance premiums in return for her resignation. The threat to sue violated LCMS doctrine regarding Christians settling disputes amongst themselves, rather than going to the civil authorities.[37] The school board informed her by letter that she might be fired. "As grounds for termination, the letter cited Perich's 'insubordination and disruptive behavior' … as well as the damage she had done to her "working relationship" with the school by 'threatening to take legal action. The congregation voted to rescind Perich's call" and she was fired.[38]

This is where the conflict between religious liberty and nondiscrimination norms occurred. The Equal Employment Opportunity Commission [EEOC] sued on Perich's behalf, alleging that because Perich had threatened to sue the school under the Americans with Disabilities Act [ADA] and then been fired her firing was retaliatory and violated the ADA.[39] In response, Hosanna-Tabor

[37] Hosanna-Tabor v. EEOC, 132 S.Ct. 694,701 (2012).

[38] *Id.* at 700.

[39] Brief for the Federal Respondent at 8, Hosanna-Tabor Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

argued that the "ministerial exception" applied, and therefore "the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. …Perich was a minister, and she had been fired for a religious reason—namely, her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."[40]

The EEOC argued that *Employment Division v. Smith* prohibited the suit from being barred by the Free Exercise Clause because nondiscrimination laws, including the ADA, are neutral rules of general applicability.[41] The EEOC also argued there was no ministerial exception available under the Establishment Clause because Perich did not seek to be reinstated, and thus there was no threat of entanglement.[42] And even if Perich did seek to be reinstated, the EEOC said, there still would be no entanglement problem, because she could simply be reinstated as a lay teacher instead of a called teacher.[43] The EEOC further argued that no ministerial exception should be recognized, or if the Court did recognize it, it should limited to a very small class of people.[44] Perhaps worst of all, the EEOC argued that even if a church fired an employee in retaliation, but did so for a religious reason, courts should apply nondiscrimination laws to the church as they would to a secular employer.[45] The only protection available to religious groups was that enjoyed by all other groups, religious and secular.[46] These were extreme positions. Although the Supreme Court had never

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[40] Hosanna-Tabor, 132 S.Ct. at 701.

[41] Brief for the Federal Respondent at 11, Hosanna-Tabor Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

[42] *Id.* at 12.

[43] *Id.* at 11.

[44] Brief for the Federal Respondent at 14-15, Hosanna-Tabor Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012) (No. 10-553).

[45] *Id*. at 37.

Merely proffering a religious reason for terminating an employee does not, moreover, invariably raise entanglement concerns. For example, when a religious employer acknowledges that it retaliated against an employee but claims it did so for a religious reason, there is no risk of entanglement. The court will not have to evaluate church doctrine, assess the centrality of the employer's religious belief, or "resolve a theological dispute" in order to adjudicate the case. The court can accept the employer's articulation of its religious reasons for retaliation but nevertheless conclude that the employer is bound by *Smith* to follow generally applicable prohibitions on such conduct.

[46] Hosanna-Tabor, 132 S.Ct. at 706.

According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances [compelling ordination of women by the Catholic Church or Orthodox Jewish seminaries] by invoking the constitutional right of freedom of association—a right "implicit" in the First Amendment. The EEOC and Perich thus see no need—and no basis—for a special rule grounded in the Religion Clauses themselves. … The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club.

ruled on the existence of a ministerial exception, "ten state supreme courts and twelve federal circuit courts" had recognized it in the previous forty years.[47]

The government's arguments demonstrate the extent to which the EEOC failed to respect the autonomy of religious groups, and how ambitious is its vision for the reach of antidiscrimination laws. Had the EEOC prevailed, it would have energetically applied the nondiscrimination statutes to require religious groups who had fired ministers like Perich to reinstate those ministers in lay positions. Given the EEOC's energy and ambition regarding the scope of the antidiscrimination laws, it likely would have extended the enforcement of the antidiscrimination laws even beyond those bounds envisioned in its brief.[48]

Fortunately for the cause of religious liberty, the Supreme Court unanimously rejected the EEOC's arguments and affirmed the existence of the ministerial exception. The ministerial exception is based in both the Establishment Clause and the Free Exercise Clause. It is based in the Establishment Clause because it implicates internal church governance and a church's selection of its ministers.[49] It is grounded in the Free Exercise Clause because if a church cannot decide who its minister will be, it barely has any free exercise rights at all.

The Court also determined that given all the facts Perich was a "minister" for purposes of the ministerial exception.[50] This determination was in accord with previous appellate court decisions, as "Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation…."[51] However, the Court did not announce firm rules for who would qualify as a minister.[52] I agree with Justice Thomas that courts should defer to religious institutions' sincere belief that a particular employee was a minister.[53] As Justices Alito and Kagan point out, many religions do not recognize the concept of "clergy" or "ordination" in the same way as do Orthodox Judaism, the Catholic Church, and mainline Protestant churches. This can put small and unfamiliar religious groups at a disadvantage when invoking the ministerial exception, which led Justices Alito and Kagan to suggest that courts look at the person's function to determine if they qualify for the ministerial exception.[54] This is a

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[47] Windham Statement, *infra* at 284.

[48] If anyone doubts the EEOC's energy and ingenuity in interpreting statutes and case law to obtain its policy preferences, I refer them to my statement in U.S. COMMISSION ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY 289 (2013), *available at* http://www.eusccr.com/downloadgpo.htm.

[49] Hosanna-Tabor, 132 S.Ct. at 706.

[50] *Id.* at 707.

[51] *Id.* at 707.

[52] *Id.* at 707.

[53] *Id.* at 710-11.

[54] *Id.* at 711-12.

reasonable suggestion, but I share Justice Thomas's concerns that so doing might excessively entangle the courts in determining the religion's beliefs, practices, and internal governance.

Unsurprisingly, the Court's decision was not met with unmixed rejoicing. One witness at the Commission has argued that the *Hosanna-Tabor* decision subjects ministers to a "clash of cultures" between American society and their religious society, because they assume they have the full protection of the civil rights laws against their employer.[55] They are shocked to discover that they do not because of the ministerial exception.[56]

This view seems to assume that many, perhaps even most, of these contested employment decisions are motivated by invidious discrimination rather than sincere religious beliefs. I note this assumption because it likely motivates the recommendations that the courts examine whether a proffered religious belief is sincere, that churches be required to state whether a particular employee is subject to the ministerial exception, that "suits based on fraud or misrepresentation should be available if religious organizations mislead applicants," and that "any religious organization that misleads employees regarding the availability of civil-rights protections loses its tax-exempt status."[57] Although it does not, and should not, affect the constitutionality of the ministerial exception, the assumption that many of these adverse employment actions are pretextual or due to invidious discrimination seems questionable and misleading. The witness implies that ministers who consider themselves victims of invidious discrimination are in fact victims and that their termination is not the result of genuine religious beliefs, differences in views, a determination that a different minister would better serve the church's mission, or simply poor job performance ("When employees lost these cases based on the ministerial exception, they felt wronged.)"[58]

An additional consideration is that in certain cases, what would be invidious discrimination in another context is considered a legitimate religious consideration. For example, in the *Petruska* case discussed below, the relevant authorities might well have thought that a male priest as chaplain was more consonant with the teachings of the Catholic Church than a female chaplain. In such situations, the person's sex is a relevant consideration. Likewise, an Orthodox Jewish seminary might decline to accept a candidate whose mother was not born Jewish and did not convert to

[55] Hamilton Statement, *infra* at 232.

[56] *Id.* at 231.

[57] *Id.* at 231.

[58] *Id.* at 231.

Judaism under conditions accepted by the seminary, even though in another context this would be considered discrimination on the basis of race or ethnicity.[59]

In *Rweyamamu v. Cote*, an African-American Roman Catholic priest sued his bishop for racial discrimination because he had not been promoted and ultimately had been terminated[60] The Second Circuit found the suit was barred by the ministerial exception. However, Father Justinian, the plaintiff, had also appealed his bishop's decision to church authorities in Rome. Those authorities found that there were just reasons for the bishop's decision not to promote him, including "complaints regarding his homilies, complaints regarding his interaction with parish staff, … and the necessity of giving a unified and positive witness to the people of the parish." The authorities in Rome also found that Father Justinian "'was not sufficiently devoted to ministry' because his work with 'BOCED [an independent charity] interfere[d] with [his] full- time parochial duties.'"[61] The fact that additional reviewers found problems with Father Justinian's performance suggests that there may have been non-discriminatory reasons for the bishop's decisions regarding Father Justinian.

In *Petruska v. Gannon University*, Petruska challenged her removal as University Chaplain, claiming it was because of her gender.[62] The Third Circuit disagreed, saying, "Her discrimination and retaliation claims are premised upon Gannon's decision to restructure, a decision which Petruska argues was merely pretext for gender discrimination. It is clear from the face of Petruska's complaint, however, that Gannon's choice to restructure constituted a decision about spiritual functions and how those functions would be divided."[63] Furthermore, the Third Circuit allowed Petruska's breach of contract claim to proceed, which suggests that the court was not merely giving the university a blank check.[64] Churches and religious institutions must have the right to choose their own ministers, even for reasons that may seem discriminatory (for example, all Roman Catholic bishops must resign their jurisdictions at age 72).[65] While instances of truly

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[59] This hypothetical is based on a case involving the Jewish Free School in London in which a boy was denied admission because his mother had converted to Judaism under procedures the school did not recognize as valid. The child's parents sued the school, claiming racial discrimination, *see* Riazat Butt, *Jewish school racial discrimination case goes to supreme court*, THE GUARDIAN, Oct. 26, 2009, *available at* http://www.theguardian.com/world/2009/oct/26/jewish-school-discrimination-case-court.

[60] Rweyamamu v. Cote, 520 F.3d 198 (2nd Cir. 2008).

[61] *Id*. at 200

[62] Petruska v. Gannon University, 462 F.3d 294, at 307 (3rd Cir. 2006).

[63] *Id.* at 307-08.

[64] *Id.* at 310.

[65] *Bishops and Their Ministry*, The Diocese of Milwaukee, *available at* http://www.diomil.org/about-bishops-and-their-ministry/.

invidious discrimination undoubtedly occur, they likely occur far less frequently than the statement implies.

Why is the ministerial exception important and why should it bar the application of antidiscrimination laws to a religious institution's selection of ministers? It is important because as Americans, we believe religious freedom is important, and if religious freedom means anything, it must mean the right to select your own minister. Furthermore, religious exercise is not something that people usually "do" in isolation. They form groups to worship God and to observe His dictates in every aspect of their lives. Their religious institutions must be free to reflect their religious beliefs, including through their selection of ministers, even if those beliefs clash with broader society. That includes using selection criteria that may be impermissible in other contexts.

Professor Marci Hamilton, a hearing witness, objects to the "clash of cultures" that occurs when general American society adheres to one view about discrimination and religious groups adhere to another. But a "clash of cultures" may benefit society by preserving the diversity of religious voices that serve as an authority that competes with the state.[66] As Professor Mark DeGirolami pointed out, "Conflict is an essential and deep feature of our society—both unavoidable and actually desirable, since its source is our different backgrounds, different outlooks, and different memories."[67] This conflict partly manifests itself in people's beliefs about the ultimate truth of a particular religion and their decision to follow that religion's precepts. As Professor Michael Helfand writes, religious institutions allow people to pursue what they believe to be the "good life—in the sense of pursuing those goods conducive to human flourishing—and to consider what the "good life" *is* in concert with others.[68] We can often better work through and advance our religious beliefs when we join with others in religious institutions than we can as individuals. Yet these institutions have independent value and importance, and are not "reducible to the rights and interests of their members and employees."[69] Refusing to second-guess religious institutions' selection of ministers allows these institutions to flourish and prevents the state from muddying

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[66] Eric Metaxas, *Comment to the U.S. Commission on Civil Rights*, at 1 (2013) (on file with the Commission).

> Today we often hear that it [wall of separation between church and state] means that the state needs to be protected from religion, and that religion should have no place in government or society.
>
> Jefferson and the Founders thought the opposite. They knew that the State was always tempted to take over everything — including the religious side of people's lives. So they put a protection in the Constitution that the government could not favor any religion over another… and could not prohibit the free exercise of religion.
>
> They wanted churches and religions to be protected *from* the government — from Leviathan. Why? Because they knew that what people believed and their freedom to live out and practice one's most deeply held beliefs was at the very heart of this radical and fragile experiment they had just launched into the world.

[67] DeGirolami Statement, *infra* at 214.

[68] Helfand Statement, *infra* at 235.

[69] Richard W. Garnett, Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses, 53 VILL. L. REV. 273, 293-94 (2008).

their distinct message.[70] Civil society is healthier when it is populated by religious institutions that serve as a counterweight to the authority of the state and that turn their adherents' attention to higher things. "[T]he existence and independence of religious institutions-self-defining, self-governing, self-directing institutions-are needed, as John Courtney Murray put it, to 'check the encroachments of secular power and preserve [the] immunities' of our "basic human things."[71]

That competing authority is why religious groups have historically had an uneasy relationship with the state. When Henry VIII could not persuade the Catholic Church to annul his marriage to Catherine of Aragon, he decided that the best course of action was to establish his own church-quite literally *his own* church, with compliant clergymen selected by him. Those who remained faithful to the Catholic Church reminded Henry of the irritating competing authority, and so had their churches and monasteries destroyed (which conveniently allowed Henry to seize their assets) and in some cases were killed, the most famous martyrs being the now-canonized Sir Thomas More and Bishop John Fisher.

As hearing witness Lori Windham said, the reason we must have a robust ministerial exception is because we must allow religious groups to choose the people who will carry their message. A robust ministerial exception is one way of protecting religious groups from government overreach.[72] Even the selection of a speaker is a message, as Henry VIII well knew when he stocked his newly created church with his supporters and executed Bishop Fisher. The ability to choose your own ministers tells society and the state what you believe God requires, and what God requires may well conflict with prevailing mores, whether that is that Jews may only marry Jews, that priests must be celibate men, or that religious school teachers must adhere to church-determined standards of behavior.[73]

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[70] Here I part company from Professor Helfand, who encourages courts to engage in determining whether a purportedly religion-based employment decision is a pretext for invidious discrimination; *see* Helfand Statement at 235-36.

[71] Garnett, *supra* note 69 at 295.

[72] John Rawls, POLITICAL LIBERALISM 221, n. 8 (2005).

> [W]e think of liberty of conscience as protecting the individual against the church. This is an example of the protection that basic rights and liberties secure for individuals generally. But equally, liberty of conscience and other liberties such as freedom of association protect churches from the intrusions of government and from other powerful associations. Both associations and individuals need protection . . . . It is incorrect to say that liberalism focuses solely on the rights of individuals; rather, the rights it recognizes are to protect associations, smaller groups, and individuals, all from one another in an appropriate balance specified by its guiding principles of justice.

[73] Windham Statement, *infra* at 288-89.

III. Same-Sex Marriage and Religious Liberty

From its earliest years, orthodox Christianity has regarded sexual relationships involving people other than a man and woman married to each other as deviations from the moral law.[74] This includes same-sex sexual relationships as well as sexual relationships between unmarried opposite-sex partners. Furthermore, orthodox Christianity teaches that the state cannot simply wave a magic wand and transform same-sex relationships into marriages.[75] They believe that marriage has certain necessary characteristics, that this nature was established by God but is accessible to reason, and other romantic attachments, no matter how strongly felt, simply are not marriage.[76] This is the "conjugal view" of marriage. This view is in conflict with what some call the "revisionist view," which regards marriage as essentially one's strongest emotional attachment.[77] The Supreme Court majority recently enshrined the revisionist view in law through

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[74] *See*, e.g., *Matt*. 5:31, I *Cor*. 5:1-5, 6:9-11.

[75] U.S. Conference of Catholic Bishops, "Supreme Court Decision on Marriage 'A Tragic Error' Says President of Catholic Bishops Conference, June 26, 2015 ("Regardless of what a narrow majority of the Supreme Court may declare at this moment in history, the nature of the human person and marriage remain unchanged and unchangeable. . . . It is profoundly immoral and unjust for the government to declare that two people of the same sex can constitute a marriage."), *available at* http://www.usccb.org/news/2015/15-103.cfm; Ethics and Religious Liberty Commission of the Southern Baptist Convention, "ERLC President Russell Moore Responds to SCOTUS Ruling to Legalize Same-Sex Marriage," June 26, 2015 ("I am a conscientious dissenter from this ruling handed down by the Court today, believing, along with millions of others, that marriage is the sacred union of one man and one woman and that it is improper for the Court to redefine an institution it did not invent in the first place.), *available at* http://erlc.com/article/erlc-president-russell-moore-responds-to-scotus-ruling-to-legalize-same-sex; The Lutheran Church-Missouri Synod, "Synod president responds to SCOTUS same-sex marriage ruling," June 26, 2015 ("Today, the Supreme Court has imposed same-sex marriage upon the whole nation . . . . Five justices cannot determine natural or divine law."), *available at* https://blogs.lcms.org/2015/synod-president-responds-to-scotus-same-sex-marriage-ruling.

[76] Sherif Gergis, Ryan T. Anderson, and Robert P. George, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2013) 11-12.

> What we have come to call the gay marriage debate is not directly about homosexuality, but about marriage. It is not about whom to let marry, but about what marriage is. It is a pivotal state in a decades-long struggle between two views of the meaning of marriage.
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> The conjugal view of marriage has long informed the law—along with the literature, art, philosophy, religion, and social practice—of our civilization. … It is a vision of marriage as a bodily as well as an emotional and spiritual bond, distinguished thus by its comprehensiveness, which is, like all love, effusive: flowing out into the wide sharing of family life and ahead to lifelong fidelity. In marriage, so understood, the world rests its hope and finds ultimate renewal.
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> A second, revisionist view has informed the marriage policy reforms of the last several decades. It is a vision of marriage as, in essence, a loving emotional bond, one distinguished by its intensity—a bond that needn't point beyond the partners, in which fidelity is ultimately subject to one's own desires. In marriage, so understood, partners seek emotional fulfillment, and remain as long as they find it.

[77] *Id*. at 12.

its decision in *Obergefell v. Hodges*[78], with Chief Justice Roberts's dissent articulating the conjugal view.[79]

This division over the nature of marriage has consequences. People who believe that the conjugal nature of marriage was established by God resist condoning same-sex marriages. This sets up a conflict when the state establishes civil same-sex marriage. A religious group or religious person's attempt to differentiate between heterosexual and homosexual married couples exposes them to the threat of running afoul of either sexual orientation or marital status nondiscrimination laws.

For example, some religious organizations believe that they cannot in good conscience place children for adoption or in foster care with same-sex couples. (Again, this almost always involves Christian organizations.) Many Christian adoption agencies, such as those operated by Catholic Charities, only place children with couples who are married. They do this both because they believe that unmarried cohabitation is wrong and that a home with a married mother and father is the best environment for children. Until very recently, the belief that children need both a mother and a father was uncontroversial. Yet even before *Obergefell*, same-sex marriages and civil unions had placed these religious adoption agencies on a collision course with the state. Bishop Thomas Paprocki of the Diocese of Springfield, Illinois writes:

> [T]his intended religious protection was completely dismissed by the state after the [civil union] bill was signed into law by Governor Patrick Quinn. Almost immediately, the state accused Catholic Charities of being in violation of the new law because of our opposition to the placement of children in the homes of unmarried couples who are living together, regardless of their sexual orientation. We were told that if we did not immediately expand our religious definition of marriage to include civil union couples, the state would dismantle the entire Catholic Charities foster care and adoption network across Illinois . . . Every attempt we made to explain our position and seek a compromise with the state was immediately dismissed—surrender your religious beliefs in this matter or we will eradicate your programs.[80]

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[78] Obergefell v. Hodges, 135 S.Ct. 2584, 2600 (2015) (Kennedy, J.) ("Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.").

[79] *Id.* at 2613 (Roberts, C.J., dissenting).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history - and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.

[80] Most Reverend Thomas John Paprocki, Bishop of Springfield in Illinois, *Comment to the U.S. Commission on Civil Rights*, at 5 (2013) (on file with the Commission).

In the end, Illinois Catholic Charities' foster care and adoption programs were eradicated.[81] Many of Catholic Charities' offices closed.[82] Likewise, Catholic Charities in Boston and Washington, D.C. ended their foster care and adoption services because they would be required to allow same-sex couples to adopt children.[83] Hearing witness Ed Whelan noted that these conflicts would become more common as more states adopted same-sex marriage.[84] Events have overtaken this long-delayed report, and Justice Kennedy recently made same-sex marriage the law of the land for the foreseeable future. These conflicts will become much more pronounced and arise more quickly than anyone thought possible in March 2013. It is possible, perhaps even probable, that in the near future there will be no orthodox Christian organizations partnering with the government to provide adoption and foster care services in the United States.[85]

Similarly, some religious service providers such as photographers and bakers believe that they cannot in good conscience help celebrate a same-sex wedding. There are at least two possible reasons why a religious believer could think they could not help celebrate a same-sex wedding. First, in assisting in celebrating a same-sex wedding, they are treating it as a wedding, bearing witness to the world through their actions that this relationship is a marriage. Because they do not believe this relationship is a marriage and that the purported marriage is invalid because of a standard of absolute truth regarding the nature of marriage that is external to all people, their involvement in the celebration is an offense twice over. It is an offense against their own conscience, because they are testifying to something they do not believe to be true. And it is an

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[81] *Id.* at 4-5.

[82] *Id.* at 6.

[83] *See* Whelan Statement at 271; *see also* William Wan, *Same-sex marriage leads Catholic Charities to adjust benefits*, WASHINGTON POST, Mar. 2, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html.

[84] Whelan Statement, *infra* at 277.

[85] Paul Coleman, Memorandum of Alliance Defending Freedom to the U.S. Commission on Civil Rights, at 7 (Apr. 19, 2013) (on file with the Commission).

Faith-based (and in particular Catholic) adoption agencies have now been closed in England. When the Sexual Orientation Regulations were passed in 2007, any agency that refused to place children with homosexual parents would be in breach of the law, would lose funding and would be forced to close down or remove its religious ethos. This was despite Catholic adoption agencies being widely recognised as some of the best in the country. In 2007, there were fourteen faith-based adoption agencies working throughout the UK, accounting for a third of adoptions within the voluntary sector. Most of these have now had to remove their religious ethos and become secularized or have had to withdraw their services completely.

In April 2011 the Charity Tribunal found against the last remaining Catholic adoption agency following a High Court decision. The tribunal stated that "religious conviction in the sphere of personal belief is protected in both domestic and European equality law, so that acts of devotion, worship, and prayer (including ceremonies) are exempt from equality obligations." However, the Tribunal went on to state that there is an "essential distinction between private acts of worship such as blessings and the provision of a public service such as an adoption agency.

offense against absolute truth itself, because they believe the same-sex marriage is a falsehood about the nature of marriage, and they are assisting in perpetrating that falsehood.[86]

The second reason why a religious believer might think they could not help celebrate a same-sex wedding is orthodox Christianity's prohibition of same-sex sexual activity. There are of course some outliers that no longer adhere to this teaching, but it was largely unchallenged Christian teaching for 2000 years and is still adhered to by churches whose members comprise the majority of Christians in the United States and worldwide. Every conception of marriage assumes that marriage includes sexual intercourse. A same-sex marriage therefore presumes sexual intercourse. And a religious believer asked to contribute to the wedding celebration in some way, whether through providing a cake or taking wedding photographs, is helping to celebrate something they believe to be a transgression of divine law. Because they believe they do not have the ability to change the divine law, they are torn between obeying the civil law and obeying the moral law.[87]

On the other hand, people in same-sex partnerships consider their sexual orientation an integral part of who they are. Furthermore, they consider expressing their sexual orientation to be an essential part of their identity, and like most people, they want to find someone they love and who loves them in return.[88] When someone refuses to help celebrate their wedding, it is a moral judgment regarding their behavior. In some instances, they believe the refusal infringes on their dignity as a person.

Can the competing interests of religious believers and same-sex couples be reconciled? It is tempting to cast the debate as a contest between two competing liberty rights - the right of same-sex couples to manifest their sexuality, and the right of religious people to manifest their religious

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[86] It might be objected at this point that religious believers are inconsistent - as mentioned above, orthodox Christianity prohibits any sexual activity outside of monogamous, opposite-sex marriage, yet many of these vendors' customers doubtless cohabitate before marriage. The constitutional answer is that religious beliefs need not be consistent to be protected, *see Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981). As a theological matter, the vendors may well think that although a marriage preceded by cohabitation is less than ideal, the marriage "regularizes" the couple's status, and thus participating in the wedding is licit. However, I would oppose any efforts to force an objecting vendor to serve a cohabitating client (or a previously-divorced client, or a client who stated that he was entering an "open marriage," and so on).

[87] Michael Stokes Paulsen, *Is Religious Freedom Irrational?* 112 MICH. L. REV. 1043, 1066-67 (2014).

[T]he religious believer is (accepting the premises on which religious freedom rests) caught between the conflicting commands of dueling sovereigns—God and Man, "church" and "state". This is a true "conflict of laws" situation; and for the religious believer, the commands of God categorically must have priority [citations omitted].

[88] Feldblum, *supra* note 2, at 142-43.

[G]ay people— of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice. …It seemed to me the height of disingenuousness, absurdity, and indeed, disrespect to tell someone it is permissible to "be" gay, but not permissible to engage in gay sex. What do they think being gay *means*?

beliefs.[89] Apparently this is how Justice Kennedy views the conflict. But it is not so straightforward.

On the one hand, the free exercise of religion is a constitutionally enumerated right. But it is only within the past few decades that sexual behavior has been found lurking in the outer fringes of the Fourteenth Amendment. Even in a narcissistic age, *pace* Justice Kennedy, it is difficult to believe that the existence of a constitutional right to sexual liberty escaped the notice of founders, framers, and constitutional scholars for over 200 years. The sudden discovery of its existence in the latter half of the 20th century suggests that sexual liberty's status as a constitutional right is dubious, and is based more in the Court's (and sometimes the public's) enthusiasm for the idea than in the Constitution. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" is dramatically clearer and more direct than "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people."[90] The flailing about to find a constitutional basis for sexual liberty, which continues to this day, suggests that no such basis exists. Until *Obergefell*, in the specific context of same-sex sexual activity, as Justice Scalia noted, the Court still had not declared such activity a "fundamental right," which admittedly may reflect an odd reticence on the Court's part rather than principle.[91] In *Obergefell* itself, Justice Kennedy still could not decide where the fundamental right to same-sex marriage is grounded, settling upon an ad hoc hybrid of the Due Process Clause and the Equal Protection Clause.[92] After all, not even the most committed partisan

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[89] Brownstein Statement, *infra* at 177 ("I suggest that the right of same-sex couples to marry and religious liberty rights share a common foundation as important personal autonomy rights").

[90] Roe v. Wade, 410 U.S. 113, 153 (1973); *see also* Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 951(1992) (Rehnquist, C.J., dissenting).

> We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is 'implicit in the concept of ordered liberty.' …These expressions admittedly are not precise, but our decisions implementing this notion of 'fundamental' rights do not afford any more elaborate basis on which to base such a classification." [citations omitted].

[91] Lawrence v. Texas, 539 U.S. 558, 586 (Scalia, J., dissenting) (2003).

> Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. Though there is discussion of "fundamental proposition[s]," and "fundamental decisions," nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case [citations omitted].

[92] Obergefell v. Hodges, 135 S.Ct. 2584, 2604-05; *id.* at 2622-23 (Roberts, C.J., dissenting).

can claim that same-sex marriage is "'deeply rooted in this Nation's history and tradition'".[93] In the end, as even Justice Kennedy tacitly admits in his opinion, these decisions are based in the policy preferences of the Court's majority.[94] Perhaps the decisions in these cases are good public policy, but that does not mean they recognize actual constitutional rights.[95]

Regardless of the dubious constitutional grounding of sexual liberty, the debate is not really about two competing constitutional rights. It is about laws that prohibit discrimination on the basis of sexual orientation or marital status, and whether religious believers can be exempted from those laws. According to the Supreme Court's decision in *Smith*, neutral laws of general applicability apply to objecting religious believers.[96] In at least some cases, though, the religious believer did not object to serving homosexual customers as a general rule, and in fact had served them for years.[97] The believer only objected to helping celebrate a same-sex wedding, which the person believed would involve oneself celebrating a violation of divine law.

This suggests that those who are opposed to exempting religious believers from laws forbidding discrimination on the basis of sexual orientation or marital status may be motivated by something other than an inability to obtain services due to society-wide discrimination against same-sex couples. Chai Feldblum describes a denial of services based on sexual orientation as a "dignitary harm" that is not alleviated even if one can easily obtain identical services elsewhere.[98] Justice

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[93] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[94] Obergefell v. Hodges, 135 S.Ct. 2584, 2598 ("When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."); *id*. at 2628 (Scalia, J., dissenting) ("Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.").

[95] Lawrence v. Texas, 539 U.S. 558, 605-06 (Thomas, J. dissenting) (2003).

I write separately to note that the law before the Court today "is . . . uncommonly silly." If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions" [citations omitted].

[96] In situations involving federal action, the Religious Freedom Restoration Act applies, and many states have RFRAs that apply to state action. We will not discuss those situations here.

[97] *See infra* at VI.

[98] Feldblum, *supra* note 2 at 153.

Kennedy uses similar language about dignitary harms in *Obergefell*.[99] Elevating nondiscrimination norms may smuggle something akin to Rawls' concept of "self-respect" as a basic requirement of the just society into our constitutional order.[100] Rawls urges that the adoption of his "two principles" will lead to increased self-respect among individuals. He writes:

> Now, our self-respect normally depends upon the respect of others. Unless we feel that our endeavors are respected by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing. . . . Thus a desirable feature of a conception of justice is that it should publicly express men's respect for one another. In this way they insure a sense of their own value.[101]

Furthermore, Rawls does not believe that a guarantee of basic liberties alone is sufficient for a just society.[102] Many proponents of nondiscrimination norms, knowingly or unknowingly, seem to be influenced by Rawls's thinking and therefore place a high premium on society taking an active role to protect the self-respect of individuals. The Constitution, however, is not a Rawlsian document. It establishes a system of natural liberty and is primarily concerned with formal justice.[103] If anyone relies upon the Constitution to secure for himself the respect of his fellow-

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[99] Obergefell 135 S.Ct. at 2604 ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

[100] I discuss Rawls here because he clearly articulates the importance of societal support of self-respect, whereas much of the public discourse surrounding nondiscrimination norms simply parrots the importance of nondiscrimination, equality, and respect without additional analysis.

[101] John Rawls, A THEORY OF JUSTICE 155-156 (1999).

[102] *Id.* at 62-64 (1999).

In the system of natural liberty the initial distribution is regulated by the arrangements implicit in the conception of careers open to talents (as earlier defined). These arrangements presuppose a background of equal liberty (as specified by [Rawls's] first principle) and a free market economy. They require a formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions. But since there is no effort to preserve an equality, or similarly, of social conditions, except insofar as this is necessary to preserve the requisite background institutions, the initial distribution of assets for any period of time is strongly influenced by natural and social contingencies. The existing distribution of income and wealth, say, is the cumulative effect of prior distribution of natural assets - that is, natural talents and abilities - as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view. . . .

There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune. Furthermore, the principle of fair opportunity can be only imperfectly carried out, at least as long as some form of the family exists.

[103] Rawls himself notes in a later work that the United States' political settlement may rely on a thinner overlapping consensus than he envisions in his ideal society. *See* John Rawls, POLITICAL LIBERALISM 149 (2005).

citizens, he will have to content himself with equality before the law. Equality before the law is not nothing, but it is not necessarily the sort of societal respect contemplated by Rawls. Nor does it bestow societal approval upon all one's life choices and therefore build up one's self-esteem.

This also raises the question whether these nondiscrimination laws are actually neutral laws of general applicability. Undoubtedly there are some service providers who would refuse to serve homosexual customers out of pure animus. The growing public acceptance, and even celebration, of gay and lesbian people suggests that this is an ever-smaller group. Furthermore, most business owners will overcome any personal distaste for someone in order to sell them goods or services.

Perhaps there are large numbers of service providers and business owners who would discriminate against gays and lesbians based purely on their sexual orientation if nondiscrimination laws were not in place. But it seems unlikely, or we would frequently hear news stories from states without sexual orientation nondiscrimination laws about blatant discrimination against gay and lesbian people. Of course there is discrimination against gays and lesbians, as there is against every identifiable group, but it seems unlikely to be a societal pandemic requiring drastic action. In that case, are purportedly neutral and generally applicable laws really so? Or are purportedly neutral laws being used as a way to punish religious believers for holding unfashionable beliefs about sexual conduct?

There are some indications that purportedly neutral laws are being used as a way to punish religious believers. One commenter mentioned a case involving a Vermont B&B owned by a devout Catholic couple.[104] In a good-faith attempt to comply with state law while remaining faithful to their religious beliefs, the couple would tell same-sex couples that they were willing to host their wedding festivities, but believed that marriage is between a man and a woman. The Vermont Human Rights Commission found in 2005 that this practice did not violate state antidiscrimination laws. Unfortunately, several years later an employee erroneously told a same-sex couple that the B&B would not host their wedding reception. The B&B was sued. The settlement agreement stipulated that the owners believed they were in conformity with state law, but also stipulated that the owners would no longer tell customers their views on marriage.[105] Even so, part of the settlement agreement was that they would no longer host weddings or wedding receptions for anyone. Although the owners agreed to this settlement, it would seem that the Vermont Human

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Yet as Baier has suggested, a less deep consensus on the principles and rules of a workable political constitution may be sufficient for less demanding purposes and far easier to obtain. He thinks that in fact in the United States we have actually achieved something like that. So rather than supposing that the consensus reaches down to a political conception covering principles for the whole of the basic structure, a consensus may cover only certain fundamental procedural political principles for the constitution.

[104] *See* Alliance Defending Freedom, *Memorandum re Briefing on Reconciling Nondiscrimination Principles with Religious Liberty*, at 2-3 (Apr. 19, 2013) (on file with the Commission).

[105] Wildflower Inn Settlement Agreement at 3(A), (B), (D) (Aug. 2, 2012), *available at* http://www.adfmedia.org/files/WildflowerInnSettlement.pdf.

Rights Commission is now interpreting the Vermont Fair Housing and Accommodation Act in a way that potentially violates the First Amendment. If the owner of a public accommodation is willing to serve people with whom he disagrees, but is prohibited from telling them he disagrees with their conduct, nondiscrimination law has now overridden free speech rights.

At this point, the objection might be raised that conformity is merely the price of citizenship.[106] That cannot be. The First Amendment protects the right to speak, and in most cases to act, in accord with one's beliefs. This is particularly true when one is acting out of religious conviction. Even aside from the First Amendment, there has long been a cultural understanding that religion, specifically Judaism and Christianity, have long enjoyed an influential role in the life of our country. We do not have an established religion, but the assumptions that undergird our laws, government, and culture spring from Judeo-Christian principles.[107]

IV. The HHS Mandate and Religious Liberty

Perhaps today's highest-profile conflict between religious liberty and nondiscrimination norms is the HHS contraception mandate. HHS promulgated regulations under the Affordable Care Act (Obamacare) that require employers to provide employee health insurance that includes coverage for contraceptive and abortifacient drugs.

One of the interesting aspects of the HHS mandate is that the religious liberty conflict is entirely a creation of HHS. The contraception mandate is not part of the Affordable Care Act's text. Congress did not create the contraceptive mandate. Rather, HHS used a provision of the ACA that requires insurance plans to include "preventive care" services to add a requirement that the plans provide contraceptive and abortifacient drugs.[108] HHS could have opted not to include

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[106] Elane Photography, LLC v. Willock, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J. concurring) ("the Huguenins have to channel their conduct … it is the price of citizenship.").

[107] *Washington's Farewell Address, available at* http://avalon.law.yale.edu/18th_century/washing.asp.

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of the religious obligation desert the oaths which are the instrument of investigation in courts of justice. And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?

[108] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

contraceptives and abortifacients as mandatory parts of insurance plans, or it could have required insurance plans to provide contraceptive drugs only when the drugs are prescribed for a non-contraceptive medical reason. But it did not adopt such a reasonable course. Instead, despite receiving tens of thousands of comments objecting to the contraceptive mandate on religious grounds during the formal comment period alone, HHS finalized the rule.[109]

This series of events suggests two possibilities. One, HHS might not have realized that a significant number of religious people believe that the use of contraceptives or abortion-causing drugs (or both) is sinful, and that paying for such drugs through a healthcare plan implicates them in the sin. Nevertheless HHS did not abandon the rule when it realized that many people objected to the rule on religious grounds. Two, HHS did realize that people would object to the rule, but was determined to proceed anyway. Perhaps knowledge of the opposition added a little extra relish to adopting the rule.[110]

Either way, HHS should not have proposed the rule, and should have abandoned the rule when opposition became clear. As Ed Whelan stated, "By dragooning employers to be the vehicle for increasing access to contraceptives and abortifacients, the Obama administration is putting many Americans to a grave test of conscience—and it is doing so *gratuitously*, for an end that could be easily accomplished through other means."[111] If an employer does not provide insurance that covers the drugs to which they object they face ruinous fines.

The interests on the other side are not as weighty as religious liberty, despite the government's portrayal of cost-free (to the employee) contraceptives and abortifacients as "benefits of great importance to health and well-being."[112] A tone of wonderment pervades the government's brief and regulations as they explain how very, very important it is that women have free contraceptives and abortifacients, as though they only just discovered that women sometimes become pregnant, and the prevention of this unlovely state of affairs is now the most pressing issue facing the nation. One hearing witness argues that the HHS mandate is necessary to assure women's equality.[113] Yet no one is preventing women from using any of these drugs or devices. They are free to purchase them and use them as often as they like. Their employer only asks not to be in any way involved in procuring these items, whether it is through purchasing an insurance plan that pays for them (in the case of for-profit businesses) or through delegating someone else to provide them (in the case

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[109] *Id.* at 8726 ("The Department received over 200,000 responses to the request for comments on the amended interim final regulations.").

[110] Whelan Statement, *infra* at 276.

[111] Whelan Statement, *infra* at 277.

[112] Brief for Petitioner at 13, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (2013).

[113] U.S. Commission on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties, Mar. 22, 2013, at 91 [hereinafter "Transcript"] ("Women's equality is at stake in the contraceptive cases").

of religious organizations).[114] Similarly, if a woman believes that insurance coverage of contraceptives and abortifacients is a great benefit to her financial well-being, she is free to find employment at one of the many, many employers who have no qualms about providing such things. As Professor Richard Epstein writes:

> A robust interpretation of freedom of association blocks the contraceptive mandate, not just for religious organizations, however defined, but for every group, regardless of its purposes or members. Any group that wants to supply contraceptive services is, of course, free to do so. But any group that opposes the mandate is free to go its separate way. … In a competitive world, firms can compete by offering or denying particular benefits, without the state having to second-guess its choices.[115]

The republic somehow limped along for 223 years without requiring employers to provide free contraceptives and abortifacients. In the interest of protecting religious liberty and free association, it can continue to do so. At least in the case of closely-held corporations, the Supreme Court apparently agrees.[116]

a. For-Profit Businesses

Essentially, two types of plaintiffs challenged the HHS mandate. The first is for-profit employers who were required to purchase insurance plans that include coverage for contraceptives and abortion-causing drugs. The second is non-profit organizations that are required to fill out a form that states that they have religious objections to providing abortion- causing drugs and contraceptives and that directs their insurance company to provide the drugs.

The Supreme Court granted certiorari in two for-profit cases involving the HHS mandate. The cases involved the companies Hobby Lobby, Mardel, and Conestoga Wood. The owners of Hobby Lobby, Mardel, and Conestoga Wood objected to providing coverage for four types of drugs and

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[114] Robert P. George, *Comment to the U.S. Commission on Civil Rights*, at 3 (2016) (on file with the Commission).

Lurking behind the name-calling and the efforts to stigmatize and marginalize advocates of the robust protection of conscience is a fundamental logical flaw. The "gender discrimination" claim presupposes that the refusal to pay for something, or to participate in something, is the legal and moral equivalent of denying a third party access to that thing. This claim is plainly false and directs attention away from the real issue, which is not a problem of access, but a desire to shift the costs and responsibilities of access to unwilling third parties who object on moral and religious grounds to, for example, the use of abortion-inducing drugs to end nascent human lives.

[115] Richard A. Epstein, *Rethinking the Contraceptive Mandate*, DEFINING IDEAS (Feb. 10, 2014), *available at* http://www.hoover.org/publications/defining-ideas/article/168086.

[116] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

devices that may cause early abortions, including Plan B (the "morning-after" pill) and Ella (the "week-after" pill).[117]

Plan B, Ella, and some IUDs can cause early abortions by preventing implantation of a human embryo. That is a scientific fact and the government has conceded it.[118] The question, then, is whether it is licit to end this nascent human life. That question may of course be answered without recourse to divine revelation but it is a moral question that many faiths take very seriously and believe affect a person's eternal destiny. Similarly, Christian churches that teach that the use of artificial contraception is a sin may seem odd and backward but their teaching rests on their understanding of the human person's relationship and duty to God and other people.[119] There is no scientific dispute. It is a purely moral and religious dispute and one in which the government has no right to pronounce judgment and no compelling interest in breaking the consciences of believers.

The government argued that because of their corporate status, for-profit businesses cannot invoke RFRA.[120] They argued that RFRA protects only individuals, churches, and religious communities.[121] The text of RFRA provides: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section."[122] In an attempt to avoid having the courts apply strict scrutiny to the challenged rule the government tried to side-step the problem by removing Hobby Lobby from the covered entities. "Person" is not defined in the statute, although several other terms are defined. Thus, the government argued that for-profit corporations are not "persons." However, the "Dictionary Act" provides "In determining the meaning of any Act of Congress, unless the context indicates otherwise — … the words 'person' and 'whoever' include

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[117] Brief for Respondent at 9-10, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (2013); Brief for Petitioners at 5, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (2013).

[118] *See* Donna Harrison, M.D., *Emergency Contraception Can Cause Abortion*, THE PUBLIC DISCOURSE (Dec. 10, 2013), *available at* http://www.thepublicdiscourse.com/2013/12/11685/; Brief for Petitioner at 9 n. 4, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (2013) (" a copper IUD … possibly [prevents] implantation (of a fertilized egg in the uterus) [Plan B] may inhibit implantation … by altering the endometrium … [Ella] may also work by altering the endometrium in a way that may affect implantation….").

[119] Charles J. Chaput, O.F.M., Archbishop of Philadelphia, *Comment to the U.S. Commission on Civil Rights,* at 3 (2013)(on file with the Commission); *see also* Pope Paul VI, HUMANAE VITAE 11-14 (1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

[120] Brief for Petitioner at 12-13, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354).

[121] *Id.* at 13.

[122] 42 U.S.C. § 2000bb-1.

corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[123] This would obviously cover for-profit corporations.[124]

The government argued that the Dictionary Act did not apply in this instance, and pointed out that none of the Supreme Court's pre-*Smith* decisions suggested that for-profit corporations could exercise religion.[125] However, the government did not present a case in which the Supreme Court said that for-profit corporations could *not* exercise religion.[126] Furthermore, as Justice Alito wrote, in the only pre-*Smith* case involving a for-profit corporation, no member of the Court suggested that a for-profit corporation could not exercise religion even though the state had made the argument.[127]

If the Court had adopted the government's reasoning, there would have been profound consequences, including in the area of abortion. There is no political or cultural issue that is as fiercely debated as abortion and the question of whether the Affordable Care Act would require Americans to pay for their fellow-citizens' abortions was one of the primary objections to the legislation.

However, during oral argument in *Hobby Lobby*, Justice Kennedy asked Solicitor General Verrilli if, theoretically, a for-profit corporation could be forced to pay for abortions.[128] The Solicitor General said that there were no laws on the books that would require that - in fact, it is the opposite. Under further questioning, he admitted that if the laws were changed there was, in his view,

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[123] 1 U.S.C. § 1.

[124] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2768-69 (2014)("We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition . . . . No known understanding of the term "person" includes *some* but not all corporations.").

See also Korte v. Sebelius, 735 F.3d 654, 674-75 (7th Cir. 2013) (Sykes, J.)

Nothing in RFRA suggests the Dictionary Act's definition of "person" is a "poor fit" with the statutory scheme. … A corporation is just a special form of organizational association. No one doubts that organizational associations can engage in religious practice. The government accepts that *some* corporations—religious nonprofits—have religious-exercise rights under both RFRA and the Free Exercise Clause. Indeed, the Supreme Court has enforced the RFRA rights of an incorporated religious sect …. Accordingly, we take it as both conceded and noncontroversial that the use of the corporate form and the associated legal attributes of that status—think separate legal personhood, limitations on owners' liability, special tax treatment—do not disable an organization from engaging in the exercise of religion within the meaning of RFRA (or the Free Exercise Clause, for that matter).

[125] Brief for Petitioner at 21-22, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354).

[126] Brief for Petitioner at 18, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354) (noting that in Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 336 U.S. 617 (1961), the Supreme Court expressly did not decide whether a for-profit business could exercise religion.").

[127] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2772-73 (2014).

[128] Sebelius v. Hobby Lobby, oral argument transcript, March 25, 2014, at 75, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf.

nothing in principle that would prevent for-profit corporations from being forced to pay for abortions.[129]

This could well have become another area of conflict between religious liberty and non-discrimination. As is the case with the contraceptive mandate a refusal to pay for abortion services could be recast as gender discrimination.[130] Even if this administration did not pursue such a policy a future administration might do so. The difference between forcing Hobby Lobby to pay for the morning-after pill and for a second-trimester abortion is only a matter of political will and public distaste, both of which could be overcome by a sufficiently determined administration.

The government's extreme position suggests an alternative possibility for the lack of cases addressing whether for-profit corporations can exercise religion-namely, that the government has never before sought to burden the consciences of corporations and their owners and directors by requiring them to, as they see it, directly finance the destruction of innocent human life. The government never before required almost all employers to provide health benefits to employees, and decreed exactly what those health benefits must be. One of the ways a diverse society survives is by giving citizens space to organize life as they see fit. When the government tells millions of business owners that they must provide a one-size-fits-all health benefits package, regardless of their religious objections, the government has removed much of the flexibility that allowed people to live their lives peacefully. That may be why there are not more cases about the free exercise rights of for-profit businesses.

Regardless of why there were not earlier cases about the free exercise rights of for-profit corporations, a majority of the Supreme Court was unimpressed by the government's arguments. Justice Alito wrote for the majority that there is no indication in the text of RFRA that Congress intended to depart from the Dictionary Act, and the Dictionary Act encompasses corporations.[131] Furthermore:

> HHS concedes that a nonprofit corporation can be a 'person' within the meaning of RFRA.... This concession effectively dispatches any argument that the term 'person' as used in RFRA does not reach the closely held corporations involved in

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[129] *Id.* at 75-76.

[130] Robert P. George, *Comment to the U.S. Commission on Civil Rights*, at 3 (2013)(on file with the Commission).

Lurking behind the name-calling and the efforts to stigmatize and marginalize advocates of the robust protection of conscience is a fundamental logical flaw. The "gender discrimination" claim presupposes that the refusal to pay for something, or to participate in something, is the legal and moral equivalent of denying a third party access to that thing. This claim is plainly false and directs attention away from the real issue, which is not a problem of access, but a desire to shift the costs and responsibilities of access to unwilling third parties who object on moral and religious grounds to, for example, the use of abortion-inducing drugs to end nascent human lives.

[131] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2768-69 (2014).

> these cases. No known understanding of the term 'person' includes *some* but not all corporations.[132]

HHS also claimed that for-profit corporations are not protected by RFRA because they do not exercise religion.[133] The majority found this argument unpersuasive as well. After all, HHS has conceded that non-profit corporations could exercise religion.[134] And in *Braunfeld v. Brown*, the Court assumed that Jewish merchants had a cognizable free exercise claim even though they operated for-profit businesses.[135] Surely HHS cannot truly believe that merely changing the form of a business from a sole proprietorship or partnership to a corporation extinguishes the owners' free exercise rights.[136] More importantly, corporations may pursue "any lawful purpose" permitted under the laws of the state in which they are incorporated.[137] Simply being for-profit corporations does not require them to seek to maximize profit and ignore all other concerns. Just as a corporation can sell fair-trade coffee and make a smaller profit in furtherance of the owners' social justice commitments, Hobby Lobby can pursue various initiatives in furtherance of its owners' Christian commitments.[138]

Although not mentioned in Justice Alito's opinion, the Court addressed a similar question in *Citizens United v. FEC*.[139] If a corporation can speak, why can't it exercise religion?[140] The government argued in *Citizens United* that the government had a particular interest in regulating the expenditures of corporations because of the benefits of the corporate form.[141] The Court rejected this argument. The ability to exercise one's First Amendment rights does not turn on the

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[132] *Id.* at 2768-69.

[133] *Id.* at 2769.

[134] *Id.* at 2769.

[135] Braunfeld v. Brown, 366 U.S. 599 (1961).

[136] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2767, 2769-70 (2014).

[137] *Id.* at 2770-71.

[138] *Id.* at 2771 ("If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.").

[139] Citizens United v. FEC, 558 U.S. 310 (2010).

[140] I realize, as Eugene Volokh writes, that there are distinctions between the two lines of cases. Eugene Volokh, SEBELIUS V. HOBBY LOBBY: CORPORATE RIGHTS AND RELIGIOUS LIBERTIES, 40-41 (2014).

[141] Brief for Appellee at 15, Citizens United v. Fed. Elec. Comm., 558 U.S. 310 (2010) (No. 08-205).

> Congress has historically imposed particularly stringent limits on the electoral advocacy of corporations and labor unions. Those restrictions reflect "a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," and this Court has consistently 'respect[ed]" that judgment. *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209-210 (1982). In particular, because of the numerous advantages that the corporate form confers, a corporation's ability to pay for electoral advocacy has "little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 05 (quoting *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

question of corporate form. Justice Kennedy wrote, "The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker . . . ."[142] In the contraceptive mandate cases involving for-profit businesses the government argues that the owners of the corporations must provide contraceptives to their employees because they have availed themselves of the benefits of the corporate form.[143] The government does not address why a corporation can exercise one First Amendment right but cannot exercise another. As Justice Alito wrote in Hobby Lobby, we protect the constitutional rights of corporations because corporations consist of people, and we are bound to protect their constitutional rights.[144] It is true, as Justice Ginsburg writes in her dissent, "Corporations . . . 'have no consciences, no beliefs, no feelings, no thoughts, no desires.'"[145] But the people who own and operate corporations do, and that is why we protect the constitutional rights of corporations.[146]

The government also argued that if the for-profit business owners are not forced to provide contraceptives and abortion-causing drugs they believe are sinful they are forcing their religious beliefs on employees who may disagree.[147] The Court addressed a similar concern (also raised by the government) in *Citizens United*, where the government argued that "corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech."[148] The Court rejected this argument as well. The government cannot infringe the First Amendment rights of one group simply because other people may disagree with how the group exercises its First Amendment rights.

i. For-Profit Businesses and RFRA

If for-profit businesses are persons within the meaning of RFRA the next step is to apply the statute. RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a neutral rule of general applicability" unless the rule can survive strict scrutiny. The first step is to determine whether there is a substantial burden on the person's religious practice. In order for a substantial burden to exist the practice must be both

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[142] Citizens United, 558 U.S. at 365.

[143] Brief for Petitioner at 12-13, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354) ("Granting the relief respondents seek for profit-making corporate entities engaged in commercial activity would expand the scope of RFRA far beyond anything Congress contemplated; would disregard deeply engrained principles of corporation law that should inform the interpretation of RFRA as they do federal statutes generally").

[144] Hobby Lobby, 134 S.Ct. at 2768.

[145] *Id.* at 2794 (Ginsburg, J., dissenting, *quoting* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 466 (citations omitted) (2010) (Breyer, J., concurring in part and dissenting in part)).

[146] Volokh, *supra* note 140 at 41-42.

[147] Brief for Petitioner at 13, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354) ("[Applying RFRA to Hobby Lobby] would deny to thousands of employees (many of whom may not share the Greens' religious beliefs) statutorily-guaranteed access to benefits of great importance to health and well-being.")

[148] Citizens United, 558 U.S. at 361-62.

explicitly religious and sincere.[149] It does not have to seem reasonable to the court—that is outside the court's competence. If the person's practice is both religious and sincere you must examine whether the government's action is truly burdensome. "[T]he substantial burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions."[150] Justice Alito wrote, "we have little trouble concluding" that the Mandate constitutes a substantial burden.[151] The business owners are forced to choose between funding an act they believe to be intrinsically evil and being subject to ruinous fines.[152]

We must now apply strict scrutiny. First we must determine the government's interest and whether it is compelling. Only the gravest interests may be considered "compelling."[153] The government cites two compelling interests, generally described as "public health" and "gender equality" or "assuring that women have equal access to health care services."[154] These purported interests are too broad to qualify as compelling interests.[155] In Hobby Lobby, the government also claimed that "the mandate serves a compelling interest in ensuring that all women have access to all FDA-

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[149] Korte, 735 F.3d at 682-683.

[150] *Id.* at 683.

[151] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2775 (2014).

[152] *Id.* at 2775-79 (2014). *See also* Brief for Respondent at 37-38, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354)("If Respondents continue to offer their current health plan, which comports with their religious beliefs but not the mandate, Respondents face fines of $100 per affected individual per day, which could total 'over $1.3 million per day, or close to $475 million per year.' If Respondents drop insurance altogether, they would face annual penalties of $2,000 per employee, or more than $26 million" (citations omitted)); Brief for Petitioner at 8, Conestoga Wood Specialties Corp. v. Sebelius, 134 S.Ct. 678 (2014) (No. 13-356) ("For Conestoga, that fine could 'amount to $95,000 per day,' which would 'rapidly destroy the business and the 950 jobs that go with it.' If Conestoga attempted to avoid these fines by dropping its healthcare plan altogether, it would incur a government penalty … (totaling $1.9 million) (citations omitted)); Korte v. Sebelius, 735 F.3d 654, 663 (7th Cir. 2013) (Sykes, J.) ("refusing to comply would financially devastate K&L Contractors and the Kortes as its owners … the monetary penalties would total $730,000 per year"); *Id.* at 664 ("the Grote Family and Grote Industries object on religious grounds to providing coverage for contraception, abortion-causing drugs, and sterilization procedures. . . . the company faced an annual penalty of almost $17 million …..").

[153] Korte, 735 F.3d at 685-86.

The compelling-interest test generally requires a "high degree of necessity." *Brown v. Entm't Merchs. Ass'n,* 131 S.Ct. 2729, 2741 (2011). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Id.* at 2738 (citations omitted). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder,* 406 U.S. at 215. "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation...." *Sherbert,* 374 U.S. at 406. (internal quotation marks and alteration omitted). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Id.* at 403. Finally, "a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi,* 508 U.S. at 547 (internal quotation marks omitted) [citations omitted].

[154] Korte, 735 F.3d at 686; Zubik v. Sebelius, 2013 WL 6118696 at *28 (W.D. Pa. 2013).

[155] Korte, 735 F.3d at 686.

approved contraceptives without cost-sharing."[156] The Court simply assumed that the government's interest was compelling.[157]

With the government's interest recast as "increasing women's access to free contraception," can it qualify as a compelling interest? There is still litigation swirling around various provisions of the HHS mandate, so it is worth examining this issue in detail. I do not credit the government's far-fetched argument that the provision of free contraceptives to employed women is as vital to the republic as the financial health of the Social Security system.[158] The Constitution does not mandate the free provision of any consumer good. Why should anyone have a right to a consumer good funded by their fellow citizens? Women's equality does not depend upon having free (to them) contraceptives;[159] it is guaranteed by the Fourteenth and Nineteenth Amendments. Except in cases where contraceptives are prescribed to address non-pregnancy related medical conditions contraceptives are not, strictly speaking, medically necessary. They may be necessary for women (and by extension men) to live as they wish, but they are not *medically* necessary. The women affected by the mandate are by definition employed so if they value contraception they can purchase it.[160] And truly low-income women already have access to free or very inexpensive contraceptives through the government.[161]

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[156] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2779 (2014).

[157] *Id*. at 2780.

[158] Korte, 735 F.3d at 686.

[159] Griffin Statement, *infra* at 220 ("the federal contraceptive mandate has unfolded as a war between religious freedom on one side and women's equality on the other").

[160] Richard A. Epstein, *Hobby Lobby vs. the Contraception Mandate*, DEFINING IDEAS, July 7, 2014, *available at* http://www.hoover.org/research/hobby-lobby-vs-contraceptive-mandate.

Rational basis has no place under the RFRA, which requires the state to show that the supposed compelling interest in women's healthcare justifies a statutory mandate that disrupts all preexisting practices whereby firms did not supply the mandated contraception services. But women's healthcare is no more a compelling interest than men's healthcare. The elaborate ACA legislative findings that uninsured women need healthcare fail miserably to explain the employer's duty to subsidize anyone's healthcare. Neither the ACA's legislative history nor the [sic] Justice Ginsburg's dissent identifies any systematic market disruption remotely comparable to natural disasters, domestic uprisings, and foreign invasions. The orderly private market for contraceptive services negates any government necessity to make employers pay for them. Nothing in the RFRA, of course, prevents the state from providing those benefits out of general revenues.

[161] Helen Alvaré, No Compelling Interest: The "Birth Control" Mandate and Religious Freedom, 58 VILLANOVA L. REV. 379, 424-25 (2013).

Furthermore, it is difficult for the government to claim that employer-provided contraceptives without a co-pay are a compelling interest given two facts: first, numerous health insurance plans were not required to provide contraceptives without cost-sharing because they were "grandfathered" under the terms of the Affordable Care Act; second, from the ratification of the Constitution in 1789 until 2010, it was the right of every employer to decide whether or not to include contraceptives and abortion-causing drugs in the health plan offered by their company. Yet now the government insists that virtually every employer must be required to provide contraceptives to their employees, no exceptions, just as the government insisted in *O Centro* that they could not allow exceptions to the Controlled Substances Act to accommodate a religious group. The Court responded: if the government's interest in prohibiting the use of the hallucinogen *hoasca* for religious ceremonies really is compelling, why does the Controlled Substances Act permit the Attorney General to exempt certain people from the Act's requirements?[162] And why has the Attorney General provided an exemption for the use of peyote by the Native American Church for the past thirty-five years?[163] The Court notes that the peyote exception has been part of the Controlled Substances Act since the Act's inception thirty-five years earlier. The right not to pay for or provide drugs or devices you believe to be gravely immoral is rooted in two-and-a-quarter centuries of American practice. The application of the mandate upon objecting employers is not merely inconsistent with previous practice, as in *O Centro*—it turns the existing relationship between business owners and the government on its head. A true compelling interest would have emerged sometime sooner than the day before yesterday. As in *O Centro*, the reason it did not emerge sooner is that the government's asserted interest is not, in fact, compelling.[164]

Additionally, as Professor Helen Alvaré explains, there is substantial reason to think that the mandate will do little to advance the government's interest in preventing unintended pregnancies. Aside from the questionable assumptions that the government actually has an interest in preventing unintended pregnancies and that "unintended" pregnancies are necessarily "unwanted" pregnancies, "cost" is not one of the main reasons women give for why they were not using contraception. "[A] CDC report … shows that among the eleven percent of American women and girls at risk of unintended pregnancy who are not practicing contraception, lack of access is not a

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On the first point, regarding the targeted audience: rates of unintended pregnancy are highest among groups the mandate will not affect—the poorest adolescents and women who are already served by myriad federal and state programs. … The [IOM] Report already acknowledges that low-income women are amply supplied with free or almost free contraception. Page 108 of the Report refers to contraceptive coverage as "standard practice for most federally-funded insurance programs." It cites its availability in community health centers, family planning centers, and Medicaid. It goes further with respect to Medicaid, and points out that since 1972 it has "required coverage for family planning in all state programs and has exempted family planning services and supplies from cost-sharing requirements. It points out that twenty-six states also have their own Medicaid family programs for women who do not technically qualify for Medicaid.

[162] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432-33 (2006).

[163] *Id.* at 433.

[164] *Id.* at 439.

significant reason."[165] Women who are employed, who are the ones covered by the Mandate, already have extensive access to contraceptives through insurance.[166] It is questionable that the government's interest in extending free contraceptives to the small number of employed women who do not receive coverage through their health plan is sufficiently weighty to constitute a *compelling* interest. Furthermore, "[R]ates of unintended pregnancy are highest among groups the Mandate will not affect—the poorest adolescents and women who are already served by myriad federal and state programs. The [IOM] Report itself makes this observation; it notes that non-use of contraceptives is particularly likely among women who 'have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group.'"[167] It is also questionable whether covering emergency contraception without cost-sharing will reduce unintended pregnancies, either because the women who take emergency contraception already are at low risk of pregnancy, or because some women change their behavior in response to the availability of emergency contraception.[168]

If it is ambiguous whether the government will actually achieve its supposedly compelling interest, or that the warned-of bad effects may or may not occur, it is difficult to make a good-faith argument that the interest is indeed compelling. If the evidence regarding the importance of the government's interest or the likelihood of that interest occurring is basically balanced, the government has failed to demonstrate that it has a worthy compelling interest. In its decision in *O Centro*, which was upheld by the Supreme Court, the "District Court concluded that the evidence

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[165] Alvaré, *supra* note 161 at 427.

[166] INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109 (2011) [hereinafter IOM 2011 REPORT] ("A more recent 2010 study of employers found that 85 percent of large employers and 62 percent of small employers offered coverage of FDA-approved contraceptives.").

[167] Alvaré, *supra* note 161 at 424, quoting IOM 2011 Report at 102.

[168] Tal Gross, Jeanne LaFortune, Corinne Low, *What Happens the Morning After? The Costs and Benefits of Expanding Access to Emergency Contraception*, 33 J. POL'Y ANALYSIS & MANAG. VOL. 1, 70, at 84 (2013).

> If women who take EC [emergency contraception] are actually at a decreased risk of pregnancy, then we would expect very small effects from expansion of access. For instance, women who take EC may do so principally because another method of contraception has failed. Some studies indicate this is indeed the case (Trussel et al., 2004). If women who consume EC face a lower risk of pregnancy from a single sexual encounter than average, say 2 percent, then the pregnancies averted by additional EC access would be negligible relative to total births.
>
> Similarly, if some women change their sexual behavior in response to the availability of EC, small and undetectable impacts are expected. The U.S. population is much larger than the number of EC pills consumed, thus, it takes only a small fraction of all U.S. women changing their behavior to offset the decrease in births driven directly by EC. …
>
> Under either scenario, very large changes to births or abortions are unlikely, given that each additional pill prevents pregnancy from only a single sexual encounter. More broadly, unexpected sexual encounters may account for a small percentage of overall pregnancies. Roughly half of women seeking abortions had been using some form of contraception, and few report unexpected sex as a factor in their abortion (Jones, Darroch, & Henshaw, 2002). If individuals who use EC actually face a low risk of unintended pregnancy, and individuals most likely to experience unintended pregnancies are unlikely to seek EC, then the impact of expanded access will be greatly diminished. *We conclude that policies offering OTC access to EC avert a private cost in acquiring the pill through a physician, but do not avert the social cost of unintended pregnancy* [emphasis added].

on health rises was 'in equipoise," and similarly that the evidence on diversion was 'virtually balanced.' In the face of such an even showing, the court reasoned that the Government had failed to demonstrate a compelling interest …."[169]

In *Hobby Lobby*, however, the government survived application of the compelling interest test only to be skewered by the least-restrictive-means test.[170] Justice Alito noted that the government's argument was fatally undermined by the existence of the so-called "accommodation" for objecting religious organizations.[171] HHS could simply make this option available to for-profit businesses, though concededly this may not satisfy all religious objections.[172]

Set aside the accommodation for a moment, as some religious businesses will likely consider it to burden their religious exercise, as do a number of religious non-profits. Why is HHS so fixated on providing contraceptives in this way? Presumably the government's goal is not merely to have contraceptives available for free to consumers, but for more women to actually start using contraception regularly. If that is the goal, why doesn't the FDA simply mandate that all forms of oral contraceptives be sold over the counter? Plan B is now available over the counter, and being able to purchase regular oral contraceptives over the counter would likely reduce the cost of the drugs and would be less time-consuming than making an appointment for a prescription and then going to the pharmacy. Or the government could simply reimburse pharmacies directly for any contraceptives they dispense. That would not be more complicated than reimbursing TPAs and insurers and providing them with an extra financial incentive. Or the government could simply have contractors such as community health centers simply dispense free contraceptives to all comers. None of these options need involve objecting employers at all.

Second, the government's exemption of numerous classes of employers undermines the "least restrictive means" prong as well as the compelling interest. "The regulatory scheme grandfathers, exempts, or "accommodates" several categories of employers from the contraception mandate and does not apply to others (those with fewer than 50 employees).[173] Since the government grants so

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[169] Gonzalez v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418, 426 (2006).

[170] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

[171] *Id.* at 2781-82.

[172] In response to the Hobby Lobby decision, HHS issued new regulations extending the accommodation to closely-held for-profit businesses. Department of the Treasury, Department of Labor, Department of Health and Human Services, "Coverage of Certain Preventive Services Under the Affordable Care Act," 80 Federal Register 41318, 41346-7 (July 14, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-17076.pdf.

[173] Department of the Treasury, Department of Labor, Department of Health and Human Services, "Coverage of Certain Preventive Services Under the Affordable Care Act," 80 Federal Register 41318, 41332 (July 14, 2015) ("Thirty-seven percent of employers offering health benefits offered at least one health benefit plan in 2014"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-17076.pdf.

many exceptions already, it can hardly argue against exempting these plaintiffs."[174] The Court did not address this issue in regard to the least-restrictive-means test in Hobby Lobby but it may have occasion to do so in future litigation.[175]

b. Religious Groups

Religious groups are the second set of plaintiffs challenging the HHS mandate, most famously the Little Sisters of the Poor, an order of Catholic nuns who care for the elderly poor.

Some religious organizations qualify for an outright exemption from the HHS mandate. Unfortunately, this exemption is limited to "houses of worship and their integrated auxiliaries."[176] The narrow class of entities covered by the exemption has the strange effect of excluding obviously religious employers such as the Little Sisters of the Poor. Because the Little Sisters are an independent order within the greater Catholic Church and not auxiliaries of any particular diocese (the Little Sisters operate thirty homes for the elderly poor within the United States) they are not considered a "religious employer." The University of Notre Dame is not considered a religious employer, which may be surprising given that every president of the University must be a priest who is a member of the order of the Congregation of Holy Cross.[177]

HHS argues that religious groups that do not qualify for the exemption still have recourse to the so-called "accommodation." The accommodation was revised after the Supreme Court's decision in Hobby Lobby and after the Supreme Court granted an injunction to Wheaton College.[178] The accommodation requires religious organizations like the Little Sisters of the Poor and Wheaton College to do one of two things: 1) self-certify that it is an eligible organization and that it objects on religious grounds to providing some or all contraceptive coverage, which it does by "executing

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[174] Korte, 735 F.3d at 686.

[175] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2763-4 (2014); Petition for a Writ of Certiorari, Little Sisters of the Poor Home for the Aged v. Burwell, July 15, 2015, at 5-6, *available at* http://www.becketfund.org/wp-content/uploads/2015/07/2015-07-23-LSP-RSI-Petition_Final.pdf.

[176] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870-01, at 39874 (July 2, 2013) (to be codified at 26 C.F.R. pt. 74, 29 C.F.R. pt. 2510 and 2590, 45 C.F.R. pr. 147 and 156).

> [T]he simplified and clarified definition of religious employer does not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations, but only eliminates any perceived potential disincentive for religious employers to provide educational, charitable, and social services to their communities. The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement. Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

[177] A religious order which counts as one of its members the late Father Theodore Hesburgh, C.S.C., president emeritus and a charter member of this Commission.

[178] Wheaton Coll. v. Burwell, 134 S.Ct. 2806 (2014).

EBSA Form 700 and [delivering] it to their insurer or third-party administrator (TPA)";[179] or notifying the Secretary of HHS that it is an eligible organization and objects for religious reasons to providing some or all contraceptive coverage.[180] If the organization follows the latter procedure it must provide information to HHS that allows HHS to identify the organization and arrange for its TPA or insurer to provide contraceptive coverage.[181] HHS then uses EBSA Form 700, or, if the second option is used, simply notifies the TPA or insurer that the employer meets certain criteria established by HHS and has religious objections to providing contraceptives in its insurance plan.

In the case of an organization with an "insured group health plan" - that is, "A benefit plan in which the employer employs a health insurance issuer to assume the risk of providing health insurance"[182] - the employer's opt-out really changes nothing other than adding a few administrative steps.[183] The government requires the insurer to provide contraceptives in its insurance plans and whether or not the religious organization objects makes no substantive difference except that the religious organization supposedly will no longer be paying for the contraception.[184] "When an organization submits the Form expressing an objection to providing contraceptive coverage, 'the issuer has sole responsibility for providing such coverage'" and "In the context of insured plans, health insurance issuers are generally responsible for paying for contraceptive coverage when a religious non-profit opts out. The Department expects this will be cost-neutral for issuers because of the cost savings that accompany improvements in women's health and lower pregnancy rates [citations omitted]."[185]

In a self-insured plan - one "in which the employer assumes the risk of providing health insurance"[186] - the objecting organization must notify its TPA or HHS that it objects to providing contraceptive coverage. The TPA must then arrange for contraceptive coverage and "The TPA's obligations are enforceable under the Employee Retirement Income Security Act ("ERISA")."[187]

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[179] Brief of Appellants at 14, Little Sisters of the Poor v. Sebelius, No. 1:13-cv-02611-WJM-BNB (10th Cir. Feb. 24, 2014).

[180] Department of the Treasury, Department of Labor, Department of Health and Human Services, "Coverage of Certain Preventive Services Under the Affordable Care Act," 80 Federal Register 41343-4 (July 14, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-17076.pdf.

[181] *Id.* at 41344.

[182] Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1158 (10th Cir. 2015).

[183] Geneva College v. Secretary of U.S. Dep't of Health and Human Services, 778 F.3d 422, 429 (3rd Cir. 2015)("The submission of the form has no real effect on the plan participants and beneficiaries.").

[184] One wonders how this will work in practice. Will insurance companies change the cost of insurance plans just for objecting organizations?

[185] Little Sisters of the Poor, 794 F.3d at 1165, 1166.

[186] *Id.* at 1158.

[187] *Id.* at 1166.

However, "the Departments concede they lack authority to enforce those [federal] requirements as to self-insured "church plans," which are group health plans established by a church or association of churches covering the church's or association's employees. Organizations that provide health care coverage for employees through self-insured church plans are exempt from regulation under ERISA [citations omitted]."[188]

This accommodation is arguably nothing more than a sleight of hand. When the insurer or TPA receives the form or notice they must arrange to provide contraceptive coverage for the employees at no cost to the employees (and in the case of universities, students).[189] The money that pays for the contraceptives comes from the insurer or TPA (who also receive a federal subsidy) but the religious employer starts the process.[190]

i. Religious Groups and RFRA

Even the government does not contest that religious groups qualify as "persons" under RFRA so we may pass over that in silence. The entire issue, then, swirls around the application of RFRA to the Little Sisters of the Poor and similarly situated groups.

As mentioned above, religious groups are eligible for the "accommodation," but they object to utilizing it, arguing that doing so "triggers" contraceptive coverage for their employees.[191] Can RFRA protect them? The Supreme Court has granted seven petitions for certiorari that ask that very question.[192]

The first step, of course, is whether the challenged belief is sincere and whether the government substantially burdens religious exercise. The sincerity of the religious groups' belief does not generally seem to be questioned by the government or the courts.[193] The bone of contention is whether filling out EBSA Form 700 and submitting it to the group's insurer or TPA, or notifying HHS of the organization's objection, constitutes a substantial burden. Judge Posner has written, *mis*."[194] "The form is two pages long—737 words, most of it boring boilerplate; the passages we

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[188] *Id.* at 1166.

[189] 26 C.F.R. § 54.9815-2713A.

[190] *Id.*; 45 C.F.R. § 156.50.

[191] Geneva College v. Secretary U.S. Dep't of Health and Human Services, 778 F.3d 422, 435 (3rd Cir. 2015).

[192] Order Granting Petitions for Certiorari in Zubik v. Burwell, No. 14-1418; Priests for Life v. HHS, No. 14-1453; Roman Catholic Archbishop v. Burwell, No., 14-1505; E. Tx. Baptist Univ. v. Burwell, No. 15-35; Little Sisters of the Poor v. Burwell, No. 15-105; So. Nazarene Univ. v. Burwell, No. 15-119; Geneva College v. Burwell, No. 15-191(Nov. 6, 2015).

[193] *See, e.g.*, East Texas Baptist University v. Sebelius, 2013 WL 6838893, at *11 (S.D. Tex. 2013) ("The government does not contend that the plaintiffs' religious beliefs about abortion, abortifacients, or forced complicity through facilitation are insincerely held, unreasonable, or "fringe.").

[194] *Id*.

quoted earlier, the only ones of consequence, consist of only 95 words. Signing the form and mailing it to Meritain and Aetna could have taken no more than five minutes."[195]

What is the substantial burden? Is it, as Judge Posner says, merely the paperwork involved? The plaintiffs say no. EBSA Form 700 informs the insurer or TPA that the employer is eligible for the accommodation and has religious objections to providing contraceptives in its insurance plan. Notifying HHS that the organization objects to providing the coverage has the same effect. When the insurer or TPA receives the form they must arrange to provide contraceptive coverage for the employees.[196] The money that pays for the contraceptives comes from the insurer or TPA (who also receive a federal subsidy) but the religious employer starts the process.[197]

The *Zubik/Persico* appellees conceded that they have provided similar information as is required by the self-certification form to their third-party administrator in the past. However, their past actions barred the provision of contraceptive products, services, or counseling. Now, under the ACA, this information will be used to "facilitate/initiate the provision of contraceptive products, services, or counseling - in direct contravention to their religious tenets.[198]

The religious organizations argue that when they submit the form they trigger the provision of contraceptives and abortion-causing drugs they believe are gravely immoral. Yes, as the government says, third parties are carrying out the actions to which the plaintiffs object, but by signing the form the plaintiffs are directing the third party to engage in morally objectionable actions.[199] It is not merely that plaintiffs object to engaging in sin *themselves* but also object to encouraging anyone else to engage in sin.

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[195] University of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014) (Posner, J.).

[196] 26 C.F.R. § 54.9815-2713A.

[197] 26 C.F.R. § 54.9815-271A; 45 C.F.R. § 156.50.

[198] Geneva College v. Secretary U.S. Dep't of Health and Human Services, 778 F.3d 422, 433 (3rd Cir. 2015).

[199] Zubik v. Sebelius, 983 F.Supp.2d 576, 606 (W.D.Pa. 2013).

[A]lthough the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held beliefs.

As of this writing, the Second[200], Third[201], Fifth[202], Sixth[203], Seventh[204], Tenth[205], and District of Columbia[206] courts of appeal have ruled against religious organizations' challenges to the revised accommodation. The Eighth Circuit has ruled in favor of religious organizations' challenge to the revised accommodation.[207]

The courts that ruled in favor of the government concluded that the rejiggered accommodation does not substantially burden the objecting parties. They determined that the burden was not substantial for two reasons: 1) the objecting organizations use the accommodation to "opt out" of the Mandate, not to "trigger" provision of contraceptives; and 2) the accommodation forbids the insurer or TPA from imposing any contraceptive-related costs on the objecting organization.[208]

Judge Posner, in a decision denying an injunction to the University of Notre Dame before the Supreme Court issued its decision in *Hobby Lobby*, described the burden as analogical to that of a Quaker who is granted a conscientious exemption from the draft but is told that someone else will be drafted in his stead. (Judge Hamilton repeated the analogy in his concurring opinion after the Supreme Court remanded the case to the Seventh Circuit.)[209] The Quaker protests that this means his exemption triggers the drafting of another man and that is a substantial burden on his own religious exercise. Judge Posner writes, "Would this mean that by exempting him the government had forced him to 'trigger' the drafting of a replacement who was not a conscientious objector, and that the Religious Freedom Restoration Act would require a draft exemption for both the Quaker and his non-Quaker replacement? That seems a fantastic suggestion."[210]

That would indeed be a fantastic suggestion *if the analogy were correct*. It is not, for two reasons. First, requiring a religious group to sign the form and send it to their insurer or TPA is not similar to the Quaker being excused from military duty knowing that some other person will be called up in his place. The religious group is sending it to a *particular* insurer or TPA, or identifying a particular TPA in its written notice to HHS. It is more akin to telling the Quaker, "You may be

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[200] Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2nd Cir. 2015).

[201] Geneva College v. Burwell, 778 F.3d 422 (3rd Cir. 2015).

[202] E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449(5th Cir. 2015).

[203] Michigan Catholic Conf. v. Burwell, 755 F.3d 372 (6th Cir. 2014).

[204] Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015).

[205] Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015).

[206] Priests for Life v. Burwell, 772 F.3d 229 (D.C. Cir. 2014).

[207] Sharpe Holdings, Inc., v. Burwell, 801 F.3d 927 (8th Cir. 2015).

[208] *See*, e.g., Geneva College v. Burwell, 778 F.3d at 435-444; Little Sisters of the Poor, 794 F.3d at 1173-74; Priests for Life, 772 F.3d at 246-46; E. Tex. Baptist Univ., 793 F.3d at 459-63; Mich. Cath. Conf., 775 F.3d at 387-90.

[209] University of Notre Dame v. Burwell, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring).

[210] University of Notre Dame v. Sebelius, 743 F.3d 547, 556 (7th Cir. 2014) (Posner, J.).

excused from military service, but only on condition that you identify a specific non-Quaker who must serve in your place."[211]

In the Tenth Circuit, Judge Baldock dissented in part, arguing that the accommodation substantially burdens self-insured organizations. The majority argued, "Plaintiffs and the dissent emphasize that the TPA may arrange or provide coverage only after a religious non-profit organization opts out. We consider this to be an uncontested and unremarkable feature of the accommodation scheme."[212] The majority did not consider this to be a substantial burden, reasoning that the ACA requires insurance plans to include contraception (this elides the law a bit, as it is only the regulations that mandate the provision of contraceptives) and that therefore the accommodation shifts the burden of compliance from the objecting organization to its TPA.[213] The dissent objected that the mechanics of the relationship between self-insured organizations and their TPA make the objecting organization the but-for cause of the coverage of contraception and that this is the same situation in which the *Hobby Lobby* plaintiffs found themselves.[214] Unlike organizations that use an insurance plan rather than self-insuring, self-insured organizations can actually prevent their insurance from covering contraceptives at all. The self-insured organizations are in a position in which they follow the law and violate their consciences, or disobey the law and face crippling fines. The dissent writes:

> Put another way, if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries? The answer: no one. The self-insured plaintiffs cannot do so per their faith; the TPAs cannot do so per the law. Thus, the self-insured accommodation renders any duty to provide, and any

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[211] Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1214 (10th Cir. 2015) (Baldock, J., dissenting in part).

In *Sheridan*, the defendant registered for the draft but did not lawfully opt out. Instead, he refused to be inducted. But the result under conscription law was the same: "another person [was] called in his place. In other words, like the *insured* plaintiffs, no matter what conscientious objectors do or refuse to do, the government can and will achieve its military draft goals.

The opposite result occurs under the self-insured accommodation scheme. If a *self-insured* plaintiff simply refuses to provide coverage and does not opt out, the government cannot call a third party in its place. The accommodation scheme thus places the self-insured plaintiffs in a very different position vis-à-vis helping the government achieve its religiously objectionable goals. Conscientious objectors cannot prevent the government from conscripting their replacements; but the self-insured plaintiffs can *completely* prevent the government from even authorizing their TPAs to provide objected-to coverage. Conscientious objectors also need not identify a related third party to serve in their stead; but the self-insured plaintiffs must identify a related third party through a form or letter. And this form or letter is the *only means* by which the government can authorize that third party to serve in their stead. . . . Such a conscientious objector scheme - where the government could draft a replacement soldier *only if* the initial conscientious objector opted out and identified a previously ineligible relative to serve in his stead - would be immensely problematic, to say the least. [citations omitted]

[212] Little Sisters of the Poor, 794 F.3d at 1182.

[213] *Id.* at 1182-83.

[214] *Id.* at 1211.

> entitlement to receive, contraceptive coverage wholly unenforceable and thus illusory - unless and until the self-insured plaintiffs opt out.[215]

This argument has been ignored or dismissed by other circuits.[216] However, the ultimate fate of these claims remains unclear. The Seventh Circuit initially ruled against Notre Dame, and then the Supreme Court vacated and remanded the case for reconsideration in light of *Hobby Lobby*. The Seventh Circuit's second opinion was virtually indistinguishable from its first, which makes one wonder if the court seriously applied *Hobby Lobby*. The Supreme Court vacated and remanded the Michigan Catholic Conference case to the Sixth Circuit, which resulted in the Sixth Circuit issuing an opinion very similar to that of the Seventh and Tenth Circuits.[217] Since the Supreme Court remanded multiple cases for reconsideration in light of Hobby Lobby it seems as though the Court is serious about applying Hobby Lobby to the claims made by religious organizations. Opinions that mirror the vacated and remanded Sixth and Seventh Circuit opinions may not be long-lived.

In the Tenth Circuit, the Little Sisters of the Poor did not petition for rehearing en banc. However, some judge[s] on the Tenth Circuit asked for a poll to be taken as to whether to grant en banc review *sua sponte*.[218] The Tenth Circuit denied rehearing, but Judges Hartz, Kelly, Tymkovich, and Holmes dissented from the denial of rehearing. In his dissent, which the other dissenting judges joined, Judge Hartz argued that the panel majority's determination that there was no substantial burden on religious liberty was contrary to prior precedent. The panel majority's opinion either relied on reframing the parties' religious beliefs[219] or on determining that the parties' religious beliefs are unreasonable.[220] Neither is appropriate for the judiciary. The analysis of

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[215] *Id.* at 1211.

[216] Priests for Life v. Burwell, 772 F.3d 229,254-56 (D.C.Cir.2014).

[217] Michigan Catholic Conference v. Burwell, 2015 WL 4979692 (6th Cir. 2015).

[218] Little Sisters of the Poor Home for the Aged v. Burwell, Order Denying Hearing En Banc, 799 F.3d 1315, 1316-18 (10th Cir. 2015) (Hartz, J., dissenting).

[219] *Id.* at 1317.

> Where did [the panel majority] go wrong? It does not doubt the sincerity of the plaintiffs' religious belief. But it does not accept their statements of what that belief is. It refuses to acknowledge that their religious belief is that execution of the documents is sinful. Rather, it reframes their belief. It generalizes the belief as being only opposition to facilitating the use and delivery of certain contraceptives to which they object. Under this reframing, the plaintiffs have no *religious* objection to executing the forms; it is just that executing the forms burdens their religious opposition to certain contraceptives. The burden would be akin to that caused by a tax on sales of religious tracts at the church bookstore, where the church has no religious objection to paying a tax but complains that the tax will make it harder to spread the Gospel. After so framing the plaintiffs' belief, the panel majority then examines the particulars of the governing law and decides that executing the documents does not really implicate the plaintiffs in the use of delivery of contraceptives. If one accepts this reframing of plaintiffs' belief, the analysis of the panel majority may be correct; perhaps one could say that the exercise of this reframed belief was substantially burdened. But it is not the job of the judiciary to tell people what their religious beliefs are.

[220] *Id.* at 1317-18.

whether the government interest in providing cost-free contraceptives is compelling is the same as the analysis for for-profit institutions. There is one additional wrinkle in the case of religious organizations. The government's interest in regard to forcing the Little Sisters of the Poor, Catholic Charities, and similar religious organizations is particularly undermined by the exemption granted to houses of worship. The District Court noted in *Zubik*:

> [T]he Court first notes that the existence of a religious employer "exemption" is an acknowledgment of the lack of a compelling governmental interest as to religious employers who hire employees for their "houses of worship." . . . Thus, the Government's argument that its two stated compelling interests will not overbalance the exact same legitimate claims to the free exercise of religion (at times raised by the same individuals—i.e., Bishop Zubik in the Pittsburgh case) when asserted on behalf of a different religious affiliated/related employer falls. If the Court were to conclude that the Government's stated interests were sufficiently "compelling" to outweigh the legitimate claims raised by the nonprofit, religious affiliated/related Plaintiffs, the net effect (as noted above) would be to allow the Government to cleave the Catholic Church into two parts: worship, and service and "good works," thereby entangling the Government in what comprises "religion."[221]

On appeal, the Third Circuit barely addressed the District Court's argument that determining which portions of the Catholic Church are eligible for the exemption and which for the accommodation would "entangle[e] the Government in what comprises 'religion.'" The Third Circuit simply noted that churches and associations of churches are exempted from filing annual returns with the IRS, whereas religious non-profits are not so exempted.[222] It then followed the Seventh Circuit and

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Or perhaps the panel majority recognizes the plaintiffs' belief but is simply refusing to recognize its importance because it is merely an "uninformed derivative" of its core belief. Some of the language could be read as saying the following: (1) Yes, the plaintiffs have a religious objection to executing the documents. (2) But the religious core of that objection is the plaintiffs' opposition to certain types of contraception; their religious objection to executing the documents is merely the expression of the view that being required to perform that task substantially burdens their beliefs regarding contraception. (3) To let the plaintiffs decide whether executing the documents is independently sinful in itself would be contrary to the court's duty to determine whether the document-execution requirement substantially burdens what the plaintiff's religious concern is really all about - the provision and use of contraceptives. Put another way, the panel majority may be saying that it is the court's prerogative to determine whether requiring the plaintiffs to execute the documents substantially burdens their core religious belief, regardless of whether the plaintiffs have a "derivative" religious belief that that executing the documents is sinful. This is a dangerous approach to religious liberty. Could we really tolerate letting courts examine the reasoning behind a religious practice or belief and decide what is core and what is derivative? . . . The Supreme Court has refused to examine the reasonableness of a sincere religious belief - in particular, the reasonableness of where the believer draws the line between sinful and acceptable - at least since *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 715 (1981), and it emphatically reaffirmed that position in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014).

[221] Zubik v. Burwell, 983 F.Supp.2d 576, 609-10 (W.D. Pa. 2013).

[222] Geneva College v. Burwell, 778 F.3d 422, 443 (3rd Cir. 2015), citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

quoted *Walz v. Tax Commission* in support of the proposition that "'[R]eligious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause.'"[223] However, Walz was not, as are the religious non-profits challenging the accommodation, a religious organization claiming it had been unjustly excluded from the class of religious organizations that received a particular benefit. (It is worth noting that the Court in *Walz* declined to characterize the tax exemption as a benefit, but rather as a way of respecting the independence of both church and state.) Rather, Walz argued that including churches in a broad class of non-profit organizations that were eligible for a property tax exemption violated the Establishment Clause.[224] Contra the Seventh and Third Circuits, the Court's decision in *Walz* has nothing to say about whether it is constitutionally permissible for the government to provide an exemption to a Catholic diocese, but not to a Catholic high school within that diocese. Judge Posner's comment that "The establishment clause does not require the burdens (or the benefits) that laws of general applicability impose on religious institutions"[225] responds more to a worry expressed in Justice Douglas's lone dissent than to anything expressed in the majority or concurring opinions.[226]

Incidentally, Justice Harlan wrote in concurrence:

> Preliminarily, I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.[227]

Given that religious organizations have now been embroiled in litigation for years, Justice Harlan's words about minimizing government involvement in religious life might profitably be embraced by HHS.

Furthermore, e-mails exchanged between a White House policy official and an IRS official suggest that the White House deliberately used the IRS provision at issue, Section 6033, to minimize the

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[223] *Id.* at 443, quoting Notre Dame v. Sebelius, 743 F.3d 547, 560 (7th Cir. 2014).

[224] Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 707 (1970)(Jackson, J., dissenting)("To be sure, the New York statute does not single out the church for grant or favor. It includes churches in a long list of nonprofit organizations").

[225] Notre Dame v. Sebelius, 743 F.3d 547, 560 (7th Cir. 2014).

[226] *Walz*, 397 U.S. 664, at 710-11.

[227] *Id.* at 694.

number of religious organizations that would be exempted from the contraception mandate.[228] It is clear that the Administration was primarily interested in maximizing the number of women entitled to contraception coverage and only secondarily concerned with the possible religious liberty ramifications.[229] In discussing the various possible tests and how likely they would be to limit the number of religious organizations that qualified for an exemption, an IRS official wrote to a White House policy official:

> I have always seen prongs 1-3 as limiters on the broader pool [of religious institutions] that could meet prong 4 (26 USC sec. 6033(a)3)(A)(i) and (iii)). Especially prong 3 (primarily serves persons who shares its tenets). The soup kitchen that is in the tax-exemption group ruling, for example, that is most likely an integrated auxilliary of a church (tax-exempt; affiliated; funded by the church) for purposes of 6033, does not limit the persons it services.

Not sure what you are looking for on your question since I don't think it is possible to say that zero additional people would fall into the reg rule. If you are looking for a quantification of the delta between using prongs 1 -4 and using only prong 4, my sense anecdotally is that the delta is more than zero but I don't think we would have any way of quantifying it for you.[230]

White House and IRS officials also engaged in detailed discussion regarding which Catholic institutions would be exempted from the contraception mandate. In the same e-mail quoted above, the IRS official noted, "Colleges would generally be required to file Forms 990. . . . (The large, well-known 'Catholic' universities - e.g., Georgetown, Notre Dame - do not appear to be part of the Catholic group ruling. They also file returns."[231] The officials are not even really discussing which institutions are more religious than others, but simply trying to determine how to write the rule to capture as many institutions as possible. The decision whether to use a third party to cover

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[228] Brief for *Amici Curiae* Dominican Sisters of Mary, Mother of the Eucharist; Sisters of Life; and the Judicial Education Project in Support of Petitioners, at 25-27, Zubik v. Burwell, Nos. 14-1418, -1453, -1505, -15-35, -105, -119, & -191 (2015), *available at* http://www.scotusblog.com/wp-content/uploads/2016/01/Dominican-Sisters-of-Mary-Mother-of-the-Eucharist.pdf.

[229] *Id.* at App. 15, e-mail from Jeanne Lambrew to Sarah Ingram and Ellen Montz, July 19, 2012.

We found the following document and are still trying to figure out if an accountant or fund manager that gets more than half of its revenue from churches would be exempt under the fourth prong as a non-filer of a 990?*available at* http://www.unclefed.com/Tax-Bulls/1996/RP96-10.PDF.

Second, assuming that the answer is no, do we feel at this point we can say that we believe that replacing the four - prong test with the fourth prong will not expand the number of workers in health plans that are exempt from contraception coverage? What more needs to be done to make such a determination?

[230] *Id.* at App. 14-15, e-mail from Sarah Ingram to Jeanne Lambrew and Ellen Montz, July 19, 2012.

[231] *Id.* at App. 12, e-mail from Sarah Ingram to Jeanne Lambrew and Ellen Montz, July 19, 2012.

drugs and devices their faith teaches are morally objectionable should be left up to the churches and the religious institutions, not the government.

The analysis of whether the government can show that the mandate is the "least restrictive means" of advancing the government's interest is the same as for for-profit organizations. I therefore refer to Section IV (a).

It is worth taking a moment to reflect on the oddity of this situation. Even if one is not religious, it is generally understood that religious people can very stubbornly refuse to engage in activities they believe violate the tenets of their religion. The more interesting question is: *Why is the government so determined to force religious objectors to provide contraceptive coverage to their employees?* Regardless of what sleights of hand are used that is what ultimately happens. HHS and DOL's best estimate as of July 2015 is that there will be 87 eligible for-profit businesses that will utilize the accommodation, and 122 non-profit religious organizations that will do so.[232] Why is HHS so determined to force a mere 200 businesses and organizations to cover contraceptives for their employees? Why is it so important that employees of Hobby Lobby and the Little Sisters of the Poor have access to cost-free contraception? Why not just allow them an exemption? Is free provision of contraceptives a key tenet of the Administration's faith?[233]

V. Christian Student Groups and Religious Liberty

Christian student groups find it increasingly difficult to establish belief and behavioral requirements for would-be leaders without suffering reprisals from university administrators or student council organizations.[234] The Commission majority applauds this state of affairs in the findings and recommendations that accompany this report. *CLS v. Martinez* is the best-known example of these cases. Generally, these Christian student groups require full members and officers to sign a statement of Christian faith.[235] This statement may also include a pledge to

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[232] Department of the Treasury, Department of Labor, Department of Health and Human Services, "Coverage of Certain Preventive Services Under the Affordable Care Act," 80 Federal Register 41332 (July 14, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-17076.pdf.

[233] T.S. Eliot, *Notes toward the Definition of Culture*, in CHRISTIANITY AND CULTURE 104 (1967).

The reflection that what we believe is not merely what we formulate and subscribe to, but that behaviour is also belief, and that even the most conscious and developed of us live also at the level on which belief and behaviour cannot be distinguished, is one that may, once we allow our imagination to play upon it, be very disconcerting.

[234] For simplicity, "university administrators" or "universities" shall apply throughout to any university body that has the ability to bestow or deny registered student organization status.

[235] InterVarsity Asian-American Christian Fellowship (IV-AACF) at Vanderbilt University, *Comment to U.S. Commission on Civil Rights* (March 18, 2013) (on file with the Commission).

IV-AACF eagerly welcomes students and faculty from all faith backgrounds to participate as members, but we require each student member to affirm a statement of faith that outlines the basic tenets of Christianity. This requirement acts as a safeguard to ensure that student leaders of AACF will maintain the group's vision and integrity.

abstain from sex outside of heterosexual marriage.[236] In some cases, university administrators have taken issue with the requirement that full members and officers abstain from sex outside of heterosexual marriage, arguing that it discriminates on the basis of sexual orientation and therefore violates the school's nondiscrimination policy (which is sometimes presented as an "accept all comers" policy).[237] Universities have taken this position even though the requirement to abstain from sex outside of heterosexual marriage is directed at conduct, not sexual orientation per se, and applies to people of all sexual orientations.[238] Oddly, according to public comments, universities have often taken these adverse actions against Christian student groups *even though there is no aggrieved student who has been denied a leadership role in the group based on these criteria.*[239]

See also Fr. John Sims Baker, Chaplain, *Comment to U.S. Commission on Civil Rights* (March 6, 2013) (on file with the Commission).

Vanderbilt's administration changed its non-discrimination policy to forbid student organizations from taking religious criteria into consideration when determining leadership positions.

The leaders of student organizations were required to sign an affirmation of the non-discrimination policy. The student leaders of Vanderbilt Catholic could not in conscience sign the affirmation since religious criteria are the most important ones for leadership in the organization. … The result is there is no registered Catholic student organization at Vanderbilt.

See, e.g., InterVarsity Christian Fellowship at Grinnell College, *Comment to U.S. Commission on Civil Rights* (2013) (on file with the Commission); InterVarsity Christian Fellowship, formerly at Rollins College, *Comment to U.S. Commission on Civil Rights* (2013) (on file with the Commission)..

[236] *See* CLS v. Martinez, 130 S.Ct. 2971, 2980-81 (2010).

[237] *Id.* at 2979-81; *see also* Vanderbilt University, *Comment to the U.S. Commission on Civil Rights* (2013) (on file with the Commission) ("Those [religious] groups have determined that they want to be able to discriminate against other students on the basis of students' protected status by restricting students' eligibility for membership and to run for leadership positions."); Carol M. Swain, *Comment to U.S. Commission on Civil Rights* at 1 (Feb. 27, 2013) (on file with the Commission). ("After months of framing the issue around its "non-discrimination" policy, the university made a sudden switch and began referring to the new policy as an "all-comers."").

[238] Jessica Laporte, *Why I am a leader in TCF*, TUFTS DAILY, Dec. 10, 2012 (submitted as part of InterVarsity at Tufts University *Comment to the U.S. Commission on Civil Rights*) (on file with the Commission).

I am a woman who is attracted to both men and women, which is something I finally had the courage to accept and see in my life. Before understanding my unconditional acceptance by God, I was unwilling to admit that I was attracted to women because I was afraid of what that would mean for my life.

I believe that God intended sex between one man and one woman in the context of marriage, and therefore, I will remain sexually chaste for the rest of my life or until I get married. This means that I will not date a woman….

Although my orientation is not strictly "heterosexual," I am a leader in TCF because of my beliefs about what God intended for relationships. I am not a leader in TCF because I "chose to be straight" but because I have chosen to deny myself in all things and take up my cross daily in order to follow Christ.

It is difficult to hear people speaking out against TCF as an unsafe space for LGBT students, because it's actually one of the only places that I feel comfortable discussing my sexuality.

[239] American Center for Law and Justice and Alliance Defending Freedom, *Comment to the U.S. Commission on Civil Rights*, at 2 (2013) (on file with the Commission).

In other cases, the administrators are hostile even to a bare requirement that student leaders adhere to the group's faith. Professor Carol Swain writes that Vanderbilt's Christian Legal Society initially attempted to meet the university's new requirements "by making appropriate changes to its constitution, such as the removal of verses of Scripture regarding Biblical lifestyles."[240] When these alterations were deemed insufficient, "CLS joined forces with other Christian ministries who sought to persuade the University to reinstate its longstanding policy of allowing religious groups to have religious leadership requirements."[241] Vanderbilt refused to do so.

Universities have been unwilling to simply express their disapproval of the student groups' religiously-based behavior requirements, as inappropriate as that would have been. They have decided that groups with theologically-based membership or leadership requirements cannot be officially recognized student groups. Withholding official recognition makes it much more difficult for these groups to exist as they are denied funding (which often exists because of mandatory student fees), the ability to meet on campus, the ability to use campus resources to advertise their events, the right to participate in official events and hold joint events with officially recognized student groups, and the use of the university name.[242] These restrictions can destroy a small group—in fact, the Hastings CLS chapter no longer exists.[243] In the most extreme instances

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The universities will typically claim that religious organizations are discriminating on the basis of religion—if the group requires its leaders to be Christians—and/or sexual orientation if the group requires that its leaders abide by a code of conduct that includes Biblical sexual ethics. Crucially, this claim will be made generally without any complaint of discrimination against the group. In other words, the group will be deemed "discriminatory" in the absence of a single identifiable victim of the group's alleged discrimination.

After approximately 125 distinct controversies, a clear trend has emerged: On college campuses, nondiscrimination regulations are not utilized to protect a coherent class of wronged students but instead as a pretext of viewpoint discrimination against orthodox Christianity.

[240] Carol M. Swain, *Comment to U.S. Commission on Civil Rights* at 1 (Feb. 27, 2013) (on file with the Commission).

[241] *Id*.

[242] *Id* at 1-2 ("These now unregistered groups can no longer use the University's mail server to announce their meetings. They cannot post notices on bulletin boards, co-sponsor events with other student organizations, or participate in interfaith activities and student fairs."); Fr. John Sims Baker, Chaplain, *Comment to U.S. Commission on Civil Rights* (March 6, 2013) (on file with the Commission) ("The university administration has furthermore demanded that the unregistered organization cease using the word "Vanderbilt" in its name.").

See, e.g., Intervarsity Christian Fellowship at Tufts University, *Comment to the U.S. Commission on Civil Rights*, at 1 (March 18, 2013) (on file with the Commission); InterVarsity Christian Fellowship at Grinnell College, *Comment to U.S. Commission on Civil Rights* (2013) (on file with the Commission); InterVarsity Christian Fellowship, formerly at Rollins College, *Comment to U.S. Commission on Civil Rights* (2013) (on file with the Commission); InterVarsity Asian-American Christian Fellowship (IV-AACF) at Vanderbilt University, *Comment to U.S. Commission on Civil Rights* (March 18, 2013) (on file with the Commission).

[243] Transcript at 65-66 ("at Hastings there is no CLS chapter because of this. Other organizations have also suffered the end of an organization on a particular campus whenever that group has been derecognized").

this official expression of disapproval has contributed to a climate that encourages actions that would be considered harassment if directed toward a more fashionable minority.[244]

As I have expressed in the past, I support a robust interpretation of the First Amendment. My description of the harassment suffered by Christian students is not intended to suggest that other students' speech should be squelched.

In regard to state universities, administrators should consider the possibility that their refusal to allow religious student groups to set criteria for leaders may constitute an Establishment Clause violation. When a university tells a religious student group what they may or may not require of a leader, they are telling the group how to choose their ministers. The university is also setting the parameters for acceptable religious beliefs. When a university says that a student religious organization cannot require its leaders to believe *x*, it is saying either that *x* is unimportant or that *x* is abhorrent. The university is saying, "You may have your little variation on the religion of secularism but your ultimate allegiance must be to secularism and therefore you may not believe *x*."[245]

Public universities' attempts to set membership and leadership criteria for student religious organizations are in tension with the spirit of *Hosanna-Tabor v. EEOC*. Although InterVarsity, CLS, and similar organizations are not churches in the traditional sense they are religious

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[244] InterVarsity Christian Fellowship, formerly at Rollins College, *Comment to U.S. Commission on Civil Rights*, at 1 (2013) (on file with the Commission).

The college's decision to remove InterVarsity has had a major impact on religious, especially evangelical, students at Rollins. In late January of 2013, a month before the Board's final decision was made, a group of students were reading the Bible together in the common area of a residential hall. This informal group included residents of the dorm, as well as a few other students who were present at the request of the residents. When an RA saw them gathered together, they were disbanded and the non-resident students were asked to leave the hall. The RA was acting on the behalf of the college's overseeing office of Residential Life, citing that the group was acting "like" InterVarsity in that it was conducting a Bible study with individuals of the same beliefs. It should be noted that the students who were meeting did not share the same faith background, and that they were not meeting to promote the organization of InterVarsity. In a subsequent meeting with the office of Residential Life, a student was informed that the decision to disband the group was "in the spirit" of the decision made by the college concerning InterVarsity. When the decision was reviewed by upper level administration, the reasoning changed: students could not meet "regularly" in a dorm common space. However, there does not seem to have been any action taken against any informal groups of students who meet regularly to study course materials. In the meantime, students have honored both decisions and have not gathered in residential halls.

See also InterVarsity Christian Fellowship at Tufts University, *Comment to the U.S. Commission on Civil Rights*, at 1 (March 18, 2013) (on file with the Commission).

The opposition to TCF was not limited to the student judiciary though. A group of students was formed with the express purpose of seeing the group removed, and they called themselves the Committee Against Religious Exclusion (CARE). Members of CARE came to TCF meetings to discourage freshmen from attending the group, chalked disparaging remarks about the TCF on campus walkways, and wrote vitriolic op-eds in the campus paper. Again it is important to note that TCF had not acted out in any way towards students at Tufts or denied an applicant a place in leadership. They simply existed as a group for evangelical Christians and those exploring the Christian faith.

[245] *See* Colby Statement, *infra* at 186-89.

organizations that engage in many of the same activities as do traditional churches. They organize worship services, Bible studies, mentoring programs, religious retreats, and so on. Particularly in evangelical Christianity, which tends to have loose church structures, para-church organizations like InterVarsity are almost indistinguishable from churches. Student leaders of these groups, although not ministers in the way we typically think of them, fulfill many of the same functions.[246] Therefore, by establishing what criteria student groups may and may not use in selecting their student leaders, universities are in a very real sense selecting ministers. This public universities may not do without violating both Religion Clauses.[247] Given that employment discrimination laws are not even implicated in these situations, only a university nondiscrimination policy, it seems that *Hosanna-Tabor* would apply with extra force. And even though private universities are not under the same constraints it would be wise for them to respect their students' religious beliefs.

University officials will fall back on *CLS v. Martinez*. However, as Kim Colby wrote, there were very particular circumstances in *CLS v. Martinez* that will not exist in every case.[248] Furthermore, even on the limited grounds on which *CLS v. Martinez* was decided, the case was decided wrongly. That does not mean that administrators do not have the weight of the law in their favor—of course they do. They should not assume, though, that this will always be the case, or that a court cannot distinguish their own case from *Martinez* and rule against them. As Professor John Inazu notes, *Martinez* has minimal analysis.[249] Strangely, even though it would seem obvious that rules governing group membership would implicate the right of expressive association, Justice Ginsburg collapses the right of free association into the right of free speech with little more analysis than a wave of the hand.[250]

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[246] Hosanna-Tabor v. EEOC, 132 S.Ct. 694, 710 (2012) (Thomas, J. concurring) ("in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. … the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith."); *Id.* at 712 (Alito, J. concurring) ("[The ministerial exception] should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.").

[247] *Id.* at 704 (2012).

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

[248] *See* Colby Statement, *infra* at 194-205.

[249] *See* Inazu Statement, *infra* at 244-46.

[250] CLS v. Martinez, 130 S.Ct. 2971, 2985 (2010).

CLS v. Martinez reflects the bare minimum of protection universities must give to religious student groups. Simply because they *may* enforce nondiscrimination rules against religious groups does not mean that they *should* do so. It is possible to have a nondiscrimination policy that respects the religious freedom of student groups.[251] Several constitutional rights are implicated in the decision to apply the full breadth of non-discrimination policies to religious groups - freedom of association, freedom of religion, and what Professor Inazu terms "the forgotten freedom of assembly." These rights deserve more consideration and protection than universities are affording them.

First, instead of thoughtlessly parroting "discrimination," universities should consider what discrimination is. In a basic sense, any act of choosing is discrimination - that is why we say people have "discriminating tastes." As Professor Richard Garnett writes:

> When we say that "discrimination" is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it, we mean that governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers, to do so.[252]

The first question, then, is whether a religious student group's requirement that its leaders assent to the group's statement of faith (and the behavioral requirements that stem from it) constitutes wrongful discrimination. It does not, because assenting to a group's beliefs is an integral part of leading a group. A belief-based group will no longer be a group if it is forced to admit leaders who disagree with its very reason for existence. The problem, as Judge Kenneth Ripple has written, is that religious student groups are forbidden from discriminating on the basis of religion, which is the entire purpose of their grouping.[253] Is it truly *wrongful* discrimination for a Muslim group to say that its leaders must be practicing Muslims, or for a Catholic group to say that its leaders must be practicing Catholics? Would it be *wrongful* discrimination for the campus vegan society to refuse to allow a butcher to lead the group? As Lori Windham writes, the principle at work in *Hosanna-Tabor* applies here as well: "This idea [that religious groups should choose their own leaders] is at work in the *Hosanna-Tabor* decision, and it should also apply to less formal religious groups such as student groups organizing on college campuses. Without the right to

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CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. *See* Brief for Petitioner at 35 (expressive association in this case is "the functional equivalent of speech itself.") It therefore makes little sense to treat CLS's speech and association claims as discrete.

[251] Colby Statement, *infra* at 186.

[252] Richard W. Garnett, *Confusion About Discrimination*, THE PUBLIC DISCOURSE, April 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5151/.

[253] *Alpha Delta Chi-Delta Chapter v. Reed,* 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added), *cert. denied*, 132 S.Ct. 1743 (2012).

govern their membership policies and select their own leaders, they cannot guarantee that their leaders will embody their message."[254]

Religious student groups are not engaging in wrongful discrimination because they are discriminating on the basis of belief and conduct, not status. A requirement to abstain from sexual activity outside the bounds of heterosexual marriage applies to *all* group leaders, *regardless* of sexual orientation. A heterosexual person cohabitating with a romantic partner would run afoul of the provision just as surely as would a homosexual person cohabitating with a romantic partner. The point is not *who* you are attracted to, but how you *act* on that attraction.

The universities should consider the constitutional values of freedom of religion, freedom of association, and freedom of assembly that are being sacrificed on the altar of non-discrimination. Religion is more than the bare ability to believe what you will, or to go to church on Sunday. Devout religious believers try to integrate their faith into every area of their lives. Very often, meeting with a dedicated group of fellow believers is one way they strive to accomplish this. It is very difficult to practice a religion alone, particularly when that religion is counter-cultural in one way or another. "[R]eligious freedom embodies 'counter-assimilationist' ideals that allow people 'of different religious faiths to maintain their differences in the face of powerful pressures to conform.'"[255] When universities make it difficult for student groups to reserve on-campus meeting space and for new students to become aware of the group's existence through student activity fairs and the like, it becomes increasingly difficult for the group to meet and to continue to exist. Especially when students are at university and away from their family and hometown support network, this likely makes it more difficult for them to continue in their faith. The universities have no duty to try to fill the vacuum left by the absence of parents and hometown churches but by making it more difficult for traditional religious groups to exist they subtly undermine their students' efforts to adhere to their minority faith.

As Professor Inazu writes, eradicating belief-based membership requirements threatens the very existence of these groups. Belief-based membership requirements require line-drawing. "Professor McConnell has also observed that 'genuine pluralism requires group difference, and maintenance of group difference requires that groups have the freedom to exclude, as well as the freedom to dissent."[256] At the very least, nondiscrimination policies drive them out of the public

[254] Windham Statement, *infra* at 288.

[255] Inazu Statement, *infra* at 242, *quoting* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990).

[256] Inazu Statement, *infra* at 243, quoting Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466 (2000).

square. Other groups are not threatened by an all-comers policy because their membership largely self-selects.[257] Groups organized around a belief system do not have this luxury.

> [G]roups that require a commitment to certain beliefs or practices for membership—groups like conservative religious organizations—will face significant consequences. Because these groups will be unwilling to alter their commitments, the all-comers policy will operate against them like a classic prior restraint—ensuring that they are forced out of the forum before their ideas and values ever manifest.[258]

Professor Garnett also notes that when we refer to "wrongful discrimination" we mean that governments should oppose this discrimination "when it is within their constitutionally and morally limited powers". Believing, as I do, that *CLS v. Martinez* was wrongly decided, I do not believe it is within the government's power (when public or publicly-funded universities are involved) to tell religious groups what they may believe and who they may select as their leader. Aside from the constitutional issues universities certainly have no *moral* right to tell religious groups what they may believe and who they may select as their leaders. Perhaps, then, they should exercise modesty and allow religious student groups to organize themselves as they wish.

VI. Sexual Orientation Discrimination and Racial Discrimination

Most of the moral authority of the gay marriage movement comes from its superficial similarity to racial discrimination. This analogy is flawed. To say so is deeply unpopular but the difference lies in the fact that race is an immutable characteristic and sexual behavior (of any type) is a behavior. This is not to say that sexual orientation is a choice, only that the decision to *act* on that sexual orientation is a choice. My colleagues state in Finding 7.4: "a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law)", and thus acknowledge a distinction between belief and conduct. The same distinction exists between sexual inclinations (of whatever stripe) and sexual behavior. Cohabiting heterosexual couples who go to court to force landlords to stifle their religious objections and rent to them are likewise forcing others to approve of their *behavior*.[259] A heterosexual couple's decision to cohabit (and presumably engage in sexual intercourse) is a choice, just as a gay couple's decision to engage in a sexual relationship is a choice. In contrast, no one has the ability to choose to stop being black or white. It is an immutable characteristic.

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[257] Inazu Statement, *infra* at 246.

[258] *Id*.

[259] *See* Smith v. Fair Employment & Housing Com'n., 913 P.2d 909 (Cal. 1996); *see also* Donohue v. Fair Employment & Housing Com'n., 2 Cal. Rptr.2d. 32 (Cal. App. 2 Dist. 1991).

In many of the situations involving discrimination against same-sex couples the religious party has made it clear that they do not object to serving a gay or lesbian person, but rather object to being forced to condone the person's sexual behavior. The religious party is happy to serve and associate with the gay or lesbian person in other contexts but believes it is sinful to assist in celebrating or condoning their sexual *behavior*.[260]

This is where Professor Alan Brownstein's suggested framework for balancing the rights of gay and lesbian couples with the rights of religious believers is helpful. As he notes, in a pluralistic society we must respect the other's "right to be wrong" and give them space to live their lives.[261] Professor Richard Epstein argues that a reinvigorated right of free association would solve most of these problems. Statutes or ordinances that add "sexual orientation" as a protected class would only further constrain a right already dying of suffocation.

I do not support drawing a distinction between non-profit religious groups and for-profit businesses. As in the HHS mandate cases, such distinctions are artificial. However, I do think that Professor Brownstein's suggestions give us a helpful starting point for thinking through these questions as a society. There are instances in which the state's interest in preventing a serious harm would almost certainly outweigh a religious objection. The state certainly has an interest in ensuring that designated next-of-kin have the right to make decisions on behalf of hospitalized patients, whatever the patient's sexual orientation.[262] Likewise, the government has a serious interest in ensuring that gay couples are not stranded in the middle of New Mexico, unable to

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[260] *Let Him Bake Cake in Freedom*, NATIONAL REVIEW ONLINE (Jan. 29, 2014), *available at* http://www.nationalreview.com/article/369694/let-him-bake-cake-freedom-interview; Defendants' motion for partial summary judgment on claims against Barronelle Stutzman in her personal capacity, State of Washington v. Arlene's Flowers and Ingersoll v. Arlene's Flowers, No. 13-2-00871-5, 3-4 (Sup. Ct. of Washington, Benton County 2013).

> [W]hen Robert Ingersoll came into the store to ask Barronelle to design the floral arrangements for his wedding ceremony, she politely told him she could not do it "because of [her] relationship with Jesus Christ." As she explains, Barronelle believes that "biblically marriage is between a man and a woman." After prayer and thoughtful consideration, Barronelle concluded that her religious beliefs prohibit her from participating in a same-sex union by using her artistic talents to create floral arrangements for the ceremony.
>
> Stutzman politely and respectfully told Robert that she could not create the floral arrangements for his wedding because of her faith and then the two chitchatted for a while. She gave Robert recommendations for other florists, they hugged, and Mr. Ingersoll left the store. …
>
> It never occurred to Barronelle that someone might consider her decision not to create floral arrangements for Robert Ingersoll's wedding as illegal. Barronelle has gladly served gay and lesbian clients for many years, expressing the same warm demeanor and artistic passion to them as she did all other clients. Mr. Ingersoll and Mr. Freed were no exception. Indeed, they were longstanding clients of Arlene's Flowers and Barronelle had served them for nearly nine years, knowing full well they were gay. But she could not participate in a same-sex marriage ceremony as a matter of conscience because of her deeply held, biblical belief that marriage is a union between one man and one woman. (citations omitted)

[261] Brownstein Statement, *infra* at 178.

[262] *Id*. at 178-179; *see also* Lambda Legal, Peaceful coexistence—Freedom of Worship is not a License to Discriminate, at 12 (April 21, 2013) (on file with the Commission).

procure a hotel room. Does the government have a similar interest in ensuring that gay couples have their first choice of wedding cake baker or that Reverend and Mrs. Kettle's bed-and-breakfast accepts honeymooning gay couples? Probably not. And unlike the parade of horribles advanced by some commenters, most religious objections to participating in same-sex weddings have been quite narrowly drawn and involve only an objection to assisting with a wedding celebration or to engaging in activities that appear to condone same-sex sexual activity.[263]

It is in this respect—the seriousness of the harm and the resulting weight of the government's interest— that these situations involving gay and lesbian couples are unlike that in *Heart of Atlanta Motel*.[264] Unlike African-Americans in the 1960s, there is probably no part of the country in which gays and lesbians are unable to find lodging for hundreds of miles. This is despite the fact that sexual orientation is not protected under Title VII. The harm they suffer is dignitary harm because a certain baker or photographer or wedding venue will not, as a matter of conscience, assist them in celebrating their wedding. This is not a matter of driving through the night because there are no hotel rooms that will accommodate you. It is easy to go down the street or to the next county to a different baker or photographer. There is not a constitutional right to have your first-choice wedding cake. This is not to say that being denied a service because someone believes your behavior is morally problematic is inconsequential. But that dignitary harm will become increasingly inescapable for all of us given our increasingly pluralistic society.

Chai Feldblum addresses the dignitary harm inflicted:

> If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table, or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.[265]

As mentioned above, this dignitary harm is unlike the discrimination suffered by African-Americans in the South, who might have been unable to find a hotel room for hundreds of miles. It is more akin to Rawls's contention that a sense of self-respect is necessary to pursue one's life-plan, and that "self-respect normally depends upon the respect of others."[266] Statements such as Feldblum's reflect a sense that someone's refusal to serve a customer because of religious objections to the person's sexual behavior reflects a lack of respect for a gay or lesbian person's

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[263] Lambda Legal, Peaceful coexistence—Freedom of Worship is not a License to Discriminate, *Comment to U.S. Commission on Civil Rights*, at 12 (April 21, 2013) (on file with the Commission).

[264] Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964).

[265] Feldblum, *supra* note 2 at 42.

[266] John Rawls, A THEORY OF JUSTICE 155 (1999).

choices and life-plan. Demands by same-sex couples that objecting vendors serve them apparently reflect a need for public validation of lifestyle choices. Tolerance, or even a willingness to serve them in some contexts but not others, is apparently insufficient.

Feldblum's admission that she can go down the street to another vendor illustrates that pure homophobia, as opposed to a religiously-based refusal to assist with certain aspects of homosexual relationships, is not remotely as pervasive or intense as was racial discrimination. As Professor Brownstein wrote in his statement he does not support analogizing discrimination against same-sex couples to racial discrimination because "racism has played such a uniquely invidious role in American history. The goal of purging racial discrimination has no equal and no counterpart."[267]

The disparity between the harms suffered by the two groups is perhaps why arguments that robust religious freedom protections will lead to a harmfully "segregated and contentious" society are unconvincing.[268] Racial segregation was mandated by law and enforced by violence. It was sometimes impossible for businesses to serve an integrated clientele even if they wanted to.[269] No state in the union has a law that says, "You may not serve gay and lesbian customers." Neither do angry mobs attack gay and lesbian couples who present themselves at wedding cake shops. (It is in fact more likely that angry mobs will attack the businesses of religious dissenters.)[270]

We will have a more contentious society if we force people to contribute their talents to events and to appear to condone behavior they believe is fundamentally immoral. In this instance, it is more conducive to civil harmony to allow people to freely exercise their religious convictions. This holds true whether the situation at issue is a baker who declines to bake a wedding cake for a same-sex couple or a landlady who declines to rent an apartment to an unmarried heterosexual couple.

VII. Justice Scalia's Prescience

It was Justice Scalia's melancholy fate to serve as our American Cassandra. This is no slur on the justice but an observation on our society.[271] As long ago as 1996, he characterized the majority's

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[267] Brownstein Statement, *infra* at 179.

[268] Lambda Legal, Peaceful coexistence—Freedom of Worship is not a License to Discriminate (April 21, 2013), Appendix A, at 12 (on file with the Commission).

[269] Bernstein, *supra* note 3 at 42 (2003).

> [I]n the South, [] state and local government remained firmly in the hands of segregationists who could pressure businesses to retain Jim Crow. Federal antidiscrimination law instead provided business owners - of whom many had found Jim Crow to be a costly nuisance - with the wherewithal to integrate, by freeing them from the threat of retaliation by local officials.

[270] Madeline Buckley, *Threat tied to RFRA prompt Indiana pizzeria to close its doors*, INDIANAPOLIS STAR, Apr. 3, 2015, *available at* http://www.indystar.com/story/news/2015/04/02/threats-tied-rfra-prompt-indiana-pizzeria-close-doors/70847230/.

[271] Remember that Cassandra did indeed possess the gift of prophecy thanks to Apollo, but the god cursed her so she would never be believed.

decision in *Romer* as "an act, not of judicial judgment, but of political will,"[272] and questioned how state denial of preferential treatment for gays and lesbians differed from state prohibition of polygamy.[273] In *Lawrence v. Texas*, Justice Scalia wrote that the majority's decision overruling *Bowers* called all morals legislation into question, including laws banning same-sex marriage,[274] and that Justice O'Connor's effort to salvage a basis for state preference for traditional opposite-sex marriages would likely be unavailing.[275] And in *United States v. Windsor,* Justice Scalia wrote:

> The penultimate sentence of the majority's opinion is a naked declaration that "[t]his opinion and its holding are confined" to those couples "joined in same-sex marriages by the State." I have heard such "bald, unreasoned disclaimer[s]" before. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," - with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here - when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: the only thing that will "confine" the Court's holding is its sense of what it can get away with [citations omitted].[276]

Justice Scalia was right. With the benefit of hindsight, it is clear that the majorities in *Romer*, *Lawrence*, and *Windsor* believed same-sex marriage to be a moral imperative, although they were unable to root it in any firm constitutional footing. Perhaps fearing a *Roe*-like backlash that might have led to a successful constitutional amendment, however, they proceeded incrementally. The incremental approach has two benefits: one, it gradually accustomed the public to an ever-more

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[272] Romer v. Evans, 517 U.S. 620, 653 (1996).

[273] *Id.* at 648-51.

[274] Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . . The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed [citations omitted]."

[275] Lawrence, 539 U.S. at 600-02.

[276] U.S. v. Windsor, 133 S.Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

radical conception of sexual liberty; two, it allowed a new generation to come of age (and the older, more conservative generation to die off) in a society that in law and popular culture treated discrimination on the basis of same-sex sexual conduct as the equivalent of racial discrimination.[277] Then in *Obergefell v. Hodges* the Court delivered the killing stroke to state support for traditional marriage, grandly declaring, "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[278] I join Justice Scalia in declaring that if I were forced to sign onto an opinion that began with such meaningless twaddle, I would put a bag over my head.[279] Whatever it might be, Constitutional law it is not.

There is likewise little reason to doubt Justice Scalia's prediction that the expanded right to sexual liberty will stop at same-sex marriage. Justice Roberts too has come to share Justice Scalia's gloomy outlook on the prospective constitutionalization of a right to polygamy.[280] There is little reason not to share their pessimistic outlook. For example, in late 2013, a federal district court ruled that Utah's prohibition of polygamy had no rational basis and was therefore unconstitutional.[281] Almost simultaneously there has been a raft of articles in mainstream publications discussing the prevalence of polyamory and suggesting it is "the next sexual revolution."[282] As alternative lifestyles continue to gain public acceptance, they too will come under the aegis of antidiscrimination laws and create their own religious liberty conflicts.

More pertinent to this statement is the threat *Obergefell* poses to religious liberty. There have already been many conflicts between same-sex marriages and religious liberty. Now that same-sex marriage has been elevated to the status of a constitutional right these conflicts will become more common and more severe. In his dissenting opinion, Chief Justice Roberts objected that same-sex marriage was nowhere contemplated in the Constitution. Rather, the Court's decision in *Obergefell* reflected the policy preferences of a majority of the Court, which through the exercise

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[277] Children born when *Romer* was decided in 1996 turned 18 in 2014.

[278] Obergefell v. Hodges, 135 S.Ct. 2584, 2593 (2015)(Kennedy, J.).

[279] *Id.* at 22 (Scalia, J., dissenting).

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[280] *Id.* at 2621-22 (Roberts, C.J., dissenting).

[281] Brown v. Buhman, 947 F.Supp. 1170 (D.Utah 2013).

[282] *See, e.g.*, Kristen V. Brown, *Web of Love*, S.F. CHRON., Mar. 2, 2014, *available at* http://www.sfchronicle.com/business/item/web-of-love-27625.php; Emanuella Grinberg, *Polyamory: When three isn't a crowd*, CNN, Oct. 26, 2013, *available at* http://www.cnn.com/2013/10/26/living/relationships-polyamory/.

of raw judicial power they elevated to the status of a fundamental right.[283] Justice Scalia echoed the Chief Justice's concerns:

> [I]t is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact - and the furthest extension one can even imagine - of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.[284]

This is dangerous. If the Supreme Court can create fundamental rights it can also destroy them.[285] If "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions,"[286] and therefore we must defer to our somberly-garbed philosopher-kings' judgment as to the boundaries of liberty, what is to prevent five members of the Supreme Court from determining that the founding generation simply did not understand how oppressive religion could be? That is, in fact, what my colleagues suggest in the findings and recommendations included in this report. My colleagues state in Finding 7, "2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly; 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate; . . . 6) a basic [civil] right as important as the freedom to marry should not be subject to religious beliefs". My colleagues do not even pretend to neutrality and instead simply declare that they are wiser than the accumulated wisdom of millennia of the world's major faiths. It appears from the recommendations that they believe religious beliefs and practices that conflict with the sexual revolution should be cabined as much as possible. The entire point of having limited and enumerated constitutional powers and a Bill of Rights was to restrain the power of government and to protect inalienable rights regardless of changing fashions. In the wake of *Obergefell*, it is impossible to be confident that those limits and protections will last. Justice Alito

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[283] Obergefell, 135 S.Ct. at 2612 (Roberts, C.J., dissenting).

> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice."

[284] *Id.* at 2627 (Scalia, J., dissenting).

[285] *Id.* at 2625-26 (Roberts, C.J., dissenting).

[286] *Id.* at 2598 (Kennedy, J.).

has no such confidence, warning, "If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate."[287]

And the liberty that the *Obergefell* majority creates differs from the older and earlier liberties in that it is not the right *not* to be forced to do something, but the right to *force* others to do something for you. As the Chief Justice wrote, "Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[288] Justice Thomas was even more explicit, stating, "Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. . . . Yet the majority invokes our Constitution in the name of a 'liberty' that the Founders would not have recognized, to the detriment of the liberty they sought to protect."[289] Justice Thomas later discusses why *Loving v. Virginia* is inapposite - namely, because the Lovings were prosecuted for cohabiting together in Virginia after being married in another jurisdiction.[290] No same-sex couples were being threatened with imprisonment for cohabiting together.

In their dissenting opinions, which Justice Scalia joined, Justices Thomas and Alito both warned about the effect same-sex marriage will have on religious liberty. Justice Thomas warned:

> In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision may change the former, but it cannot change the latter. It appears all but inevitable the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.
>
> The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice. [citations omitted][291]

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[287] Obergefell, 135 S.Ct. at 2643 (Alito, J., dissenting).

[288] *Id.* at 2612 (Roberts, C.J., dissenting).

[289] *Id.* at 2631 (Thomas, J., dissenting).

[290] *Id.* at 2636-37 (Thomas, J., dissenting).

[291] *Id.* at 2638 (Thomas, J., dissenting).

Justice Alito echoed him, stating:

> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their beliefs will be respected. We will soon discover whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.[292]

There is no reason to doubt the Justices' vision of the future. The majority's findings and recommendations lend credence to the Justices' warnings.

VIII. Why Should Religious Liberty Take Precedence?

The core of the dispute between partisans of sexual liberty and traditional religious believers is whether the two rights are of equal importance. In our constitutional order, the first reason that religious liberty takes precedence over sexual liberty is that this is enshrined in our Constitution. The First Amendment establishes the right to free exercise of religion, free speech, free association, and freedom of assembly. It does not establish the right to coerce other people into expressing approval of one's self-expression.

But why does the Constitution enshrine religious liberty as a "first freedom"? And why should we continue to treat it as a fundamental right that often trumps conflicting rights or government interests?[293] After all, religious liberty sounds nice but nondiscrimination sounds nice too. The answer is that we accept that religious claims may actually be true, and if they are true, a person's duty to God may be seen as weightier than his duty to the state.[294] It is not unreasonable to believe in God, and it is impossible for the government or any person to remain truly undecided on the question. Either the government will act as though God may exist, or the government will act as though God does not exist. And for constitutional purposes it seems likely that the Framers assumed that God did exist though they differed mightily about specifics, and that is why they enshrined religious freedom in the First Amendment.[295] If the Framers assumed that God exists,

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[292] Obergefell, 135 S.Ct. at 2642-43 (Alito, J., dissenting).

[293] *See* Brian Leiter, WHY TOLERATE RELIGION 7 (2013).

[294] Michael Stokes Paulsen, *Is Religious Freedom Irrational? Reviewing* Why Tolerate Religion? *By Brian Leiter*, 112 MICH. L. REV. 1043-44 (2014).

[295] Michael Stokes Paulsen, *The Priority of God*, 39 PEPP. L. REV. 1159, 1203-04 (2013).

> We protect religious liberty on the premise that God is real and that the true priorities of God trump the ordinary commands of man. . . .

and if the Establishment Clause is predicated on that assumption, then there is no Establishment Clause violation if the present government also assumes the possibility of God's existence and therefore avoids burdening religious practice and expression.[296]

As recently as twenty years ago there was a broad societal consensus in favor of giving heightened protection to religious liberty.[297] That is why RFRA was enacted after the *Smith* decision. Of course, a person cannot simply brandish, "I have a duty to God" and triumph every time his religious practices run afoul of state requirements. Nor is such an outcome contemplated under RFRA. RFRA's compelling interest test is an attempt to balance the religious believer's duty to God with society's need for public order. RFRA simply places the burden on the government to prove that its interest is compelling and that infringing on the religious practice is the least restrictive means of achieving its goal.

Religious belief and conscience take precedence over a person's self-expression. Conscience is more than self-will. As the nineteenth-century intellectual John Henry Newman wrote:

> Conscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with conscience, to ignore a Lawgiver and Judge, to be independent of unseen obligations. . . . Conscience is a stern monitor, but in this century it has been superseded by a counterfeit, which the eighteen centuries prior to it had never heard of, and could not have mistaken for it if they had. It is the right of self-will.[298]

The word "religion," in the original sense of the term employed by the Constitution (and still in common usage today), necessarily involves some sort of conception of God (or gods) and the obligations of man and restrictions on conduct thought to flow from rightful devotion to the prior and superior claims of God. It is, necessarily, "something more than just the projection of the individual's inner sense of self, value, ethics, or morals, or of a social, moral, or political philosophy that involves no such transcendent reality or creative force."

As I have written elsewhere, there is probably no better operational definition of "religion" in this constitutional sense than the one supplied by the original Virginia Declaration of Rights and employed by James Madison in his Memorial and Remonstrance Against Religious Assessments: religion is "the duty which we owe to our Creator, and the manner of discharging it." (This is not direct "legislative history" of the meaning of the First Amendment. But it is good contemporaneous evidence of common public usage of the term "religion" at or about the time the Constitution was adopted.

[296] *Id.* at 1217-19.

[297] Ramesh Ponnuru, *Cross Purposes*, NATIONAL REVIEW ONLINE, Mar. 10, 2014, *available at* http://www.nationalreview.com/article/372984/cross-purposes-ramesh-ponnuru.

The old, reactionary conception of liberty championed by Ted Kennedy really did regard religious liberty as a trump, in many instances, over laws that were enacted democratically to advance other values. The same is true of course of any other liberty: If it does not sometimes act as a trump, it does not exist; and if it does not often act as a trump, it hardly exists.

[298] John Henry Newman, Certain Difficulties Felt by Anglicans Considered … A Letter Addressed to the Duke of Norfolk 156 (1897).

Professor Robert George, a former member of this Commission, elaborates: "Conscience, as Newman understood it, is the very opposite of 'autonomy' in the modern liberal sense. It is not a writer of permission slips. . . . conscience is one's last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action."[299] This conception of conscience stands in stark contrast to the lazy conception of conscience that is often tossed about, where "Conscience as self-will identifies permissions, not obligations. It licenses behavior by establishing that one doesn't feel bad about doing it …."[300]

A conscience that imposes duties and does not serve as a rationalization of one's behavior is a stern taskmaster. Undoubtedly, even those who strive to conform their behavior to the dictates of conscience sometimes lapse into using conscience to justify their preferred behavior. But it is important to have a correct conception of what conscience is so that we can discuss why it deserves deference. It also helps us think about why some claims of conscience, such as pacifism, deserve deference, whereas others, such as polygamy, do not.

IX. The Danger of Leviathan

One reason clashes between religious liberty and nondiscrimination provisions have become commonplace is because of the growth of government. When government - both federal and state - confined itself to performing only a few functions, there was room for religious believers to organize their lives in accordance with their beliefs. When government expands into every aspect of life, conflicts between the dictates of God and the dictates of man increase. Ilya Shapiro writes:

> The cultural flashpoint surrounding wedding vendors' pleas for toleration is evidence of a more insidious process whereby the government foments social conflict as it expands its control into areas of life that we used to consider public yet not governmental. . . .
>
> Indeed, it's government's relationship to public life that's changing - in the places that are beyond the intimacies of the home but still far removed from the state, like churches, charities, social clubs, small businesses, and even "public" corporations that are nevertheless part of the private sector. Under the influence of the Obama

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[299] Robert P. George, CONSCIENCE AND ITS ENEMIES, 112-113 (2013).

[300] *Id.* at 113; *see also* Newman, *supra* note 298 at 154.

> This view of conscience, I know, is very different from that ordinarily taken of it, both by the science and literature, and by the public opinion, of this day. It is founded on the doctrine that conscience is the voice of God, whereas it is fashionable on all hands now to consider it in one way or another a creation of man. . . .
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> Conscience is not a long sighted selfishness, nor a desire to be consistent with oneself; but it is a messenger from Him, who, both in nature and in grace, speaks to us behind a veil, and teaches and rules us by His representatives. Conscience is the aboriginal Vicar of Christ, a prophet in its informations, a monarch in its peremptoriness, a priest in its blessings and anathemas, and, even though the eternal priesthood throughout the Church could cease to be, in it the sacerdotal principle would remain and would have a sway.

> administration, the Left is weaving government through these private institutions, using them to shape American life according to its vision.[301]

Therefore, one way of defusing the tension between religious liberty and nondiscrimination provisions is to reduce the size and scope of government. As Commissioner Heriot noted at the briefing, the problem with universities and colleges refusing to recognize religious organizations could be partly ameliorated if the schools stopped collecting mandatory student activity fees and doling them out to preferred organizations. Similarly, the Affordable Care Act created a previously unknown crisis of conscience. If the government had not mandated that all employers with a certain number of employees provide health insurance or pay heavy fines, the cases challenging the contraceptive mandate never would have materialized.

X. The Findings and Recommendations

The findings and recommendations in this report should serve as an alarm to liberty-loving Americans. I voted in favor of these findings and recommendations only because this report has already been delayed for over three years, and was concerned that a "no" vote from me would be used as an excuse to further delay the report.

The findings and recommendations elevate the nondiscrimination laws, which with the exception of the Fourteenth Amendment are mere statutes, not constitutional provisions, over the provisions of the Constitution. The majority writes, "Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence."[302] Mere "policies" are now of "preeminent importance" - a distinction not shared, it appears, by the poor Free Exercise Clause. A bit later, the majority states, "Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights."[303] "The First Amendment's Establishment Clause constricts the ability of government actors to curtail private citizens' rights to the protections of non-discrimination laws and policies. Although the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act (RFRA) limit the ability of government actors to impede individuals from practicing their religious beliefs, religious exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis."[304]

The fundamental problem with the approach embodied in the findings and recommendations is that it is in practice, if not intent, hostile to religion. It also elevates the right to sexual liberty over

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[301] Ilya Shapiro, *Against Conscience Taxes*, CATO INSTITUTE, Sept. 10, 2015, *available at* http://www.cato.org/blog/against-conscience-taxes.

[302] USCCR Report, Finding #1, *infra* at. 25.

[303] USCCR Report, Finding #3, *infra* at 25.

[304] USCCR Report, Finding #4, *infra* at. 25.

the right to religious liberty. This is the precise opposite of the choice enshrined in our Constitution. That decision cannot be truly undone by civil rights statutes or even the whims of the Supreme Court but only through the amendment process. However, statements such as the following make it clear that, in their view, religion is only acceptable if it conforms to the dictates of modern liberalism:

> The Commission endorses the briefing panelists' statements as summarized at page 26 of the Report in support of these Findings:
>
> Further, specifically with regard to number (2) above, religious doctrines that were widely accepted at one time came to be deemed highly discriminatory, such as slavery, homosexuality bans, and unequal treatment of women, *and that what is considered within the purview of religious autonomy at one time would likely change* [emphasis added].[305]

I will address each of the report's Recommendations in turn.

> Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.[306]

This recommendation is so muddled that it is almost impossible to make heads or tails of it. The underlying assumption is that there is some Platonic ideal of nondiscrimination laws that must not be marred by "overly-broad" religious exemptions. That simply is not the case. All nondiscrimination laws are the product of balancing competing interests and competing costs and benefits. And in this case, there are two competing nondiscrimination interests. When examined closely, this recommendation has no substance. However, the main problem with the recommendation is that it misunderstands the applicable law. It takes a few words and phrases from RFRA, mashes them together, and somehow thinks that these tests apply to religious exemptions from nondiscrimination laws. They do not. "Narrow tailoring," "burden," and so forth only apply when there is government action involved, not private action. And a wedding cake baker restricting his services to opposite-sex couples is private action, not state action.

> RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause.[307]

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[305] USCCR Report, Finding #7, *infra* at 26.

[306] USCCR Report, Recommendation #1, *infra* at 26.

[307] USCCR Report, Recommendation #2, *infra* at 26.

I am not sure what this recommendation means but if there is a powerful cabal plotting a Henry VII-style creation of an established church I am glad my colleagues are ready to oppose it. I hope that this recommendation means that my colleagues will defend the rights of churches and religious organizations such as Hosanna-Tabor and the Christian Legal Society to establish criteria for ministers and leaders without encountering government interference and retaliation.

> In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct.[308]

Let us try a thought experiment. In the findings, my colleagues hail the Supreme Court's decision in *E.E.O.C. v. Abercrombie*, which held that a clothing store violated Title VII when it refused to hire a young Muslim woman who wore a headscarf. Under my colleagues' reasoning, should we consider Abercrombie to have actually been in the right? The store did not refuse to hire the applicant because she believed in the tenets of Islam but because she wore a headscarf and that conflicted with the store's "Look Policy."[309] The applicant never mentioned her religion during her interview, so the employer did not even know for sure that she was Muslim. The "Look Policy" of a clothing store like Abercrombie is an important aspect of its business and marketing, and would doubtless be applied if, say, a nun wanted to get a second job and wanted to wear her habit at work. If the majority believes that we should protect belief but not conduct, should we amend Title VII to encompass only belief, and not conduct? And if not, why should Samantha Elauf be entitled to wear her headscarf at work despite it conflicting with her employers' desired image, but a small bakery be fined hundreds of thousands of dollars and driven out of business for refusing to bake a wedding cake?[310]

> Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and *only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination* [emphasis added].[311]
>
> States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that

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[308] USCCR Report, Recommendation #3, *infra* at 27.

[309] E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2031 (2015).

[310] George Rede, *Sweet Cakes owners pay damages while continuing appeal of $135,000 bias case*, THE OREGONIAN, Dec. 28, 2015, *available at* http://www.oregonlive.com/business/index.ssf/2015/12/sweet_cakes_owners_pay_damages.html.

[311] USCCR Report, Recommendation #4, *infra* at 27.

> those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.[312]

These parallel recommendations would be nonsensical if they were not so dangerous. RFRA cannot "create" First Amendment Free Exercise Clause rights. Those rights already exist by virtue of the fact that *the First Amendment Free Exercise Clause exists*, even if the interpretation is contested. This thus represents an attempt to limit both RFRA and the Free Exercise Clause. It is a radical proposal, in that it calls not just for stripping Free Exercise protection from the Hobby Lobbies of America, but for limiting the Free Exercise rights of individuals and religious institutions if they are considered to unduly burden favored classes in some way.

XI. The Dangers of Secularist Intolerance

We should exercise prudential judgment to protect religious believers' First Amendment rights. Refusing to provide robust protection of First Amendment rights is a dangerous narrowing of our freedom. People who live in accordance with their unfashionable religious beliefs will be unable to work in many professions. When a baker or a photographer or a CEO is forced to participate in activities that offend their religious beliefs, what hope is there for a doctor, a counselor, a lawyer? Traditional believers will have very few careers where they can both make a living and live according to their faith. It is an unofficial form of the legal disabilities imposed on English Catholics following the Glorious Revolution.

And although these cases are mostly directed toward traditional Christians whose beliefs about sexuality clash with prevailing secularism, there is no reason to think that it will stop there. Secularism is a jealous god, and it will brook no others.[313] Nathan Diament of the Orthodox Union made this point when explaining why his organization filed a brief opposing the HHS mandate, although Orthodox Judaism does not prohibit contraception: "Today, in America, Catholic objections to women's use of contraceptives may be broadly unpopular; tomorrow, it may be

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[312] USCCR Report, Recommendation #5, *infra* at 27.

[313] Roger Trigg, Is Religious Freedom Special?, Comment to the U.S. Commission on Civil Rights at 9 (2013)(on file with the Commission).

> Religion in general, and Christianity in particular, is, it seems, not to be brought into public places either symbolically or as part of the democratic debate. Religion has always been vulnerable because it poses an authority different from, and sometimes at odds with, secular authority. Even if that authority is democratic, the 'will of the people,' it dislikes being judged by other standards. The vulnerability of religion both on an institutional and individual basis, is a good reason for giving a special emphasis to freedom of religion. Yet it is also clear that once freedom of contract, freedom of conscience or other freedoms are thought sufficient, religion itself becomes marginalised.

circumcision or kosher slaughter that are looked at askance in America, as they are today in Europe."[314]

There is an additional danger of which those who would exalt individuals' right not to be offended above religious liberty should be aware. As they destroy the moral and religious foundations of law, they also destroy the foundations of their own most cherished ideals.[315] The entire basis for nondiscrimination laws rests on the belief that all people are equal in dignity. Whence comes that dignity? There are few things as obvious in life as that people are unequal - unequal in beauty, unequal in intellect, unequal in virtue.

When the America was founded, the Founders located man's freedom and dignity in God. But not just any god - not Baal, not Odin, not Zeus - the God of Christianity and Judaism.[316] Jefferson wrote, "all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness" and "Almighty God hath created the mind free, and manifested his supreme will that free it shall remain." Even Jefferson, one of the least religiously orthodox of the Founders, ascribed to the Judeo-Christian belief that man is created in the image of God, and that is the source of our freedom and dignity.

Why should this concern those who would elevate nondiscrimination principles over religious liberty? Because if they destroy the moral and religious assumptions underpinning the idea of human dignity, they may accidentally destroy the idea of human dignity itself. The late political scientist Samuel Huntington wrote, "Of all the objective elements which define civilizations,

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[314] Nathan J. Diament, *Why the Orthodox Union Supports Religious Exemptions to the Contraceptive Mandate*, THE TABLET, Jan. 28, 2014, *available at* http://www.tabletmag.com/scroll/160928/why-the-orthodox-union-opposes-the-contraception-mandate.

[315] Charles J. Chaput, O.F.M., Archbishop of Philadelphia, *Comment to the U.S. Commission on Civil Rights*, at 3 (2013)(on file with the Commission).

Catholic moral convictions about abortion, contraception, the purpose of sexuality and the nature of marriage are rooted not just in revelation, but also in reason and natural law. Human beings have a nature that's not just the product of accident or culture, but inherent, universal and rooted in permanent truths knowable to reason.

This understanding of the human person is the grounding of the entire American experiment. If human nature is not much more than modeling clay, and no permanent human nature exists by the hand of a Creator, then natural, unalienable rights obviously can't exist. And no human "rights" can finally claim priority over the interests of the state.

[316] Thomas S. Kidd, GOD OF LIBERTY 253-254 (2010).

Americans' faith allowed them to articulate why oppression was wrong in the eyes of God, and it helped them envision a republic where individual freedom could be guided by ancient ideals of the Scriptures: charity, justice, and protection for the weak and poor.

Does the national significance of these precepts mean that America was founded as a Christian nation? Yes, in the sense that believers - the majority of whom were Christians of some kind, with an important minority of Jews - played a formative role in the creation of the American Republic. … The founders' religious agreement was on public values, not private doctrines.

however, the most important usually is religion".[317] As discussed earlier in this statement, the effort to force traditional religious believers to bow to certain sexual mores is really an attempt to replace the old faith with the new. But if the old faith is destroyed, and with it the idea of human dignity, the adherents of the new faith may rue the day they did so. Secularists may believe that they are simply expanding the idea of human dignity to encompass various important facets of human behavior, but in so doing they are destroying the foundation of the idea and are unlikely to find a similarly compelling basis.[318] Revolutions often turn on their instigators. The Judeo-Christian belief that man is created in the image of God, the *imago Dei*, undergirds Jefferson's proclamation that "all men are created equal". Despite the failures of its adherents, as is the case with any set of principles, this concept is the root of the traditional Christian belief that people are ends, not means, and that therefore every person - male, female, black, white, disabled, gay, straight - is inherently dignified, despite his undoubted sins and perhaps seemingly dubious prospect of salvation.[319] Without that foundation, the idea that everyone has equal dignity is little more than a polite fiction to be brushed aside for greater convenience.

Do you think that the Faith has conquered the World?

And that lions no longer need keepers?

Do you need to be told that whatever has been, can still be?

Do you need to be told that even such modest attainments

As you can boast in the way of polite society

Will hardly survive the Faith to which they owe their significance?[320]

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[317] Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order 42 (1996).

[318] Roger Scruton, "The Future of European Civilization: Lessons for America," THE HERITAGE FOUNDATION, Dec. 8, 2015, *available at* http://www.heritage.org/research/reports/2015/12/the-future-of-european-civilization-lessons-for-america.

Europe is rapidly jettisoning its Christian heritage and has found nothing to put in the place of it save the religion of "human rights."

I call this a religion because it is designed expressly to fill the hole in people's worldview that is left when religion is taken away. The notion of a human right purports to offer the ground for moral opinions, for legal precepts, for policies designed to establish order in places where people are in competition and conflict. However, it is itself without foundations. If you ask what religion commands or forbids, you usually get a clear answer in terms of God's revealed law or the Magisterium of the church. If you ask what rights are human or natural or fundamental, you get a different answer depending on whom you ask, and nobody seems to agree with anyone else regarding the procedure for resolving conflicts.

Consider the dispute over marriage. Is it a right or not? If so, what does it permit? Does it grant a right to marry a partner of the same sex? And if yes, does it therefore permit incestuous marriage too? The arguments are endless, and nobody knows how to settle them.

[319] C.S. Lewis, *The Weight of Glory*, at 9, *available at* http://www.verber.com/mark/xian/weight-of-glory.pdf.

[320] T.S. Eliot, "Choruses from the Rock, VI".

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Commissioner Gail Heriot Statement and Rebuttal

"Magnanimity in politics is not seldom the truest wisdom, and a great empire and little minds go ill together." -- Edmund Burke

The conflicts that can arise between religious conscience and the secular law are many and varied. Some of the nation's best legal minds have written on how the federal and state governments should resolve those conflicts. But no one has ever come up with a systematic framework for doing so—at least not one that all Americans can agree on. And perhaps no one ever will. Instead, we have been left to resolve the issues that arise on a more or less case-by-case basis.

I am not going to try to create such a framework in this statement. I like to think I know my limitations. One bird's eye comment I can offer is this: ***The bigger and more complex government becomes, the more conflicts between religious conscience and the duty to comply with the law we can expect.***

Back when the federal government didn't heavily subsidize both public and private higher education, when it didn't heavily regulate employment relationships, when it didn't have the leading role in financing and delivering healthcare, we didn't need to worry nearly so much about the ways in which conflicts with religious conscience and the law arise. Nobody thought about whether the Sisters of Charity should be given a religious exemption from the Obamacare contraceptive mandate, because there was no Obamacare contraceptive mandate. The Roman Catholic Church didn't need the so-called Ministerial Exception to Title VII in order to limit ordinations to men (and to Roman Catholics), because there was no Title VII.

The second—again bird's eye—comment I can make is this: While the targeted religious accommodations approach may sometimes be a good idea, it is not always the best strategy for people of faith. ***Targeted religious accommodations make it possible for ever-expanding government bureaucracies to divide and conquer. They remove the faith-based objections to their expansive ambitions, thus allowing them to ignore objections that are not based on faith. The bureaucratic juggernaut thus rolls on.*** People of faith should not allow themselves to become just another special interest that needs to be appeased before the next government expansion is allowed to proceed. They have an interest in ensuring the health of the many institutions of civil society that act as counterweights to the state—including not just the Church itself, but also the family, the press, small business and others. They also have an interest in ordered liberty in all its manifestations. A nation in which religious liberty is the only protected freedom is a nation that soon will be without religious liberty too.

* * * * *

From a bird's eye view, let me move to the worm's eye view by sharing my thoughts on the official Findings and Recommendations appended to this report. I believe they do little to illuminate the issues.

Sometimes this is because they just don't say much. Consider for example, Recommendation #1, which begins:

> "Overly-broad religious exemptions unduly burden nondiscrimination laws and policies."

Yes, of course. But the first trick is figuring out what is "overly-broad" and what isn't. Only then do we know whether a burden is undue. Note also that the Commission could just as easily have concluded the reverse, "Overly-broad nondiscrimination laws and policies unduly burden religious liberty." Or more broadly, "Overly broad exceptions to rules unduly burden rules." But what's the rule and what's the exception? Do we live in a nation where the rule is everyone has the right to the free exercise of his or her religion, subject to certain possible exceptions? Or do we live in a nation where everyone has a right not to be discriminated against on the basis of race, sex, religion, national origin, age, disability or sexual orientation subject to certain possible exceptions? Suddenly, it's not so easy.

Recommendation #1 continues:

> "Federal and state courts, lawmakers, and policy-makers at every level ***must*** tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law ***requires***." (Emphasis added.)

Again, yes, of course. Insofar as "applicable law ***requires***" them to tailor religious exceptions narrowly, they must do so. But that's the issue, isn't it? *When, if ever, does applicable law* ***require*** *that religious exceptions be narrowly tailored? And when should it?* The recommendation gives no clue on those questions. It makes no claim that any particular statute or Constitutional provision contains such a requirement. The recommendation indicates only that if a statute does contain such a requirement (and it is consistent with the Constitution) or if the Constitution contains such a requirement, that requirement must be obeyed by courts and executive branch policymakers.[1]

Note that the Commission could just as easily have stated that courts, lawmakers and policy-makers "***must*** tailor anti-discrimination exceptions to religious liberty protections as narrowly as

[1] The recommendation refers not just to courts and executive branch policymakers, but also to "lawmakers," who are obviously not bound by statutory requirements of this type. They create statutes and can thus always repeal such requirements or promulgate new statutes that do not contain such requirements. While they "must" do what the Constitution requires, they are not otherwise bound.

applicable law ***requires."*** We'd still be in the position of having to figure out whether applicable law does indeed or should require any such thing.

Recommendation #2 states:

> "RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause."

If you are having trouble figuring out what Recommendation #2 is trying to get at, you are not alone. Perhaps it is trying to say that Congress, in attempting to protect the religious liberty of some, must take care not to violate the Constitution's Establishment Clause, which prohibits "any law respecting an establishment of religion." If so, again, yes, of course. But, again, the difficulty is in the details. Everybody with even a passing understanding of the Constitution knows that Congress must steer a path between the Free Exercise Clause and the Establishment Clause.[2] How to do that is not so easy; volumes have been written on it. Yet a simple, foolproof technique for doing so has never been discovered and perhaps never will be, since cases continue to reach the Supreme Court in need of resolution. This report does nothing to help resolve those issues.

Recommendation #3 states:

> "In the absence of controlling authority to the contrary such as a state-level, RFRA-style statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holding of *Employment Division v. Smith*, which protects religious beliefs rather than conduct."

Two things: First, like some of the other recommendations, this one is worded in such a way as to sound significant, but in the end it doesn't mean much. It states that in the absence of law pointing in the other direction one should apply *Smith*. But often there *is* authority pointing in the other direction (and when there isn't, the legislature may create such a law). It can come not only from RFRA-style statutes, but also from state constitutions, whose religious liberty guarantees may be very different from the Free Exercise Clause of the U.S. Constitution as interpreted in *Smith.* It can also come from the nondiscrimination statutes themselves, in the form of an explicit or implicit requirement for religious accommodation (or in the form of broader exceptions into which religious accommodations may fit). For example, Title VII forbids sex discrimination in employment, but contains an exception for "bona fide occupational qualifications based on sex." Might such a provision permit a specialty restaurateur whose religion forbids his co-religionists from eating food prepared by women to hire only men? The Commission's recommendation surely provides us with no assistance in answering that question.

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[2] For example, if the federal government funds religious schools, is it a violation of the Establishment Clause? Or is it a violation of the Free Exercise Clause to fund all schools, except religious schools?

Second, the distinction in *Smith* is being misrepresented here. Rather than drawing a distinction, as my colleagues suggest, between "religious belief" and "conduct," the Court specifically stated that some conduct is indeed covered by the Free Exercise Clause. "It would doubtless be unconstitutional, for example, to ban the casting of statues that are to be used for worship purposes or to prohibit bowing down before a golden calf," the Court wrote.[3] Instead, *Smith* held that the State of Oregon could refuse unemployment benefits to a person fired for using peyote in violation of state law, even though the peyote was being used in connection with a religious ritual. It did so on the ground that Oregon's prohibition was a law of general applicability not passed for the purpose of curtailing the performance of that ritual, not on the ground that the use of peyote was "conduct" rather than "belief."

In the *Smith* Court's view, Oregon had the power to exempt persons engaged in religious ritual from otherwise valid prohibitions of general applicability, but it was not required to exempt them. That is where RFRA comes in. It was passed to overrule *Smith* by requiring legislators to accommodate religious conscience.

Recommendation #4 states:

> "Federal legislation should be considered to ***clarify*** that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination." (Emphasis added.)

The use of the word "clarify" is odd here. What the Commission is actually proposing is that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), which has already held that RFRA applies to closely held corporations, be overruled by Congress. Surely the Commission is within the scope of its authority to recommend that. But it is inexcusable for the Commission's majority to fail to point out the fact that it is calling for *Hobby Lobby* to be overruled.

Of course, Congress can choose to amend RFRA in this manner. But why would it want to? It is surely not clear why an individual should be protected by RFRA when she chooses to operate her business as a sole proprietorship, but not when she chooses to operate it as a closely-held corporation. The ability to incorporate one's business is useful. It allows an entrepreneur to protect her personal assets in case the business fails. To create policy under which people of faith cannot operate as a closely held corporation without losing their rights under RFRA seems pointless and arbitrary.

The part of the recommendation that suggests that Congress "clarify" that RFRA creates the right to religious accommodation "only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination" is also wrongheaded. Sure, it avoids the obvious questions: What constitutes an undue burden? What's due? But more

[3] *Smith* at 877-78.

important, it ignores the fact that Congress has already laid out the standard by which conflicts between religious conscience and federal law are to be resolved. That standard cuts in the opposite direction from where my colleagues are attempting to lead. RFRA's Section 3 demonstrates that rather than asking for a clarification, they are asking for a reversal of policy, which is something they should be willing to own up to. That section states:

> In general
>
> a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> 1) is in furtherance of a compelling governmental interest; and
>
> 2) is the least restrictive means of furthering that compelling governmental interest
>
> ….

42 U.S.C. sec. 2000bb-1.[4]

That is a very tough standard, tougher than many would have liked. But it is the course Congress has taken. Under it, Federal laws and other actions (including anti-discrimination laws) are to be interpreted to bend over backwards to protect religious liberty, not lean in the direction of minimizing the scope of religious liberty exemptions. Congress has taken the position that federal actions that substantially burden religious exercise are inappropriate unless the application of that burden is justified by a compelling government interest and (2) the least restrictive means of furthering that interest. When is a religious accommodation an undue burden on a law prohibiting status-based discrimination? Congress has created a standard under which the answer to that question will be hardly ever. Why doesn't Recommendation #4 acknowledge this?

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[4] This section was originally intended to cover both federal and state law. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court decided that Congress had overstepped its authority under Section 5 of the Fourteenth Amendment in subjecting state law to this standard. Only the courts have the authority to define what is or is not a violation of the Fourteenth Amendment. While Congress has a certain level of prophylactic power under Section 5, its response must be "congruent and proportional" to the problem. The upshot of this for the purposes of the report is that RFRA applies only to federal law and not to state law. On the other hand, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, et seq., applies to state law, and some states have adopted RFRA-style laws.

Recommendation #5 is essentially the same as Recommendation #4 except it applies to states and it inexplicably uses mandatory language:

> "States with RFRA-style laws should amend those statutes to ***clarify*** that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA ***must*** guarantee those statutes do not unduly burden civil liberties and civil rights with status-based discrimination." (Emphasis added.)

First, I am again disturbed by the use of the word "clarify" here. Whether RFRA-style state laws were intended to apply beyond individuals and religious institutions is a matter of statutory interpretation. The Commission has made no effort to examine each of these state statutes and determine how it should be interpreted. What the Commission's majority really means is not that a state legislature should "clarify" that its RFRA-style law was not intended to cover closely held corporations, but rather that it should amend its statute to exclude closely held corporations regardless of what was intended at the time of the statute's passage and regardless of *Hobby Lobby*. If that is what the majority really means, it needs to give an argument as to why this would be a better policy. As I have suggested above, it seems pointless and arbitrary to me to deny people of faith the ability to configure their businesses as closely-held corporations without losing their rights under RFRA-style laws.

Second, the notion that states with RFRA-style laws "must" guarantee those statutes do not unduly burden protections against status-based discrimination is noticeably without legal citation. (Contrast that with Recommendation #1 which at least makes mandatory only what "applicable law requires.")

What has caused the Commission's recommendations to be so off-kilter? Sound conclusions can only be built on sound facts, whether those facts are explicit or implicit. Unfortunately the official findings appended to this report leave much to be desired. In Finding #1, the Commission declares that "[c]ivil rights protections ensuring nondiscrimination, as embodied in Constitution, laws, and policies" are *"preeminent"* in American jurisprudence. (Italics added). On the other hand, in Finding #3, the 'protection of religious liberty" is referred to as a "longstanding and vital part of the American tradition," but is apparently not preeminent. My colleagues declare in Finding #4 that religious exemptions to nondiscrimination laws "when they are permissible, significantly infringe upon … civil rights." From that they conclude in Finding #5 that such exemptions "must be weighed carefully and defined narrowly."

I can imagine an argument that eventually ends with that conclusion, but by starting with an assertion that antidiscrimination laws are "preeminent," the Commission's analysis essentially begins with its conclusion. Why should anyone accept it? The Commission said so.

If anything, our Constitutional jurisprudence is grounded more in the opposite view. Religious liberty is sometimes referred to as our nation's "First Freedom," because of its preeminent

position in the text of the First Amendment and its importance in the founding of our nation.[5] The Commission thus could just as easily—indeed more easily—have gone in the opposite direction of Finding #5: Because religious liberty is our First Freedom, it is preeminent, and laws, including non-discrimination laws, that purport to coerce individuals into acting or prohibiting them from acting in ways that would violate their conscience "must be weighed carefully and defined narrowly."

I wish the Commission had refrained from attaching these findings and recommendations. They were adopted without sufficient reflection and without sufficient appreciation for the complexities of the issues that are presented.

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[5] By contrast, our anti-discrimination laws are of more recent vintage. Some are grounded in the Constitution and some are not. The Fourteenth Amendment's requirement that states (not private individuals) accord individuals "equal protection under the laws" was made part of the Constitution in 1868. But the requirement is worded in a vague manner (alas, deliberately so), and it was not until the mid-twentieth century that the Supreme Court, in developing the doctrine of strict scrutiny, held that state laws discriminating on the basis of race would be subjected to a very exacting level of scrutiny while state laws discriminating on the basis of sex would only be subjected to an intermediate level of scrutiny. *See*, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Korematsu v. United States*, 323 U.S. 214 (1944). Laws that discriminate on most other bases are subjected to a lesser standard. Title VII of the Civil Rights Act of 1964, which prohibits race and sex discrimination (among other things) even in private employment, is more recent than the strict scrutiny doctrine.

Age discrimination in employment was not outlawed until 1967, and the Americans with Disabilities Act was not passed till 1990. To this day, there are no federal statutes prohibiting private individuals from declining to do business with another (as opposed to employ) on account of his or her sex or religion. If an owner of an interior decorating business doesn't want to design home interiors for women, because he feels they tend to interfere with his vision, federal law again does not interfere. If an individual arbitrarily decides that he doesn't want to patronize a dry cleaner, because it is owned by Evangelical Christians, federal law has nothing to say about it.

The exception for discrimination on the basis of race in private contracts arose in a very curious way. In *Jones v. Alfred H. Mayer Co*., 392 U.S. 409 (1968), the Court misinterpreted the Civil Rights Act of 1866 (re-promulgated as the Civil Rights Act of 1870 and codified as 42 U.S.C. § 1982). *See also Runyon v. McCrary*, 427 U.S. 160 (1976) (sticking to this misinterpretation as applied to 42 U.S.C. § 1981). While the original statute was intended to confer upon African Americans and members of other minority races the same legal capacity to own and convey property, to contract and to devise and bequest property as whites have, it was erroneously interpreted to prohibit private individuals from engaging in race discrimination in those transactions. This is equivalent to construing the "right to marry" as a right that allows an individual to insist on marrying someone who doesn't want to marry him. *See* Gail Heriot & Alison Somin, *Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation and Academia's Favorite New Vehicle for the Expansion of Federal Power*, 13 Engage 31 (October 2012); Gerhard Casper, Jones v. Mayer: *Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89, 100 (1968)("I am afraid the Court's approach in *Jones v. Mayer* represents a combination of … creation by authoritative revelation and 'law-office' history."); Charles Fairman, 6 History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, 1207, 1258 (MacMillan 1971)("In *Jones v. Mayer*, the Court … allowed itself to believe impossible things—as though the dawning of enlightenment of 1968 could be ascribed to the Congress of a century agone."). Congress has since re-promulgated and modified 42 U.S.C. § 1981, thus acquiescing to *Jones* and *Runyon*. But there was never a time that Congress affirmatively decided to adopt a statute that would prohibit private individuals from discriminating on the basis of race in ordinary non-employment, non-public accommodation, non-housing contexts. This was put in place by a judicial decision. Note that as a result of the *Jones-Runyon* pair of decisions, it is illegal for an individual, even in his capacity as a consumer, to decide to patronize (or not patronize) a business on account of the race of its owner. Thus, for example, an Asian American is violating § 1981 if she prefers an Asian-American physician.

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Finally, allow me to share my thoughts about the Statements filed by my fellow Commissioners, which I had the opportunity to read only after I wrote the preceding. Unfortunately, as Commissioners, we are given only a 30-day period in which to file comments on our fellow Commissioners' remarks—30 days during which many other major tasks also had to be accomplished.[6] For that reason, I am not able to cover everything I might like to cover.

***The Statement of Chairman Castro*:** Chairman Castro asserts:

> "The phrases "religious liberty" and "religious freedom" will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance."

In some ways, I envy anyone who can dismiss those who disagree with him as mere hypocrites. Those who do so envision a world that is peopled only by good guys and bad guys, and they are easy to tell apart. That is not the world with which I am familiar.

Does Chairman Castro really believe that the Little Sisters of the Poor, whose case is currently before the Supreme Court, are just a bunch of hypocrites?[7] Does he believe that they are making up their concern over being compelled to finance their employees' contraception? Does he think they really just want to save money?

Chairman Castro inexplicably associates statutes like the RFRA with "Christian supremacy." He seems to be unaware that Christians are a majority in this country. If they wanted laws that made exceptions only as dictated by their own faith, they often would have the political clout to get just that—at least if they didn't explicitly label it as such. Instead, RFRA protects people of all faiths. Indeed, it is the adherents to less common religions--Muslims, Buddhists, Sikhs, Hindus, and Bahá'ís--that usually derive the most protection from RFRA and RFRA-style laws. Their political clout may be otherwise too weak to influence legislation.[8]

In *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule*, John Wybraiec and Roger Finke found that "religions

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[6] By contrast, the body of this report (less than 25 pages long) was approximately three years in the making and written by full-time staff members, while I am engaged only part-time.

[7] *Little Sisters of the Poor Home for the Aged v. Burwell et al*., 15-105.

[8] *See*, e.g., *Caruso v. Zenon*, 2005 U.S. Dist. LEXIS 45904 (D. Colo. 2005)(RLUIPA case ordering prison officials to provide halal meat diet to prisoner despite evidence that prisoner had ordered haram food from the prison canteen on numerous occasions and despite availability of vegetarian diet, which satisfied Muslim diet requirements); *Toler v. Leopold*, 2008 U.S. Dist. LEXIS 27121 (E.D. Mo. 2008)(RLUIPA case ordering prison officials to provide kosher diet to Jewish convert).

in tension with society are more likely to be involved with the judiciary." For example, while Jewish, Muslim and Native American religions together made up less than 3 percent of church membership at the time of their study, those religions made up more than 18 percent of court cases concerning the free exercise of religion. Similarly, what Wybraniec and Finke called "new religions" or "cults" made up only 1 percent of church membership, but 16.5 percent of court cases concerning free exercise.[9]

The second (and final) paragraph in Chairman Castro's short statement is as disturbing as his first. It accuses individuals who just want to be left alone of having exercised "dominion" and "veto power" over the rights of others:

> "Religious liberty was never intended to give one religion dominion over others, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. In our nation's past religion has been used to justify slavery and later, Jim Crow laws. We now see "religious liberty" arguments sneaking their way back into our political and constitutional discourse (just like the concept of "states rights") in an effort to undermine the rights of some Americans. This generation of Americans must stand up and speak out to ensure that religion never again be twisted to deny others the full promise of America."

It is serious error to fail to make a distinction between the desire not to be coerced by the government and the desire to use governmental authority to coerce others.[10] RFRA-style laws are about the former; anti-discrimination laws, especially when enforced with great zeal even against the most trivial of deviation, are about the latter. By declining to listen, a private citizen has not "vetoed" the right of another to speak. By declining to associate, a private citizen has not exercised "dominion" over another's right of association.[11]

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[9] John Wybraiec & Roger Finke, *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule*, in Regulating Religion: Case Studies from Around the Globe 535, 542-43 (James T. Richardson, ed. 2004).

[10] Commissioner Narasaki's short Statement also fails to make this distinction, although, to her credit, her rhetoric is more measured than the Chairman's.

[11] Often complexities come from cases in which the individuals who claim they just want to be left alone are in reality consuming or distributing finite public resources. If a Coast Guard captain refuses to rescue Roman Catholics that is clearly and unequivocally not simply a case of wishing to be left alone. He is endangering Roman Catholics, since the Coast Guard is unlikely to be able to deliver rescue services to them as readily. Speed is crucial in such cases.

Other cases that in some sense involve public resources may cut in the other direction. Consider the example of a Christian evangelical society at a public university. Its members welcome all comers, but they wish to limit leadership roles in their society to Christians—in violation of university rules that prohibit discrimination on the ground of race, color, sex, religion, national origin or sexual orientation. Is the group simply asking to be left alone so as to preserve what is special about their group? Or are its members diverting precious school resources—like the right to meet on school property—to an exclusive group?

As for the rest of Chairman Castro's statement,[12] I believe it basically speaks for itself. I considered asking him to withdraw it. But then I decided it might be better for Christians, people

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Put differently, is its practice an effort to exert dominance over others? Or is it the school attempting to exert dominance over the Christian evangelical society (and indeed to drain it of its meaning)? I believe that on these assumed facts it likely is the latter—assuming the university has not had to turn away other groups who wish to use the facilities for lack of a meeting room. But I understand and appreciate those who might argue otherwise. Judging from his tone, I am less certain that the Chairman understands and appreciates other sides of the debate.

[12] Chairman Castro begins with a quotation that he attributes to John Adams: "The government of the United States is not, in any sense, founded on the Christian religion." The words are not Adams'; they are taken from the Treaty of Tripoli of 1797, which was written and signed on behalf of the United States by American poet and diplomat Joel Barlow. (For D.C. history buffs, Barlow may be best known as the owner of the Kalorama Estate, which has since become the Kalorama neighborhood in the Northwest part of the city.) Adams, with the advice and consent of the Senate, later "accept[ed], ratif[ied] and confirm[ed]" the treaty.

The full quote from that section of the treaty is: "As the Government of the United States of America is not, in any sense, founded on the Christian religion; as it has in itself no character or enmity against the laws, religion, or tranquility, of Musselmen; and as the said States never entered into any war or act of hostility against any Mahometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries."

The back story is this: For centuries prior to the treaty, North African Barbary states had preyed upon commercial ships coming near their shores. *See* Robert C. Davis, Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast and Italy 1500 - 1800 (2003). Cargo was stolen, and crew members and passengers were routinely ransomed or enslaved. In general, the Barbary States (consisting of the nominally Ottoman, but de fact independent, cities of Algiers, Tripoli and Tunis and the independent sultanate of Morocco) declared themselves to be at war with *all* Christian states that had not agreed by treaty to pay tribute. Prior to the Revolution, American ships had been protected by virtue their relationship to the British Empire. During the Revolution, French ships had given them protection. But after that, at least two American ships were captured and their crews enslaved.

Treaties were hurriedly negotiated (and sometimes re-negotiated) with Morocco and Algiers during George Washington's Presidency. Downplaying any connection with Christianity on the part of the government made sense. By 1797, when Adams became President, he was desperate to come to an arrangement with Tripoli and Tunis so as to ensure the safety of American commerce.

In return for that safety (and well before the treaty was ratified), the Pasha of Tripoli received 40,000 Spanish dollars, 13 watches of gold, silver and "pinsbach," three diamond rings, one sapphire ring and one ring with a watch in it, 140 "piques of cloth," and 4 brocade caftans. In addition, the Pasha demanded the equivalent of an additional 12,000 Spanish dollars and "naval stores" consisting of five 8-inch braided rope hawsers, three 10-inch braided rope cables, 25 barrels of tar, 25 barrels of pitch, 10 barrels of rosin, 500 pine boards, 500 oak boards, 10 masts, 12 yard arms, 50 bolts of canvas, and four anchors. He received all of it either in kind or cash equivalent.

Nevertheless, the efforts to avoid war through tribute were unsuccessful—as such efforts often are. By 1801, the Pasha of Tripoli was demanding that the United States pay greater amounts as "voluntary presents." He revoked the treaty. The result was the first of the conflicts known in American history as the Barbary Wars.

It is unclear what the Chairman meant by quoting the Tripoli Treaty. (I note that he chose not to quote Adams' more well-known statement: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.") Why does the language in the Tripoli Treaty help him prove his point? He chafes at the notion that our government was founded upon the Christian religion. But where does that get him in his argument? Presumably if government had been specifically designed to promote Christianity, the conflicts between the law and the Christian faith would be far less numerous and RFRA and RFRA-style laws would have been less necessary. The point of the treaty language wasn't that Christians should be forced to engage in conduct that betrays their faith. The point was that people of good will, no matter what their faith, can live in dignity as Americans or as neighbors or allies of the United States. Making that possible—through RFRA, RFRA-style laws or other means—is what this report is supposed to be all about.

of faith generally and advocates of limited government to know and understand where they stand with him.[13]

The Statement of Commissioners Achtenberg, Kladney, Yaki and the Chairman: Since I understand Commissioner Achtenberg was the primary author of this Statement, for simplicity's sake I will refer to it as hers. It is a more serious effort to discuss the issues presented in the report than the Chairman's. But in the end it too is deeply flawed.

Commissioner Achtenberg states that the fight for religious exemptions is often characterized as a battle waged by "Christians who purport to speak for all Christians." "On the contrary," she writes, "many Christian denominations and individuals" support stronger anti-discrimination laws instead.

I should say that in my entire 58 years of life I have never run across a single Christian who purported to speak for all Christians. Not once. This is not to say that no such person exists; it is simply a statement that given my experience they must be the rare exception and not the rule. On the other hand, I frequently run across individuals who *believe* that those who disagree with them on religious grounds purport to speak for all Christians. These individuals are mistaken.

It makes me wonder whether with all the talk of the power of diversity today we are the most cocooned people ever. We read the news as it is presented to us by our friends on Facebook. We may eat in a different ethnic restaurant every week, and our friends may be of different races and from different parts of the country or world, but the opinions they hold are anything but diverse. It is not easy to find an LGBT rights activist who routinely engages with an Evangelical Christian social conservative or vice versa. We have become ideologically isolated.

In any event, I am not certain what point Commissioner Achtenberg is trying to make when she states that some Christians agree with her.[14] Each individual must wrestle with his or her own conscience. The point is not whether most Americans or Christians agree. Each conscience is a dictatorship; it is not a democracy.

More broadly, I believe that Commissioner Achtenberg's statement suffers from the same defects as the Findings and Recommendations. It simply assumes that anti-discrimination laws are

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[13] The same should be said for the majority of the U.S. Commission on Civil Rights, which adopted a short statement on April 15, 2016, entitled *The U.S. Commission on Civil Rights Condemns Recent State Laws Targeting the Civil Rights of the LGBT Community*. That statement alleged—without evidence—that recent state laws that deal with religious liberty issues are merely using religion as a "guise" or an "excuse" to cover for more earthly motivations. Commissioner Kirsanow's and my response to that Statement is entitled *Statement of Commissioners Gail Heriot and Peter Kirsanow* and can found at: http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf

[14] Note that just as not all Christians agree on same-sex marriage issues, not all gays agree. Furthermore, some are Evangelical Christians themselves, some support RFRA-style laws despite not being religious themselves, and some wouldn't dream of forcing Evangelical Christians who oppose same-sex marriage on religious grounds to cater their wedding. I wish there were more overlap between such groups.

"pre-eminent" over religious liberty. Moreover, it occasionally slips into rhetoric similar to that of Chairman Castro: It assumes a lack of good faith among those who disagree with Commissioner Achtenberg and her colleagues. In doing so, it seeks to make difficult issues seem easy. But they are not.

As to the first point, I have already pointed out that one could just as easily, indeed more easily, make the converse argument from the one Commissioner Achtenberg makes—that religious liberty is preeminent over anti-discrimination laws. See supra at 7. Indeed, at least three arguments point in that direction.

The first is historical. The right to the free exercise of religion was the reason many early settlers came to this county and was the First Freedom to be enshrined in the Bill of Rights. By contrast, most of the anti-discrimination laws referred to by my fellow Commissioners are comparatively recent. This is particularly so for bases for discrimination that Commissioner Achtenberg is concerned with in her Statement—sexual orientation and gender identity. *These are so new that at the federal level they do not exist at all; there are no federal statutes forbidding discrimination on those bases.* There is only a recent 5-4 decision of the Supreme Court holding that the right to marry cannot be denied to same-sex couples. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). That is an astonishingly slim reed upon which to balance a claim of preeminence over religious liberty.

The second argument against any notion of the "pre-eminence" of anti-discrimination laws is based on democratic values. By passing RFRA (and also by passing the RLUIPA), Congress has decided that religious conscience must be accommodated except under the unusual circumstance of a compelling purpose on the part of the government. Our democratically elected representatives put religious liberty first, the opposite of what Commissioner Achtenberg is trying to assert in her Statement. In the case of sexual orientation and gender identity discrimination, Congress has not passed a statute at all. Whatever protections exist come from the other branches of government and sometimes involve rather strained interpretations of the term "sex discrimination."

The third argument proceeds from liberty—that this is a nation that seeks to constrain private conduct only when it is necessary.[15] While laws that require non-discrimination are all about requiring certain conduct even when the individuals who are governed by the law might prefer to act otherwise, laws that protect free exercise are about leaving people to conduct their own lives as they see fit. The latter should be construed broadly, while the former, like all exercises of coercion, should be interpreted with appropriate restraint.

Again, I am open to arguments that, as a matter of sound public policy, the standards set by RFRA, RLUIPA and other RFRA-style laws may be too high or should be more context-specific.

[15] Patrick Henry famously said, "Give me liberty or give me death," not "Prohibit others from discriminating against me or give me death."

One context that I have given some thought to is prisons,[16] where I believe special incentives are at work.[17] These special incentives make it especially important to be mindful of the statutory and

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[16] I elaborated on my views in that area in the Commission's 2008 enforcement report, *Enforcing Religious Freedom in Prison*. One way to illustrate the tricky kinds of problems that can arise there may be the Wotanist prison lawsuits. See, e.g., *Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003)(vacating an entry of summary judgment against Wotanist inmate); *Wood v. Maine Dep't of Corrections*, 2007 U.S. Dist. LEXIS 81146 (D. Me. Oct, 25, 2007)(recommendation of U.S. Magistrate to enter summary judgment against Wotanist inmate), summary judgment entered, 2008 U.S. Dist. LEXIS 42245 (D. Me. May 22, 2008).

Wotanists worship the ancient Norse gods, chief among them Wotan (or Odin). In fact, Wotanists tend to be white supremacists, whose taste in literature runs to racist screeds and violent rants. See *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006)(noting that Wotanism is a religion that "entail the worship of Norse gods" and rejecting Wotanist inmate's claim that RLUIPA guarantees him books like The Temple of Wotan, which Wisconsin prison authorities had found to promote white-supremacist violence). *See also* Mattias Gardell, Gods of the Blood: The Pagan Revival and White Separatism (2003).

The Church of the New Song provides another interesting example. Originally founded as a "game" among prisoners, its adherents have filed more than [a] dozen lawsuits in federal court. *Goff v. Graves*, 362 F.3d 543, 546 (8th Cir. 2004). One court described the Church of the New Song, which goes by the acronym "CONS," as "a masquerade designed to obtain First Amendment protection for acts which would otherwise be unlawful and/or reasonably disallowed…." It reported that members of CONS had (apparently tongue-in-cheek) demanded means of steak and wine as part of their religious regimen. *Theriault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978).

Prison officials, of course, are not required to take a prisoner's word for it when he claims adherence to a particular faith and argues that his free exercise of that faith is being substantially burdened by prison policies. See *Coronel v. Paul*, 316 F. Supp. 2d 868, 881 (D. Ariz. 2004)("The question under the RLUIPA's substantial burden prong, as this Court interprets it, is whether the state has prevented [the plaintiff] from engaging in conduct both important to him and motivated by sincere religious belief"). On the other hand, they may not play favorites in analyzing which religions it will accommodate and which it will not. The fact that a religion is non-traditional or just unattractive to others does not give the authorities carte blanche to ignore it. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion …").

[17] Prisoners tend to have a lot of time on their hands and often don't hesitate to make demands. This can lead to "grievance fatigue" on the part of prison officials that in turn may result in a tendency to err on the side of accommodation. I note that the National Institute of Corrections' reference manual on inmate religious beliefs and practices lists "Odinism/Asatru" along with "Protestant Christianity," "Buddhism," "Islam," and other traditional faiths as religions that prison authorities must deal with on a fairly regular basis. See National Institute of Corrections, Bureau of Prisons, U.S. Department of Justice, Technical Reference: Inmates Religious Beliefs and Practices (Mar. 27, 2003)(hereinafter "Technical Reference"). Among the long list of religious items that such a congregation is permitted to have is "Thor's Hammer." There is some evidence that not all versions of Odinism/Asatrú have the same overtly racist theme that Wotanism tends to have. *See* Southern Poverty Law Center, Behind the Walls: An Expert Discusses the Role of Race-Based Gangs and Other Extremists in America's Prisons, Intelligence Report (Winter 2002), *available at*, http://www.splcenter.org/intel/intelreport/article.jsp?sid=55. Mark Pitcavage of the Anti- Defamation League stated in that interview: "Non-racist versions of Asatrú and Odinism are pretty much acceptable religions in the prisons. But again, if it is a racist version of these religions, then those materials may be prohibited. I should add, though, that a recent law, the Religious Land Use and Institutionalized Persons Act, puts the burden more squarely on prison officials to make their case that particular sects or practices pose threats to security."

One could argue, for example, that the appropriate standard to protect the religious liberty of prisoners should be different from that on the outside. For one thing, outside of prison, the faithful are ordinarily responsible for their own religious activities. They build their own churches and temples, pay their own clergy, and celebrate the sacraments without direct government assistance. All they ordinarily need is to be left alone. In prison, the situation is different. Prisoners need more than just to be left alone to follow their faith; they need the direct and active

legal remedies that are available for aggrieved individuals, since remedies have a profound effect on how statutes are ultimately implemented.[18] But the one thing I feel sure of is that a pat assertion that anti-discrimination laws are "preeminent" over the First Amendment as well as RFRA and RFRA-style laws is not an argument. It is merely triumphalism in the immediate wake of *Obergefell.*

Commissioner Achtenberg's Statement then goes on to discuss pending state and federal legislation, much of which is really outside the scope of this report. But since she describes it in

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cooperation of prison officials. If prisoners are to have chaplains, kosher meals, or even Christmas trees, prison officials must provide for them (and for any extra security these activities may require).

That creates a substantial incentive for prisoners to request things that they would not have provided for themselves on the outside. It also creates an incentive for prison officials to resist even the most reasonable request for religious accommodation in order to protect already strained budgets. Congress has attempted to counteract the latter (but not the former) incentive by imposing a strict standard upon prison officials. They may not place "a substantial burden" on the religious exercise of a prisoner unless the imposition of that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." It is no excuse that the "burden results from a rule of general applicability." The Act itself makes it clear that a prison may be "require[d]...to incur expenses in its own operation to avoid imposing a substantial burden on religious exercise." Religious activity is thus given priority over other uses of time and money. Prison officials must essentially err on the side of greater religious freedom in its rules and regulations.

Courts have ordered prison officials to incur expenses. For example, in *Jackson v. Department of Corrections*, the Court ordered the Massachusetts Department of Correction to "employ an additional Imam" to conduct "weekly jum'ah services" for Muslim prisoners. 2006 Mass. Super. LEXIS 389 23 (Aug. 25, 2006). *See also Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 842 (S.D. Ohio 2001) rev'd on other grounds sub nom. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) rev'd 544 U.S. 709 (2005)("The language of RLUIPA, fairly read, strongly evinces Congress' intent to require the States to fund new, substantial rights….")(internal quotation marks omitted). Other courts have commanded prison officials to furnish special diets for prisoners despite the added costs of doing so. See *supra* n. 8. Moreover, prisons now routinely furnish a wide assortment of special religious items to support worship as well as special security to support a wide variety of religious observances for a wide number of faith traditions ranging from Buddhist to Presbyterian, Rastafarian to Wiccan. Court orders are not required. See Technical Reference.

Not every effort to require prisons to incur expenses to assist in religious free exercise are successful—though every such effort does impose its own costs on prison budgets. See *Smith v. Kylar*, 2008 U.S. App. LEXIS 21341 (3d Cir. Oct. 9, 2008)(affirming trial court's refusal to order prison to provide Rastafarian chaplain where too few inmates were Rastafarian). Efforts to require prisons to construct a sweat lodge for practitioners of traditional Native American religions appear to have often resulted in failure, see, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), but some prisons that had previously declined to provide a sweat lodge have later changed their policy. See *Pounders v. Kempker*, 79 Fed. Appx. 941, 943 n.2 (8th Cir. 2003).

[18] I believe that RFRA and RLUIPA would have to be substantially overhauled if ever the Prison Litigation Reform Act ("PRLA"), 42 U.S.C. § 1997(e), were repealed (or just repealed as it affects RFRA or RLUIPA). It is entirely possible that part of the reason that frivolous and vexatious litigation under RFRA and RLUIPA has not reached greater levels is PRLA, which was in part passed in response to the perception that federal courts had become overwhelmed with frivolous and vexatious litigation. For that reason, in its 2008 enforcement report, *Enforcing Religious Freedom in Prisons,* the Commission made the following recommendation: "We see no reason to provide religious liberty claims with a special exemption from [PLRA's] provisions relating to exhaustion, the limitation on monetary awards absent a physical injury and attorneys' fees." 2008 Report Recommendation 4 at 103. For my discussion of the reasons for that recommendation and conclusion, see Statement of Gail Heriot, *Enforcing Religious Freedom in Prisons* 126-29 (2008).

such emotionally-charged terms, I feel obligated to comment where I can. While I regard some of these bills as good policy, some as in need of tinkering and others as likely misguided, I view Commissioner Achtenberg's general description as overly dramatic. Although I have not been able to review them all, from what I have seen so far, it seems unfair to characterize these bills as a "backlash" against the LGBT community.[19]

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[19] Note that from the standpoint of those who support traditional marriage, the backlash has been against them, not against the LGBT community, and it started a few years ago, not just last summer. They see the various state legislative bills as an effort to stop that backlash, and it is easy to see why they would see it that way.

For them, it began in earnest with the harassment and reprisals experienced by supporters of California's Proposition 8, which amended the California Constitution to overrule the California Supreme Court's decision in favor of same-sex marriage. See, e.g., *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010)(per curiam)(stating that past harassment "substantiated" witness concerns about testifying at a televised trial and noting "71 news articles detailing incidents of harassment related to people who supported Proposition 8"); *Doe v. Reed*, 561 U.S. 186, 205 (2010)(Alito, J., concurring)(noting "widespread harassment and intimidation suffered by supporters of California's Proposition 8); *Citizens United v. FEC*, 558 U.S. 310, 480-83 (2010) (Thomas, J., concurring in part and dissenting in part)(detailing "intimidation tactics" used by Proposition 8 opponents against its supporters). Harassment tactics included acts of vandalism to the homes, cars, and other property of Proposition 8 supporters. Thomas M. Messner, The Price of Prop 8 at 3-4 & nn. 8-12, 15, 17-18 (2009). A number of Mormon houses of worship were vandalized. Jennifer Garza, *Feds Investigate Vandalism at Mormon Sites*, Sacramento Bee (Nov. 14, 2008). A number of donors to Proposition 8 allegedly "has … their employees harassed, and … received hundreds of threatening emails and phone calls." Declaration of Frank Schubert in Support of Defendant- Intervenors' Motion for a Protective Order at 6, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Other supporters of Proposition 8—in this case supporters distributing materials and displaying pro-8 decals—were reportedly "victims of physical assaults such as being spat upon and having hot coffee thrown on them by passengers in passing automobiles." Declaration of Ronald Prentice in Support of Defendant-Intervenors' Motion for a Protective Order at 4, *id.*

Some Proposition 8 supporters were reportedly physically attacked, including one with Yes on 8 campaign signs, who needed stitches after being punched in the face by someone who seized the signs and yelled, "What do you have against gays?" *Attack Outside of Catholic Church Part of "Wave of Intimidation," Says Yes on 8*, Catholic News Agency (Oct. 15, 2008). Others received death threats. Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2- Edged Sword*, N.Y. Times (Feb. 8, 2009). *See also* Editorial, *Prop 8 - Boycott or Blacklist?,* L.A. Times (Dec. 10, 2008)(concluding that "postelection boycott efforts: by "defenders of same- sex marriage" have turned into "a vengeful campaign against individuals who donated" in support of Proposition 8, "usually in the form of pressure on their employers").

There are many more examples. See Brief of Amici Curiae ProtectMarriage.com - Yes on 8, Dennis Hollingsworth, Martin Gutierrez, and Mark Jansson in Support of All Respondents, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

By contrast, the period immediately after Obergefell was relatively quiet, perhaps because supporters of same-sex marriage had won. The major exception was that calls to strip churches that support traditional marriage of their tax exemption began to surface. See, e.g., Harry Bruinius, *Same-Sex Marriage: Will Conservative Religious Colleges Lose Tax Exempt Status?*, Christian Science Monitor (July 1 2015)("'I don't think that a number of these religious schools can reasonably hope to adhere to principles that are clearly in violation of public policy, a la Bob Jones,' say Michael Olivas, law professor and director of the Institute for Higher Education Law & Governance at the University of Houston"); Felix Salmon, *Does Your Church Ban Gay Marriage?: Then It Should Start Paying Taxes*, Fusion (June 29, 2015). If these calls are eventually successful (and that is a big "if"), it will be a major backlash against faithful adherents to traditional marriage.

My point in bringing this up is that civil rights leaders, leaders of the same-sex marriage movement, and leaders of the traditional marriage movement have a responsibility to avoid putting their arguments in exaggerated terms that are likely to inspire lawlessness. Once the cycle begins, it is not always easy to stop.

Commissioner Achtenberg states, **"Threats to civil liberties, cloaked as 'religious freedom' protection bills, are emerging in dozens of states and localities across the nation."** She elaborates by stating:

> "In 2015, twenty-eight state legislatures were already considering more than eighty-five anti-LGBT bills by mid-March. By early 2016, approximately two dozen state legislatures were considering at least that many bills which aim to limit Americans' access to marriage rights, other government services, commercial services, and other aspects of daily life based on 'religious exemption.'"

The source of this allegation is apparently the web site of an advocacy organization—the Human Rights Campaign—that specializes in LGBT issues. Commissioner Achtenberg supplies a URL to a page on that web site that makes the allegation that in 2015 twenty-eight state legislatures were already considering eighty-five anti-LGBT bills by mid-March. Two prominent red buttons are marked "Donate" and "Give Now."

Pending legislation on the Human Rights Campaign web site is described in apocalyptic terms, but seldom in sufficient detail to enable the reader to locate the bill without substantial effort. This is not the kind of source that should be cited in a report of the U.S. Commission on Civil Rights. If there are 85 or more bills out there that raise concern, we should be looking at and citing the actual bills one by one, not the characterizations of those bills by an advocacy organization out to excite potential donors. Since Commissioner Achtenberg does not cite to any of the actual state bills she refers to, it seems unlikely that she has examined them directly. In the short amount of time I had, I tried to examine some of them. But I could not analyze all or nearly all of them given that time. I note again that many of them have nothing to do with the topic of this report.

RFRA-style State Bills: As many as 25 of the bills are described by the Human Rights Campaign as RFRA-style laws.[20] As Commissioner Achtenberg admits herself elsewhere in her

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[20] I have been able to locate some of them. See, e.g, Indiana Senate Enrolled Act No. 1 (available at https://www.documentcloud.org/documents/1699997-read-the-updated-indiana-religious- freedom.html), which was later amended to make clear that it "does not authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to a member to any member of the general public"; Nevada S.B. 272 (available at https://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB272.pdf) , Nevada A.B. 277 (available at https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB277.pdf) (both bills appear to have died in committee); Montana House Bill No. 615, (available at http://leg.mt.gov/bills/2015/billpdf/HB0615.pdf) (bill was defeated); Arkansas Senate Bill 975 (available at https://drive.google.com/viewerng/viewer?url=http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/SB975.pdf); Georgia Senate Bill No. 129 (available at http://rfraperils.com/wp-content/uploads/2014/01/Georga_SB129_Pending_2015_RFRA.pdf)(failed to pass; Governor Nathan Deal later vetoed another religious liberty bill introduced later); Utah S.B. 296 (available at http://le.utah.gov/~2015/bills/static/SB0296.html), which was reportedly praised by the HRC for including language that sought to strike a balance between protecting the interests of LGBT persons and persons of faith (see Dennis Romboy, "Utah, Indiana religious freedom laws not alike," Deseret News National, April 1, 2015 (available at http://national.deseretnews.com/article/3942/utah- indiana-religious-freedom-laws-not-alike.html); Colorado House Bill 15-1171 (available at

Statement, RFRA was a bipartisan effort that passed the Senate 97-3. I am certainly open to reasoned arguments that RFRA-style laws are less than perfect. But to suggest that they are "**thinly-veiled attempts to turn back the clock**" that will **"fall in constitutional challenge as overbroad and motivated by animus,"** as Commissioner Achtenberg does in her Statement, is deeply unfair.[21]

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http://www.leg.state.co.us/clics/clics2015a/csl.nsf/fsbillcont3/3901E9064BFBA38187257DA4000302AA?open&file=1171_01.pdf); South Dakota House Bill No. 1220 (available at http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?File=HB1220P.htm&Session=2015&Bill=HB%201220)(defeated by the House); Oklahoma H.B. 1371 (available at https://www.billtrack50.com/BillDetail/659832); Michigan House Bill No. 5958 (available at http://www.legislature.mi.gov/documents/2013-2014/billengrossed/House/pdf/2014-HEBH-5958.pdf)(passed Michigan's House but stalled in its Senate); Mississippi Senate Bill No. 2681 (available at http://billstatus.ls.state.ms.us/documents/2014/pdf/SB/2600-2699/SB2681PS.pdf); Maine L.D. 1428 (available at http://www.mainelegislature.org/legis/bills/bills_126th/billtexts/SP051401.asp)(rejected by Maine's Senate); West Virginia H.B. 4012 (available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb4012%20intr.htm&yr=2016&sesstype=RS&i=4012)(rejected by West Virginia's Senate.)

Some of these are proposed constitutional amendments that, if passed, would need to be approved by a majority of the state's voters before amending the Constitution. See, e.g., Missouri Senate Joint Resolution No. 39, available at http://www.senate.mo.gov/16info/pdf-bill/intro/SJR39.pdf; Texas H.J.R. No. 55, available at http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HJ00055I.pdf.

Some of these bills closely resemble the federal RFRA. A few have been commonly described as stronger. If Commissioner Achtenberg had problems with particular bills I would have been happy to look at them with her.

Note that several of these bills appear to have died without getting much serious legislative consideration (which tends to be the fate of most bills in both state legislatures and Congress).

[21] An example of a limited-scope, RFRA-style bill is Tennessee's H.B. 1840, which as of this writing had cleared the legislature and is awaiting the Governor's signature. H.B. 1840, which has been unfairly called "Hate Bill 1840," would permit a counselor or therapist with sincerely held principles that conflict with a potential client's "goals, outcomes or behaviors" to decline to offer counseling/therapy to that potential client, ***provided*** *that he or she refers the potential client to someone who will.* It does not apply if the potential client is in imminent danger of harming himself or others.

That anyone would object to this is curious. Few individuals would want a counselor or therapist who objects to their lifestyle. Should a Muslim be required to counsel a gay man who seeks to persuade another gay man to marry him? Should a Roman Catholic be required to help the owner of an abortion clinic work through the day-to-day stresses connected with his business? Should a Jainist be forced to provide therapy for the owner of a slaughterhouse as he discusses how he sends animal after animal to its death?

I can imagine a law that actually *forbids* such a counselor or therapist from working with such a client on the ground of conflict of interest. Under certain circumstances, for example, attorneys may be forbidden from representing a client with whom they may have a conflict of interest. But I have a harder time imagining a legitimate reason for wanting to compel counselors and therapists like those covered by this bill to take on a client whose "goals, outcomes or behaviors" conflict with their "sincerely held religious belief." In a statement adopted by the Commission on April 15, 2016, the majority of my colleagues alleged that this law "is part of an alarming trend to limit the civil rights of a class of people using religious beliefs as the excuse." It seems just the opposite to me. This law decreases the likelihood that a gay individual in need of counseling or therapy will be saddled with a counselor or therapist who disapproves of the way he leads his life.

Another example is the portion of Mississippi's H.B. 1523, which was signed into law by the Governor on April 5, 2016, that deals with same-sex marriage and "sex reassignment" surgery, treatment and related therapy. First, it seeks to ensure that those who have religious or moral objections to same-sex marriage are not forced to participate

How does Commissioner Achtenberg explain why Congressional Democrats massively supported RFRA, despite its being, in her view, not just a terrible law, but an actual "threat[] to civil liberties"? It turns out it is George W. Bush's fault—or so her argument goes. The reader is told that during his administration, the Department of Justice's Office of Legal Counsel ("OLC") issued an opinion that encouraged "an overbroad interpretation of RFRA," causing RFRA to "become highly politicized and a source of discriminatory overreach [that] must be curtailed." Achtenberg at 36.

Her statement does not specify what was in the OLC opinion. We're supposed to take her word for it that it was "overbroad" and has caused RFRA to become "overpoliticized." But by my reading, the OLC opinion she complains of should have been fairly routine for those who take the text of statutes seriously. See Office of the Legal Counsel, Memorandum Opinion for the General Counsel: Office of Justice Programs: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, vol. 31, 1 (June 29, 2007).

The issue concerned World Vision, an Evangelical Christian humanitarian organization founded by the Rev. Robert Pierce, an American Baptist minister, missionary and relief worker. Its web site describes its mission thusly:

> "World Vision is an international partnership of Christians whose mission is to follow our Lord and Savior Jesus Christ in working with the poor and oppressed to promote human transformation, seek justice, and bear witness to the good news of the Kingdom of God.
>
> We pursue this mission through integrated, holistic commitment to:

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in same-sex weddings as wedding planners, photographers, cake designers, etc. This includes state employees with responsibilities for issuing marriage licenses or officiating at weddings (although the bill additionally requires all necessary steps be taken to ensure that the couple's wedding not be imperiled or delayed by such recusals). Similar dispensations (with appropriate limitations) were given to persons with religious and moral objections to participating in sex reassignment surgery, treatment and related therapy. The Act also reaffirms the First Amendment rights of such employees and also adoptive and foster parents to express their views on same-sex marriage, sex outside marriage and the immutability of biological sex.

Note that the purpose of this legislation is not to deny same-sex couples the opportunity to celebrate their weddings (or transgenders access to sex reassignment surgery treatment or related therapy). Same-sex couples have many alternative sources for wedding services. The purpose is to avoid coercing unwilling individuals into participating in something they do not believe in. There are many in this nation with sincere religious and moral objections to same-sex marriage. Denying that, as our colleagues do, is simply a way to pretend the issues that face us as a nation are easy. Toleration is all about leaving people alone to live their lives as they see fit; it is not about forcing people to take part in other people's lives. Whatever it is that my Commission colleagues are standing up for, it is not toleration.

* Transformational development that is community-based and sustainable, focused especially on the needs of children.

Emergency relief that assists people afflicted by conflict or disaster.

* Promotion of justice that seeks to change unjust structures affecting the poor among whom we work.

* Partnerships with churches to contribute to spiritual and social transformation.

* Public awareness that leads to informed understanding, giving, involvement, and prayer.

* Witness to Jesus Christ by life, deed, word, and sign that encourages people to respond to the Gospel."

http://www.worldvision.org/about-us/who-we-are#sthash.wsZ2ZwaP.dpuf

In other words, World Vision's team does the kind of work that most of the rest of us only dream of doing. And they do it for the greater glory of their Creator. I distinctly remember during the Ethiopian famine of the mid-1980s, a newspaper reported that there were only two relief organizations getting through to the hinterland, where food and supplies were needed most—World Vision and Catholic Relief Services. Why? Unlike their secular counterparts, they had a ground game—networks of Evangelical Christians and Roman Catholics respectively—who knew the terrain and were willing to risk their lives to perform what they saw as their duty as Christians. Their trucks rolled, while the materials brought in by other famine relief organizations languished in airports, railway depots, and cities.[22] My respect for both organizations is boundless. I wept off and on for days thinking of their heroism.[23]

But guess what? World Vision hires only practicing Christians who believe in its statement of faith.[24] World Vision has even dismissed employees who turned out to be non-

[22] Despite my very vivid recollection of this article, which I suspect ran in the Washington Times, I have been unable to find it. But a few other articles I have found collectively convey the substance of the story. See Clifford May, *U.S. Will Give Development Aid to Ethiopia*, N.Y. Times, May 9, 1985, available at http://www.nytimes.com/1985/05/09/world/us-will-give-development-aid-to- ethiopia.html; Rhonda Givens, *Pennies, Dimes, Dollars: World Vision Takes in Millions to Aid the Starving*, L.A. Times, Feb. 24, 1985, available at http://articles.latimes.com/1985-02-24/news/ga-24806_1_world-vision.

[23] It brought to mind the lyrics of John Bunyan's well-known hymn, He Who Would Valiant Be:

No foes shall stay their might,
Though they with giants fight.

John Bunyan, *He Who Would Valiant Be*, English Hymnal (1906)(mutatis mutandis).

[24] Spencer v. World Vision, Inc., 633 F.3d 723, 736 (9th Cir. 2010).

believers.[25] Put differently, its leaders discriminate on the basis of religion. They believe it is their Christian mission that unites them and makes them strong. No one with the gift of wisdom would doubt them on this.

Among World Vision's many other humanitarian projects is its Vision Youth Program, which seeks "'to transform the lives of high-risk young people in eight locations across the country' by facilitating 'one-on-one mentoring, educational enhancement, and life-skills training for at-risk children and youth.'" OLC Op. at 2, quoting World Vision Grant Application. It was this project that gave rise to the OLC's need to interpret RFRA. World Vision sought and received a government grant pursuant to the Juvenile Justice and Delinquency Prevention Act, which is administered by the Department of Justice's Office of Justice Programs, for its Vision Youth Program.

Grants made pursuant to the Juvenile Justice and Delinquency Prevention Act are subject to 42 U.S.C. § 3789d(c), the nondiscrimination provision of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Safe Street Act"), Pub. L. No. 90-351, 82 Stat. 197. That provision of the law states, "No person … shall on the ground of … [among other things] religion … be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter."

Unlike Title VII, the Safe Streets Act has no explicit section exempting religious organizations from its prohibition on religious discrimination. But RFRA applies. The OLC agreed that applying the anti-discrimination prohibition would impose a "substantial burden" on World Vision's religious exercise and that the burden was not "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Consequently, World Vision did not have to give up its identity in order to qualify for a federal grant.[26]

Who would have argued that World Vision's religious mission was not substantially burdened by requiring it to hire atheists? I have a hard time imagining. Those who will brook no challenge to the plenary power of the State? Those who are out to weaken all institutions that function as counterweights to the centralized power of the State?[27] Or maybe those driven to

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[25] *Id.* at 725 (9th Cir. 2010) ("In 2006, World Vision discovered that the Employees denied the deity of Jesus Christ …. As this was incompatible with World Vision's doctrinal beliefs … the Employees were terminated.").

[26] Note *Smith* involved a government subsidy too.

[27] At an earlier point in my life, I would have maintained that almost no American was interested in weakening the numerous institutions that we collectively call "civil society," each of which in its own way contributes to the health of the nation as a whole precisely because it is not part of the government and therefore does not make use of coercive power. Now I am not surprised when I learn that a popular Presidential candidate opposes private charity:

> "I don't believe in charities," said Mayor [Bernard] Sanders, bringing a shocked silence to a packed hotel banquet room. The Mayor, who is a Socialist, when on to question the "fundamental

distraction by the notion that somewhere there is a party that they are not invited to? I cannot say. I believe that OLC got it right with its conclusion that it would substantially burden an Evangelical Christian humanitarian relief organization to be required to hire non-believers.[28]

Commissioner Achtenberg's suggestion that it is only because of OLC's World Vision opinion that RFRA has become a problem is thus off-base. It is a handy explanation for why RFRA was so uncontroversial among Democrats and Republicans alike in 1993, but is now anathema to right-thinking Progressives. But it simply doesn't fit the facts. Whether one was initially a fan of RFRA or not, all this was implicit in the standard in 1993.

The real story is likely driven by political convenience. RFRA was fine when it protected Native Americans who had been fired from their jobs at a private drug rehabilitation clinic for using peyote in the course of a Native American religious ceremony. For years, the ACLU and other left-leaning organizations were happy to represent plaintiffs in lawsuits brought pursuant to RFRA and RFRA-style state laws. But the case of the Indiana bakers who, motivated by their understanding of Biblical teachings, declined to create a cake to celebrate the commitment ceremony of a gay

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concepts on which charities are based" and contented that government, rather than charity organizations, should take over responsibility for social programs.

Albin Krebs & Robert McG. Thomas, *Notes on People: Some Disunity Along the United Way*, N.Y. Times (Sept. 19, 1981).

[28] The answer to the question, "Is the Pope Catholic?" used to be considered obvious. Perhaps if those who those who believe the OLC Opinion has caused RFRA to "become highly politicized and a source of discriminatory overreach [that] must be curtailed" get their way, it will not be so obvious. The Roman Catholic Church will be just one more civil institution that needs to be reduced to utter conformity with the will of the State.

couple, doesn't appeal to them.[29] The bakers' actions were considered by them to be intolerant and intolerable.[30]

When it comes to discrimination, the real question is evidently whose ox is being gored. That raises the question of what my colleagues would have thought if the roles had been somehow reversed: What if a same-sex couple owning a videography business had been asked to be the videographers for a meeting of the Christian Association to Limit Marriage to Opposite-Sex Couples? Or a Muslim baker had been asked to design a cake making fun of Mohammad? Or a woman baker had been asked to bake a sexually-explicit cake for a gathering of Hustler Magazine subscribers? Under those circumstances, not only would many left-of-center groups continue to support RFRA-style laws, they would argue that they don't go far enough (because the bakers' objections in my hypotheticals are not all faith-based).

The outrage machine that has been cranked up since *Obergefell* against RFRA-style laws in states like Indiana and Georgia has been astonishing given the near-unanimity of Congress at the time of RFRA's initial passage. These laws are not, as Commissioner Achtenberg puts it, of **"[t]hreats to civil liberties, cloaked as 'religious freedom.**'" Nor are they an "**effort to eviscerate nondiscrimination protections**." Achtenberg at 33, 152. It's a shame the rhetoric has gotten so out of hand.

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[29] The owners of 111 Cakery were husband and wife and members of a Baptist church. They had a policy of not creating a custom cake with a message related to alcohol, drugs or violence. When asked to create a custom cake to celebrate a same-sex commitment ceremony, they declined, saying they would be happy to help the couple with anything else. Their business was located in a neighborhood with many same-sex couples, and the owners did not decline to serve same-sex couples seeking to purchase a cake for other reasons. In explaining their decision, they wrote: "Why are we doing what we do? We want to show the love of Christ. We want to be right with our God, but we also want to show kindness and respect to other people." See *Owners Who Refused Cake for Gay Couple Close Shop*, Christianity Today (March 3, 2015); Will Higgins, *Owners Who Refused Cake for Gay Couple Close Shop*, USA Today (Feb. 27, 2015); Yvonne Man, *Same-Sex Couple Denied Cake by Bakery; Owners Speak Out*, Fox59.com (March 14, 2014).

In Oregon, a similar story unfolded with a slight twist. Aaron and Melissa Klein, owners of Sweet Cakes by Melissa, had declined to design and bake a cake for the wedding of Rachel Cryer and Laurel Bowman, a lesbian couple. Oregon had (and continues to have) an applicable law that prohibits discrimination on the basis of sexual orientation, and the couple who sought the cake decided to file a complaint with the Oregon Labor Commission and were eventually awarded $135,000 in damages. George Rede, *Sweet Cakes Final Order: Gresham Bakery Must Pay $135,00 for Denying Service to Same-Sex Couple*, Oregonlive.com (July 2, 2015). Again in this case, the Kleins had not declined to sell baked goods to Ms. Cryer and Ms. Bowman, but, citing their religion, they did not wish to put their creative talents to work in a way that, in their view, appeared to specifically condone same-sex marriage.

[30] The argument is made that the RFRA claim in the Indiana bakery case should fail, because the State has a "compelling governmental interest" in ensuring that no one is ever discriminated against on account of race, color, sex, religion, national origin or sexual orientation. Tell that to Barbara Grutter. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court held that the University of Michigan may discriminate against Asians and whites in order to obtain the racial mix of students the University prefers. Why didn't the federal government have a compelling governmental interest to ensure that the ban on race discrimination in Title VI of the Civil Rights Act of 1964 be enforced there? *Grutter* involved discrimination by a state university—making it a much stronger case for race-neutrality than the Indiana bakery case.

Nelson Mandela once said, "When a man is denied the right to live the life he believes in, he has no choice but to become an outlaw."[31] RFRAs and RFRA-style laws are intended to avoid such outcomes. I don't think it helps for my colleagues to insist that this is not really an issue of religious freedom. It is always tempting to view one's ideological adversaries as simply scoundrels or hypocrites. Those with political clout can feel good about just mowing those who disagree with them down. It's so much easier than beginning the slow and meticulous process of engagement. But the right thing to do is often the more difficult thing to do. And this case is no exception: Try to persuade them you are right, and be open to the possibility that sometimes they are right and might persuade you instead.

Reasonable people may disagree both on how extensive anti-discrimination laws should be and how far protections of religious liberty should go. They may draw distinctions between cases that involve race, cases that involve sex and cases that involve sexual orientation. They may draw distinctions between public and private conduct or between the conduct of monopoly services and services, like the Indiana bakery case (and the similar case in Oregon) where alternatives exist for those seeking services. But when opponents of these laws shriek that the other side's true intent is only "cloaked as 'religious freedom'" and that the other side's real project is to "eviscerate" anti-discrimination laws, they are being unfair and unreasonable.

State Bills Concerning Adoption Agencies: Some of the bills referred to by the Human Rights Campaign involve adoption services. According to the Human Rights Campaign, these bills "attack adoption" and place "[p]rospective parents" "at risk of rejection for reasons completely unrelated to their ability to parent a child." In fact, they don't affect anyone's "right" to adopt (assuming that anyone has the right to adopt a child). They simply affect whether certain faith-based adoption agencies can exist as an option.

I have located the three bills on this topic collectively signed into Michigan law on June 11, 2015.[32] Together they codified Michigan's already-existing practice of allowing faith-based adoption agencies to decline to provide adoption services when to do so would conflict with that faith. The main operative clause states:

> (2) To the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing

[31] E.g., Philip Gourevitz, *Nelson Mandela*, The New Yorker (Dec. 16, 2013)(quoting Mandela).

[32] Mississippi's H.B. 1523, signed into law by the Governor on April 5, 2016 is another example. Among other things, it deals with the adoption issue, *available at* http://index.ls.state.ms.us/isysnative/UzpcRG9jdW1lbnRzXDIwMTZccGRmXGhiXDE1MDAtMTU5OVxoYjE1MjNpbi5wZGY=/hb1523in.pdf.

> agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency.

Pub. L. 53 (2015), codified at Mich. Comp. Laws 722.124e.

The new Michigan law then went on to improve matters from the standpoint of anyone an agency declines to serve by requiring that agency to provide referrals.

> (4) If a child placing agency declines to provide any services under subsection (2), the child placing agency shall provide in writing information advising the applicant of the department's website, the Michigan adoption resource exchange or similar subsequently utilized websites, and a list of adoption or foster care service providers with contact information and shall do at least 1 of the following:
>
> > a) Promptly refer the applicant to another child placing agency that is willing and able to provide the declined services.
> >
> > b) Promptly refer the applicant to the webpage on the department's website that identifies other licensed child placement agencies.

Pub. L. 53 (2015), codified at Mich. Comp. Laws 722.124e.

There is a tragic story behind laws like Michigan's. A decade ago, Catholic Charities of Boston was forced to close down its adoption service as a result of the lack of such a law in Massachusetts. See Jeff Jacoby, *Adoption Flap a Tragedy for Children*, Boston Globe (March 5, 2006); Jeff Jacoby, *Kids Take Backseat to Gay Agenda*, Boston Globe (March 15, 2006).

Catholic Charities was well-known in New England for its success in placing hard-to-place children—those with physical handicaps or behavioral problems—in loving homes. But in 2003, a Vatican office headed by then-Cardinal Joseph Ratzinger (later Pope Benedict XVI) prohibited the practice of allowing gay couples to adopt children, calling it "gravely immoral," a form of "violence" that places children "in an environment that is not conducive to their full human development." This conflicted with Massachusetts law, which prohibited organizations that work under contract with the state, presumably including adoption agencies, from discriminating in any way on the basis of sexual orientation.

Catholic Charities sought a statutory dispensation for faith-based adoption services. The Massachusetts legislature, having been heavily lobbied by advocacy groups, refused to grant such a dispensation. As Jacoby put it:

> The church's request for a conscience clause should have been unobjectionable, at least to anyone whose priority is rescuing kids from foster care. Those who spurned that request out of hand must believe that adoption is designed primarily for the benefit of adults, not children. The end of Catholic Charities' involvement in

> adoption may suit the Human Rights Campaign. But it can only hurt the interests of the damaged and vulnerable children for whom Catholic Charities has long been a source of hope.

Id.

Note that the advocacy group cited by Jacoby—the Human Rights Campaign—is the same group whose research was relied upon by Commission Achtenberg when she characterized these bills as "threats to civil liberties, cloaked as 'religious freedom' protection bills." The Human Rights Campaign thought Catholic Charities, operating under rules from the Vatican it could do nothing about, was a threat to civil liberties. It didn't matter that anyone who couldn't adopt through Catholic Charities could easily go to one of the other adoption agencies. More tellingly, it didn't matter that Catholic Charities had greater successes placing children with disabilities and behavioral problems than other agencies.

Miscellaneous State Bills that Do Not Involve Issues of Religious Liberty: The rest of the bills alluded to by Commissioner Achtenberg have nothing to do with the subject of this report, so

I will address them only briefly.[33] Many of them affect only transgender[34] issues rather than LGBT issues more generally.[35]

[33] The most talked-about bill in the press may be North Carolina's H.B. 2, which was signed into law by the Governor on March 23. See Tal Kopan and Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN.com (Mar. 24, 2016), *available at* http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/.

One unusual aspect of the North Carolina bill that has drawn criticism is the fact that it appears to take away from local governments the power to promulgate ordinances banning discrimination in employment as well as a few other areas. To understand this aspect of the bill, one must first understand something about North Carolina's system of local government and its Constitution, which was adopted in 1971, much too early to be a deliberate effort to thwart the policy objectives of LGBT advocacy organizations.

North Carolina is one of the few non-home rule states. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. Rev. 1983, 2003 (2006). Among other things, the North Carolina Constitution does not permit the state or local governments to enact ordinances governing labor and employment in a local area. See N.C. Const. art. II, § 24; *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E. 2d 415 (2003). This was an effort—by creating a single set of laws governing employment—to create a business climate that would produce more jobs for North Carolinians. In the past, some local governments made efforts to circumvent the policy by imposing labor and employment requirements on their public contractors. That practice was then prohibited by the North Carolina legislature, which was also keen to prevent North Carolina from becoming a patchwork of different ordinances.

H.R. 2 was triggered by a City of Charlotte ordinance that was seen as another effort by a local government to create that patchwork. Adding to North Carolina's discomfort was the fact that the ordinance passed at the same time that city governments in other parts of the country were raising the minimum wage to what many regard as unsustainable levels. The legislature feared that this could result in substantial job loss to North Carolinians.

Interestingly, the Charlotte City Council had not attempted to prohibit discrimination on the basis of "marital status, familial status, sexual orientation, gender identity, and gender expression" *in employment*, since it was fairly clear it had no such power. Nor did it attempt to circumvent that policy by *imposing labor and employment requirements on their public contractors*, since it was fairly clear it had been statutorily prohibited from that too. Instead, it came in at a slightly different angle by attempting to impose requirements that its contractors refrain from discriminating on the basis of "marital status, familial status, sexual orientation, gender identity, and gender expression" *in their other business dealings*, including their dealings with their suppliers and other customers (regardless of whether those contractors were located in Charlotte or elsewhere). Note the problem here: If cities have the authority to place requirements on contractors in this way, contractors located in Raleigh or in Chicago could be required to follow Charlotte law. What happens if the local law in Raleigh or in Chicago requires something entirely different? What, for example, if another city requires family discounts while Charlotte law apparently forbids them?

The patchwork that North Carolina wanted to avoid was re-asserting itself. Among other things, therefore, H.B. 2 re-asserted that the state legislature and not localities controlled labor and employment law, including wage and hour law and employment discrimination law. This was not a change in the law, except to clarify what was already obvious—that its previous law against sex discrimination concerned biologically defined sex.

Athletic Teams: Some of these bills will, if passed, define who is eligible for girls' teams at elementary and secondary schools and who is not. In a better world, I might have preferred to leave this issue to local coaches, teachers, principals and school boards. But given the aggressive stance taken on transgender issues by the U.S. Department of Education's Office for Civil Rights ("OCR"), I am not surprised that state legislatures have been tempted to intervene. OCR has strong-armed at

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Might North Carolina prohibit employment discrimination on the basis of "marital status, familial status, sexual orientation, gender identity, and gender expression" or some subset of those bases at some point in the future? It is always possible. Shortly after H.B. 2's passage, the Governor, in what might have been intended as a gesture of good will given the panic in the LGBT community, issued an executive order banning sexual orientation and gender identity discrimination in state government employment. But first and foremost, H.B. 2 was about hurriedly re-asserting the state government's authority and its policy against legal patchworks. In addition to re-asserting that local governments cannot regulate labor and employment either directly or through public contracts, the legislature pushed back on local governments' efforts to regulate contractors' other business dealings and its efforts to regulate the business dealings of businesses open to the public. Note that the latter move actually expanded the reach of anti-discrimination law. Prior to that, there had been no North Carolina law requiring businesses open to the public to serve all comers, regardless of race, religion, color, national origin or biological sex. Now there is. (Federal law—Title II of the Civil Rights Act of 1964—prohibits discrimination by public accommodations on the basis of race, color, religion or national origin. But a "public accommodation" is defined narrowly to include such things as hotels, restaurants and places of public entertainment. The North Carolina law's coverage is now broader and includes ordinary retail establishments.) For a discussion of other aspects of the North Carolina bill, see infra at n.41; Statement of Commissioners Gail Heriot and Peter Kirsanow, *available at* http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf.

[34] Confused by the term "transgender"? Lots of people are. These days it is used as an umbrella term. Some use the circular definition that anyone who considers himself or herself to be transgender is transgender. A more helpful definition would be that anyone who was born into one sex, but who psychologically identifies with the other sex (or some third alternative or combination of alternatives) is transgender. A transgender is not necessarily a transsexual in the sense that not all transgenders have had surgical alteration of their genitalia. Indeed, few have undergone such procedures. Not all (or even most) transgenders have had any kind of hormonal treatment. Some go out of their way at all times to dress and speak in a manner more traditional for the sex they identify with than with the sex they were born into. Others do so only on occasion or only partially. Not all transgenders are "gay" (in the sense of attracted to persons of the same sex they were anatomically born into). Indeed, according to the famed Kinsey Report, only a rather small percentage of "transvestites" (i.e. individuals who prefer to dress as the opposite sex at least sometimes) are also homosexual. Alfred Kinsey, et al., Sexual Behavior in the Human Female 680 (1953), cited in *Trapped in Sing Sing* at 511. According to a study conducted by UCLA's Williams Institute and the American Foundation for Suicide Prevention, of the over 6000 respondents to the National Transgender Discrimination Survey, 21% identify as "Gay/Lesbian/Same-Gender Attraction," 23% as "Bisexual," 20% as "Queer," 21% as "Heterosexual," 4% as "Asexual," and 11% as "Other." See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* 5 (January 2014).

[35] See Florida House Bill 585, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0583.docx&DocumentType=Bill&BillNumber=0583&Session=2015. Contrary to the Human Rights Campaign's web site, it does not require restroom surveillance. Some bills like Massachusetts House Bill 1320, *available at* https://legiscan.com/MA/text/H1320/2015, cover both restrooms and athletic programs. Contrary to the Human Rights Campaign's web site, the Massachusetts bill does not criminalize the use of a women's rest room by an anatomical male, but self-identified female. Rather, it simply states that use of such facilities is to be determined by one's anatomical sex rather than one's gender identity. See infra at n. 43.

least one school into allowing an anatomically intact male student who psychologically identifies as female to change in the girls' locker room.[36]

S.F. 1543 (Minnesota), for example, states in pertinent part:

> Subd. 2. **Female teams; male participation.** When an elementary or secondary school establishes a team for students of the female sex, students of the male sex may not try out for or participate on that team. For purposes of this section, "sex" means the physical condition of being male or female, which is genetically determined by a person's chromosomes and is identified at birth by a person's anatomy.

H.B. 1112 (South Dakota) is similar, but also contains significant differences:

> Section 1. The board of directors of the South Dakota High School Activities Association may not adopt any transgender policy. The sole determinant of a student's sexual identity is the sexual identity noted on the student's certificate of birth. If no sexual identity is noted on the student's certificate of birth, the sole determinant is the sexual identity noted on the South Dakota High School Activities Association physical exam form that is completed by a health care professional at the student's physical examination. Any transgender policy adopted by the board of directors prior to this Act is hereby declared void.

Note one interesting difference between the bills. The Minnesota bill covers cases in which "an elementary or secondary school establishes a team for students of the female sex." This might be interpreted to leave schools the authority to establish a team explicitly for females *and* male-to-female transgenders or indeed transgenders of any description. I have no idea if that was intended. The South Dakota bill leaves less wiggle room. South Dakota appears to require the South Dakota High School Activities Association to define teams by sexual identity as noted on the student's certificate of birth rather than some alternative way. In the excruciatingly rare circumstance under which an individual's sex is not noted on his or her birth certificate, the bill appears to contemplate that anatomy will control.

Neither of these can be characterized as "**[t]hreats to civil liberties, cloaked as 'religious freedom' protections bills.**" They have nothing to do with religious freedom. They are simply an honest effort to deal with the sex/gender issue that has emerged, much to the surprise of many, in the last few years.

These days we are repeatedly told that an individual's "gender identity" may be different from his or her sex. While that individual may have been born with the anatomy of one sex, he or

[36] See, e.g., Letter of Peter Kirsanow and Gail Heriot to the Honorable Trent Franks, December 15, 2015 (discussing a resolution agreement with an Illinois school district that required a male-to-female transgender student to be permitted to change in the girls' locker room.)

she may identify psychologically with the opposite sex or even with some non-binary alternative. But, if so, that just raises the question of which sports team such a person should be assigned to. It doesn't answer that question.

So allow me to pose it again: Should a student with a intact boy's physical body (sex) but who psychologically feels like a girl (gender identity) be assigned to a sports team based on sex or on gender identity?

The supporters of S.F. 1543 and H.B. 1112 apparently believe that physical body (sex) should be determinative of athletic team eligibility. There is a lot to be said for that approach. We have traditionally separated boys from girls in high school athletics for two reasons. First, we do it to ensure that girls, whose average size, strength and speed tends to be a cut below the average boy's, will nevertheless have opportunities for athletic competition. Second, in contact sports, we sometimes do it for sexual privacy.

The best example of why transgendered individuals should play on teams with fellow members of their sex rather than members of the sex they psychologically identify with is the winner of the decathlon at the 1976 Summer Olympics in Montreal. This is not just a pretty good athlete who could have made his varsity football team at his high school, this is the *world's greatest athlete* of 1976. Bruce Jenner may have felt inside that he was a woman, but his body was doing things that no woman's body has ever done. In 2015, Jenner became openly transgender, and now wishes to be known as "Caitlyn." Fine. But Caitlyn is still 6 feet, two inches tall and still weighs nearly 200 pounds, with shoulders, arm length and other relevant measurements that are more typical of a man than of a woman. With the exception of modest surgery to reduce the appearance of an Adam's Apple and supplemental estrogen treatments, Caitlyn is an intact anatomical male. Caitlyn is also on record as having a sexual orientation more typical of males (i.e. a sexual attraction to

women, not men).[37] Sexual privacy considerations would therefore have cut in favor of assigning a young Caitlyn to the boys' teams in high school on both grounds.[38]

The notion that gender is not binary further complicates the issue. See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, The Sciences 20 (March/April 1993); Darren Rosenblum, *Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & Law 499, 503 (2000) ("Although most people accept that there are two sexes, "male" and "female," these categories actually contain a myriad of genders, formed genetically, biologically, and culturally"). If gender were determinative of sports team eligibility, schools would need to field a whole range of teams, rather than just a boys' and a girls' team.

According to the National Transgender Discrimination Survey conducted by UCLA's Williams Institute, 31 percent of transgender respondents identified either strongly (10 percent) or somewhat (21 percent) with the identity "Third Gender."[39] Since no school can float a different

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[37] Did you notice that once I got to Caitlyn as opposed to Bruce I stopped using pronouns? Yes, Caitlyn prefers feminine pronouns and under other circumstances I might have been more inclined to indulge an individual's preference in these matters. The problem is that a remarkable number of people have started to actually believe that a man who dons women's clothes and undergoes hormone treatment is, in some significant sense, a woman. Still others—notably the New York City Commission on Human Rights ("NYCCHR)"—believe it is appropriate to legally require employers, landlords and owners of public accommodations "to use an individual's preferred name, pronoun, and title (e.g., Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification." As a result, the intentional or repeated refusal to do so can now result in fines as high as $250,000 in New York City. NYCCHR further states:

> "Most individuals and many transgender people use female or male pronouns and titles. Some transgender and gender non-conforming people prefer to use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir."

NYC Commission on Human Rights, Legal Enforcement Guidance on the Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23) 4 (Dec. 21, 2015).

Voluntarily indulging an individual's eccentricities can be a good thing, whether those eccentricities are connected to the individual's sex or to some other characteristic. Indeed, such indulgences can add to life's charm. Cf. William Drury, Norton I, Emperor of the United States (1986). Mandating that an employer, landlord or business owner address an employee, tenant or customer as if he is something he is not, on pain of a $250,000 fine, is quite another thing. And the notion that an employer, landlord or owner of a public accommodation can be forced to use pronouns that are alien to the English language like ze/hir is abhorrent.

Even during the French Revolution's Reign of Terror, when Robespierre's Committee on Public Safety banned traditional titles like "Madame" and "Monsieur" and required instead the use of "Citoyen" and "Citoyenne" (i.e. "Citizen" and "Citizeness") as titles, no one tried to force new-fangled pronouns on unwilling persons. Proper nouns weren't considered sacred: Robespierre and his compatriots changed the names of the months of the year, the days of the week and many other things. But they didn't just make up pronouns.

I believe that I have an obligation to refrain from contributing to the confusion, especially given that this is a government report.

[38] Buzz Bisinger, Caitlyn Jenner: The Full Story, Vanity Fair, June 25, 2015, *available at* http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz.

[39] See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 6 (January 2014).

team for all the gender choices that seem to be in fashion these days, going with sex as determined at birth may well be the best and most practical rule. See, e.g., Sam Escobar, *I'm Not Male I'm Not Female. Please Don't Ask Me About My Junk*, Esquire (March 31, 2016); Ernie Grimm, *My Gender is Bunny*, San Diego Reader (March 25, 2009). I note that the number of high school and middle school transgenders who have received surgery in order to have their anatomy appear more like the sex they psychologically identify with is vanishingly small.[40]

The argument for allowing schools more discretion is somewhat appealing to me. More discretion would allow decision makers who are closer to each situation to make these choices. Suppose a young boy is physically small, delicate and psychologically identifies as female. As a result, he is bullied by the boys. Is it inappropriate for a teacher to allow him to play on the middle school girls' team instead of the boys' team, when the girls engaged in the competition welcome him? I certainly don't think so. But I also don't think that state legislation aimed at a once-size-fits-all solution constitutes a "backlash" against the LGBT community.

This is especially so given that these decisions need to be made at the league level, since they involve competition and no individual team should be allowed to give itself an advantage in this way. Moreover, particularly in today's political climate, I can see why teachers would prefer a hard and fast rule they must follow rather than have to deal with conflicting demands on the subject (even if OCR had not already raised the issue). We live in a world in which many issues are resolved in favor of those who scream the loudest and most insistently rather than in favor of principle, practicality or even majority sentiment. The result—predictably—is a cacophony of escalating demands. This in turn leads traditional decision makers (in this case coaches, teachers, principals, and school boards) to yearn for an easy answer: *My hands are tied; the higher ups have commanded me to follow their rules*. The result is that there are no counterweights to the tendency toward the centralization of power. In this case, when the Department of Education or when state legislatures attempt to bind local schools to a "one size fits all rule," there is less push back from the schools than there might otherwise be. The result has been a poisonous concentration of power at the center.

Use of Restrooms: Many of the state legislative bills referred to by Commissioner Achtenberg prohibit the use of women's restrooms set by men (and vice versa).[41] They are controversial only

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[40] Note also that different individuals have different onsets of "gender dysphoria," which complicates the issue yet again. In a recent study in Finland, the authors describe both childhood-and adolescent-onset gender dysphoria. See Riittakerttu Kaltiala-Heino, Maria Sumia, Marja Työläjärvi & Nina Lindberg, *Two Years of Gender Identity Service for Minor: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development*, 9 Child & Adolescent Psych. & Ment. Health 9 (2015).

[41] Again, the most talked-about such bill has been North Carolina's H.B. 2, which in addition to the provisions discussed *supra* at n.33, had provisions dealing with restroom assignment. There is no doubt this bill was passed in a hurry. Part of the reason for haste stemmed from the City of Charlotte's strange treatment in its ordinance of restrooms in businesses open to the public. The Charlotte ordinance repealed a provision of the Charlotte Code that allowed businesses to maintain sex-segregated "[r]estrooms, shower rooms, bathhouses and similar facilities which

because they group transgenders with their biological/anatomical sex rather than with the sex they psychologically identify with—something that would have seemed ordinary and unobjectionable a decade or so ago, but which has become anything but uncontroversial. According to the Human Rights Campaign web site cited by Commissioner Achtenberg, this is the primary form the anti-transgender bills it complains of take.[42]

It is very unlikely any of these bills would have been drafted in the absence of actions like that of OCR in requiring the use of the girls' locker room for changing by an anatomically intact boy who psychologically identifies as a girl or like that of the City of Charlotte's ordinance.[43]

I note that such proposals appear to be quite popular.[44] Is that because the public is "**motivated by animus**" against transgenders? Or that the public is complicit in "**thinly-veiled attempts to turn back the clock**" as Commissioner Achtenberg alleges? I don't think so. While not all of them are well-drafted to accomplish what I believe to be their aim, none strike me as anything but honest efforts to deal with an issue. In theory, one can imagine separate restrooms

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are in their nature distinctly private." The intent seems to have been to allow transsexuals and perhaps transgenders to use the restrooms of their choice rather than the ones intended for members of their biological sex. In doing so, the City Council seems to have eliminated the ability of these businesses to maintain separate restrooms for men and women *at all*. This appears to be a case of very poor drafting.

Under H.B. 2, the maintenance of sex-specific multi- or single-occupancy restrooms and changing facilities by businesses open to the public is declared not to constitute illegal sex discrimination. Weirdly, few seem to have noticed that such businesses can still *choose* to designate its restrooms and changing rooms by "gender" rather than biological sex if they if what they desire to do. Because North Carolina doesn't prohibit "gender identity" discrimination in the first place, there was no need to declare in H.B. 2 that the maintenance of separate restrooms and changing facilities based on gender identity does not constitute illegal gender identity discrimination.

For the reasons I discussed in the section on Mississippi law above, I do not believe gender-specific as opposed to sex-specific restrooms and changing facilities work well in the typical case, since they make it difficult to prevent voyeurs and pranksters. But it's not up to me. Under North Carolina law, business owners are not prevented from creating gender-specific facilities. (In other words, the law is back to where it was before the City of Charlotte effectively prohibited both sex-specific *and* gender-specific facilities.)

By contrast, H.B. 2 does require multi-occupancy restrooms and changing facilities in public schools and government offices to be designated by "biological sex, " defined as "the physical condition of being male or female, which is stated on a person's birth certificate," rather than gender. Again, I believe there are good and sufficient reasons for designating private facilities in this manner (and it is certainly what most people understood the custom to have been for as far back as anyone can remember). The tough case is the transsexual—one whose anatomy has been altered to better reflect the individual's preferred status. I note that, unlike Kansas, North Carolina does alter birth certificates after surgery of that kind has occurred.

[42] I note that these bills are being proposed to deal with sexual privacy concerns and not religion and thus they are not properly part of this report. But since Commission Achtenberg has brought them up, I believe I need to respond.

[43] For the OCR action, see *supra* at n. 36; for the City of Charlotte's ordinance, see *supra* at 41

[44] An effort to repeal a Houston transgender-rights ordinance that was thought to give transgenders the right to use the restroom of their choice, rather than the one that corresponds to their actual sex, passed overwhelmingly. Valerie Richardson, Houston "Bathroom Bill" Rejected by Voters, Washington Times (Nov. 3, 2015), available at http://www.washingtontimes.com/news/2015/nov/3/houston-bathroom-bill-rejected-voters/?page=all.

based on sex or separate restrooms based on gender. For reasons that most Americans agree with, these bills choose sex as the deciding factor.

South Dakota's H.B. 1008 is actually quite modest.[45] It applies only to public schools. The rules applicable to private facilities will continue to be set the way they always have been—by the owner/occupier of the property involved—and enforceable in the way they have always have been—through criminal and/or civil actions in trespass. H.B. 1008 states in full:

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[45] Some of the other state bills are more far-reaching. In Massachusetts, H.1320 would state in full:

An Act relative to privacy and safety in public accommodations. Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

> Section 1. Section 7 of chapter 4 of the General Laws, as appearing in the 2012 Official Edition, is hereby amended by adding the following clause:
>
> Fifty-ninth, The meaning of "gender identity" shall be distinct from that of "sex" and "sexual orientation." Access to lawfully, sex segregated facilities, accommodations, resorts, and amusement, as well as educational, athletic, and therapeutic activities and programs, shall be controlled by an individual's anatomical sex of male and female, regardless of that individual's gender identity."
>
> https://malegislature.gov/Document/Bill/189/House/H1320.pdf

As I interpret this bill, it applies to restrooms that are sex-segregated, whether on public or private property. It would assign an individual who has had the surgery necessary to change one's primary sex organs to resemble those of the opposite sex to the restrooms reserved for one's "new" sex. Anatomy, not chromosomes, controls. One question I might have is how much room for choice it was intended to have. Suppose the owners of a restaurant heavily frequented by transgenders choose to maintain gender-specific rather than sex-specific restrooms. My read of the text (without having looked at anything else) is that they could do exactly that, at least provided they mark the restrooms clearly. I cannot say whether that was the intent of the drafters, but it certainly might have been.

Oklahoma's S.B. 1014 states:

> An Act relating to public health; prohibiting the use of certain facilities under certain circumstances; directing promulgation of rules; providing for codification; and providing an effective date.
>
> BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:
>
> Section 1. New Law A new section of the law to be codified in the Oklahoma Statutes as Section 1-1022 of Title 63, unless there is created a duplication in numbering, reads as follows:
>
> A. It shall be unlawful for a person to use a gender-specific restroom when that person's biological gender is contrary to that of the gender-specific restroom.
>
> B. The State Board of Health shall promulgate rules to implement the provisions of this act.
>
> Section 2. This act shall become effective November 1, 2016.
> http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/SB/SB1014%20INT.PDF

The Oklahoma proposal does not make use of the "sex"/"gender" distinction that has entered the vocabulary of late. But it gets the point across. Again, I do not believe it rules out the possibility of restrooms that are not "gender-specific." A private business that believes its customers would prefer restrooms divided in some different way presumably is free to do so if it makes it clear to customers that is what it has done. What it does is ensures the user of a typical sex-specific restroom that only members of one biological sex are permitted in that restroom.

> "FOR AN ACT ENTITLED, An Act to restrict access to certain restrooms and locker rooms in public schools.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:
>
> Section 1. That chapter 13-24 be amended by adding a NEW SECTION to read:
>
> The term, biological sex, as used in this Act, means the physical condition of being male or female as determined by a person's chromosomes and anatomy as identified at birth.
>
> Section 2. That the code be amended by adding a NEW SECTION to read:
>
> Every restroom, locker room, and shower room located in a public elementary or secondary school that is designated for student use and is accessible by multiple students at the same time shall be designated for and used only by students of the same biological sex. In addition, any public school student participating in a school sponsored activity off school premises which includes being in a state of undress in the presence of other students shall use those rooms designated for and used only by students of the same biological sex.
>
> Section 3. That the code be amended by adding a NEW SECTION to read:
>
> If any student asserts that the student's gender is different from the student's biological sex, and if the student's parent or guardian consents to that assertion in writing to a public school administrator, or if the student is an adult or an emancipated minor and makes the assertion in writing to a public school administrator, the student shall be provided with a reasonable accommodation. A reasonable accommodation is one that does not impose an undue hardship on a school district. A reasonable accommodation may not include the use of student restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex if students of the opposite biological sex are present or could be present. A reasonable accommodation may include a single-occupancy restroom, a unisex restroom, or the controlled use of a restroom, locker room, or shower room that is designated for use by faculty. The requirement to provide a reasonable accommodation pursuant to this section does not apply to any nonpublic school entity."

Note that South Dakota's proposal attempts to deal with the genuine problem of what to do with the case of a student whose sex and gender identity do not match up.[46] Consider the case of

[46] Note that this is not a new problem. It is only a new vocabulary used to describe the problem. Our great, great

the biological/anatomical boy who nevertheless psychologically identifies as a girl. There is a long, unfortunate history of other children taunting or bullying such a child. Rightly or wrongly, the child may have safety fears. At the same time, allowing such a child to use the girls' restroom or change in the girl's locker room may raise legitimate issues of sexual privacy for the girls. The South Dakota bill attempts to eliminate the possibility that the child is just trying to be a pill (yes, some students do that) by requiring the student's parent to consent to the claim that the student's sex and gender identity don't match up. In such a case, the school district would be required to make a reasonable accommodation for that student, such as a single-occupancy restroom, a unisex restroom, but not the use of the restroom designated for the opposite sex.

Here's the $64,000 question: Why it is offensive to the Human Rights Campaign to classify people by actual sex for restroom assignment, but okay to classify them by gender? Consider, for example, the case of an anatomical male who psychologically identifies with females and prefers the use of female pronouns, *but who nevertheless prefers to use the men's room*. As an anatomical male, should this male who identifies as female be able to use the men's room? Or should all transgenders be required to use the restroom assigned to their gender (rather than their anatomical sex)? If the answer is that transgenders should have their choice or restrooms, what does that do to the notion of equality? So-called "cisgenders" (i.e. individuals who identify psychologically with their actual sex) do not get to choose which restrooms they get to use. Why should transgenders have options when cisgenders do not?

Ultimately, the logic of the movement to allow transgenders the choice to use the restroom that corresponds to their gender, rather than the restroom that corresponds to their actual sex, is that everybody must be given the choice of which restroom to use. If so, that means unisex restrooms are the only principled alternative. Everybody gets to choose, which quickly collapses into nobody gets to choose, since only one choice will be offered.

The South Dakota proposal appears to be a common-sense solution to the problem of ensuring sexual privacy for all students. The notion that the use of restrooms should be governed by one's gender identity rather than one's anatomical sex suffers from two problems. First,

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grandparents had to grapple with the problem of the student who didn't fit other people's conception of what a member of that student's sex "should" be like. That is not to say that they always dealt with it well or that we should necessarily respond in the same way we did. But it is nevertheless useful to remember that we are not the first to have to address the issue.

It is also worth pointing out that, contrary to what some commentators have been suggesting, the pending bills are not the first time the use of the wrong restroom has been criminalized. Knowingly walking into the women's room if one is a man or into the men's room if one is a woman has always been a crime (unless one has reason to believe that the owner/occupier has granted permission). It is the crime of trespass. Walking into any part of a building without the owner/occupier's permission is trespass (though an owner/occupier would need to press charges in order for a prosecution to take place). If the restroom door has a signed that says "Women," this is understood to mean that men do not have the owner/occupier's permission to enter. Similarly, if the door says "staff only," it is understood to mean that customers do not have the owner/occupier's permission to enter. Violators may be prosecuted.

restroom fixtures are designed with anatomy in mind, not with one's psychological state. A female-to-male transgender who has not undergone surgery in an effort to anatomically conform to the male physique cannot efficiently make use of the fixtures of the men's restroom. Second, and more important, opening restrooms to individuals based on their gender identity rather than actual sex opens up all kinds of issues. Of the over 6000 respondents to the Williams Institute's National Transgender Discrimination Survey, 38 percent identified either strongly (15 percent) or somewhat (23 percent) with the identity "Two Spirit."[47] Would that mean that they would be entitled to use both restrooms? Would it mean that when they are feeling more feminine, they should use the women's restroom and when they are feeling more masculine, they should use the men's room? The more difficult it is to determine an individual's eligibility for a particular restroom at a glance, the more difficult it will be to exclude voyeurs and pranksters.[48] If the point of opposition to proposals like South Dakota's is to introduce uncertainty and chaos into public restrooms, it will work just fine.[49]

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[47] See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 6 (January 2014).

[48] Cf. Jessica Chin, *University Of Toronto Gender-Neutral Bathrooms Reduced After Voyeurism Reports*, Huffington Post (Oct. 6, 2015)(discussing sex-integrated restrooms).

[49] Kansas once allowed an individual to change the sex reported on his or her birth certificate *either* by signing an affidavit stating that the sex was incorrectly recorded *or* by submitting a medical certificate substantiating that a physiological or anatomical change occurred.

The Governor is now moving forward with a policy change that would allow such alterations only if the person signs an affidavit attesting that his or her sex was incorrectly indicated in the first place *and* provides medical records to back up that affidavit. This is thought by the Commission majority to be anti-transgender.

But these are *birth* certificates, not life-style certificates. Kansas has the right to keep records that accurately reflect the facts of a birth. It's about truth. And truth cannot be pro- or anti-LGBT. It's just truth. As much as some individuals born as males may identify psychologically with females, as much as they may exercise their right to adopt female habits and dress, as much as they may undergo surgery and other physiological treatments in order to cause their physical bodies to better resemble females … indeed as much as we might even support them in those endeavors, they are not in fact members of the female sex (or vice versa). When every cell in an individual's body contains chromosomes identifying that individual's sex, Kansas is not required to pretend otherwise in its official records, especially not retroactively to birth. For my colleagues to suggest that Kansas is acting unconstitutionally is Orwellian. See *Statement of Commissioners Gail Heriot and Peter Kirsanow*, available at: http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf.

This is not to say that another state could not *choose* to record on its birth certificates different information—such as what is typically called "gender." While that individual may have been born into one biological sex, he may identify psychologically with the opposite sex (or even with some non-binary alternative) and may adopt its habits and traits. In doing so, he demonstrates that his "gender" is not the same as his biological sex.

But it is not so easy to record "gender" rather than sex, precisely because it is so variable. At birth, only sex is revealed. And even after an individual's gender asserts itself, it can change. Some identify as having "two spirits"; others say they are neither male nor female in gender. Given that, it is doubtful a state would be interested in recording gender rather than sex on its birth certificates.

Moreover, it is not clear why anyone should be dismayed by any of this. *Note that nothing turns on what one's birth certificate says about one's sex in Kansas.* It does not determine what restroom one can use. It does not determine

> By contrast, the point of South Dakota's proposal appears to be to protect the sexual privacy of as many students as possible, while discouraging pranks and voyeurism. That's a good thing.

Conversion Therapy: One of the bills mentioned on the Human Rights Campaign web site would apparently have authorized therapists to conduct conversion therapy—a method of counseling designed to cause individuals who believe or fear they may be gay, lesbian, bisexual or transgender to be heterosexual and cisgender instead. In this case, the web site did provide information on the bill, so I was able to find it quickly. It was H.B. 1598 in the Oklahoma Legislature, entitled "The Freedom to Obtain Conversion Therapy Act." Like the sex-specific restroom bills referred to in the previous paragraph, this bill is outside the scope of this report in that it does not have anything to do with religious liberty. Nevertheless, since Commissioner Achtenberg uses it as evidence of a "backlash" against LGBTs, I feel obligated to address it briefly.

It is not quite clear why this proposal was thought necessary. Perhaps there was a fear that some state administrative agency or local government would outlaw the treatment or some professional association would forbid its members from offering this treatment. In this regard it is worth pointing out that several jurisdictions have indeed outlawed conversion therapy for minors.[50] Note the obvious: These prohibitions apply even in cases where both the minor and the minor's parents would like the minor to have that treatment. It limits people's options. By contrast, the Oklahoma proposal was designed solely to ensure that an option will be available. It does not require anyone to take it.

It's interesting to compare the laws that prohibit conversion therapy for minors with the lack of laws prohibiting minors from obtaining surgery designed to give them the anatomical appearance of the opposite sex (This is sometimes referred to a "sex change operation" or "gender reassignment surgery.") Conversion therapy is non-invasive. It is just psychological therapy. This kind of surgery on the other hand, literally mutilates the body and is irreversible. Yet in Oregon, for example, the age of consent for surgery is 15 (even without parental consent) and recently Oregon's

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what school athletic teams one can join or what jail cell one should occupy in the event of arrest. Those are questions that are left for another day. Nor does it determine whether an individual should be treated with courtesy and respect when they have chosen to lead their lives in a transgender manner. That is a question that must be answered by each individual American.

There may well be circumstances, for example, under which transsexuals (those who have had surgery) may wish to have some way to identify their status to others. But in Kansas at least birth certificates are not the way to do that.

[50] See New Jersey P.L. 2013, Chapter 150, *available at* https://legiscan.com/NJ/text/A3371/id/884607; Oregon H.B. 2307, amending ORS 675.070 et seq., available at https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2307/Enrolled; D.C. Act 20-530, *available at* http://lims.dccouncil.us/Download/29657/B20-0501-SignedAct.pdf; California

S.B. 1172, amending Chapter 1 of Division 2 of the Business and Professions Code, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172); Illinois Public Act 099-411, available at http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0411).

Medicaid program began to cover such surgery.[51] If there were really a backlash against transgenderism, that would be unthinkable. Just as generals are always fighting the last war, political activists are always imagining that yesterday's powerless minority is still powerless. In our own minds, we are all always the underdog.

The First Amendment Defense Act: Commissioner Achtenberg also criticizes the First Amendment Defense Act ("FADA"). I agree with many of the criticisms that are made by the authorities cited in her Statement. But since those authorities published their commentary, FADA has undergone an additional draft. Many of the problems have already been corrected.

If passed, FADA would essentially prohibit the federal government from penalizing persons on account of their support of the exclusivity of traditional opposite-sex marriage. Its operative clause (Section 3) would state:

> "Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes, speaks, or acts in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage."

FADA was thought to be appropriate by its supporters on account of a statement by the Solicitor General during oral argument in *Obergefell v. Hodges*. When asked whether religious schools that maintain an opposition to same-sex marriage could, for that reason, lose their tax-exempt status, he candidly replied, "[I]t's certainly going to be an issue."[52] Both the Solicitor General and the Justices were thoroughly familiar with *Bob Jones University v. United States*, 461

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[51] Anemona Hartocollis, *The New Girl in School: Transgender Surgery at 18*, N.Y. Times (June 16, 2015). Hartocollis further wrote:

[T]he number of teenagers going through gender reassignment has been growing amid wider acceptance of transgender identity, more parental comfort with the treatment and the emergence of a number of willing practitioners. Now advocates like Empire State Pride Agenda are fighting for coverage at an earlier age, beginning with hormone blockers at the onset of puberty, saying it is more seamless for a teenage boy to transition to becoming an adult woman, for example, if he does not first become a full-bodied man.

[52] Harvard law professor Mary Anne Glendon predicted in 2004 that if same-sex marriage became law, the United States would follow the European experience in becoming intolerant towards those who opposed the change in law. "As much as one may wish to live and let live," Glendon wrote during the same-sex marriage debate in Massachusetts, "the experience in other countries reveals that once these arrangements become law, there will be no live-and-let-live policy for those who differ. Gay-marriage proponents use the language of openness, tolerance, and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination . . . Every person and every religion that disagrees will be labeled as bigoted and openly discriminated against. The ax will fall most heavily on religious persons and groups that don't go along. Religious institutions will be hit with lawsuits if they refuse to compromise their principles." Mary Ann Glendon, *For Better or Worse?*, Wall St. J. (Feb. 25, 2004).

U.S. 574 (1983), a case in which the Supreme Court had upheld the authority of the Internal Revenue Service to revoke the tax-exempt status of a university that engages in race discrimination.

Objections were raised (rightly in my view) that such a law should not apply to a government official or employee whose job it is to issue marriage licenses or whose job it is to review tax returns and determine whether taxpayers have correctly listed their filing status. As a result, a new draft of FADA was produced that exempted Federal employees acting within the scope of their employment" from its coverage. Section 6(3)(B).[53]

Another set of objections were raised (again, rightly in my view) that in awarding certain privileges, such as ambassadorships, the President should be able to consider all aspects of an individual's values, character and political or social views. In response, the new draft limited the scope of FADA's definition of "discriminatory action." Section 3(b).

A third set of objections (mostly correct in my view) were aimed at the fact that a wide set of "persons" arguably would be covered by the proposed Act. The new draft specifically exempted publicly traded for-profit entities, federal for-profit contractors, acting within the scope of their contracts, and medical facilities and nursing homes with respect to visitation and recognition of a designated representative for the purpose of healthcare decision making.

There may be other rough spots in the proposal that need smoothing. Contrary to popular belief, the drafting of a statute that does what you want it to do (and not what you don't want it to do) requires skill, experience, imagination and a willingness to go through many drafts.

There is one more objection that has been repeatedly made and is not been dealt with in the new draft—the fact that FADA protects only those who oppose same-sex marriage; it does not protect those who support it. It is therefore not "content neutral" to use the terms favored by First Amendment scholars.

It's easy to see reasons why the sponsors of FADA might not even think to include protections for supporters of same-sex marriage: The supporters were the victors. *Obergefell v. Hodges* guarantees the fundamental right to marry for same-sex couples. No one has called for institutions that support same-sex marriage to lose their tax-exempt status. Members of Congress, almost certainly rightly, believe that there is a danger of retaliation against opponents of same-sex marriage, but there is no equivalent danger in the other direction.

Should the Constitution be construed to forbid FADA's one-way protection? My instinct is no. There are two categories of cases that have come up repeatedly over time—efforts to suppress or ban speech and efforts to channel speech through time, place and manner regulation. While it is not always easy to tell them apart, in the former case, it shouldn't matter if Congress attempted to suppress just expressions of opposition to same-sex marriage or both expressions of opposition

[53] See, e.g., Walter Olson, *Gay Marriage and Religious Rights: Say Nada to FADA*, Newsweek (Sept. 10, 2015).

and support (i.e. all discussion) of same-sex marriage. Either approach would clearly violate the First Amendment. On the other hand, when it comes to regulation of time, place and manner, a lack of content neutrality can be a sign of nefarious purpose. If Congress bans posters in opposition to same-sex marriage on the Washington Metro system, citing their political nature, but does not ban posters in support of same-sex marriage, that is obviously a problem.

FADA is neither of those things. It is a declaration that it will *not* penalize those who have views in *opposition* to what has been national policy since *Obergefell*. A declaration that it will not penalize those who *agree* with national policy seems a bit unnecessary. If that turns out to be untrue—i.e. if someone is punished for agreeing with the national policy toward same-sex marriage—it seems to me they are better off if FADA were law. They could argue the both sides of the same-sex marriage debate must be treated alike, and so if opponents of same-sex marriage are protected from retaliation, they must be protected from retaliation too.

Under the circumstances, I can't understand those who would vote against FADA on the ground that it is one-sided. Passing FADA would eliminate retaliation of one kind and increase that likelihood that a court would rule against retaliation of the other kind (if it were to occur). Without FADA, no one is protected.

One the other hand, I have not yet heard any argument for why supporters of FADA should not be willing to protect supporters as well as opponents of same-sex marriage. When Edmund Burke argued for magnanimity in politics, he wasn't only speaking to the victors.

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Commissioners Achtenberg, Castro, Kladney, Narasaki, and Yaki Rebuttal

I. A new wave of laws is being proposed to limit the freedoms of lesbian, gay, bisexual, and transgender people.

In recent months, there has been nothing short of a tsunami of legislative proposals, the purpose of which is to eviscerate the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") persons - using "religious liberties" as the alleged justification. As of this writing, more than 100 anti-LGBT bills have been or are being considered in twenty-two states.[1] In late March and early April alone, both Mississippi[2] and North Carolina[3] enacted statutes that condone LGBT employment discrimination, restrict access of LGBT persons to public accommodations and services, and proscribe restroom use when an individual's gender identity conflicts with the sex assigned to him or her at birth.[4]

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[1] "Anti-LGBT Religious Exemption Legislation Across the Country," American Civil Liberties Union, *available at* https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country?redirect=anti-lgbt-religious-refusals-legislation-across-country#2016; *see also* "Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States," The Huffington Post, April 15, 2016, *available at* http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9.

[2] "Mississippi Governor Signs Law Allowing Businesses to Refuse Service to Gay People," The Washington Post, April 5, 2016, *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/mississippi-governor-signs-law-allowing-business-to-refuse-service-to-gay-people/. For the text of the law, *see* "House Bill NO. 1523," Mississippi Legislature, Regular Session 2016, *available at* http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf.

[3] "North Carolina Governor Signs Controversial Transgender Bill," CNN, March 24, 2016, *available at* http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/.

In addition to addressing LGBT issues, this law "supercede[s] and preclude[s]" the ability of jurisdictions within the state from raising the minimum wage for workers.

"House Bill 2: An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies And to Create Statewide Consistency in Regulation of Employment and Public Accommodations," March 23, 2016, *available at* http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf.

[4] "Transgender" is defined as "being a person … who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth." Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary/transgender.

"Gender identity" is defined as "the totality of physical and behavioral traits that are designated by a culture as masculine or feminine [or] a person's internal sense of being male, female, some combination of male and female, or neither male or female." Merriam-Webster, *available at* http://www.merriam-webster.com/medical/gender%20identity.

Gender identity is also understood as a circumstance involving "[o]ne's internal, deeply held sense of one's gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices. Unlike gender expression … gender identity is not visible to others." GLAAD Media Reference Guide - Transgender Issues," *available at* http://www.glaad.org/reference/transgender.

The North Carolina legislature considered the cause of limiting LGBT civil rights to be so urgent that it convened its first special session in thirty-five years and adopted a bill pre-empting a Charlotte ordinance which would have *outlawed* LGBT discrimination.[5] Also included in that bill was a shameful provision, specifically designed to restrict bathroom use by transgender persons. The legislature's deliberations took a total of twelve hours, from start to finish.[6] The governor signed the bill in the dead of night.[7] Corporate leaders, chambers of commerce, and local

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[5] "An Ordinance Amending Chapter 2 of the Charlotte City Code Entitled 'Administration'" [sic] Chapter 12 Entitled Human Relations", [sic], and Chapter 22 Entitled "Vehicles for Hire," *available at* http://charmeck.org/city/charlotte/CityClerk/Documents/NDOrdinance.pdf. For a transcript of diverse and compelling public comments preceding the Charlotte Council's vote on its anti-discrimination ordinance, *see* "Item No. 12: Non-Discrimination Ordinance," Business Meeting Minute Book 140, Feb. 22, 2016, pp. 13 - 43, *available at* http://charmeck.org/city/charlotte/CityClerk/Minutes/February%2022,%202016.pdf#search=antidiscrimination%20ordinance.

[6] As recorded:

> What happened in North Carolina could prove to be the deadly recipe that helps … other discriminatory bills actually make it across the finish line. Indeed, the rushed special session was a perfect recipe for avoiding all of the various resistance that has held back these bills from even being considered in previous years.
>
> For example, the bill's language was only made public mere minutes before it was considered. The committee first tasked with voting on it had to request to even have five minutes to read it. There was only a total of 30 minutes of public comment, meaning there was basically no opportunity for public input. (Polling showed that there was bipartisan opposition across the state to overturning Charlotte's ordinance.).
>
> This meant that transgender people did not have the notice or option of traveling to the capitol to share their stories. Businesses had no opportunity to chime in about the economic impact on the state. Though companies like Dow Chemical, Biogen, and Red Hat software tweeted their opposition during the day, it was too little too late. In short, the anti-transgender motives of the lawmakers eager to pass this legislation did not have to pass through any filters before it became law.

"How North Carolina Become the Most Anti-LGBT State in Less Than A Day," ThinkProgress, March 24, 2016, *available at* http://thinkprogress.org/lgbt/2016/03/24/3763023/north-carolina-anti-lgbt/.

See also "North Carolina Passes Law Blocking Measures to Protect LGBT People," National Public Radio, March 24, 2016, *available at* http://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people *and* "BREAKING: North Carolina Gov. Pat McCrory to Sign Anti-LGBT Bill Immediately: Sweepingly Broad Legislation Voiding All LGBT Nondiscrimination Ordinances About to Become Law," The New Civil Rights Movement, *available at* http://www.thenewcivilrightsmovement.com/davidbadash/breaking_north_carolina_gov_pat_mccrory_to_sign_anti_lgbt_bill_immediately.

State legislatures passed, but governors vetoed, similar laws in Georgia and Virginia. *See, e.g.,* "Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay," The Washington Post, March 28, 2016, *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/, *and* "Virginia Governor Vetoes Anti-LGBT 'Religious Freedom' Bill," The Huffington Post, March 30, 2016, *available at* http://www.huffingtonpost.com/entry/virginia-lgbt-religious-freedom-bill-veto_us_56fc05cde4b0a06d58046049.

[7] *See, e.g.,* "McCrory Signs Bill Overturning Transgender Ordinance," ABC Eyewitness News, March 23, 2016, *available at* http://abc11.com/news/mccrory-signs-bill-overturning-transgender-ordinance/1258961/.

businesses protested.[8] Some withdrew expansion plans.[9] Others threatened to move out of North Carolina, altogether.[10] The National Football League and the National Basketball Association ("NBA") registered concern. In fact, the NBA threatened to move its All-Star Game from North Carolina if the governor and the legislature do not reverse course.[11]

There is even international concern being voiced. Great Britain has issued "an advisory warning travelers to be aware of controversial new laws in North Carolina and Mississippi,"[12] cautioning that "LGBT travellers may be affected by legislation recently passed in the states of North Carolina and Mississippi."[13]

The North Carolina and Mississippi laws allow state and private actors to discriminate freely against LGBT people in a variety of private commercial settings including employment and public accommodations. One of the most dangerous provisions of the North Carolina law requires transgender people to use restrooms for the sex designated on their birth certificates rather than the sex with which they identify. There are no known, reported problems with transgender people using restrooms befitting their gender identities in the entire United States. The bathroom provision in this law is designed to garner public attention, create antipathy toward - and fear of - transgender people, and appease a political base that wants to see LGBT rights dealt a blow.

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[8] *See, e.g.,* "Anti-Gay Laws Bring Backlash in Mississippi and North Carolina," The New York Times, April 5, 2016; "Companies Reconsidering North Carolina Over LGBT Rights," The Chicago Tribune, April 1, 2016, *available at* http://www.chicagotribune.com/business/ct-north-carolina-lgbt-law-20160401-story.html; *and* "National Gay & Lesbian Chamber of Commerce Condemns the Shameful State-Sanctioned Discrimination Law Passed in North Carolina," WBTV.com, March 25, 2016, *available at* http://www.wbtv.com/story/31566213/national-gay-lesbian-chamber-of-commerce-condemns-the-shameful-state-sanctioned-discrimination-law-passed-in-north-carolina.

[9] *See, e.g.,* "As PayPal Cancels Expansion, the Consequences of N.C.'s anti-LGBT Law Get Real," Los Angeles Times, April 25, 2015, *available at* http://www.latimes.com/business/hiltzik/la-fi-hiltzik-paypal-nc-20160405-snap-htmlstory.html; *and* "Deutsche Bank Halts North Carolina Growth Plan Over Anti-Gay Law," Bloomberg, April 12, 2016, *available at* http://www.bloomberg.com/news/articles/2016-04-12/deutsche-bank-halts-north-carolina-growth-plan-over-anti-gay-law.

[10] *See, e.g.,* "TV, Movie Production Companies to Leave NC Over LGBT Law," FOX8, April 1, 2016, *available at* http://myfox8.com/2016/04/01/tv-movie-production-companies-to-leave-nc-over-lgbt-law/.

[11] *See, e.g.,* "North Carolina Anti-Gay Law May Jeopardize 2017 NBA All-Star Game," USA Today, March 25, 2016, *available at* http://www.usatoday.com/story/sports/nba/2016/03/24/north-carolina-anti-gay-law-may-jeopardize-2017-nba-all-star-game/82234488/; *and* "NBA Commish: 'Necessary' to Change Bathroom Law to Hold All-Star Game in Charlotte," Breitbart, April 25, 2015, *available at* http://www.breitbart.com/sports/2016/04/23/commissioner-adam-silver-necessary-nc-change-bathroom-laws-nba-hold-2017-star-game-charlotte/.

[12] "Britain Issues Warning for LGBT Travelers Visiting North Carolina and Mississippi," The Washington Post, April 20, 2016, *available at* https://www.washingtonpost.com/news/worldviews/wp/2016/04/20/britain-issues-warning-for-lgbt-travelers-visiting-north-carolina-and-mississippi/.

[13] "Foreign Travel Advice, USA: Local Laws and Customs," GOV.UK, *available at* https://www.gov.uk/foreign-travel-advice/usa/local-laws-and-customs.

The bathroom restriction is a deep affront to the dignity of transgender people - and even more critically, a threat to their physical safety. The U.S. Commission on Civil Rights noted this concern in its April 18, 2016 statement condemning these laws.[14] A transgender woman forced to use a men's restroom certainly risks verbal harassment at a minimum and physical or sexual assault at worst. A transgender man in a women's restroom may not fare well, either.

Further, there is a related, serious, negative impact on transgender people's mental health, as well. Recent research "indicates that the denial of access to [bathrooms] had a significant relationship to suicidality."[15] Trans Lifeline, a suicide prevention hotline serving transgender people, reports that incoming calls have "'nearly doubled' since North Carolina restricted use of public bathrooms based on birth certificate gender markers."[16] The North Carolina law stands to worsen the situation by allowing doctors and mental health professionals to withhold treatment on the basis of sexual orientation or gender identity of the person in need. This provision was hastily enacted, even though it appears to run afoul of the Affordable Care Act,[17] Medicaid,[18] and the Emergency Medical Treatment and Labor Act.[19]

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[14] "The U.S. Commission on Civil Rights Statement Condemning Recent State Laws and Pending Proposals Targeting the Lesbian, Gay, Bisexual, and Transgender Community," U.S. Commission on Civil Rights, April 18, 2016, *available at* http://www.usccr.gov/press/2016/PR_Statement_LGBTDiscrimination.pdf.

[15] Seelman, Kristie L., "Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality," Journal of Homosexuality, Feb. 25, 2016, *available at* http://www.tandfonline.com/doi/pdf/10.1080/00918369.2016.1157998.

[16] "After North Carolina's Law, Trans Suicide Hotline Calls Double," The Daily Beast, April 20, 2016, *available at* http://www.thedailybeast.com/articles/2016/04/20/after-north-carolina-s-law-trans-suicide-hotline-calls-double.html.

[17] Patient Protection and Affordable Care Act, 42 U.S.C. sec. 18001 et seq. (2010).

[18] Social Security Act, Title XIX, 42 U.S.C. sec. 1900 et seq. (as amended 1965).

[19] Emergency Medical Treatment and Labor Act, 42 USC sec. 1395dd (as amended 2008).

"Religious freedom" laws may create special problems for LGBT medical patients:

> LGBT exemptions, though, could have a fatal flaw: They may conflict with federal law. The Affordable Care Act prohibits sex discrimination in any program or facility that gets federal funding for health-care services, which includes Medicaid. … The Department of Health and Human Services interprets gender-identity discrimination as part of sex discrimination and has enforced the rule with that in mind, initiating a number of investigations into complaints against medical providers related to harassment of and lack of coverage for trans people. That interpretation is not expressly written in the law, though. And discrimination on the basis of sexual orientation is not currently banned for all doctors and health-care providers; a proposed update to federal guidelines on that topic is pending. …
>
> Compared to new laws that would protect wedding-related businesses, though, medical professionals have a lot more power over the people they provide services to. "When we're talking about doctors or counselors, we are talking about people who are much closer to the patients, in situations that are much more intimate and private and confidential," said Elizabeth Sepper, an associate law professor at Washington University in St. Louis. "The harm of discriminatory denial in those circumstances can be really severe in that one makes oneself vulnerable to one's doctor or one's counselor in a way that you might not when you're coming into a bakery."

At least some in law enforcement understand the enforceability and constitutional issues at play here. Sheriff Leon Lott of Richland County, South Carolina has voiced his objection to an anti-transgender "bathroom bill" being considered in his state.

> Lott says the bill is "unnecessary and unenforceable" and would expose his department to costly litigation.
>
> "In the 41 years I have been in law enforcement in South Carolina," Lott writes, "I have never heard of a transgender person attacking or otherwise bothering someone in a restroom. This is a non-issue."
>
> Lott says to be enforced, a law enforcement officer would have to determine the sex of every person entering a restroom in the state. The sheriff also says the bill would raise due process and Fourth Amendment issues.[20]

Whether or not the North Carolina law, and similar ones which may be enacted, will survive judicial scrutiny will be determined in time.[21] It bodes well that the U.S. Court of Appeals for the Fourth Circuit, under the jurisdiction of which North Carolina is situated, ruled on April 19, 2016 that a transgender male public school student could sue his school district for the freedom to use restrooms designated for males.[22] The Court agreed with the teen that the U.S. Department of Education may interpret sex discrimination under Title IX to allow a transgender student to choose the bathroom which fits his or her gender identity rather than sex assigned at birth.

"When Doctors Refuse to Treat LGBT Patients," The Atlantic, April 19, 2016, *available at* http://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapists-mississippi-tennessee/478797/.

[20] "Sheriff Leon Lott: Sen. Lee Bright's Bathroom bill "Unnecessary, Unenforceable," WISTV.com, April 13, 2016, *available at* http://www.wistv.com/story/31707515/richland-sheriff-bathroom-bill-unnecessary-and-unenforceable; *see also* "Transgender Bathroom Hysteria, Cont'd.," The New York Times, April 18, 2016, *available at* http://www.nytimes.com/2016/04/18/opinion/transgender-bathroom-hysteria-contd.html.

[21] The American Civil Liberties Union has already sued the state of North Carolina in U.S. District Court. The Complaint for Declaratory and Injunctive Relief in Carcano v. McCrory, No. 1:16-cv-236, filled March 28, 2016 in the U.S. District Court for the Middle District of North Carolina , is *available* at https://www.aclu.org/sites/default/files/field_document/dkt_1_-_carcano_v._mccrory_complaint.pdf.

[22] G.G. v. Glouchester County School Board, United States Court of Appeals for the Fourth Circuit, No. 15-2056, April 19, 2016, *available at* http://apps.washingtonpost.com/g/documents/local/court-opinion-4th-circuit-sides-with-transgender-high-school-student-suing-school-board-for-access-to-boys-bathroom/1960/. *See also* "What a Federal Appeals Court's Ruling Could Mean for North Carolina's Bathroom Law," The Washington Post, April 20, 2016, *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/04/20/what-a-federal-appeals-courts-ruling-could-mean-for-north-carolinas-bathroom-law/.

II. These laws and proposals represent an orchestrated, nationwide effort by extremists to promote bigotry, cloaked in the mantle of "religious freedom."

The current spate of anti-LGBT laws is not the result of a spontaneous, populist revolt. It is a carefully-planned strategy, being undertaken to punish LGBT people for having the temerity to pursue equality and prevailing in the U.S. Supreme Court.[23]

Liberty Counsel, which calls itself a Christian ministry and litigation agency,[24] but which the Southern Poverty Law Center defines as a hate group,[25] is spearheading this assault on LGBT dignity, safety, and rights in at least twenty states. It is no secret that this effort is in retaliation for the pursuit of equality. The leader of Liberty Counsel, Mat Staver, has stated bluntly, "The Supreme Court in the 5-4 opinion on marriage in 2015 lit the house on fire. … All we're trying to do is control the fire at this point in time."[26]

Fighting LGBT equality under the law provides Liberty Counsel its bread and butter. Staver is reknown for his inflammatory rhetoric. For example, he states that

> [The marriage fight] is the thing that revolutions literally are made of. This would be more devastating to our freedom, to our religious freedom, to the rights of pastors and their duty to be able to speak and to Christians around the country, than anything that the revolutionaries during the American Revolution even dreamed of facing. This would be the thing that revolutions are made of. This could split the country right in two. This could cause another civil war."[27]

Staver also urges civil disobedience in one of the most offensive, incendiary ways possible; by claiming that Christians opposed to marriage equality are akin to persons of conscience facing the Nazi regime:

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[23] *See, e.g.*, United States v. Windsor, 133 S.Ct. 2675 (2013); *and* Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

[24] "Advancing the Mission Through Three Pillars of Ministry," Liberty Counsel, *available at* https://lc.org/about-liberty-counsel.

[25] *See, e.g.,* "Liberty Counsel: Extremist Group Info," Southern Poverty Law Center, *available at* https://www.splcenter.org/fighting-hate/extremist-files/group/liberty-counsel; *and* "SPLC Adds Seven New Organizations to Anti-Gay Hate Group List," Truth Wins Out, Feb. 28, 2014, *available at* https://www.truthwinsout.org/news/2014/02/39681/.

[26] "Who's Behind the New LGBT Bathroom Laws?," CBS Evening News, April 13, 2016, *available at* http://www.cbsnews.com/news/whos-behind-the-new-lgbt-bathroom-laws/.

[27] "Liberty Counsel Continues Penchant for Inciting 'Revolution,'" Good As You, April 14, 2014, *available at* http://www.goodasyou.org/good_as_you/2014/04/liberty-counsel-continues-penchant-for-inciting-revolution.html.

> as a believer, you cannot obey something that is contrary to God's law. And we would easily say, well, what would happen if the government forced you turn over a Jew in Nazi Germany? All of us would say we wouldn't do that, we wouldn't listen to that. Well, we're about ready to walk into the moment."[28]

Having lost the war on marriage equality, Liberty Counsel and its cohorts are seeking to move the battle against LGBT equality from marriage clerks' offices into bathrooms. Unfortunately, groups like Liberty Counsel are not working in a vacuum. They would appear to have the tacit support of some national political figures as well as a major political party.[29]

III. There is no justification for these laws and proposals. They are pretextual attempts to justify naked animus against lesbian, gay, bisexual, and transgender people.

These laws and proposals have nothing to do with "sincerely held religious beliefs." Rather, they are put forward by those who evince a startling animus toward LGBT people. For example, Steve Crampton of Liberty Counsel has stated

> When you consider that the life of the average homosexual is not controlled by reason, not controlled by the will, it's really a life controlled by this lust, this passion, that has kind of overwhelmed them, and so you have kind of the essence of a lack of self control.[30]

Matt Barber, also of Liberty Counsel, opines that "homosexuality - is always and forever,

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[28] "Mat Staver Will Disobey a SCOTUS Marriage Equality Ruling Just as He'd Refuse to Turn a Jew Over to The Nazis," Right Wing Watch, March 13, 2015, *available at* http://www.rightwingwatch.org/content/mat-staver-will-disobey-scotus-marriage-equality-ruling-just-hed-refuse-turn-jew-over-nazis.

[29] The Republican National Committee's "Resolution Condemning Governmental Overreach Regarding Title IX Policies in Public Schools" states that

> A person's sex is defined as the physical condition of being male or female, which is determined at conception, identified at birth by a person's anatomy, recorded on their official birth certificate, and can be confirmed by DNA testing" and that "[t]ransgender policies deal with students who choose to be designated by their desired gender identity; an identity that conflicts with their anatomical sex….

"Resolution Condemning Governmental Overreach Regarding Title IX Policies in Public Schools," Republican National Committee Counsel's Office, (undated), *available at* https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/Resolution_Title_IX%20_Overreach.pdf.

Specifically, "[t]he Republican National Committee encourages state legislatures to enact laws that protect student privacy and limit the use of restrooms, locker rooms and similar facilities to members of the sex to whom the facility is designated."

Id.

[30] "Liberty Counsel Extremist Group Info," Southern Poverty Law Center, *supra* note 28.

objectively and demonstrably wrong. It is never good, natural, right or praiseworthy."[31]

The articulated rationales for the current crop of bills also demonstrate open anti-transgender bigotry. When South Carolina State Senator Lee Bright introduced a North Carolina-style "bathroom bill" on April 6, 2016, he stated that

> I've about had enough of this. I mean, years ago we kept talking about tolerance, tolerance, and tolerance, and now they want men who claim to be women to be able to go into bathrooms with children. And you got corporations who say this is okay.[32]

Certainly, not all religious authorities or adherents agree that religion makes the adoption of these discriminatory laws an imperative. To the contrary, many people of faith actively oppose such laws. For example, Episcopal Bishop Brian R. Seage implored Mississippi's governor to veto his state's anti-LGBT legislation, writing

> Our baptismal covenant requires that each of us will respect the dignity of every human being. It does not provide an exception to that respect.
>
> The Episcopal Diocese of Mississippi stands as one with our brothers and sisters in the LGBT community …. We respect their painful journey as they have sought full inclusion in our society. Many of them share a Christian faith that is deep and profound. We should embrace their quest for equality and justice rather than placing obstacles in their pathway.
>
> I am aware that some Christian bodies say this legislation is needed. I disagree. It addresses a conflict which does not exist. The Episcopal Church embraces all persons who seek to follow our Lord, and we honor all persons who yearn for equality in this society. Our doors remain open to all God's children.[33]

Legislators, obviously, are free to hold any religious views of their choosing. What they cannot do is enact discriminatory secular laws based upon those beliefs. No religion, including the "orthodox Christianity" to which Commissioner Kirsanow refers repeatedly in his statement, is the official religion of the United States. No religion can be. The First Amendment makes this clear.

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[31] *Id*.

[32] "Sen. Lee Bright Introduces 'Bathroom Bill" to SC Senate," WISTV.com, April 6, 2016, *available at* http://www.wistv.com/story/31659358/sen-lee-bright-introduces-bathroom-bill-to-state-senate.

[33] "Statement by the Rt. Rev. Brian R. Seage, Bishop of the Episcopal Diocese of Mississippi: HB 1523 Press Release 033116 - In Light of Senate Passage," Episcopal Café, March 31, 2016, *available at* http://www.episcopalcafe.com/brian-r-seage-bishop-of-the-episcopal-diocese-of-mississippi-on-hb-1523/.

We all know this.

Photographers, florists, and bakers who follow any religion - or none at all - can refuse to sanctify a wedding in their hearts. What conservative religious adherents cannot do, however, is to discriminate in the stream of commerce based upon religious beliefs. Even when religious beliefs, sincere or otherwise, dictate thoughts, secular law controls actions.

Providing commercial goods and services does not require that one "blesses" an event. Taking pictures is not "testifying" to one's spiritual endorsement of a legally recognized ceremony. Frosting a cake is not "helping to celebrate something … believe[d] to be a transgression of divine law."[34] Selling flowers is not "contribut[ing] to" a marriage celebration.[35] Those are secular, commercial *quid pro quo* transactions; straightforward exchanges of products or services for money.

To claim otherwise simply is to try to darken the smokescreen that "religious beliefs" provide for anti-LGBT animus. Would this country, at this juncture in our evolution, support the right of a baker to refuse wedding services to an interracial, heterosexual couple based upon a "sincerely held religious belief" against miscegenation? Would our society condone a white photographer's refusal to take commemorative pictures of an African American doctoral student's graduation ceremony due to religious beliefs of racial superiority? Clearly not.

Would society view similar denials to LGBT people as "'dignitary harm' that is not alleviated even if one can easily obtain identical services elsewhere" that U.S. Equal Employment Opportunity Commissioner Chai Feldblum describes LGBT people as suffering?[36] Clearly.

IV. There must be no rush to judgment when it comes to this flood of bills.

The North Carolina statute embodies a number of evils. It outlaws employment protections for LGBT people. It deprives people of access to public accommodations based upon specious claims of religious liberty. It denigrates transgender people, and jeopardizes their physical and mental health. It was adopted and signed in haste. Given the reverberations, there may be some North Carolina decision-makers already having second thoughts.

The Missouri statute is equally heinous. In the more than twenty states with 100-plus bills outstanding, the range of discriminatory proposals aimed at LGBT people is broad and deep. The threats to employment protections, public accommodations, and transgender safety are clear and

[34] "Statement of Commissioner Peter Kirsanow," USCCR Report, 2016, *supra* at 62.

[35] *Id*. at 98.

[36] *Id*. at 99.

present. And the efforts to legalize such discrimination are coordinated. In particular, the "bathroom bills" are a solution in search of a problem.[37]

Professor Tobias Barrington Wolff of the University of Pennsylvania Law School offers this critique:

> Proponents of these "bathroom bills" often talk about protecting children. The lieutenant governor of North Carolina released a video to justify that state's terrible new law in which he repeated the hysterical claim that policies that treat trans people respectfully would help "sex offenders and pedophiles" prey on "women and children." This is absurd on its face. No one is allowed to lurk in a bathroom for improper reasons, regardless of gender; no policy about respecting trans people would ever change that; and protecting trans people does not put anyone else at risk. But you know who I do want to keep away from the children in my life? Anyone who spends his time trying to figure out how to pass a law that would make other people's genitals his business.[38]

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[37] Fox News commentators Chris Wallace and Charles Krauthammer agree with this characterization. Wallace stated on camera that

> We actually decided to try to find out whether it is a public safety issue, whether it is a problem with transgender people misusing bathrooms to prey on others….
>
> And here's what the fact-checking group Politifact found: "We haven't found any instances of criminals convicted of using transgender protections as cover in the United States. Neither have any left-wing groups or right-wing groups."
>
> Which brings me to Charles Krauthammer's comment, … which is that this seems to be a solution in search of a problem."

"Fox Host: 'Bathroom Bills' Are A 'Solution In Search Of A Problem,' (VIDEO)," Talking Points Memo Livewire, April 25, 2016, *available at* http://talkingpointsmemo.com/livewire/chris-wallace-bathroom-bills.

Charles Krauthammer's comments, which Wallace referenced, identified the North Carolina law as

> "… a solution in search of an issue."
>
> "I mean, do we really have an epidemic of transgenders being evil in bathrooms across the country? I haven't heard of a single case."
>
> [Krauthammer] called it a "very small problem at the edges of other problems having to do with gender identity that's become national precisely because Republicans in North Carolina decided it was a problem."

"Krauthammer: NC Bathroom Law Was a 'Solution In Search of an Issue,'" Fox News Insider, April 21, 2016, *available at* http://insider.foxnews.com/2016/04/21/krauthammer-transgender-bathroom-law-solution-search-issue.

[38] Wolff, Tobias Barrington, "The Ugly Fantasy at the Heart of Anti-Trans Bathroom Bills: Do Supporters of So-Called 'Bathroom Bills' Want Trans People to Cease to Exist Altogether?'," The Nation, March 25, 2016, *available at* http://www.thenation.com/article/the-ugly-fantasy-at-the-heart-of-anti-trans-bathroom-bills/.

It really is that simple. Legislators must have the courage to see the homophobia and transphobia that drive this entire, orchestrated, nationwide campaign. Hopefully, most legislators will understand, and have the strength to resist these efforts of questionable merit.

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Commissioner Peter Kirsanow Rebuttal

Responding to all the errors, misstatements, and mischaracterizations in my colleagues' statements would require the wholesale destruction of an entire forest in violation of the Paperwork Reduction Act. I will therefore only address two points.

Response to Statement of Chairman Castro

The answer to the question posed by the title of this briefing has been answered by the majority of my Commission colleagues with an unequivocal "no." Any doubt that the majority maintains that nondiscrimination principles trump and/or extinguish principles of religious liberty was erased by their statements in response to the report.

The majority's take on the primacy of nondiscrimination over religious freedom was perhaps most clearly and succinctly stated by Chairman Castro in the Commission's April 15, 2016 meeting. In responding to a proposed Tennessee bill that would provide an accommodation for therapists and counselors with moral objections to a patient's lifestyle by allowing the therapists to refer such patient to another counselor, Chairman Castro asked:

> "So why is it even necessary for there to be an accommodation on any of this because of someone's sexual orientation? ***They [the therapists] shouldn't have to be accommodated.*** The services should just be provided." (Emphasis added)

Chairman Castro asserts that religious liberty has been used in the past to justify slavery and invidious discrimination. Chairman Castro's singling out of Christianity is especially puzzling. At first I thought he surely meant to identify for opprobrium religions in addition to Christianity. But, as it happens, his venom is directed against American Christians past and present. Of course, there were Christian slave owners in America. That is indeed a repugnant period in American and Christian history but, unfortunately, unremarkable when viewed in the context of history as a whole. Slavery has been an almost universal institution. It is the *abolition* of slavery, largely because of individuals motivated by their Christianity, that is unusual.

So, it is peculiar that the Chairman singles out Christianity for opprobrium in regard to slavery. Slavery has existed in almost every society and among the adherents of almost every major religion. But it was only in the Christian world that a serious critique of slavery arose. Those Christians who supported slavery were utterly unremarkable in the sweep of human affairs, no better or worse than millions of others throughout history. In contrast, it is remarkable, perhaps even astonishing, that there were Christians who rose far above the historical propensities of humankind to call for abolition as a religious and moral imperative.

In criticizing Christianity in regard to Islam and slavery, the Chairman fails to recognize that Islam's ties to slavery are at least as deep as those of Christianity.[1] It was the self-avowed Christian British Empire that initially ended its own involvement in the international slave trade and then acted to curtail the slave trade within the Muslim world. As the Middle Eastern scholar J.B. Kelley wrote:

> No movement of any consequence towards abolition ever arose of its own accord in the Muslim world; it was the reproach of Muslim slavery, not Christian, that men and boys were castrated for service in the *harim*; and it was a Christian nation, Britain, which led the campaign to end the Arab slave trade and to compel Muslim rulers to forbid it to their subjects. . . . It was [British officials], after all, who led the Arab tribes of the Persian Gulf to cease trading in their fellow-Muslims, the Somalis.[2]

Religious believers were also in the forefront of the civil rights movement. Of course, the most prominent leaders of the civil rights movement were disproportionately Christian ministers - Rev. Dr. Martin Luther King, Jr., Rev. Fred Shuttlesworth, Rev. Ralph David Abernathy, Rev. C.K. Steele. Rev. Theodore Hesburgh, perhaps our own Commission's most renowned member, was among them. "More than 900 Catholics participated in the Selma protests" and a log of out of town participants in the Selma protests included "140 priests, 50 sisters, 29 ministers, four rabbis".[3] Mary Parkman Peabody, the wife of a prominent Episcopal bishop, "at the behest of the Rev. Dr. Martin Luther King Jr. and his Southern Christian Leadership Conference" travelled to Florida, engaged in civil disobedience, and spent two nights in jail.[4]

A sense of modesty, humility, and perspective should temper our remarks about those who lived before us. We are all creatures of our own time, our minds and attitudes shaped by influences and assumptions of which we are largely unaware, our actions constrained by weighty responsibilities

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[1] Bernard Lewis, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 124, 126 (1995) ("At first [the janissaries] were recruited exclusively from Christian captives and slaves, mainly by the *devshirme*"; "To some extent the dwindling supply of captives and renegades from Europe could be made good by importing slaves from the Caucasus. Caucasian women had always been appreciated in the harems of the Middle East, and Caucasian men-slaves had also played a role of some importance").

[2] J.B. Kelly, "The European Empires and Islam," in FIGHTING THE RETREAT FROM ARABIA AND THE GULF: THE COLLECTED ESSAYS AND REVIEWS OF J.B. KELLY, VOL. I, 308-09 (2013); *see also* Lewis, *supra* note 1 at 318 ("The abolition of legal chattel slavery [within the Ottoman Empire] was accomplished, in the main, by Western rule, interference, or influence, and did not evoke much concern or debate.").

[3] Paul Murray, *54 miles to freedom: Catholics were prominent in 1965 Selma march*, NAT'L CATH. REP., Mar. 7, 2015, http://ncronline.org/news/peace-justice/54-miles-freedom-catholics-were-prominent-1965-selma-march.

[4] Robert D. McFadden, *Mary Peabody, 89, Rights Activist, Dies*, N.Y. TIMES, Feb. 7, 1981, http://www.nytimes.com/1981/02/07/obituaries/mary-peabody-89-rights-activist-dies.html; Karen Grigsby Bates, *Why a Proper Lady Found Herself Behind Bars*, NPR, Mar. 28, 2014, http://www.npr.org/sections/codeswitch/2014/03/28/294816965/why-a-proper-lady-found-herself-behind-bars.

and unacknowledged self-interest. We all like to think that had we lived in the past we would be among the few righteous. But history is plain - the visionary righteous are few. Most of us are far more likely to have subscribed to the conventional wisdom of our time, or in good faith to have been unable to see our way clear to what is now considered self-evident. We cannot know the reasons future generations will condemn us.[5] All we can know is that they will indeed condemn us, and hope that they judge us with more charity than the Chairman does our predecessors.

Response to Statement of Commissioners Achtenberg, Kladney, Yaki, and Chairman Castro[6]

In footnote 35, Commissioner Achtenberg approvingly quotes Professor Ira Lupu:

> Despite *Obergefell's* nod to the existence of good faith religious opinion against same sex marriage, religious objections to same sex intimacy will ultimately retain no more respect than religious objections to racial integration and inter-racial intimacy. In a nation committed to a more Perfect Union, the arc of the religious universe is long, but it too bends toward justice. [footnotes omitted.][7]

What Professor Lupu argues for is the subordination of religious beliefs to the secular orthodoxy of the moment. This presumes religious beliefs are temporal rather than eternal. This fundamentally misapprehends the nature and quality of religious belief. It also misunderstands the lessons of history. Spectacularly so.

The twentieth century had no shortage of those who believed that they were ushering in a new and better age, and that ushering in that age was worth silencing unpopular beliefs and squelching unpopular views. Some of those individuals lived in places such as the Soviet Union, Maoist China, and areas of the Middle East. Rhetorical flourishes about the arc of history or the religious universe bending toward justice are, tragically, often disproven by *actual* history. The history of totalitarian regimes in the twentieth and twenty-first centuries should disabuse everyone of the notion that history's, or the religious universe's, arc *necessarily* bends in a particular direction, a predictable direction, a beneficent direction.

Accepting that we are not inexorably moving toward an immanentized eschaton leads to the realization that we can make mistakes. Indeed, we can make potentially catastrophic mistakes like the triumphalist thought-conformity contemplated in footnote 35.

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[5] For example, at one time eugenics was a pet cause of the Progressive great and good. Today eugenics is publicly regarded with horror. *See* Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, J. OF ECON. PERSPECTIVES, Vol. 19, No. 4, 207 (2005), https://www.princeton.edu/~tleonard/papers/retrospectives.pdf.

[6] For simplicity, throughout this section I will refer only to Commissioner Achtenberg, although I am of course referring also to the three other commissioners who signed this statement.

[7] Achtenberg Statement, *supra* n. 35 at 40.

Such thought conformity may seem comfortable and enlightened when, during any given moment in the arc of history, the regnant thoughts, beliefs, and values are consistent with one's own. But when the prevailing thoughts and beliefs shift, as they inevitably do, such conformity can prove disastrous. That is precisely why religious liberty, freedom of belief, freedom of *thought* is so important. That is why it should be accommodated, whenever possible, in a manner that affords an appropriate balance with other constitutionally-protected rights. Without such accommodation for freedom of belief all other freedoms are not merely fragile, but illusory.

PANELISTS' WRITTEN STATEMENTS

Alan Brownstein

My name is Alan Brownstein. I am a Professor of Law at the University of California, Davis School of Law. Thank you for giving me the opportunity to contribute to this briefing. I am going to focus my statement on issues relating to religious liberty and, in part, on the problem of reconciling religious liberty and government policies recognizing same-sex marriages and protecting same-sex couples against discrimination.

The Limited Constitutional Constraints on State Action Burdening or Accommodating Religious Liberty

The subject of this briefing - the problem of reconciling non-discrimination principles with civil liberties - confronts our society with difficult issues. As a legal matter, many cases, particularly those involving religious liberty concerns, raise complex doctrinal questions that challenge the sometimes limited analysis of past precedent. From a normative perspective, these problems are hard to resolve because important interests and values can be counted on both sides of these disputes. Some costs we would prefer not to incur will be unavoidable no matter what decision we reach.

The job of evaluating and balancing the competing interests and values in controversies involving religious liberty claims will fall primarily, although not exclusively, on the political branches of government. Over the last twenty-five years, the Supreme Court has substantially narrowed the scope of both of the religion clauses of the First Amendment. Under the holding of *Employment Division v. Smith*, the Free Exercise Clause has been interpreted to provide substantially no protection to religious exercise against neutral laws of general applicability.[1] The rigor and enforceability of establishment clause principles restricting state aid to religious institutions and prohibiting the endorsement of religion through state sponsored displays have been seriously eroded as well.[2] Given this precedent and the strong likelihood that the current Court will follow this doctrinal approach, most church-state issues relating to religious liberty and equality in our society are going to be resolved through political deliberation rather than the constitutional adjudication of religion clause claims.

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[1] *See* Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

[2] *See e.g.*, Mitchell v. Helms, 530 U.S. 793, (2000) (upholding direct grants to religious institutions distributed according to neutral criteria); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding voucher program subsidizing religious schools); Van Orden v. Perry, 545 U.S. 677 (2005) (upholding Ten Commandments monument on state capitol grounds); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (restricting taxpayer standing to litigate Establishment Clause claims).

The Court has decided two contemporary cases, *Church of Lukumi Babalu Aye v. Hialeah*[3] and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,*[4] in which the religion clauses were successfully asserted as a shield against government interference with religious liberty. I do not believe that either case suggests a significant change in doctrinal direction by the Court. In *Church of Lukumi Babalu Aye,* a case involving laws restricting ritual animal sacrifices performed by members of the Santeria faith, the Court employed a complex analysis to determine whether the challenged laws are sufficiently neutral and generally applicable to fall within the holding of *Employment Division v. Smith.* Because the Court considered multiple factors of indeterminate weight in concluding that the Free Exercise Clause was violated in this case, the *Church of Lukumi Babalu Aye* decision is of uncertain precedential utility. It most clearly establishes that states cannot use ostensibly neutral and general laws as a form of "religious gerrymander" to discriminate against a specific religion. Most neutral laws of general applicability burdening religious exercise will not be vulnerable to such a challenge.

While *Hosanna-Tabor Evangelical Lutheran Church and School* is an important case, it is also unlikely to dramatically redirect the development of religion clause jurisprudence. In *Hosanna-Tabor,* the Supreme Court confirmed for the first time the existence of a "ministerial exception" grounded in the religion clauses of the First Amendment that immunizes the hiring of clergy from the operation of civil rights laws. However, the case holding is limited to persons who hold the title of minister, self-identify with that designation, and perform important religious functions as part of their professional duties. Moreover, every Federal Court of Appeals addressing the question had already recognized the existence of the "ministerial exception."[5] There is no evidence that their doing so had any extraneous impact on other free exercise or establishment clause cases.

Overwhelmingly, anti-discrimination laws are neutral laws of general applicability. Thus, aside from cases falling within the ministerial exception, or involving a religious gerrymander under *Lukumi Babalu Aye*, as a general rule these laws can be applied even when doing so has the effect of burdening the free exercise of religion. Accordingly, it will typically be up to the people and their elected representatives to resolve the tension between religious liberty concerns and non-discrimination policies. Political deliberation will determine whether discretionary accommodations are provided either through broadly stated statutes[6] or specific exemptions from general laws.[7]

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[3] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[4] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S.Ct. 694 (2012).

[5] *Id*. at 705.

[6] *See, e.g.,* The Religious Freedom Restoration Act of 1993, 42U.S.C. § 2000bb *et seq*. Several states have also adopted laws modeled after the federal Religious Freedom Restoration Act, but they have had limited utility. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look At State RFRAS*, 55 S.D. L. REV. 466 (2010).

[7] *See, e.g.,* Section 702 of the 1964 Civil Rights Act, 42 U.S.C.A. § 2000e-1 (exempting religious organizations from Title VI's prohibition against religious discrimination in hiring).

While the availability of exemptions from anti-discrimination laws for religious individuals and institutions will be determined by political decision-making in most situations, constitutional law will continue to impact legislative and executive decisions burdening or accommodating religious liberty in three distinct ways. First, in a relatively limited set of circumstances, some statutory or administrative religious accommodations will be struck down for violating the Establishment Clause. Second, freedom of speech and freedom of association claims may be asserted by religious associations and institutions to challenge anti-discrimination policies. Third, the conceptual analysis and arguments employed in constitutional opinions will influence political culture and attitudes. The reasoning of judicial opinions will sway the exercise of political discretion.

As to constitutional constraints on the decision to grant particular religious accommodations, the Establishment Clause restricts the nature and scope of such accommodations to some extent. While most accommodations are permissible, some accommodations are unconstitutional because they are not sufficiently even-handed and impermissibly favor one faith over others.[8] Other accommodations violate the Establishment Clause because they go too far and impose an unacceptable burden or risk on third parties.[9] It remains to be seen whether the Court will weaken its review of religious accommodations under the Establishment Clause to the same degree that it has retreated from establishment clause requirements restricting state financial subsidies to religious institutions and prohibiting the endorsement of religion through state sponsored displays.

While the Establishment Clause imposes some limits on the state's power to grant discretionary religious accommodations, freedom of speech and freedom of association doctrine can serve as an alternative foundation for asserting that the Constitution requires accommodations to protect the exercise of religion. In a significant line of cases, the Court has bypassed the Free Exercise Clause and struck down government regulations denying religious groups access to public property for expressive religious activities when secular groups were provided access to the same facilities for non-religious activities.[10] In the most recent of these cases, the Supreme Court concluded that these exclusions of expressive religious activities constituted impermissible viewpoint discrimination in clear violation of accepted free speech doctrine.

This viewpoint discrimination contention has been raised by religious groups to challenge the application of anti-discrimination policies to their membership decisions and their selection of

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[8] *See, e.g.,* Larson v. Valente, 456 U.S. 228 (1982); Board of Education, Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994).

[9] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down statute providing absolute and unqualified accommodation of Sabbath observers because it unconstitutionally favors and advances religion); Cutter v. Wilkinson, 544 U.S. 709, 720-24 (2005) (upholding broad accommodation requirement with the understanding that it will be applied neutrally among faiths and will not impose unreasonable burdens on nonbeneficiaries).

[10] *See, e.g.,* Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

officers. Most notably, plaintiffs in *Christian Legal Society v. Martinez*[11] argued unsuccessfully that the Hastings College of Law's anti-discrimination policy constituted prohibited viewpoint discrimination. Justice Alito and the other dissenting Justices in *Martinez,* however, were persuaded that a state college policy prohibiting student clubs from discriminating on the basis of religion, while not prohibiting student clubs from discriminating on the basis of political or secular beliefs, was viewpoint discriminatory because it interfered with the associational freedom of religious organizations, but not their secular counterparts.[12]

As I have argued in prior work, Justice Alito's viewpoint discrimination argument in his dissent in *Martinez* is mistaken on the merits and inconsistent with accepted free speech principles.[13] The more important problem with the *Martinez* dissent, however, is that it helps to demonstrate how the Court's willingness to construe religious beliefs and expressive activities to be speech, rather than the exercise of religion - protected under freedom of speech, rather than free exercise, doctrine - may severely undercut the legitimacy of laws accommodating religious liberty or shielding it from state interference.

Understood as a liberty right, the exercise of religion may receive distinctive protection and accommodations that need not be provided to secular activities or institutions. Such religion-specific accommodations are rarely constitutionally mandated after the *Smith* decision, but discretionary, political determined religious accommodations are often constitutionally permissible for religion clause purposes. Put simply, the religion clauses do not prohibit the distinctive treatment of religion by the state. If anything, they acknowledge the propriety of distinctive treatment in limiting the state's ability to interfere with or promote religion.

Free speech doctrine is entirely different. If religious expressive activities are conceptualized as speech, indeed, as expressing a viewpoint of speech, the First Amendment's free speech clause requirements prohibit government from treating these religious activities any differently than non-religious expressive activities. The Free Speech Clause is a harsh mistress, particularly with regard to its prohibition against viewpoint discrimination. The same doctrinal principle that prohibits government from discriminating against religion operates with equal force to prohibit government from discriminating in favor of religion.

The implications of this reasoning are far reaching. If religious beliefs and expressive activities are conceptualized as speech, in the way that Justice Alito's analysis suggests, various accommodations of religion might be subject to constitutional challenge on the grounds that they impermissibly favor religious viewpoints and messages. One example, arising out the *Martinez*

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[11] Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010).

[12] *Id*. at 3009 - 13.

[13] Alan Brownstein and Vikram Amar, Reviewing Association Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action, 38 HASTINGS CONST. L. Q. 505 (2011).

case, should be sufficient to illustrate the risks created by an overly ambitious willingness to construe religion as speech. Conventional civil rights laws (and the original written policy at the Hastings College of Law) prohibit discrimination based on a variety of individual characteristics: race, gender, religion, sexual orientation, age, disability etc. Such laws rarely prohibit discrimination on the basis of political affiliation or belief.

From a liberty or equality perspective, these laws are unexceptional. The exercise of religion is a distinctively recognized liberty interest. A person's religious status is a core aspect of their identity that too often has been the focus of prejudice and irrational discrimination. For religion clause purposes, there is nothing problematic about prohibiting discrimination based on religion, while not prohibiting discrimination based on political affiliation or belief.

If we conceptualize religion as a viewpoint of speech and examine the same laws under free speech doctrine, a very different analysis applies. Now we are reviewing a law that provides far greater protection against discrimination to individuals who hold and espouse religious beliefs than it provides to individuals who hold and espouse political or secular beliefs. For free speech purposes, why shouldn't these civil rights laws be vulnerable to challenge on the grounds that they unconstitutionally favor religious viewpoints? The Court's continued willingness to construe religion as speech, without providing any demarcation lines that suggest when one constitutional framework or another is appropriate in particular circumstances, makes it more and more difficult to answer questions like this one.

Finally, even if constitutional law does not directly constrain government decisions related to religious liberty, the Court's decisions may indirectly influence whether discretionary religious accommodations will be granted by the legislature or government administrators. Discretionary political accommodations of religious practice and belief are predicated on the principle that there is something distinctive about religion that justifies exempting religious individuals and institutions from laws that their secular counterparts must obey. Accordingly, constitutional arguments that cast doubt on the idea that religion is distinctive by suggesting that religious and non-religious individuals or institutions are similarly situated and should be treated the same way by government erode the conceptual foundation on which religious accommodations are based. The reasoning of recent Supreme Court decisions adjudicating establishment clause and free speech cases communicate just this message, and in doing so, they substantially undermine the basic idea that religion is different in a way that justifies special legal attention and treatment.

Recent establishment clause cases permitting government to fund religious institutions through grants or vouchers suggest that there is nothing about these institutions that warrants treating them differently for funding purposes than non-religious institutions. As long as the funding criteria being used to award subsidies is neutral, the religious nature of the entities seeking state subsidies can be ignored.[14] This neutrality model, however beneficial it may be to religious institutions in

[14] *See* Mitchell v. Helms and Zelman v. Simmons-Harris, *supra* note 2.

financial terms in some circumstances, recognizes religious communities as just another interest group seeking state support for their activities. If religious institutions can demand and receive an equal right to seek the same support from the government as their competitors, they will be far less persuasive in demanding exemptions from general regulations that other organizations must obey.

The reasoning underlying recent free speech cases, discussed above, is even more problematic for claims for discretionary religious accommodations. When religious practice and activities are understood to express particular viewpoints in public discourse and debate, providing distinctive protection to religious activities and institutions seems inconsistent with a core understanding of freedom of speech - the rule that government cannot favor one viewpoint or message over another. Accommodations that may seem justifiable if they are perceived as shielding the exercise of a liberty right, religious freedom, from state interference may seem far less deserving of support if they are perceived to be privileging religious messages in the marketplace of ideas.

Reconciling Religious Liberty and the Right of Same-Sex Couples to Marry

If conflicts between religious liberty and non-discrimination policies are going to be resolved politically, rather than through constitutional adjudication, how are we as a society to approach and evaluate these disputes? Is there any basis for seeking some principled resolution of these controversies, or will all these issues be decided solely as matter of political power - with the larger or stronger constituency in a jurisdiction controlling the result without regard to the value or interests on the losing side?

I have been struggling with this issue for several years in the specific context of the conflict between religious liberty and policies protecting same-sex married couples against discrimination. I don't know that I can claim to bring an entirely evenhanded perspective to this dispute. I can say that I am unequivocally committed to the moral necessity of states recognizing same-sex marriages, and that I have spent the last twenty five years of my professional life writing about, and advocating for, the rigorous protection of religious freedom.

Not all religions oppose same-sex marriages and there is disagreement within many denominations about both the religious and the legal status of same-sex unions. Religious individuals and institutions that oppose same-sex marriages fear that if such relationships are legalized they will be required by anti-discrimination laws or other government policies to affirm or support as valid marriages that violate the requirements of their faith. Some disputes have already occurred and more are predicted.[15] Religious objectors and their proponents may seek exemptions from laws or duties that require them to facilitate or validate same-sex marriages by issuing a marriage license to a same-sex couple, providing catering, photography, floral arrangements or other services to a same-sex couple's wedding, or renting an apartment or hotel room to a gay or lesbian couple.

[15] *See generally* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, (Douglas Laycock. Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds. 2008); Ira CV. Lupu and Robert W. Tuttle, *Same-Sex Equality and Religious Freedom,* 5 NW. J. L. & SOC. POL'Y 274 (2010).

Other claims may involve religious adoption agencies refusing to place children with same-sex couples or religious employers refusing to extend spousal benefits to a same-sex spouse.

In public discourse the arguments on both sides of this debate are sometime harsh and uncompromising. To some opponents of same-sex marriage, gay and lesbian couples are trying to force religiously observant individuals and religious institutions to accept as normal and moral what they perceive to be the unnatural and sinful behavior of homosexual unions. Similarly, some opponents of religious accommodations view religious individuals and institutions seeking exemptions from civil rights laws as unrelenting bigots determined to undermine the equal treatment of gays and lesbians in our society in any way that they can.

In addressing this conflict, I start with a basic normative and political principle.[16] If we are going to achieve some form of reconciliation between the constituencies supporting these competing claims, some form of political compromise, people on both sides of these issues need to recognize that one of the best ways to protect one's own liberty and autonomy rights is to recognize the liberty and autonomy of others.

The application of this principle to the current debate about religious liberty and same-sex marriage presupposes that religious liberty and the right of same-sex couples to marry are autonomy rights that are worthy of respect. Here, I suggest that the right of same-sex couples to marry and religious liberty rights share a common foundation as important personal autonomy rights. Indeed, counter intuitive as it may seem, at some basic level, these rights can be understood to mutually reinforce each other. Thus, strengthening our cultural and legal commitment to personal autonomy supports both religious liberty and the right of same-sex couples to marry.

Equality and autonomy rights grounded in sexual orientation and equality and liberty rights grounded in religious identity parallel each other in important respects. For example, for many devoutly religious persons, religion is a core aspect of their identity. It is a fixed part of who they are. Similarly, sexual orientation is a fixed part and core aspect of a gay or lesbian person's identity. Just as it is unrealistic, unfair, and useless to insist as a matter of social policy that gays and lesbians should just stop being gay, it is equally unacceptable to insist that devoutly religious persons should just stop obeying the dictates of their faith.

Also, religion and sexual orientation have a merged identity and conduct dimension to them. It makes no sense to tell devout Catholics that they are protected as to their religious identity, but they are prohibited from practicing Catholicism. It is similarly senseless to protect the identity of gays and lesbians, while prohibiting their right to sexual intimacy. Neither gays nor lesbians nor devoutly religious individuals can reasonably be required to change who they are - or to separate

[16] This section of my statement is based on a previously published article, 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 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 389 (2010).

their conduct from their identity. Religion is no more an easily discarded so-called lifestyle than is an orientation toward sexual intimacy and association.

Moreover, both religious belief and affiliation and same-sex marital relationships are the source of duties and responsibilities. They are both intended to express the seriousness of mutual commitments. Religious people want to have the liberty to fulfill the responsibilities that arise out of their relationship with G-d. Same-sex couples want to marry in order to express their commitment to the person with whom they want to share their lives - and to fulfill the responsibilities that arise out of this relationship.

Perhaps most importantly, the essence of religious liberty is the right to be different and to be wrong in the eyes of others. Members of many faiths believe that adherents of other religions or non-believers are deeply and seriously in error in their beliefs. A commitment to religious liberty tempers the conflict among religions by allowing the adherents of different faiths to follow their own path -- even if other religions believe it is the wrong road and takes them away from G-d.

A similar analysis applies to the conflict between some religious adherents and same-sex marital couples. Protecting the liberty interests of both groups requires the mutual recognition of the right to be wrong in the other group's eyes.

Ultimately, respect for personal autonomy rights has to be a two way street. It cannot be restricted solely to those who exercise their liberty and autonomy in approved ways. There is no gold standard that defines the scope of fundamental rights by only protecting what the majority deems to be the best religions or the best kinds of sexual intimacy. If we believe that we should limit the state's authority to interfere with core autonomy interests, then those limitations should apply equally when we are in the majority and can use state power to impose our beliefs on others, and when we are a minority and fear having the majority's beliefs imposed on us. A meaningful commitment to core autonomy rights would protect both religious liberty and the right of gays and lesbians to marry the person with whom they choose to share their lives.

Agreeing that two autonomy rights, religious liberty and the right of same-sex couples to marry, both deserve respect doesn't tell us how we should reconcile these rights when they are in conflict with each other. Here, I suggest that existing models of religious accommodation provide some useful guidance. We have a long history in the United States of resolving conflicts between religious liberty and public policy requirements through carefully crafted exemptions and accommodations. Recognizing the objections of religious pacifists to conscription may be one of the oldest examples of such accommodations, but it is only one example of many. The adoption of civil rights laws and the protection of various autonomy rights have often created problems for some religious individuals and institutions and in appropriate circumstances, religious accommodations have been created to respond to these concerns.

Some understanding of how prior conflicts between civil rights laws (and other government policies) and religious liberty have been resolved has to be part of the analysis. There is nothing

about same-sex marriages that suggests that they represent some kind of a unique, outlier problem because of their impact on religious liberty. Once cannot simply presume that claims for religious exemptions from civil rights laws prohibiting discrimination based on race, gender, national origin, religion, age, or disability that would be rejected in the past must be accepted now when the prohibited discrimination is based on sexual orientation.

Two models, based on existing frameworks, have been offered as a basis for determining when accommodations for religious objectors to same-sex marriage should be granted. One model analogizes discrimination against same-sex marital couples to racial discrimination. Under this approach, few, if any accommodations would ever be granted. I reject this analogy because racism has played such a uniquely invidious role in American history. The goal of purging racial discrimination from our society has no equal and no counterpart.

Another model analogizes accommodations for religious objectors to same-sex marriage to conscience clauses for health care providers who refuse to perform abortions. I reject this analogy as well. Narrow and limited accommodations focused on a specific set of health care procedures have little relevance to religious objections to on-going relationships that may endure for decades.

I suggest that a better model for evaluating proposed exemptions from civil rights laws protecting same-sex married couples from discrimination would be based on accommodations that permit discrimination on the basis of religion. That is, a starting point for our inquiry would be to determine when we would free religious institutions or individuals from any civil rights obligation to employ, or provide goods and services to, people of other faiths without discrimination based on their religious belief, identity, or practices.

This model is supported by the parallels between religious liberty and the right of same-sex couples to marry described above. It also reinforces two important ideas that may be essential to meaningfully reconciling these conflicting claims. First, just as we recognize in evaluating proposed accommodations of religiously based religious discrimination that there is something of serious value on each side of the scale, a comparable balance between important values applies when we evaluate proposed accommodations of religiously-based discrimination against same-sex married couples.

Second, by providing limited accommodations for discrimination based on religion, we acknowledge that protecting the religious liberty of the diverse faiths in our society requires some mutual recognition of the right to be wrong in the eyes of others. Both the religious group engaging in discrimination and the religious individuals subject to such discrimination may view the other faith's beliefs and conduct as sinful or immoral. Limited accommodations require that both groups provide the other some freedom to act wrongly free from state interference or private discrimination. A similar analysis applies if we analogize the accommodation of religious objectors to same-sex marriage to the accommodation of religiously based religious

discrimination. Both groups would be asked to recognize the right to act wrongly in the eyes of the other.

The model I propose provides a way to think about the problem of reconciling religious liberty and the right of same-sex couples to marry and be free from discrimination. It is not intended to serve as a blueprint for specific legislative accommodations. It requires that legislatures ask when they consider specific accommodations whether they would be willing to support the exemption from civil rights laws if it accommodated discrimination against Jews or Moslems or Mormons as well as same-sex couples. Religious exemptions would apply to discrimination based on religion as well as sexual orientation, not just to discrimination based on sexual orientation.

Still, it is possible to suggest some ways in which the model could be applied. Turning to existing law for guidance, the model would protect non-profit religious institutions far more than it would protect commercial businesses. Title VII's exemption of non-profit religious organizations from the statute's prohibition against religious discrimination in hiring[17] would apply to discrimination in the hiring of married gays and lesbians and, arguably, to the denial of spousal benefits to the non-employee spouse of a same-sex couple. The autonomy of non-profit religious institutions in other circumstances, however, would have to be subordinated to the needs of gay and lesbian families. I cannot imagine a religious hospital being allowed to deny the legal prerogatives due the spouse of a patient because the hospital objected to an inter-faith marriage or to the marriage of previously divorced individuals. Accordingly, religious hospitals would be required to acknowledge the rights due the same-sex spouse of a patient in their care.

In some cases, the application of this model to accommodations for religious objectors to same-sex marriage will be obvious. There will also be grey areas and hard cases. The model provides a framework for beginning a discussion about the reconciliation of conflicting rights. It is not presented as the complete answer to all the issues that may arise in the numerous circumstances in which religious liberty claims relating to same-sex marriage may be asserted.

Kimberlee Wood Colby

I am Kim Colby, Senior Counsel at Christian Legal Society's Center for Law and Religious Freedom where I have worked for over 30 years to protect religious students' rights to meet for religious speech on college campuses. Christian Legal Society ("CLS") has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected regardless of the current popularity of their speech. For that reason,

[17] *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding constitutionality of Section 702 of the 1964 Civil Rights Act, 42 U.S.C.A. § 2000e-1, which exempts religious organizations from Title VI's prohibition against religious discrimination in hiring, in the context of nonprofit activities).

CLS was instrumental in passage of the Equal Access Act of 1984[18] that protects the right of students to meet for "religious, political, philosophical or other" speech on public secondary school campuses.[19] The Act has protected both religious and homosexual student groups seeking to meet for disfavored speech.[20]

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students. All students are welcome at CLS meetings. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of faith, signifying agreement with the traditional Christian beliefs that define CLS. Beginning in 1993, CLS student chapters, like other religious student groups, began to encounter some university administrators' *misuse* of nondiscrimination policies to exclude religious student groups from campus, simply because they require their leaders to agree with their religious beliefs.[21]

This expanded written statement examines the supposed conflict between university nondiscrimination policies and religious liberty that occurs when some college administrators' misinterpret nondiscrimination policies to treat religious groups' use of religious leadership criteria as "religious discrimination." But it is common sense and basic religious liberty - not discrimination -- for religious groups to expect their leaders to share their religious beliefs. Nondiscrimination policies serve valuable purposes. But nondiscrimination policies are intended to *protect* religious students on campus, not *punish* them for being religious. When universities misuse nondiscrimination policies to exclude religious student groups, they actually undermine nondiscrimination policies' purposes and the good they serve. If used with appropriate sensitivity, nondiscrimination policies and religious liberty are eminently compatible, as shown by many universities' model policies that create a sustainable environment in which nondiscrimination principles and religious liberty can harmoniously thrive.[22]

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[18] 20 U.S.C. 4071-4074 (2013).

[19] *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement).

[20] *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (requiring access for religious student group); Straights and Gays for Equality v. Osseo Area School No. 279, 540 F.3d 911 (8th Cir. 2008) (requiring access for homosexual student group).

[21] See Michael Stokes Paulsen, A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups, 29 U.C. Davis L. Rev. 653, 668-72 (1996) (detailing University of Minnesota's threat to derecognize CLS chapter); Stephen M. Bainbridge, Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act, 21 J.C. & U.L. 369 (1994) (detailing University of Illinois' threat to derecognize CLS chapter).

[22] *See* Attachment C. The University of Florida's nondiscrimination policy is an excellent model for striking the appropriate balance between nondiscrimination policies and religious liberty: "A student organization whose

Part II explores the need for a reflective understanding of "discrimination" that is sensitive to both religious liberty and nondiscrimination principles. Examining the intersection of religious freedom and nondiscrimination norms, a leading constitutional scholar explains:

When we say that 'discrimination' is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it we mean that governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers, to do so.[23]

Caution needs to be taken before affixing the stigmatizing label of "wrongful discrimination" to religious groups' exercise of a fundamental religious liberty. Reflecting an appropriate sensitivity to religious liberty, most nondiscrimination laws, including Title VII, simultaneously prohibit discrimination while protecting religious groups' ability to maintain their religious identities.

Part III analyzes the Supreme Court's decision in *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Martinez,*[24] a narrow decision that is easily misunderstood. In Martinez, the Court explicitly did not decide whether nondiscrimination policies could be used to penalize the religious students that they are supposed to protect. Instead, the Court narrowly, and conspicuously, confined its decision to an unusual "all-comers policy," unique to one law school, that required all student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with—or actively opposed—the values, beliefs, or speech of the group.[25] Moreover, the Court held it was not enough for a university to adopt an "all-comers policy": the policy must actually be uniformly applied to all student groups.[26]

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primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy." University of Florida "Student Organization Registration Policy Update," at 12, *available at* https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Organizations/Handbooks/Student%20Org%20Handbook%202011-2012.pdf (last visited March 8, 2013). *See also*, University of Texas, "New Student Organization Application," *available at* http://deanofstudents.utexas.edu/sa/downloads/New_Org_App.pdf (last visited March 8, 2013); University of Houston, "Organizations Policies," § 2.4 (a) (3), *available at* http://www.uh.edu/dos/pdf/2011-2012StudentHandbook.pdf (last visited March 8, 2013); University of Minnesota "Constitution and By-Laws Instructions" in Student Groups Official Handbook, *available at* http://sua.umn.edu/groups/handbook/constitution.php (last visited March 8, 2013).

[23] Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm,* ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 198 (Cambridge University Press, 2012). A summary of Professor Garnett's article is found at Richard W. Garnett, *Confusion about Discrimination, The Public Discourse,* Apr. 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5151/ (last visited March 8, 2013).

[24] 130 S.Ct. 2971 (2010).

[25] *Id.* at 2982, 2984; *id.* at 2999 (Kennedy, J., concurring).

[26] *Id.* at 2993-2995.

As Part IV explains, "all-comers policies" are rare because, as the Martinez decision requires, they must be applied without exception to all student groups. As a practical matter, an "all-comers policy" is completely unworkable because of its inherent incompatibility with the sororities and fraternities, a cappella groups, and club sports teams found on most campuses. Besides ending selection of members and leaders on the basis of sex, an all-comers policy would seem to require fraternities and sororities to adopt a "first-come, first-pledge" selection process to ensure their openness to all students.

A healthy balance between nondiscrimination policies and religious liberty is absolutely necessary and easily attainable. The conflict is entirely avoidable if university administrators exercise tolerance, common sense, and sensitivity to religious student groups and their basic religious liberty to be led by persons who share their religious beliefs.

Misuse of Nondiscrimination Policies to Exclude Religious Student Groups from Campus Violates The Students' Basic Religious Liberty and Is Instead Religious Discrimination by the Universities.

Nondiscrimination policies serve valuable purposes. But nondiscrimination policies are intended to protect religious students on campus, not punish them for being religious. When universities *misuse* nondiscrimination policies to exclude religious student groups, they actually undermine nondiscrimination policies' purposes and the good they serve.[27] In the process, they diminish diversity on campus. In the name of "tolerance," college administrators institutionalize religious intolerance. In the name of "inclusion," college administrators exclude religious student groups from campus.[28]

This misuse of nondiscrimination policies is unnecessary. Many leading universities have policies that protect religious groups' religious leadership criteria. The University of Florida's nondiscrimination policy is an excellent model for striking the appropriate balance between nondiscrimination policies and religious liberty. Protection for religious student groups is embedded in the nondiscrimination policy: "A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground

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[27] As Dean Joan Howarth of the Michigan State University College of Law has explained, "the application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom." Joan Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups,* 42 U.C. Davis L. Rev. 889, 915 (2009).

[28] This happened quite literally at Tufts University when a group calling itself the "Coalition Against Religious Exclusion" failed to see the irony in its efforts to exclude a religious student group from campus because of the group's traditional religious beliefs. After the religious student group was derecognized for several months, its recognition was restored under a new policy that allows religious groups to have religious leadership criteria. Tufts University, Undergraduate Education, Student Affairs, & Student Services, "Decision of the Tufts University Committee on Student Life on Recognition of Student Religious Groups," Dec. 5, 2012, *available at* http://uss.tufts.edu/studentaffairs/handbook /SRGrecognition.asp (last visited March 8, 2013).

that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy."[29] Similarly, the University of Texas provides: "[A]n organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith."[30] The University of Houston likewise provides: "Religious student organizations may limit officers to those members who subscribe to the religious tenets of the organization where the organization's activities center on a set of core beliefs."[31] The University of Minnesota provides: "Religious student groups may require their voting members and officers to adhere to the organization's statement of faith and its rules of conduct."[32] By demonstrating that nondiscrimination policies and religious liberty are eminently compatible, such model policies create university environments in which nondiscrimination principles and religious liberty harmoniously thrive.

The treatment of religious students is important not only for the students threatened with exclusion, and not only to preserve a diversity of ideas on college campuses, but also because the lessons taught on college campuses about the First Amendment spill over into our broader civil society.[33] Those who insist that we must choose between religious liberty and nondiscrimination policies in reality are demanding a zero-sum game in which religious liberty, nondiscrimination principles, and pluralism ultimately all lose.

Religious student organizations enhance campus diversity in myriad ways by contributing to the religious, philosophical, cultural, social, and ethnic "marketplace of ideas" on campus. But this diversity is threatened when university administrators ban religious student organizations from campus because they exercise the basic religious liberty to require their leaders to agree with their religious beliefs.

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[29] University of Florida "Student Organization Registration Policy Update," p. 12 *available at* https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Organizations/Handbooks/Student%20Org%20Handbook%202011-2012.pdf (last visited March 8, 2013).

[30] University of Texas "New Student Organization Application," *available at* http://deanofstudents.utexas.edu/sa/downloads/New_Org_App.pdf (last visited March 8, 2013).

[31] University of Houston "Organizations Policies," § 2.4 (a) (3), *available at* http://www.uh.edu/dos/pdf/2011-2012StudentHandbook.pdf (last visited March 8, 2013).

[32] University of Minnesota "Constitution and By-Laws Instructions" *in Student Groups Official Handbook*, *available at* http://sua.umn.edu/groups/handbook/constitution.php (last visited March 8, 2013).

[33] For example, a federal appellate judge opined that New York City might consider denying a church access to public school auditoriums on weekends, to which other community groups had access, because its meetings might not be "open to the general public" if the church reserved communion to baptized persons. *Bronx Household v. Bd. of Education*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring).

For the past forty years, some college administrators have tried to exclude religious student groups from campus.[34] From the mid-1970s to the mid-1990s, the Establishment Clause was the justification given for excluding religious student groups. Administrators claimed that the Establishment Clause would be violated if they allowed religious groups to meet in empty classrooms on campus. But in 1981,[35] and again in 1995,[36] the Supreme Court ruled that the Establishment Clause was not violated by religious groups meeting on campus. Instead, the Court held that the freedoms of speech and association protected religious groups' right to meet on campus.

Universities' nondiscrimination policies then became a new justification for excluding religious student groups from campus. Asserting it was "religious discrimination," some administrators told religious groups they could not require their leaders to agree with their religious beliefs.[37]

But it is common sense - not discrimination - for religious groups to choose leaders who agree with their religious beliefs. It is religious liberty - not discrimination - that protects religious groups' ability to choose leaders who agree with their religious beliefs. The leadership of any organization affects its ability to carry out its mission. Particularly true for religious groups, leaders conduct the Bible studies, guide the prayers, and facilitate the worship at religious groups' meetings. To expect the person conducting the Bible study to believe that the Bible reflects truth seems obvious. To expect the person leading prayer to believe in the God to whom she is praying seems reasonable. Both are a far cry from wrongful discrimination.

Yet some university administrators woodenly characterize these common sense expectations as "religious discrimination." For example, last year, Vanderbilt University denied recognition

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[34] The technical term for excluding student groups from campus is to "deny them recognition." To be an official student group on campus, the group must "register" or "be recognized" by the administration as an official student group. "Recognition" as a student group allows a student group to reserve meeting space for meetings and activities, publicize meetings through campus channels of communication, attract new members through the organizational fair in the fall, and apply for funding to bring speakers to campus. Practically speaking, without recognition, a student organization cannot exist on campus. Large universities have several hundred student groups. The Ohio State University, for example, has over 1000 recognized student organizations. *See* http://ohiounion.osu.edu/get_involved/student_organizations (last visited March 8, 2013).

[35] Widmar v. Vincent, 454 U.S. 263 (1981) (religious student groups have free speech and free association rights to meet on public university campus, and such meetings do not violate the Establishment Clause).

[36] *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995) (religious student group's freedom of speech was violated when the university denied it access to student activity fee funding for the printing costs of its evangelical magazine, and the Establishment Clause would not be violated by the University paying $5,862 toward those printing costs).

[37] See Michael Stokes Paulsen, A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups, 29 U.C. Davis L. Rev. 653, 668-72 (1996) (detailing University of Minnesota's threat to derecognize CLS chapter); Stephen M. Bainbridge, Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act, 21 J.C. & U.L. 369 (1994) (detailing University of Illinois' threat to derecognize CLS chapter).

to a Christian Legal Society student chapter because the students expected their leaders to lead Bible study, prayer, and worship, and to affirm that they agreed with the group's core religious beliefs.[38] Vanderbilt University demanded that another Christian group delete five words from its leadership requirements if it wanted to remain on campus: "personal commitment to Jesus Christ."[39] In the end, Vanderbilt University forced fourteen Catholic and evangelical Christian student groups from campus.[40] While Vanderbilt refused to allow religious groups to have religious leadership requirements, it specifically announced that fraternities and sororities could continue to engage in sex discrimination in their selection of both leaders and members.[41]

Religious groups' ability to choose their leaders is the most basic of religious liberties. Last year, the Supreme Court unanimously protected the right of religious institutions to choose their leaders despite the federal government's claim that their decisions violated federal nondiscrimination laws. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,*[42] the Court rejected the government's argument that nondiscrimination laws could be used to second-guess religious associations' leadership decisions. The Supreme Court acknowledged that nondiscrimination laws are "undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[43] Religious leaders "personify" a religious group's beliefs and "shape its own faith and mission."[44] In their concurrence, Justice Alito and Justice Kagan stressed that "[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."[45]

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[38] *See* Attachment A (also *available at* https://www.clsnet.org/document.doc?id=456 (last visited March 8, 2013)).

[39] *See* Attachment B (also *available at* http://www.clsnet.org/document.doc?id=455 (last visited March 8, 2013)).

[40] The excluded groups are: Asian-American Christian Fellowship; Baptist Campus Ministry; Beta Upsilon Chi; Bridges International; Campus Crusade for Christ (CRU); Christian Legal Society; Fellowship of Christian Athletes; Graduate Christian Fellowship; Lutheran Student Fellowship; Medical Christian Fellowship; Midnight Worship; The Navigators; St. Thomas More Society; and Vanderbilt + Catholic.

[41] Colleges frequently invoke Title IX's exemption for fraternities and sororities to justify their unequal treatment of religious groups compared to Greek groups. But that response is a red herring. Title IX gives fraternities and sororities an exemption *only* from Title IX itself, which prohibits sex discrimination in higher education. It does not give fraternities and sororities a blanket exemption from all nondiscrimination laws or policies, including a university's own nondiscrimination policy or an all-comers policy. If a university exempts fraternities and sororities from their nondiscrimination policies, they must also exempt religious groups. *See* Christian Legal Society v. Martinez, 130 S.Ct. 2971, 2993, 2995 (2010); *cf.,* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545-46 (1993).

[42] 132 S.Ct. 694 (2012).

[43] *Id.* at 710.

[44] *Id.* at 706.

[45] *Id.* at 713 (Alito, J., concurring).

These same considerations are true for student religious groups when they choose the leaders who will speak on their behalf to the campus community and lead the Bible study, prayer, and worship at their meetings. In perhaps the most cogent legal analysis of the reason nondiscrimination policies, when misused, impose a particular burden on religious student groups, Seventh Circuit Judge Kenneth Ripple has explained:

Under this [nondiscrimination] policy, most clubs can limit their membership to those who share a common purpose or view: Vegan students, who believe that the institution is not accommodating adequately their dietary preferences, may form a student group restricted to vegans and, under the policy, gain official recognition. Clubs whose memberships are defined by issues involving "protected" categories, however, are required to welcome into their ranks and leadership those who do not share the group's perspective: Homosexual students, who have suffered discrimination or ostracism, may not both limit their membership to homosexuals and enjoy the benefits of official recognition. The policy dilutes the ability of students who fall into "protected" categories to band together for mutual support and discourse.

For many groups, the intrusive burden established by this requirement can be assuaged partially by defining the group or membership to include those who, although they do not share the dominant, immutable characteristic, otherwise sympathize with the group's views. Most groups dedicated to forwarding the rights of a "protected" group are able to couch their membership requirements in terms of shared beliefs, as opposed to shared status.

Religious students, however, do not have this luxury—their shared beliefs coincide with their shared status. They cannot otherwise define themselves and not run afoul of the nondiscrimination policy... The Catholic Newman Center cannot restrict its leadership—those who organize and lead weekly worship services—to members in good standing of the Catholic Church without violating the policy. *Groups whose main purpose is to engage in the exercise of religious freedoms do not possess the same means of accommodating the heavy hand of the State.*

The net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based. While those who espouse other causes may control their membership and come together for mutual support, others, including those exercising one of our most fundamental liberties—the right to free exercise of one's religion—cannot, at least on equal terms.

Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added), *cert. denied,* 132 S.Ct. 1743 (2012).

By insisting that religious groups abandon their religious belief requirements for their leaders, university administrators effectively demand that religious groups recant their basic religious beliefs. No starker illustration can be found than Vanderbilt University telling a Christian group that it could remain a recognized student group *only* if it deleted "personal commitment to

Jesus Christ" from its constitution.[46] This is something that many faithful Christian groups will not do. It is not that they are unable to recant - deleting a few words is not that difficult. It is that Christians view recanting religious beliefs as the equivalent of overtly denying God. Over the past two millennia, millions of Christians have suffered great hardship rather than recant their faith. In comparison, forfeiting access to campus may seem a small thing. But it is still fundamentally wrong for university authorities to demand that religious students choose between recanting their religious beliefs and remaining on campus.

Of course, when university administrators are also government officials, as are public university administrators, then the government itself is making the demand. If the First Amendment does not protect in this situation, what is left of religious liberty? Public school students faced an analogous situation when they were expelled during World War II for refusing to salute the flag because they believed they would thereby violate the Second Commandment.[47] In ruling for the students, the Supreme Court's words seem particularly apt to a discussion of the protection of both religious liberty and nondiscrimination values:

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.* If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[48]

Religious liberty must be reinforced on university campuses. The "right to religious freedom" must not be redefined to mean the "right to recant." Religious freedom must remain the right to hold traditional religious beliefs without fear of expulsion from the public square.

When Religious Groups Require Their Leaders to Share Their Religious Beliefs, They Are Exercising Their Religious Liberty, Not Discriminating.

A. The label of "discrimination," or the "Scarlet D," must be affixed carefully.

To our society's credit, affixing the label of "discrimination" to an action immediately casts that action as bad and intolerable. For that reason, the push to recast as "discrimination" religious groups' right to have religious leadership requirements must be carefully weighed (and ultimately rejected) if religious liberty and pluralism are to survive in our society. "It is tempting and common, but potentially misleading and distracting, to attach the rhetorically and morally

[46] *See* Attachment B, (also *available at* http://www.clsnet.org/document.doc?id=455 (last visited March 8, 2013).

[47] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1942).

[48] *Id.* at 642.

powerful label of 'discrimination' to decisions, conduct, and views whose wrongfulness has not (yet) been established."[49]

When school administrators impose a "Scarlet D" on religious groups for being openly religious, great damage is done to religious liberty and pluralism. But damage is also done to the equality and nondiscrimination principles that those applying the label claim to advance. A constitutional scholar recently explained that "overenthusiastic or insufficiently deliberate campaigns against 'discrimination,' in the name of 'equality,' can conflict with or even undermine the fundamental and core idea of liberal, constitutional, and, therefore, limited government."[50] To force an unnecessary and false dichotomy between nondiscrimination policies and religious liberty is likely to diminish religious citizens' support for nondiscrimination policies generally. Because it is possible to have strong nondiscrimination policies *and* religious liberty, the better approach is to facilitate both, rather than demand that religious liberty lose.

Instructively, the Supreme Court itself "decline[s] to construe" federal laws "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."[51] College administrators would do well to follow the Supreme Court's example of restraint and interpret university policies, which are hardly on par with federal laws, to avoid "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." This is particularly true when the common sense interpretation of nondiscrimination policies avoids the dilemma altogether.

It is common sense, not "religious discrimination," for religious groups to have religious leadership criteria.

To begin, "[i]t is not 'discrimination' that is wrong; instead, it is *wrongful* discrimination that is wrong."[52] "'Discrimination,' after all, is another word for discernment, and for choosing and acting in accord with or with reference to particular criteria."[53] To label something "discrimination" is not the end of the matter, but merely the beginning of the inquiry because:

When we say that 'discrimination' is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it we mean that

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[49] Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm,* ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 197 (Cambridge University Press, 2012). A summary of Professor Garnett's article is found at Richard W. Garnett, *Confusion about Discrimination, The Public Discourse,* Apr. 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5151/.

[50] Garnett statement, *supra* n. 32 at 198.

[51] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979).

[52] Garnett statement, *supra* n. 32 at 197.

[53] *Id*.

governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers, to do so.[54]

The essential common sense of the matter renders it self-evident that the government should not infringe religious liberty by wrongly invoking the label of "discrimination" when religious groups confine their leadership to those who share their faith.[55] Religious groups need leaders who agree with the group's basic beliefs regarding the Bible, prayer, worship, mission, and message. Leaders exemplify the group's mission and articulate the group's message to the broader campus community. A religious group's leaders necessarily guide the group's distinctive religious practices, including worship, prayer, study of scripture, and service to others. Leaders are the group's primary voice, both internally to its members and externally to the University community. A committed leader can determine whether a group thrives or withers.

For centuries, religious groups' right to control the selection of their leaders has been crucial to securing religious liberty for all. "The ultimate authority of religious organizations to select and supervise their leaders has been vital to the development of institutional religious freedom."[56] From "the investiture controversy of the eleventh and twelfth centuries, in which popes and monarchs fought over who would have the authority to appoint Catholic bishops"[57] to President Thomas Jefferson's letter to the Ursuline Sisters of New Orleans, assuring the religious order that "the Louisiana Purchase would not undermine their legal rights," including the order's right "'to govern itself according to its own voluntary rules without interference from the civil authority,'" religious groups' ability to be free to choose their leaders has been a basic component of religious liberty.[58]

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[54] Garnett statement, *supra* n. 32 at 198.

[55] Professor Garnett identifies several factors that should be considered in assessing whether action constitutes "wrongful" discrimination, including:

> Who is the decision maker? Who are the affected parties? What is the criterion for decision? How will the decision, and others like it, affect our ability to respect and vindicate other goods? How costly would it be to regulate or try to prohibit such decisions? Is the social meaning of the particular decision in question such that it belies the principle that people are of equal ultimate worth, or is it something else? And, is the decision one that a limited state in a free society has the authority to supervise?

Garnett statement, *supra* n. 32 at 199 (quotation marks omitted).

[56] Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck, Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception,* 106 Nw. U. L. Rev. Colloquy 175, 179 (2011). *See id.* at 179-184 (detailing the dominant role played by church-state struggles over control of religious institutions' leadership in the development of religious liberty in Europe and America). *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S.Ct. 694, 702-704 (2012) (tracing similar history).

[57] *Id.* at 179.

[58] *Id.* at 182-83 (*quoting* Thomas Jefferson's letter, *as quoted in* 1 Anson Phelps Stokes, Church and State in the United States 478, 678 (1950)).

The Supreme Court's jurisprudence has long protected the ability of religious institutions to select their leaders according to their own religious criteria.[59] A year ago, the Supreme Court unanimously protected the right of religious institutions to choose their leaders despite the federal government's claim that their decisions violated federal nondiscrimination laws. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,*[60] the Court rejected the government's argument that nondiscrimination laws may be used to second-guess religious institutions' leadership decisions. Rejecting the government's "untenable" position that the Religion Clauses do not protect such decisions, the Court stressed that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations" and rejected the government's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[61] The Court agreed that religious leaders "personify" a religious group's beliefs and "shape its own faith and mission."[62] In their concurrence, Justice Alito and Justice Kagan stressed that "[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."[63] Because religious groups' "very existence is dedicated to the collective expression and propagation of shared religious ideals," [w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters."[64] Obviously, "[a] religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses."[65]

Most relevant to the subject of the briefing, the Supreme Court acknowledged that nondiscrimination laws are "undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[66] Concluding that "the First Amendment has struck the balance," the Supreme Court ruled that "[t]he church must be free to choose those who will guide it on its way."[67] Likewise, in their concurrence, Justice Alito and Justice Kagan affirmed the importance of nondiscrimination

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[59] See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929).

[60] 132 S.Ct. 694 (2012).

[61] *Id.* at 706.

[62] *Id*.

[63] *Id.* at 706 & 713 (Alito, J., concurring).

[64] *Id.* at 712-13 (Alito, J., concurring).

[65] *Id.* at 713 (Alito, J., concurring).

[66] *Id.* at 710.

[67] *Id.* at 710.

laws, yet came down on the side of religious groups' ability to choose their leaders without interference:

[W]here the goal of the civil law in question, the elimination of discrimination against persons with disabilities, is so worthy - it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.[68]

Federal and state nondiscrimination laws typically protect religious organizations' ability to choose their leadership on the basis of religious belief.

Of course, no federal or state law, regulation, or court ruling requires a college to adopt a policy that prohibits religious groups from having religious criteria for their leaders and members. Instead, federal and state nondiscrimination laws typically protect religious organizations' ability to choose their staff on the basis of their religious beliefs.

Title VII explicitly provides that religious associations' use of religious criteria in their employment decisions does not violate Title VII's prohibition on religious discrimination in employment. In three separate provisions, Title VII exempts religious associations from its general prohibition on religious discrimination in employment. Pursuant to 42 U.S.C. § 2000e-1(a), Title VII does not apply to religious associations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the associations' activities. Pursuant to 42 U.S.C. § 2000e-2(e) (2), an educational institution may "employ employees of a particular religion" if it is controlled by a religious association or if its curriculum "is directed toward the propagation of a particular religion." Pursuant to 42 U.S.C. § 2000e-2(e) (1), any employer may hire on the basis of religion "in those certain instances where religion ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." It is hard to imagine a better example of "a bona fide occupational qualification" than the requirement that the individual who leads a religious group's Bible study, worship, and prayer agree with the group's religious beliefs.[69]

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[68] *Id.* at 712 (Alito, J., concurring).

[69] Legislative proposals to expand Title VII to include sexual orientation are invariably accompanied by exemptions for religious groups with conflicting moral views. *E.g.*, Employment Non-Discrimination Act of 2009, H.R. 3017 § 6. Every state law extending nondiscrimination protections to sexual orientation has some exemption for religious groups *See* Colo. Rev. Stat. §§ 24-34-401(3), 24-34-402(7), 24-34-601(1); Conn. Gen. Stat. § 46a-81p; 19 Del. Code § 710(6); D.C. Code § 2-1402.41(3); Haw. Rev. Stat. § 515-4b; 775 Ill. Comp. Stat. §§ 5/5-102.1(b), 25/3; Iowa Code §§ 216.6(6)(d), 216.7(2)(a), 216.9(2), 216.12(1)(a); Mass. Gen. Laws 151B §§ (1)(5), (4); 5 Me. Rev. Stat. §§ 4553(10)(G), 4602; Md. Code, State Gov't § 20- 604(2); Minn. Stat. § 363A.26(2); Nev. Rev. Stat. § 613.320; N.H. Rev. Stat. § 354-A:2(XIV-C); N.J. Stat. §§ 10:5-5(n), 10:5-12(a); N.M. Stat. § 28-1-9(C); N.Y. Exec. Law § 296(11); Or. Rev. Stat. § 659A.006(3),

In 1987, the Supreme Court upheld the constitutionality of Title VII's exemption against an Establishment Clause challenge.[70] Justice Brennan wrote a concurring opinion in which he explained why religious groups need such an exemption:

We are willing to countenance the [religious group's] imposition of [a religious] condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.[71]

Justice Brennan insisted that "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to… select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."[72]

In Martinez, the Supreme Court Avoided Deciding the Issue of Nondiscrimination Policies.

The *Martinez* decision is narrowly limited to a unique factual context of an "all-comers policy," not a nondiscrimination policy.

The holding and scope of the Supreme Court's narrow decision in *Martinez* is easily misunderstood. In *Martinez,* the Court explicitly did *not* decide whether an enumerated nondiscrimination policy could be used to penalize the religious students it is supposed to protect.[73]

The Court narrowly, and conspicuously, confined its decision to an unusual policy, unique to Hastings College of the Law, that required *all* student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with—or actively opposed—the values, beliefs, or speech of the group.[74] Moreover, the Court held it was not

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(5); R.I. Gen. Laws §§ 28-5-6(15), 34-37-3(16); 9 Vt. Stat. § 4502(l), 21 Vt. Stat. § 495(e); Wash Rev. Code §§ 49.60.040(2), (11); Wis. Stat. § 111.337(2) (am).

[70] Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[71] *Id.* at 342-43 (Brennan, J., concurring).

[72] *Id*. at 341-42 (quotation marks and punctuation omitted).

[73] Commenting on *Martinez*, a senior vice president and general counsel for claims management at United Educators Insurance, who is "a prominent adviser to colleges on issues related to legal risk," cautioned university counsel that they should "not be lulled into thinking their policies on student groups are immune to legal challenges based on the U.S. Supreme Court's decision." According to *The Chronicle for Higher Education*:
The ruling … focused on a type of policy … found at only a minority of colleges: an "accept all comers" policy requiring any student group seeking official recognition to be open to anyone who wishes to join. More common at colleges … is a policy of allowing student groups to have requirements for membership and leadership as long as those requirements are not discriminatory.
Peter Schmidt, Ruling Is Unlikely to End Litigation over Policies on Student Groups, Chron. Higher Educ. (June 30, 2010) *available at* http://chronicle.com/article/Many-Colleges-Student-Group/66101/ (last visited March 8, 2013).

[74] *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,*

enough for a university to adopt an all-comers policy: the policy must actually be uniformly applied to all student groups.[75]

The decision explicitly does *not* apply to conventional nondiscrimination policies that prohibit discrimination on the basis of enumerated, protected classes, which are commonly found at most universities. Writing for the majority, Justice Ginsburg emphasized that "[t]his opinion, therefore, considers *only* whether conditioning access to a student organization forum on compliance with *an all-comers policy*" is permissible and does not address a written nondiscrimination policy that protects specific, enumerated classes.[76] Justice Ginsburg emphasized that the policy under review was "one requiring *all* student groups to accept *all* comers."[77]

Instead, in *Martinez,* four Supreme Court justices explicitly determined that a nondiscrimination policy cannot be constitutionally applied to religious groups' choice of leaders and members.[78] These justices explained that such an application of a nondiscrimination policy would be unconstitutional viewpoint discrimination. Justice Stevens, who retired the day *Martinez* was announced, was the only justice who expressed the view that a written nondiscrimination policy could be constitutionally applied to religious student groups' selection of leaders, in a concurrence that began by observing that the Court "confines its discussion to the narrow issue" of the all-comers policy.[79] In his concurrence, Justice Kennedy emphasized that the decision was only concerned with an all-comers policy.[80]

As explained in more detail below, *Martinez* also makes clear that an all-comers policy is unconstitutional if it is not applied uniformly to every student group on campus.[81] An all-comers policy must be applied to all student groups' membership and leadership criteria.

The *Martinez* decision requires no change in any college's policy. The decision merely permitted a law school the discretion to adopt a novel policy, the wisdom of which has been

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130 S.Ct. 2971, 2982, 2984 (2010)*; id.* at 2999 (Kennedy, J., concurring).

[75] *Id*. at 2995. The Court remanded the case on that issue.

[76] *Id.* at 2984 (emphasis added).

[77] *Id*. at 2993 (original emphasis). *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795 (9th Cir. 2011), *citing Martinez*, 130 S.Ct. at 2982, 2984 (the Supreme Court in *Martinez* "expressly declined to address whether [its] holdings would extend to a narrower nondiscrimination policy that, instead of prohibiting all membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation"); *see also, Id*. at 805 (Ripple, J., concurring) ("this case is not controlled by the majority opinion in *Christian Legal Society*"; the Supreme Court "explicitly reserved" the issue in *Martinez*).

[78] 130 S.Ct. at 3009-13 (2010) (Alito, J., dissenting, joined by Roberts, C.J., Scalia, J., and Thomas, J.).

[79] *Id.* at 2995 (Stevens, J., concurring).

[80] *Id.* at 2999 (Kennedy, J., concurring).

[81] 130 S.Ct. at 2995 (remanding to determine whether "Hastings selectively enforces its all-comers policy").

widely questioned. The majority noted that "the *advisability* of Hastings' policy does not control its *permissibility.*"[82] For instance, the fact that Hastings was a law school, as opposed to a university, meant that Hastings need not consider the effect of its "all-comers policy" on the wide array of groups that most universities have on campus, particularly fraternities and sororities.[83]

Misuse of a nondiscrimination policy to prohibit religious groups' religious leadership criteria creates viewpoint discrimination.

In *Martinez,* four Supreme Court justices would have found that a nondiscrimination policy cannot be constitutionally applied to religious groups' choice of leaders and members.[84] These justices explained that such an application of a nondiscrimination policy would be unconstitutional viewpoint discrimination.

To prohibit religious groups from adopting criteria for leaders related to the goals of the organization and purposes of the activities, while allowing other student groups to do so, is unconstitutional viewpoint discrimination and violates the students' free speech rights. Essentially, the University violates its own nondiscrimination policy if it prohibits religious student organizations from having leadership requirements that reflect their religious viewpoints, while it allows nonreligious student groups to have leadership requirements that reflect their nonreligious viewpoints. Just as the Democratic Students Association wants its leaders to agree with the Democratic Party's platform, and the Animal Rights Club wants its leaders to commit to veganism, many religious groups believe that it is essential for expression of their religious identities that their officers agree with their religious beliefs. In other words, the right of religious groups to be religious depends on their ability to have leaders who are committed to their religious beliefs.

The Seventh Circuit held that a university's application of a nondiscrimination policy to a religious student group was unconstitutional, stating it had "no difficulty concluding that [a university's] application of its nondiscrimination policies in this way burdens CLS's ability to express its ideas."[85] The Second Circuit held that the Equal Access Act requires a public secondary school to recognize a religious student group despite its religious leadership criteria.[86] In so holding, the Second Circuit relied heavily on First Amendment precedent to reach its conclusion. The Ninth Circuit reached a different result and allowed application of a nondiscrimination policy to religious groups; however, the panel believed it was bound by a prior

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[82] *Id.* at 2992.

[83] An all-comers policy's inherent incompatibility with fraternities and sororities is discussed *infra* at Part IV.B.

[84] *Id.* at 3009-13 (2010) (Alito, J., dissenting, joined by Roberts, C.J., Scalia, J., and Thomas, J.).

[85] Christian Legal Society v. Walker, 453 F.3d 853, 863 (7th Cir. 2006).

[86] Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996).

Ninth Circuit decision.[87] It remanded the case for a determination whether the policy had been uniformly applied to all groups.

In perhaps the most cogent legal analysis of the reason nondiscrimination policies, when misused, impose a particular burden on religious student groups, Seventh Circuit Judge Kenneth Ripple explained that nonreligious groups can redefine themselves to form around shared values, but religious groups cannot do this because their shared values are *religious* values, which some administrators will mislabel as "religious discrimination."[88]

An All-comers Policy Is Unworkable and Undermines Nondiscrimination Values.

An "all-comers" policy may be applied to religious groups only if the University applies the policy to all groups without exception.

There are numerous reasons why an all-comers policy is bad policy and unworkable. As *Martinez* itself explains, "the *advisability* of Hastings' policy does not control its *permissibility*."[89]

The Court held that it was not enough for a university to adopt an all-comers policy: a university must actually apply the policy uniformly, without exception, to all student groups.[90] *Martinez* is unequivocal that if a University allows *any* exemption to its all-comers policy, it cannot deny an exemption to a religious group.[91] Indeed, the Court remanded the *Martinez* case for further consideration of whether the all-comers policy had been uniformly or "selectively enforce[d]."[92] Justice Ginsburg emphasized that the policy under review was "one requiring *all* student groups to accept *all* comers."[93]

Therefore, even if a university were to adopt an all-comers policy, it could not deny a religious group an exemption for religious leadership requirements if the university allowed any exemption to its policy.[94] As the Court has long ruled, the government cannot deny religious groups an exemption for certain conduct while granting nonreligious groups an exemption for similar conduct. "[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of

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[87] Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1743 (2012).

[88] *Id*. at 804-05 (Ripple, J., concurring). Judge Ripple's reasoning is quoted at length *supra* at pp. 7-8.

[89] 130 S.Ct. at 2992.

[90] *Id*. at 2995.

[91] *Id.* at 2995; *id.* at 2999 (Kennedy, J., concurring).

[92] *Id.* at 2995.

[93] *Id.* at 2993 (original emphasis).

[94] *Id.* at 2993.

"religious hardship" without compelling reason.'"[95] Such a discrepancy triggers strict scrutiny of the government's denial of the exemption to the religious group.[96]

Of course, this is precisely why "all-comers" policies are rare: they must be applied without exception to *all* student groups. In *Martinez* itself, the Court hardly endorsed an "all-comers" policy when it observed that "the *advisability* of Hastings' policy does not control its *permissibility*."[97]

Single-sex sororities and fraternities, a cappella groups, and intramural sports teams are incompatible with an all-comers policy.

The *Martinez* facts were unusual, not only because of the unique all-comers policy, but also because the school at issue was a stand-alone law school and not a major university. The law school did not need to weigh the impact of an all-comers policy on single-sex sororities and fraternities, a cappella groups, and club sports teams. If an all-comers policy were implemented, the University would have to abandon its current exemption for fraternities and sororities to select members according to sex. Besides ending selection of members and leaders on the basis of sex, an all-comers policy would require fraternities and sororities to adopt a "first-come, first-pledge" selection process because all groups must be open to all students. The Greek system is the antithesis of an all-comers policy, based as it is on selection of members through the highly subjective "rush" system.

Colleges frequently invoke Title IX's exemption for fraternities and sororities, but that response is a red herring. Title IX gives fraternities and sororities an exemption *only* from Title IX itself, which prohibits sex discrimination in higher education.[98] It does not give fraternities and sororities a blanket exemption from all nondiscrimination laws or policies, including a university's own nondiscrimination policy or an all-comers policy.

An all-comers policy undermines the very protection for minority groups that nondiscrimination policies are intended to provide.

In a remarkably candid PBS interview, the acting dean of the law school in *Martinez* admitted that its all-comers policy required an African-American student group to admit white

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[95] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 537 (1993), quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[96] "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 433 (2006), *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted).

[97] 130 S.Ct. at 2992 (original emphasis).

[98] 20 U.S.C. 1681-1688 (2013).

supremacists as members.[99] At oral argument, its counsel conceded that an all-comers policy would allow exclusion of Orthodox Jewish groups or Muslim groups, if their traditional practices were deemed to be "discriminatory."[100] Thus, the groups most likely to be harmed by an all-comers policy are the very groups - minority racial, ethnic, or religious groups - that a conventional nondiscrimination policy is intended to protect.

An all-comers policy eviscerates all university students' First Amendment rights.

An all-comers policy erases *all* student groups' freedom of expression to require their leaders to agree with their specific goals, values, and speech, a right that most students would wish to preserve. The ability of groups to form around a specific goal and mission has fueled most great reform movements and is necessary in order to maintain genuine pluralism and diversity on campus.[101]

An all-comers policy compounds university administrators' administrative difficulties.

Under an all-comers policy, a university must police the rationale for all decisions made by every student group regarding membership and leadership, rather than limiting its concern only to decisions that might violate the limited protected categories in a nondiscrimination policy. Dissatisfied students could challenge every election outcome on the basis that their beliefs were improperly considered by the other students who voted. A student who denies global warming could force the Sierra Club to defend itself in administrative proceedings to determine whether his or her beliefs were improperly considered by the group in denying the student's bid for its presidency.

In regard to religious groups, the administrative difficulties are particularly troubling. University administrators will need to examine religious groups' religious practices to respond to any claim that a religious group's traditional practices are "discriminatory." Examining religious groups' doctrine, however, is not within the province of government officials.[102] Determining that some religious groups' doctrines are "discriminatory," but other religious groups' doctrines are not, strikes at the Establishment Clause's core requirement that the State not favor some religious

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[99] *Christian Legal Society v. Martinez*, Religion & Ethics Newsweekly (PBS television broadcast) (Apr. 16, 2010), http://www.pbs.org/wnet/religionandethics/episodes/april-16-2010/christian-legal-society-v-martinez/6109/ (last visited March 8, 2013). http://www.pbs.org/wnet/religionandethics/episodes/april-16-2010/christian-legal-society-v-martinez/6109.

[100] Tr. of Oral Arg. 44, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf (last visited March 8, 2013).

[101] *See, e.g.*, Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment*, The Huffington Post (June 29, 2010) at http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html?view=print (last visited March 8, 2013).

[102] Thomas v. Review Board, 450 U.S. 707 (1981).

beliefs over other religious beliefs.[103] To save its policy, Hastings' counsel claimed that groups might impose tests on membership and, therefore, a religious group could require applicants to pass a Bible test—but only "[i]f it were truly an objective knowledge test."[104] A policy that envisions university officials determining whether a religious group's knowledge test is "objective" or "subjective" is a constitutional quagmire.

An all-comers policy exposes the University to lawsuits because consistent enforcement is nearly impossible.

Any student can insist that the University review his or her exclusion from any group for any reason, with a lawsuit dangling over each administrative review. Indeed, *Martinez* places the burden on university administrators to ensure that the policy is not used by students to change the message or mission of any group.[105] The Court provided no practical guidance for administrators as to how to carry out a task that seems inherently to contradict the basic concept of an all-comers policy.

Even as a limited decision, Martinez is incompatible with the Supreme Court's traditional First Amendment jurisprudence.

Martinez's departure is so sharp, and its analysis so superficial, that its viability seems doubtful, even on the very narrow issue that it decided. Whether or not *Martinez* was correctly decided has no bearing on whether nondiscrimination policies and religious liberty are compatible. Yet, it is worth noting that the *Martinez* majority opinion has been criticized on a number of grounds.[106] In fundamental ways, the opinion departed from forty-years of Supreme Court

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[103] Larson v. Valente, 456 U.S. 228 (1982).

[104] Tr. of Oral Arg. 52, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf (last visited March 8, 2013).

[105] 130 S.Ct. at 3000 (Kennedy, J., concurring) (observing that a group "would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views").

[106] *See, e.g.*, John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 Hastings L.J. 1213, 1231-1242 (2012); John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 5-6, 145-149 (Yale University Press 2012); Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Sarat, *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* 194, 208-211, 219-225 (Cambridge University Press 2012); Douglas Laycock, *Sex, Atheism, and the Free* Exercise of Religion, 88 U. Det. Mercy L. Rev. 407, 428-29 (2011); Michael W. McConnell, *Freedom by Association*, First Things, Aug-Sep2012, at 39-44 *available at* http://www.firstthings.com/article/2012/07/freedom-by-association (last visited March 8, 2013); Mary Ann Glendon, *The Harold J. Berman Lecture Religious Freedom - A Second-Class Right?*, 61 Emory L.J. 971, 978 (2012); Richard Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2010 Cato Sup. Ct. Rev. 105 (2010); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 Ed. Law Rep. 473 (2010); Carl H. Esbeck, *Defining Religion Down: Hosanna-Tabor, Martinez, and the U.S. Supreme Court,* 11 First Amendment Law Review 1 (2012); Note, *Freedom of Expressive Association*, 124 Harv. L. Rev. 249 (2010).

precedent protecting student groups' free speech and expressive association rights on campus.[107]

The Supreme Court has repeatedly held that universities do not endorse student groups and their beliefs when they recognize them: recognition is not endorsement.

As the Supreme Court remarked in *Healy v. James*, "state colleges and universities are not enclaves immune from the sweep of the First Amendment." [108] For nearly forty years before the *Martinez* decision - since *Healy* - it has been universally recognized that group rights of freedom of speech and association extend to student groups operating on state university campuses.

The *Martinez* decision deeply conflicts with the Court's landmark decisions in *Healy* and in *Widmar v. Vincent*.[109] Both those cases held that campus student groups possess an affirmative freedom of speech and expressive association to meet on state university campuses, without restriction based on officials' disapproval of the nature of their associations or identities. *Healy* involved a *political* group's associational freedom, while *Widmar* involved a *religious* group's religious speech and identity. In each situation, campus officials had argued that they possessed the authority to exclude such groups from recognition because of the nature and content of the groups' expressive identity. And in each case, the Court rejected the college administrators' arguments.[110]

Healy specifically rejected a state university's claimed authority to deny a student political group, Students for a Democratic Society ("SDS"), recognition because of its associational identity: "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." Accordingly, "denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[111] The Court *held* that a state university "*may not restrict speech or association*" of campus student groups simply because it considered a particular group's views, identity, or affiliations to be undesirable as a policy matter - indeed, even if it thought a group's positions "abhorrent."[112]

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[107] Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment* (June 29, 2010), *available at* http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html (last visited March 6, 2013). An attorney with the Student Press Law Center, Mr. Goldstein stated that "the rationale of this opinion could end up doing more violence to student expression rights than any decision in the last 22 years." *Id.*

[108] 408 U.S. 169, 180 (1972).

[109] 454 U.S. 263 (1981).

[110] *Healy* and *Widmar* of course stand in the midst of a long line of Supreme Court cases recognizing a broad right of expressive association. *See* Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1923-39 (2001) (collecting and discussing cases).

[111] *Id*.

[112] *Id.* at 187-88 (emphasis added).

In *Widmar,* the Court extended *Healy*'s recognition of campus groups' freedom of speech and association to religious groups: "*With respect to persons entitled to be there*, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[113] Because "students enjoy First Amendment rights of speech and association on the campus," denial of recognition and use of facilities to student groups, on the basis of their religious mission and identity, "must be subjected to the level of scrutiny appropriate to any form of prior restraint."[114]

The *Martinez* majority attempted to distinguish *Healy* and *Widmar* by treating them as cases where the student groups "had been unconstitutionally *singled out*" for different treatment.[115] Ostensibly, there was no *general* right of campus student groups to freedom of expressive association. But such a distinction is utterly alien to the opinions in *Healy* and *Widmar* themselves which spoke clearly of students possessing group rights of "*speech and association*," "*on campus,*" simply because they were "*entitled to be there.*"[116]

But there is an even more dramatic conflict between *Martinez,* on one hand, and *Healy* and *Widmar,* on the other. Fundamentally, the central premise of *Martinez* is entirely irreconcilable with the central premise of *Healy* and *Widmar,* as well as the underlying premise of *Good News Club*, *Rosenberger*, *Lamb's Chapel* and *Mergens.*[117] Inexplicably, the *Martinez* majority began with the mistaken premise that permitting a student group access to a limited forum was "subvention" or "state subsidy" of the group's expression.[118] But *Martinez*'s starting point simply cannot be squared with four decades of caselaw protecting student groups' free speech and expressive association. If access to a speech forum is a "state subsidy" of the group's purposes or identity, then *Healy, Widmar*, *Lamb's Chapel*, *Rosenberger*, *Mergens,* and *Good News Club* were all wrongly decided. If a student group's access to meeting space is a state subsidy, then Central Connecticut State College had every right to refuse to subsidize the SDS's advocacy of violence in *Healy*. And the school officials in *Widmar, Lamb's Chapel, Rosenberger, Mergens,* and *Good News Club* were absolutely correct that access for religious groups was the equivalent of government subsidy of religious speech in violation of the Establishment Clause. But the Court held the exact opposite each time.

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[113] 454 U.S. at 268-69 (emphasis added).

[114] *Id.* at 267 n.5 (*citing Healy*).

[115] 130 S.Ct. at 2987-88.

[116] *Widmar*, 454 U.S. at 268-69 (emphasis added). *Accord Healy*, 408 U.S. at 181-182, 184.

[117] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). *See also, Capitol Square Rev. & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Niemotko v. Maryland,* 340 U.S. 268 (1951).

[118] 130 S.Ct. at 2978, 2986.

Martinez's basic construct - that student groups' access to classroom space and campus communication channels is a government subsidy - is a radical departure from *Healy, Rosenberger, Widmar, Lamb's Chapel, Mergens,* and *Good News Club.* In *Rosenberger,* the Court stressed that it "did not suggest in *Widmar*, that viewpoint-based restrictions are proper when *the University does not itself speak or subsidize transmittal of a message it favors* but instead expends funds to encourage a diversity of views from private speakers."[119] As the Court held, access to meeting space, channels of communication, and student activity fee funds was not a government subsidy of the religious student group's private speech. For that reason, the Establishment Clause was not violated by a religious group's access to meeting space, channels of communication, or student activity fee funding.[120] The Court made this point itself in *Rosenberger*: "If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar, Mergens,* and *Lamb's Chapel* would have to be overruled."[121]

A troubling aberration, *Martinez*'s treatment of students' associational rights conflicts with long-established precedent establishing the First Amendment principle that students at state universities possess group rights of expression and association, simply by virtue of being "entitled to be there" as students.

The government cannot justify its denial of one group's expressive association rights by wiping out all groups' expressive association rights.

The decision in *Martinez* also rested on the mistaken premise that a state university might uniformly provide that *all* campus groups be denied rights of "expressive association" traditionally enjoyed by private expressive groups, as an aspect of the university's restrictions on its limited public forum. The religious student group's right to choose its leaders and members could be denied because, *and only because,* all other student groups' right to choose their leaders and members were denied.

But the First Amendment usually cannot be evaded so easily. For example, a religious speaker challenged Los Angeles International Airport's policy that banned all First Amendment activity in the airport. The Supreme Court unanimously ruled for the religious speaker "because no conceivable governmental interest would justify such an absolute prohibition of speech."[122] For the same reason, an all-comers policy that bans all student groups from exercising their rights of speech and expressive association should have been a *per se* violation of the First Amendment.

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[119] 515 U.S. at 834.

[120] *Id.* at 842-43.

[121] *Id.* at 843.

[122] Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987).

Healy and *Widmar* again demonstrate the incorrectness of the *Martinez* decision. If *Martinez* is correct, all the campus officials in *Healy* needed to do to keep the SDS off campus was to adopt a uniform policy restricting all campus student groups' freedom of expressive association. Under *Martinez* - quite contrary to *Healy* - a state university apparently *may* restrict speech and association and *does* have power to burden the associational right of student groups "to associate to further their personal beliefs," even though *Healy* holds the diametrical opposite.[123] All the university need do is impose "neutral" across-the-board restrictions on all groups' expressive association. Likewise, all that the campus officials in *Widmar* needed to do in order to suppress students' religious meetings was to adopt a uniform policy forbidding all student groups from having any ideologically distinctive identity. Under *Martinez* - quite contrary to *Widmar* - students "enjoy First Amendment rights of speech and association on the campus" only to the extent state university officials choose to define their limited forum in such a way as to allow such rights, which contradicts both *Healy* and *Widmar.*[124]

The Court's more recent decision in Hosanna-Tabor rejected the basic free exercise analysis upon which Martinez relied.

The Court's decision in *Hosanna-Tabor* casts serious doubt on the correctness of *Martinez*'s treatment of the free exercise claim. The majority believed that *Employment Division v. Smith*[125] "forecloses" a religious student group's free exercise claim that a state university may not penalize a religious group for requiring its leaders to agree with its religious beliefs.[126] In *Hosanna-Tabor*, however, the Court unanimously distinguished "a church's selection of its ministers" from *Smith,* which it characterized as "involv[ing] government regulation of only outward physical acts."[127] A state university's use of its nondiscrimination policy to penalize a religious student group for insisting its leaders agree with its religious beliefs seems much closer to the "government interference with an internal church decision that affects the faith and mission of the church itself," found unconstitutional in *Hosanna-Tabor,* than to "government regulation" of "an individual's ingestion of peyote," permitted in *Smith.* This is particularly true given that the Free Exercise Clause provides "special solicitude to the rights of religious organizations."[128]

Indeed, even without *Hosanna-Tabor's* analysis, *Martinez*'s was incorrect to claim that *Smith* governed. Even under the *Smith* analysis, the government may not regulate, or discriminate

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[123] 408 U.S. at 181.

[124] 454 U.S. at 267-68 & n.5.

[125] 494 U.S. 872 (1990).

[126] 130 S.Ct. at 2995 n.27, 2993 n.24.

[127] 132 S.Ct. at 707.

[128] *Id.*.

against, the exercise of First Amendment rights of expression and association, on the basis of the *religious* nature of such expression or association. The minimum content of the Free Exercise Clause is that government must not *discriminate against religion specifically* and regulate conduct *specifically because* of its religious nature or the religious identity of the person or persons engaged in it.[129] To exclude religious groups from campus because their leadership criteria are *religious* is discrimination on the basis of religion in violation of *Smith* and *Lukumi.*

Conclusion

Religious liberty scholar, Professor Douglas Laycock, recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle - suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized."[130] He posits "that the deep disagreements over sexual morality . . . have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences."[131] He counsels against taking a "path [that] causes the very kinds of human suffering that religious liberty is designed to avoid," a path leading to a society in which religious persons "who cannot change their mind [about a moral issue] are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse."[132]

Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. Misuse of university nondiscrimination policies poses a serious threat to religious liberty and pluralism - a threat easily avoided if nondiscrimination policies are once again given a common sense interpretation that protects religious student groups, rather than penalizing them for choosing leaders who agree with their religious beliefs.

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[129] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Smith, 494 U.S. at 877; McDaniel v. Paty, 435 U.S. 618 (1978).

[130] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). Other religious liberty scholars are sounding a similar alarm. *See, e.g.,* Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty,* 32 Cardozo L. Rev. 1755, 1780 (2011) ("I fear that religious liberty, understood as a distinctive and precious human right, our 'first freedom,' might become a relic of the past - perhaps a cherished relic, but one that no longer commands a contemporary commitment."); Mary Ann Glendon, *The Harold J. Berman Lecture Religious Freedom - A Second-Class Right?*, 61 Emory L.J. 971 (2012).

[131] Laycock, *supra* n. 130, at 414.

[132] *Id*. at 419.

Attachment A

---------- Forwarded message ----------
From: [redacted]
Date: Tue, Aug 9, 2011 at 10:40 PM
Subject: RE: Christian Legal Society status
To: [redacted]
Cc: [redacted]

Dear [redacted],

Thank you for submitting your new Constitution for the Christian Legal Society. In reviewing it, there are some parts of it that are in violation of Vanderbilt University's policies regarding student organizations; they will need to be addressed before the Office of Religious Life can endorse CLS's approval.

Article III states that, "All officers of this Chapter must subscribe to the Christian Legal Society Statement of Faith." Vanderbilt's policies do not allow any student organization to preclude someone from a leadership position based on religious belief. Only performance-based criteria may be used. This section will need to be rewritten reflecting this policy.

The last paragraph of Section 5.2 states that "Each officer is expected to lead Bible studies, prayer and worship at Chapter meetings as tasked by the President." This would seem to indicate that officers are expected to hold certain beliefs. Again, Vanderbilt policies do not allow this expectation/qualification for officers.

Section 9.1 regarding Amendments to the Constitution should include language stating that any amendment must also be in keeping with Vanderbilt University's policies on student organizations and must be approved by the University before taking effect.

Please make these few changes and submit a copy of the amended Constitution to me so we can proceed with the approval process.

Also, we do not have in hand a copy of the revised Officer and Advisor Affirmation Form, as requested in the initial deferral. Specifically, we need a clean document without the handwritten text that seems to be an exclusionary clause advocating for partial exemption from the University's non-discrimination policy. Please forward us a copy of this as well.

Thank you. Please let me know of any questions you may have.

Best,

[redacted]

[redacted]

Attachment B

---------- Forwarded message ----------
From: vanderbiltcollegiatelink
<noreply@collegiatelink.net<mailto:noreply@collegiatelink.net><mailto:noreply@colle
giatelink.net<mailto:noreply@collegiatelink.net>>>
Date: Tue, Apr 17, 2012 at 11:53 AM
Subject: Registration Status Update: [redacted name of Christian student group]
To: [redacted name of student]

The registration application that you submitted on behalf of [redacted name of Christian student group] <https://vanderbilt.collegiatelink.net/organization/[redacted]> has not been approved and may require further action on your part. Please see the reviewer's comments below or access your submission now<https://vanderbilt.collegiatelink.net/organization/[redacted]/register/Review/650475>.

Thank you for submitting your registration application. Vanderbilt appreciates the value of its student organizations. Your submission was incomplete or requires changes, thus we are not able to approve your application at this time. Please re-submit your application including the following items or changes: - Please change the following statement in your constitution:
"Article IV. OFFICERS
Officers will be Vanderbilt students selected from among active participants in [redacted name of Christian student group]. Criteria for officer selection will include level and quality of past involvement, personal commitment to Jesus Christ, commitment to the organization, and demonstrated leadership ability."

CHANGE TO:
Officers will be Vanderbilt students selected from among active participants in [redacted name of Christian student group]. Criteria for officer selection will include level and quality of past involvement, commitment to the organization, and demonstrated leadership ability.

We are committed to a timely review of every complete application received and to letting you know the status of your application as soon as possible.

Attachment C

Student Activities • Office of the Dean of Students • *Division of Student Affairs* • The University of Texas at Austin • Student Services Building, 4.400 • 512-471-3065 • **deanofstudents.utexas.edu/sa/**

Student Activities
WHAT STARTS HERE CHANGES THE WORLD

New Student Organization Registration Application

Submit completed forms to Student Activities, along with required $10 non-refundable fee.

A student organization that wishes to use university facilities must be registered with Student Activities. A group of three (3) or more enrolled students is eligible under the university's *Institutional Rules*, Section 6-202, if:

1) its membership is limited to enrolled students, staff and faculty of The University of Texas at Austin;
2) it does not deny membership on the basis of race, color, religion, national origin, gender, age, disability, citizenship, veteran status, sexual orientation, gender identity or gender expression, except that ***a)*** an organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith; and ***b)*** an organization may restrict membership based on the provisions of Title IX of the Education Amendments of 1972;
3) it is not under disciplinary penalty prohibiting registration; and
4) it conducts its affairs in accordance with the Regents' *Rules and Regulations,* university regulations and administrative rules.

Please Note: If the registered student organization is approved, the following information (1–6) will be posted on the Student Activities Web site.

1. Name of proposed registered student organization _____

2. Type of organization: *(Check **one** only)*

- ❑ Political
- ❑ Student Governanace
- ❑ Recreational
- ❑ International/Cultural
- ❑ Educational/Departmental
- ❑ Professional
- ❑ Religious
- ❑ Special Interest
- ❑ Honorary
- ❑ Social
- ❑ Service

3. State the registered student organization's official purpose _____

_____

_____

_____

4. Indicate any membership requirements* beyond those stated in the *Institutional Rules* above _____

_____

_____

_____

*** Does your registered student organization intend to limit membership to a single gender?** ❑ **Yes** ❑ **No**

For Office Use Only

Receipt Number _____

Staff Signature _____ **Date** _____

August 2011

Attachment C

ORGANIZATIONS POLICY

1. General Statement of Purpose

The University recognizes:

1. the importance of organized student activities as an integral part of the total educational program of the University;
2. that college learning experiences are enriched by student organizational activity; and
3. that organizations provide a framework for students within which they may develop their own special talents and interests.

Inherent in the relationship between the University and organized student groups is the understanding that the purposes and activities of such groups should be consistent with the main objectives of the University.

All student organizations must register annually with the Department of Campus Activities and must then comply with the procedures and policies regarding registration as set forth.

The Dean of Students Office recognizes the role of Greek Coordinating Councils in establishing and upholding policies for member groups. However, membership in said councils does not exempt fraternities and sororities from judicial referrals to the Dean of Students Office for violations of Student Life Policies, including Organizations Policies.

The University Hearing Board, with the approval of the Dean of Students, delegates to Greek coordinating councils general supervision over those chapters of social sororities and fraternities which choose to be members of these councils.

The term "general supervision" shall include all the duties, powers and responsibilities exercised by the Greek coordinating council prior to the adoption of this policy, with the provision that membership in the Greek coordinating councils is optional with the local chapter.

It is understood that the Greek coordinating councils and their member groups will operate under the provisions of the Student Life Policies, including the Organizations Policy.

2. Procedure for Registration of New Organizations

2.1 Permanent Organizations

a. The group will file its name, statement of purpose, constitution or statement regarding its method of operation, faculty/staff advisor (if applicable), and the names of its officers or contact persons with the Department of Campus Activities.

b. In cases where a potential faculty/staff advisor is unknown to the group, the Campus Activities staff will assist in identifying a university faculty or staff member who may wish to serve as an advisor. Organizations are encouraged to have a faculty/staff advisor.

c. Should the group not have elected its officers or completed other work connected with its formation at the time they initially see the Campus Activities staff, the Campus Activities staff shall make arrangements for them to use university facilities for organizational purposes on a meeting-to-meeting basis until the organizational process is completed and the required information can be filed.

d. At the time of filing, three officers or contact persons for the organization will sign a statement indicating that they are familiar with and will abide by the aforementioned responsibilities of student organizations. They will also sign the standard hazing and discrimination disclaimer required of all student organizations.

e. Having ascertained that the group's purpose is lawful and within university regulations and that the group has filed the required forms and disclaimers, the Director of Campus Activities, or designate, will sign the application. Appropriate university personnel are notified by Campus Activities that the group is then eligible for all of the rights of student organizations.

f. Should the staff feel that the organization does not meet the requirements for registration, a written copy of the decision and reasons will be furnished to the applying organization. The group may appeal the decision to the Dean of Students.

g. The Campus Activities staff shall make arrangements for the group to use university facilities on a meeting- to-meeting basis until the appeals process is completed.

h. Decisions of the University Hearing Board may be appealed to the Dean of Students.

2.2 Registration for a Limited Purpose: Temporary Status

In some cases, groups will organize with some short-term (one which can be accomplished in less than one academic year) goal in mind such as the passage of some particular piece of legislation or the holding of some particular event. The organization's structure will expire on the date indicated on the registration form. Requests for extension of Temporary Status may be made to the Director of Campus Activities.

2.3 Membership Regulations

a. Registered student organizations have freedom of choice in the selection of members, provided that there is no discrimination on the basis of race, color, religion, national origin, sex, age, disability, veteran status, or sexual orientation.

b. Membership in registered student organizations is restricted to currently enrolled University of Houston students, faculty, staff and alumni.

c. Hazing-type activities of any kind are prohibited.

2.4 Officers Regulations

a. Student organizations are free to set qualifications and procedures for election and holding office, with the following provisions:

1. All officers must be regular members of the organization.
2. There is no discrimination on the basis of race, color, religion, national origin, sex, age, disability, veteran status, or sexual orientation except where such discrimination is allowed by law.
3. Religious student organizations may limit officers to those members who subscribe to the religious tenets of the organization where the organization's activities center on a set of core beliefs.

b. Persons not currently enrolled at the University of Houston may not hold office or direct organizational activities.

2.5 Records

All registered student organizations must maintain the following records in the Campus Activities Office:

a. An organizational information form listing the current officers and faculty/staff advisor (if applicable) is due at the beginning of each school year. Any changes during the year, other than membership, are to be recorded within 10 days with the Department of Campus Activities.

Attachment C

University of Florida's Policy
(https://www.union.ufl.edu/involvement/index.asp)

Student Organization Registration Policy Update

The University of Florida has modified its policies relating to the registration of religious student groups as Registered Student Organizations (RSOs). The modification was made to accommodate any student group whose religious mission requires its membership to share the organization's religious beliefs, while at the same time continuing to protect the University's nondiscriminatory educational program.

More than 760 student organizations covering a wide variety of interests are registered at the University. UF has always welcomed registration of religious organizations. More than 60 religious student organizations, of which about 48 are Christian, are registered as RSOs at UF.

The University considers participation in registered student organizations to be an important educational opportunity for all of our students. The University applies its nondiscrimination in membership policy to registered student organizations to ensure that these important learning opportunities are not denied to any student due to discrimination based on race, sex, religion or certain other prohibited bases.

A small number of religious student groups have expressed a religious need to ensure that all of their members share the religious beliefs of the organization.

To the greatest extent possible-while fulfilling our nondiscriminatory educational mission and complying with the law-the University wants to be sure that a full range of religious student organizations feel just as free to register as any other type of student organization. This ensures that all of our students will find meaningful educational opportunities to participate in registered student organizations.

As we are committed to serving all of our students well, the University has carefully considered how to address the concerns expressed by some religious student groups and individuals without compromising our educational program. After doing so, the University has made the decision to modify its nondiscrimination policy as follows:

"Student organizations that wish to register with the Center for Student Activities and Involvement (CSAI) must agree that they will not discriminate on the basis of race, creed, color, religion, age, disability, sex, sexual orientation, marital status, national origin, political opinions or affiliations, or veteran status as protected under the Vietnam Era Veterans' Readjustment Assistance Act.

A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy."

This modification of the University's registration policy recognizes a meaningful distinction between sincerely held current religious beliefs (which may be considered in selecting members or leaders of religious RSOs)-and religious or other status (e.g., religion of birth or historical affiliation). The modification takes effect immediately and is now reflected in the CSAI's Handbook of Student Activities as well as its registration and constitution guidelines and Web site. A letter has been sent to each religious student group that has recently sought and not received registration to ensure that it is aware of the modification and to invite its registration.

Attachment C

University of Minnesota's "Constitution and By-Laws Instructions" in *Student Groups Official Handbook*, available at http://sua.umn.edu/groups/handbook/constitution.php (last visited December 7, 2012)

3. University of Minnesota Policy: Student groups must comply with all University policies and procedures, as well as local, state, and federal laws and regulations. This includes, but is not limited to, the Board of Regents Policy on Diversity, Equal Opportunity and Affirmative Action as they relate to group membership and access to programs. Religious student groups may require their voting membership and officers to adhere to the group's statement of faith and its rules of conduct. Your constitution needs to include a statement about your group's responsibility to operate in accordance with these policies.

Marc O. DeGirolami

Thank you for the chance to testify before you today. I am an associate professor at St. John's University School of Law. My work focuses on constitutional law, criminal law, and the law of religious liberty.

The subject of our panel concerns the conflict of anti-discrimination norms and civil rights, and the specific civil right of our collective focus is the right of religious liberty. My prepared remarks divide into two parts.[133]

The first part considers the importance of studying and, to some extent, preserving the conflicts that we are considering. The wish to resolve a conflict sometimes can mask the depth and complexity of the conflict. Even more than this, an overeager desire to resolve a conflict can obscure the possibility that conflicts are part of every person's experience, and, perhaps more controversially, that justice often does not consist of any sort of large-scale harmonious solution or consensus either within an individual or within a polity. The second part reflects on the ways in which our law attempts to negotiate around one specific type of conflict between non-discrimination norms and the right of religious liberty in the doctrine of the ministerial exception, which was recently recognized by the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[134]

Conflict

We are asked to consider certain types of conflicts—conflicts between and among rights. Underlying each of these rights are multiple values. The right of religious liberty includes within it the conventional values of liberty, autonomy, and equality, but also less conventional values like piety, asceticism, charity, devotion, self-control, fidelity, temperance, patience, and obedience. These are only some of the values that religious liberty can help a person or an institution to achieve, and therefore only some of the reasons that we should want to protect it as a right. It is not possible to understand what is valuable about religious liberty without also, as Catholic University of America President John Garvey has put it, thinking about what religious liberty is valuable for.[135]

But the values that underwrite the right of religious liberty can and often do intersect and compete with others that obtain in the particular social, political, and legal culture. Values against unjust

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[133] Portions of this testimony are drawn from MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM (Harvard University Press, forthcoming 2013).

[134] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012).

[135] JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (Harvard University Press, 1996).

discrimination are one such set. And conflicts arise whenever these various values of religious liberty clash with other values, so that a decision must be made in favor of some and against others.

Conflicts can occur not only among different types of values, as when a religious organization's autonomy conflicts with the state's interest in a certain conception of equality, public welfare, or health, but also among different values of the same type, as when a religious organization's conception of equality conflicts with the conception of equality contained in, for example, the Americans With Disabilities Act (ADA)[136] or Title VII of the Civil Rights Act.[137] We might be able to reach consensus in the abstract that equal treatment means the absence of unjust discrimination, but what counts as unjust discrimination is open to an array of conflicting interpretations, underwritten by conflicting values.[138]

It is not the burden of constitutional law conclusively to resolve these conflicts.[139] That is because the state of being in conflict—the condition of experiencing and living within these kinds of conflicts—is often the best approximation of justice of which we are capable. Conflicts are not great evils to be hidden from or dodged. In fact, as the philosopher Stuart Hampshire once said: "Conflict is perpetual. Why then should be deceived?"[140] Conflict is an essential and deep feature of our society—both unavoidable and actually desirable, since its source is our different backgrounds, different outlooks, and different memories. And the most plausible interpretations of our legal traditions—including our constitutional traditions—have acknowledged that we want multiple and conflicting goods from our laws. As Justice Souter put it a few years ago:

[T]he Constitution contains values that may well exist in tension with each other, not in harmony . . . . The explicit terms of the Constitution . . . can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises . . . . A choice may have to be made, not because the language is vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours clash, and when they do a court is forced to choose between them, between one constitutional good and another one.[141]

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[136] 42 U.S.C. § 12101 et seq. (1990).

[137] 42 U.S.C. § 2000e et seq. (1964).

[138] *See* Marc O. DeGirolami, *The Problem of Religious Learning*, 49 B.C. L. REV. 1213 (2008).

[139] There are salient differences between judicially imposed constitutional resolutions and legislative compromises. Legislation—for example, the Religious Freedom Restoration Act and its state analogues, as well as the Religious Land Use and Institutionalized Persons Act—reflects political compromise in ways that constitutional law cannot. Moreover, legislative compromises can be amended or repealed if the balances that they achieve are subsequently felt not to reflect an appropriate equilibrium as between values.

[140] STUART HAMPSHIRE, JUSTICE IS CONFLICT (Princeton University Press, 1999).

[141] David H. Souter, *Harvard Commencement Address*, HARVARD GAZETTE (May 27, 2010), *available at* http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/.

It is true, and everyone agrees that it is true, that when there are certain particularly powerful interests at stake—interests in protecting the weak from physical harm and abuse, for example—those interests should always trump any countervailing interest. But most conflicts between religious liberty and nondiscrimination norms are not of this extreme character and should not be analogized to the most extreme circumstances. Likewise, nothing that I have said about the justice of conflict negates the importance of compromise, particularly legislative compromise. But compromise does not mean harmony, or the absence of tension. A good compromise is one where the tension between conflicting forces and impulses remains, even after the compromise, perceptible and vivid. Because of the nature of conflict as constitutive of our lives, it is probable that our own lives could be characterized as a series of compromises between competing values. Much the same may be said of the institutions of civil society, very much including our legal institutions.

The Ministerial Exception

In light of the clash of values I have described, one may well wonder how a court is to proceed in negotiating these clashes as a matter of constitutional adjudication. No matter how important preserving conflict may be, adjudication requires the termination of a specific dispute, and so it is necessary to consider what courts ought to say in carrying out their obligations.

The best way forward for courts—the way that permits them to preserve as much of an existing conflict between religious liberty and non-discrimination norms as possible while fulfilling the duties of their office—is to decide cases narrowly and with close attention both to our historical traditions and to the factual particulars that shape each specific dispute. In these types of cases, courts should avoid issuing decisions that imprint a single value or class of values (whether, for example, those of religious liberty or of nondiscrimination) as categorically superior to other values. Decisions that are informed by historical compromises and our national traditions, and that reflect careful consideration of factual particulars, are preferable to those which proceed by reference to the all-out vindication of an abstract value, such as liberty, equality, neutrality, non-discrimination, or the separation of church and state, at the expense of all other goods.

It is a fortuity that the Supreme Court's most recent, unanimous, religious liberty case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, reflects just this approach to adjudication. As the Commission Members are aware, *Hosanna-Tabor* involved the issues of the existence and scope of the ministerial exception, a doctrine which recognizes that in certain contexts, the state's interest in enforcing its nondiscrimination norms must be qualified by a religious institution's interest in retaining control over employment decisions involving its ministerial employees. The Court concluded that the Hosanna-Tabor Evangelical Lutheran Church and School had the right to make employment decisions as to a "called teacher" in its employ, Cheryl Perich, who had sued the church pursuant to the ADA. Yet just as important as the Court's recognition of the doctrine of the ministerial exception in *Hosanna-Tabor* was its methodology.

The Court began by giving serious consideration to the history of "[c]ontroversy between church and state over religious offices" stretching back to the medieval period. It concluded that this history formed an important part of the foundation for religious liberty in the United States, especially the idea of church-state separation as properly understood[142]—a concept which at its source has far more to do with recognizing distinct realms of temporal and spiritual authority than with the civic acknowledgement of religion in the public square. That history explains the source of the American commitment both to free exercise and disestablishment. And it uncovers a fact often hidden to the modern mind: church-state independence was first sought by religious, not secular, institutions. The Court rightly rejected the view advanced by both the federal government and certain of its academic supporters that this history should be ignored or marginalized, and that religious liberty should simply be subsumed within and reduced to the very different doctrine of freedom of association.[143] Instead, the Court properly relied on both our distinctive tradition of religious liberty and the consensus view of the Circuit Courts of Appeals that the ministerial exception exists and is grounded in the First Amendment.[144]

In determining the scope of the ministerial exception, however, the Court was circumspect, approaching its task narrowly and incrementally:

We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.[145]

What is important in these lines and what is reflected in the balance of the opinion is a highly particularized set of questions about the nature and function of the plaintiff's duties—a suite of fact-specific inquiries—without reliance on any one of those inquiries as of itself controlling. The Court signaled that it will depend on this method, rather than any categorical rule or master value, to fashion the doctrine of the ministerial exception over time. And though its analysis was not ideal in certain respects,[146] the Court rightly recognized that on balance, in light of what both Perich and the church understood and expected from the position, Perich's job responsibilities were sufficiently ministerial that she should come within the compass of the rule.

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[142] Hosanna-Tabor, 132 S.Ct. at 702-03.

[143] *Id.* at 706, 709 (calling "untenable" and "extreme" the government's position that under the First Amendment it makes no difference whether a court deals with "the Lutheran Church, a labor union, or a social club").

[144] *Id.* at 707.

[145] *Id*.

[146] For example, the nature of the remedy sought—whether money damages or reinstatement—might make a greater difference than the Court acknowledged. *See id.* at 709. Furthermore, the discussion of free exercise doctrine was less than fully persuasive in distinguishing the unduly parsimonious rule applicable to individuals. *See id.* at 706-07; Employment Division v. Smith, 494 U.S. 872 (1990).

Yet the Court refused to extend that holding any more than necessary. It declined to opine on other kinds of law suits and other types of positions.[147] And it did not adopt the view that churches have unbridled discretion to define any job as "ministerial" thereby to circumvent the state's laws. That, too, was proper, inasmuch as the fact that a religious institution is involved in this type of conflict does not diminish, let alone erase, the state's—or Perich's own—interest in vindicating the equal application of non-discrimination laws.[148] That interest remains powerful, even in the presence of a religious institution in the conflict. But the involvement of a church does qualify or complicate the government's interest, introducing important competing values with which the government's and Perich's interests clash. It would be a mistake to select between these values categorically for constitutional purposes—choosing one set that ought to dominate the other set in all future cases. It would do violence to commitments each of which are important features of our political and legal traditions.

It is true that narrow decisions may have costs. A narrow decision may provide less certainty than a broad decision; it may give prospective litigants less guidance; and it may leave the law less stable than is optimal.[149] But that same uncertainty and instability may also promote compromise at the individual level; it may enable courts to communicate effectively with other government actors; and it may be more honest about the realities of constitutional adjudication—more candid and therefore more legitimate in a liberal democracy. Most importantly, however, narrow constitutional decisions avoid the trap of fixing in amber a monolithic ranking of values and interests. They reserve judgment for future cases and controversies.

The Supreme Court avoided these mistakes in *Hosanna-Tabor*, instead adopting a highly particularized, historically sensitive approach. And it is that method, more than any specific outcome, which does justice to conflict when religious liberty and norms of nondiscrimination inevitably clash.

Thank you for the opportunity to offer these remarks.

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[147] Hosanna-Tabor, 132 S.Ct. at 710 ("There will be time enough to address the applicability to the exception to other circumstances if and when they arise."). State and federal courts have already begun to confront these issues, and in time a mature tradition of judicial doctrine of the ministerial exception will develop. *See, e.g.*, http://clrforum.org/2012/08/14/dc-court-of-appeals-first-amendment-does-not-bar-ministers-breach-of-contract-suit-agianst-church/; http://clrforum.org/2013/01/31/new-york-court-dismisses-breach-of-contract-suit-under-ministerial-exception/.

[148] *See* Hosanna-Tabor, 132 S.Ct. at 710 ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.").

[149] Whether this is true will depend on exactly how uniformly the principles underwriting the broader decision are applied. For an argument that the broad rule in the *Smith* decision actually provides less guidance than might be expected, see DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM, Chapter 8.

Leslie C. Griffin

Thank you for this opportunity to discuss the conflict between antidiscrimination norms and civil liberties. Unfortunately, today antidiscrimination principles and religious freedom are on a collision course. Recent legislative and presidential actions, as well as court rulings, leave antidiscrimination norms in jeopardy because of excessive solicitude for religion.

Religious Conduct is not Absolutely Protected

My starting point is a reminder that the religious liberty defended by the First Amendment is not absolute. Although religious *beliefs* are protected absolutely, religious *actions* are not.[150] Religious conduct must yield to the law and its protection of all citizens.[151] The government must remain especially aware of its need to protect everyone through its enforcement of the antidiscrimination laws; it must not waver on antidiscrimination because of religion.

The Supreme Court well understood this point in 1983, when it unanimously rejected Bob Jones University's free exercise challenge to the IRS's decision to deny tax exemptions to a school that expelled advocates and members of interracial relationships because the Bible prohibits them. "[C]ertain governmental interests [can be] so compelling," the Court ruled, "as to allow even regulations prohibiting religiously based conduct."[152] *Bob Jones* was focused on the particular evil of racial discrimination. Because the Commission's job is broader—to enhance enforcement of and advance *all* federal civil rights laws—it must always consider the need to regulate even religiously based conduct in order to protect the antidiscrimination laws.

This is the positive insight gleaned from the Court's opinion and Justices Stevens' concurrence in the case the Commission considered earlier this morning, *Christian Legal Society v. Martinez*.[153] *Christian Legal Society* reiterates the fundamental point that the government does not have to endorse discrimination even when faced with religious appeals to do so. Consistent with California law, Hastings' nondiscrimination policy banned discrimination on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.[154] According to the Court, religion did not entitle CLS to a "special dispensation" from its rule that all student groups must accept all comers.[155] Justice Stevens' concurrence acutely emphasized the point that CLS's expression and beliefs were not regulated "at all"; only their "discriminatory *conduct*" was.[156]

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[150] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[151] *Id.* at 304.

[152] Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983).

[153] 130 S.Ct. 2971 (2010).

[154] *Id.* at 2979.

[155] *Id.* at 2978.

[156] *Id.* at 2996 (Stevens, J., concurring).

Belief enjoys absolute protection; conduct does not. As in *Bob Jones*, the government need not yield in its antidiscrimination efforts, and in particular it "need not subsidize [discriminatory groups], give them its official imprimatur, or grant them equal access to law school facilities."[157]

The Government Has a Strong Interest in Combatting All Discrimination

That same message about the government's interest in combatting discrimination was delivered in the state court cases upholding state laws that require employers to provide contraceptive insurance to their employees. Just as *Bob Jones* allowed the IRS to combat racial discrimination, and *Christian Legal Society* permitted the law school to oppose sexual orientation and religious discrimination, so too did state laws protecting women's access to contraception promote women's equality. The highest courts of California and New York ruled that state legislation promoting women's access to contraception does not violate the rights of religious employers who oppose contraception.[158] In *Catholic Charities of Sacramento v. Superior Court*, the California Supreme Court held that the "compelling state interest of eliminating gender discrimination" justified a regulation of religious employers.[159] Religious freedom is not absolute; sometimes it must yield to the law.

Something additional to the employers' religious freedom was at stake in *Catholic Charities*, which "employs a diverse group of persons of many religious backgrounds."[160] Exempting Charities from the law, the court reasoned, would "sacrifice[] the affected women's interest in receiving equitable treatment with respect to health benefits."[161] Thus vindicating the employer's religious claim would undermine the nondiscrimination rights of women employees. The court refused to do so, concluding that it was "unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would *detrimentally affect the rights of third parties.*"[162]

That holding, with its recognition that religious exemptions must not limit *third-party* civil rights, was similar to the case of Edwin Lee, an Amish man who employed fellow Amish on his farm and carpentry shop and argued for a religious exemption from the social security and unemployment taxes. The U.S. Supreme Court refused his request, reiterating a central point of my testimony—

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[157] *Id.* at 2998.

[158] *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).

[159] Catholic Charities of Sacramento, 85 P.3d at 92-94.

[160] *Id.* at 75.

[161] *Id.* at 93.

[162] *Id.* (emphasis added).

"some religious practices yield to the common good"[163]; "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs"[164]—and adding that an exemption from social security taxes "operates to *impose the employer's religious faith* on the employees."[165]

Religious Conduct Must Not Violate the Rights of Third Parties

These important points have been buried in the acrimonious debate about the contraceptive mandate of the federal Affordable Care Act (ACA),[166] which has been repeatedly mischaracterized as an assault on religious freedom. Unfortunately the federal contraceptive mandate debate has unfolded as a war between religious freedom on one side and women's equality on the other, and thus, from this hearing's perspective, as an ultimate conflict between antidiscrimination norms and civil liberties.

According to the mandate, employee group health benefit plans must contain preventive care coverage that includes FDA-approved contraceptive methods and sterilization procedures. Consistent with the state laws on contraceptive insurance, the initial regulations from the Secretary of Health and Human Services applied the contraceptive regulations to religious employers.[167] After complaints by religious groups, however, in February 2013 the Obama administration released a new regulation allowing employees to receive free coverage directly from insurance companies under a separate plan. Insurance companies will independently contact employees and make separate contraceptive policies available to them at no charge. Religious organizations will not have to pay for contraceptive insurance coverage. Insurance companies are expected to pay the extra costs. The definition of religious employer was expanded to include not only organizations where everyone shares one faith but also those that—like Catholic Charities—employ or provide services to individuals who are not members of the same religious community.[168]

Religious groups continue to criticize this most recent accommodation of religion by the administration as an insufficient protection of religious liberty. Unfortunately, the repeated concessions to religious employers and the constant focus on the employers' religious freedom have overshadowed concerns about individuals' freedom of conscience and antidiscrimination

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[163] United States v. Lee, 455 U.S. 252, 259 (1982).

[164] *Id.* at 261.

[165] *Id.* (emphasis added).

[166] *See* 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011).

[167] *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (Aug. 3, 2011).

[168] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148 & 156).

norms. On the employee front, many women of faith disagree with their employers about the morality of contraception. The Constitution protects their reproductive choice and the Affordable Care Act provides their insurance coverage. To exempt women's employers from the statute because the employers believe women should not have that freedom infringes upon employees' religious liberty as well as women's equality and "operates to *impose the employer's religious faith* on the employees." [169]

RFRA Misinterprets Free Exercise and Religious Conduct

There are currently 14 for-profit and 30 non-profit lawsuits challenging the contraceptive mandate; [170] their outcomes threaten antidiscrimination norms, for women's rights now and for other civil rights later. The for-profit lawsuits involve a wide range of businesses—a power equipment company; an arts and crafts store; a heating, ventilation and air conditioning manufacturer; a company that mines, processes and distributes refractory and ceramic materials and products; businesses engaged in scrap metal recycling; a construction business; a non-bank holding company including farming, dairy, creamery, and cheese-making; a cabinet and wood specialties company; and a company that manufactures vehicle safety systems.[171] The owners all claim that their moral beliefs against contraception relieve them of the obligation to provide insurance to their employees of varying faiths. The non-profit plaintiffs include colleges, universities and dioceses, primarily but not exclusively Roman Catholic. The non-profit lawsuits have been on hold while the Obama administration developed the new rule that was released in February. [172]

Under existing precedent, the for-profit cases should be easily decided in favor of the government. As the Court stated in *Lee*, "[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."[173] Moreover, as *Lee* and *Catholic Charities* held, employers should not be permitted to use their religious freedom to limit the rights of third parties. Finally, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* suggests that the government violates the Establishment Clause when it gives accommodations to for-profit organizations and

[169] *Lee*, 455 U.S. at 261 (emphasis added).

[170] The status of these lawsuits is regularly updated at *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, *available at* http://www.becketfund.org/hhsinformationcentral/ (last visited Mar. 1, 2013).

[171] See *id*.

[172] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148 & 156).

[173] *Lee*, 455 U.S. at 261.

therefore "puts at the disposal of religion the added advantages of economic leverage in the secular realm."[174]

To date, however, the decisions in these cases are all over the map in a manner that threatens antidiscrimination norms.[175] Although losing on Free Exercise grounds, the employers have enjoyed some success under the Religious Freedom Restoration Act (RFRA), which prohibits the federal government from "substantially burden[ing] a person's exercise of religion."[176] Although this law was ostensibly passed to promote civil liberties, its interpretation now potentially "operates to impose the employer's religious faith on the employees."[177]

A major problem with RFRA is that the courts in the contraception cases have focused on the "substantial burden" language of the statute to the exclusion of the "exercise of religion."[178] Many discussions of the mandate, both legal and political, assume that any and all conduct motivated by religious belief should enjoy constitutional and statutory exemption from law. It should not. Although religious *beliefs* are protected absolutely, religious *conduct* is not.[179] Religions are comprehensive doctrines that govern all aspects of their adherents' lives. To give special protection to all religiously-motivated conduct puts religious citizens and corporations completely outside the orbit of the law. Such exclusion is not required by free exercise and is prohibited by establishment. RFRA must not be interpreted to give such special solicitude to religion that First Amendment and antidiscrimination norms are undermined.

In interpreting the Religious Land Use and Institutionalized Persons Act (RLUIPA),[180] which prohibits land use regulations that impose a substantial burden on the exercise of religion and is similar to RFRA in analysis, some courts have accurately ruled that some conduct of religious organizations is not the exercise of religion. The courts have wisely held that many activities—such as building a commercial fitness center or a dance studio[181]—do not qualify as the exercise of religion. They have rightly decided in particular that commercial activities—building apartment

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[174] 483 U.S. 327, 343 (1987) (Brennan, J., concurring) (Giving accommodations to for-profit organizations "puts at the disposal of religion the added advantages of economic leverage in the secular realm, ... and has the effect of furthering religion in violation of the Establishment Clause."); *see also id.* at 349 (O'Connor, J., concurring) ("It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization.").

[175] *See* Leslie C. Griffin, *Misunderstanding the Mandate*, ACSBLOG (Jan. 8, 2013), *available at* http://www.acslaw.org/acsblog/misunderstanding-the-mandate.

[176] 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

[177] *Lee*, 455 U.S. at 261.

[178] *See, e.g.*, Korte v. Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012).

[179] *Cantwell*, 310 U.S. at 303-04.

[180] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

[181] New Life Worship Ctr. v. Town of Smithfield Zoning Bd. of Review, C.A. No. 09-0924, 2010 R.I. Super. LEXIS 101 (R.I. Super. Ct. July 7, 2010).

houses[182] and leasing religious properties for commercial events,[183] e.g.,—are not the exercise of religion.

So too with the Affordable Care Act. Instead of measuring the substantial burden on religion, the courts should hold that the exercise of religion is not implicated in the business of secular, for-profit companies. Running a business is not the exercise of religion. Providing insurance coverage is not the exercise of religion. If courts, legislatures and administrative agencies develop the idea that all religious beliefs are exempted from the law's reach, then antidiscrimination norms cannot hold. As the Court stated in *Lee*, "there is a point at which accommodation [of religion] would 'radically restrict the operating latitude of the legislature.'"[184] As Justice Brennan explained in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, when the government accommodates for-profit organizations it "puts at the disposal of religion the added advantages of economic leverage in the secular realm, and has the effect of furthering religion in violation of the Establishment Clause."[185]

Religious Exemptions Threaten Antidiscrimination Law

Unfortunately, the second case of interest to the Commission, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[186] supports the idea that religious organizations enjoy some immunity from the antidiscrimination laws. Left wide open in the Court's narrow ruling in *Hosanna-Tabor*—"hold[ing] only that the ministerial exception bars" Cheryl Perich's "employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her"[187] —is how much "special solicitude" religious organizations will continue to receive when they compete with antidiscrimination norms.[188]

One of the secular, for-profit companies has already argued that *Hosanna-Tabor* should free it from the contraceptive mandate.[189] In Kentucky, one tenured professor's *race* discrimination

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[182] Greater Bible Way Temple v. City of Jackson, 733 N.W.2d 734 (Mich. 2007), *cert. denied*, 552 U.S. 1332 (2008).

[183] Scottish Rite Cathedral Ass'n v. City of Los Angeles, 67 Cal. Rptr. 3d 207 (Ct. App. 2007).

[184] *Lee*, 455 U.S. at 259 (internal citations omitted).

[185] 483 U.S. 327, 343 (1987) (Brennan, J., concurring) (Giving accommodations to for-profit organizations "puts at the disposal of religion the added advantages of economic leverage in the secular realm, ... and has the effect of furthering religion in violation of the Establishment Clause."); *see also id*. at 349 (O'Connor, J., concurring) ("It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization.").

[186] 132 S.Ct. 694 (2012).

[187] *Id.* at 710.

[188] *Id.* at 706.

[189] *See* Conestoga Wood Specialities Corp. v. Sebelius, No. 12-6744, 2013 WL 140110, at *7 (E.D. Pa. Jan. 11, 2013) (rejecting plaintiffs' claim because of the distinction between religious organizations and secular corporations).

lawsuit against a seminary was dismissed due to the ministerial exception.[190] A tenured Jewish professor at the same school received the surprising news that he is a Christian minister for ministerial exception purposes even though he does not, of course, believe in Jesus Christ.[191] Commercial photographers, bakers, innkeepers and dress shops assert their rights of religious freedom to refuse pictures, cakes, reception venues and wedding dresses to gay men and lesbians who marry.[192] Race, gender and sexual orientation liberties repeatedly conflict with claims that religious conduct is beyond the law.

In *Hosanna-Tabor*, Chief Justice Roberts was openly skeptical of the EEOC's argument that a "parade of horribles" might arise from allowing "unfettered discretion" to religious employers.[193] The parade has started. Antidiscrimination norms are challenged for religious reasons, setting up the possibility that, especially under RFRA, "the professed doctrines of religious belief [become] superior to the law of the land, and . . . permit every citizen to become a law unto himself" instead of a citizen who lives by the law of antidiscrimination.[194]

Religious freedom and antidiscrimination norms are both cherished values under our Constitution. If we are to maintain both values, the starting point is a reminder that the religious liberty defended by the First Amendment is not absolute. Although religious *beliefs* are protected absolutely, religious *actions* are not.[195] Religious conduct must yield to the law and its protection of all citizens.[196]

Marci A. Hamilton[197]

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[190] *See* Kirby v. Lexington Theological Seminary, No. 2010-CA-001798-MR, 2012 WL 3046352 (Ky. App. July 27, 2012).

[191] *See* Kant v. Lexington Theological Seminary, No. 2011-CA-000004-MR, 2012 WL 3046472, at *15 (Ky. App. July 27, 2012) (Keller, J., dissenting).

[192] *See, e.g.,* Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. App. 2012) (photographer's refusal to photograph same-sex marriage ceremony is a violation of New Mexico Human Rights Act); Mike Benner, *Oregon Bakers Refuse to Make Same-Sex Wedding Cake*, WHAS 11 (Feb. 3, 2013, 10:30AM), *available at* http://www.whas11.com/news/189563131.html; Dave Gram, *Vermont's Wildflower Inn Settles Gay Marriage Lawsuit With Lesbian Couple*, HUFFINGTON POST (Aug. 23, 2012, 7:51PM), *available at* http://www.huffingtonpost.com/2012/08/23/wildflower-inn-vermont-gay-marriage-lawsuit_n_1826218.html; Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride; Owner Says "That's Illegal,"* ABC NEWS (Aug. 19, 2011), *available at* http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333.

[193] 132 S.Ct. at 710.

[194] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

[195] *Cantwell*, 310 U.S. at 303-04.

[196] *Id*. at 304.

[197] Paul R. Verkuil Chair in Public Law and Benjamin N. Cardozo School of Law, Yeshiva University.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.[198] brought the so-called "ministerial exception" doctrine to the Supreme Court for the first time. This First Amendment theory—originally articulated in the lower courts over fifty years ago—stands for the proposition that religious organizations have the right to determine the employment criteria for their clergy.

The Court needed to address three questions to alleviate confusion among the lower courts: (1) is the ministerial exception a jurisdictional issue?; (2) does an employment decision, not motivated by religious belief, still receive the protections of the ministerial exception under the First Amendment?; and (3) when is an employee of a religious institution a "ministerial employee" for purposes of the ministerial exception?

The best example of a case where the exception applies—and one that continuously resurfaced during the oral argument at the Supreme Court—is the Roman Catholic Church's prohibition on women serving as priests. At oral argument in *Hosanna-Tabor*, the Justices and the attorneys on both sides all seemed to agree that the federal anti-discrimination laws certainly may not be used to strong-arm the Catholic Church into accepting women as priests. However, *Hosanna-Tabor* itself involved a much trickier scenario.

The Facts of the *Hosanna-Tabor* Case Before the Court

The *Hosanna-Tabor* case involved Cheryl Perich, a teacher whose primary duties included the teaching of secular subjects, as well as some irregular religious teaching. She was originally hired as a teacher without being informed what the Church considered a "called" teacher. Subsequently, Perich enrolled in courses that qualified her to become a "called" teacher. Interestingly, her duties were identical before and after being "called."

While employed by the Church, Perich began to suffer from narcolepsy and took a leave for medical reasons. When she returned mere months later, the Church informed her that her position was no longer available. Perich threatened to sue under the Americans with Disabilities Act ("ADA"), alleging that the Church should have worked with her to accommodate her narcolepsy so she could continue to teach. The Church fired her and invoked the First Amendment, alleging that it had a belief that disputes should be resolved peaceably between members through internal procedures, which precluded her filing of a federal lawsuit. Therefore, her failure to invoke internal procedures and the very filing of the civil rights lawsuit was the justification, according to the Church, for letting her go. Under an ordinary civil rights case, this was a classic, illegal retaliatory move.

The record does not indicate how Perich would ever have known that she had to follow that procedure—as Justice Breyer forcefully noted at oral argument.[199] She also did not know that, by

[198] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C, 132 S.Ct. 694 (2012).

[199] Transcript of Oral Argument at 20, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C, 132 S.Ct. 694 (2012) (No. 10-553) [hereinafter Hosanna-Tabor Oral Argument].

working for the Church, she was expected to forego her rights under the anti-discrimination laws. She was playing a game she could not possibly win. When asked at oral argument by Justice Ginsburg if the Church handbook contained the information, the Church's representative, Professor Douglas Laycock, dodged the question, saying most of the handbook was not in evidence. However, he never pointed to any aspect of the record substantiating that she would have known this was a belief until she invoked federal law and they responded.[200] Thus, there was, without question, a troubling element of unfairness, largely because of our shared cultural expectations that employees are protected from arbitrary, invidious discrimination on the basis of disability (and race, gender, and alienage), and a sense that the Church's purported belief in court avoidance might not have been sincere given that a woman they claimed was a "minister" did not even know it was a belief.

The Ministerial Exception Is Not a Jurisdictional Issue

The Church advocated a categorical, jurisdictional rule: A teacher who teaches any religion course(s) is a "minister," and any case involving employment decisions regarding a minister are beyond the very power of the courts; they simply may not invoke jurisdiction.[201] Thus, the First Amendment would have forbidden the courts from considering any aspect of Perich's case. Laycock repeatedly articulated this logic upon insistent questioning by the Justices.[202]

The Supreme Court rejected this extreme position and instead held that the First Amendment is a potential defense but courts must determine on a case-by-case basis whether an employee is a "minister."

The Supreme Court also declined to embrace a "church autonomy doctrine." The corollary to the jurisdictional argument was a theory that churches have "autonomy" from discrimination law. This theory has been endorsed by numerous church lawyers in a wide variety of settings, but as I explained in my amicus brief in this case on behalf of *BishopAccountability.org, The Cardozo Advocates for Kids, Child Protection Project, The Foundation to Abolish Child Sex Abuse, Jewish Board of Advocates for Children, Inc., KidSafe Foundation, The National Black Church Initiative, The National Center for Victims of Crime, Survivors for Justice, and the Survivors Network of those Abused by Priests* and below, the Supreme Court has never embraced or identified a "church autonomy doctrine,"[203] and did not do so in this case. In fact, only two members of the Court, and

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[200] *Id*. at 20-21.

[201] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); Young v. N. Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1356 (D.C. Cir. 1990).

[202] Hosanna-Tabor Oral Argument *supra* n. 199 at 3-26.

[203] Brief of BishopAccountability.org et al. at 17, as Amici Curiae Supporting Petitioner, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C, 132 S.Ct. 694 (2012).

two who rarely see eye-to-eye on any subject, Justices Alito and Kagan, endorsed an "autonomy" approach.[204]

The Hard Question Largely Left Unanswered: Who is a "Minister"?

Because the Court did not side with the church's argument in favor of a jurisdictional rule, but embraced the concept of a ministerial exception required by the First Amendment, it was forced to decide which employees of religious organizations qualify for the exception. One bright line would have been to limit it to ordained clergy, but the Court declined to limit the class of those employees affected to only those who are obviously ordained clergy. The Court also declined to hold that each and every employee of a religious institution is included. As usual, the hard part in a constitutional case is the line-drawing.

The lower courts struggled with this same line-drawing, which is why, in the end, the Supreme Court took up the issue. Essentially the Court held that if an employee is a "minister," he or she is excluded from the protections of federal civil rights law. Accordingly, if Perich were not a "minister," she would have received the full protection of the ADA, Title VII, and every other federal, state, and local anti-discrimination law, despite the fact that her employer was religious.

In a Supreme Court case, the most important argument that any litigant can offer is a workable test. Here, after the Court rejected the jurisdictional theory and a bright-line ordained clergy category, the test would need to resolve who is, and is not, a minister. Yet, no compelling test was put forward by either side in *Hosanna-Tabor*, or, in fact, the Court. For employees who are not ordained clergy, each case in the future will be based on the facts of that case.

[204] *Hosanna-Tabor*, 132 S.Ct. at 711-716 (Alito, J., concurring).

An Interesting Analogy: If "Religious" Beliefs Can Be Challenged In Court as Insincere, Why Can't "Religious" Employment Decisions Be Challenged as Pretexts?

I found most curious the failure of any of the lawyers or Justices to analogize the ministerial exception cases to the "sincerity" cases. It seemed to be a general assumption, at oral argument, that the courts may not question religious believers. But, in fact, courts—while they may not decide or determine religious doctrine—can certainly consider evidence as to whether someone, or some institution, sincerely holds a given belief.

Indeed, free exercise cases routinely involve the question of whether the professed believer is sincere.[205] The initially Baptist prisoner—who claims sudden conversion to Judaism to obtain the benefits of kosher food after he sees it is fresher and better than the other food offerings—does not automatically get to demand a change in his meal options. The prison authorities can and do argue that a prisoner's real purpose is secular (seeking fresher food) and not religious, and therefore avoid liability for false religious liberty claims. It is my view that the sincerity doctrine survives the *Hosanna-Tabor* decision.

Perhaps some will argue that the prison cases are inapposite, even suggesting that it is absurd to parallel respected religious leaders with prisoners. Yet, sincerity analysis is standard and appropriate in every free exercise case. With all due respect, religious organizations and their leaders run the full spectrum of human fallibility. The First Amendment does not require courts to pretend that religious organizations and believers never err. That would be both nonsensical and counterfactual.

The *Hosanna-Tabor* case did not directly address issues involving sincerity, but I assume that in future cases, if the religious organization is not sincere in arguing that an employee players the role of a minister or about its beliers, and the sincerity defense is raised, First Amendment doctrine will not bar consideration of the sincerity question.

The *Hosanna-Tabor* Decision Is Narrow, and the Doctrine in This Area Will Need to Be Developed Further

The Supreme Court reversed the Sixth Circuit, because Perich exercised enough religious obligations to cross the line from being a secular employee to a "minister." The Court reasoned, "[t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above."[206] With respect to Perich, the Court reasoned, "[b]ecause Perich was a minister within the meaning of the

[205] Petruska v. Gannon University, 448 F.3d 615 (3d Cir. 2006), *vacated*, 2006 U.S. App. LEXIS 15088 (3d Cir. 2006). *See also Bollard*, 196 F.3d at 947; McKelvey v. Pierce, 800 A.2d 840, 858 (N.J. 2002).

[206] *Hosanna-Tabor*, 132 S.Ct. at 709.

exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer."[207]

The consequence is that, if an employee is found as a matter of fact on a case-by-case basis to be a "minister," religious organizations can fire the minister based on disability, race, or gender, and the employee will not be able to sue their employer for invidious discrimination. Conversely, if the employee is found not to be a "minister," the religious organization at issue will still have to deal with the ADEA, ADA, and Title VII, along with state civil rights statutes.

The Limited Reach of the *Hosanna-Tabor* Decision

One related question raised at the oral argument was whether certain categories of action by employees would be encompassed by the ministerial exception. For example, would religious institutions be immune under the First Amendment for retaliating against whistleblowers who report criminal or other bad behavior to the appropriate secular authorities (such as the EEOC, in the event of discrimination against a non-ministerial employee, or the police in the event of child sex abuse)? After all, Perich was fired *because* she invoked her rights under the ADA. That is a classic retaliation fact pattern.

Early in the oral argument, Justice Sotomayor insisted that the Court could recognize no First Amendment right in cases involving retaliation for reporting the abuse of women and/or children.[208] Here, she was apparently referring to the recent cases involving the Fundamentalist Church of Jesus Christ of Latter-Day Saints, polygamy, and child sex abuse.

The Church's lawyer was more than willing to agree to an exception for sex abuse or the protection of children, but he did not have an explanation as to how those cases, on his jurisdictional theory or an autonomy theory, could be decided by the courts. He merely reiterated several times that the protection of children is paramount. That principle of excluding certain actions between religious employers and ministers from the ministerial exception doctrine was explicitly noted.

The Court's opinion states, "[a]ccording to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial."[209] But, the Court noted that even Hosanna-Tabor had not gone that far:

Hosanna-Tabor responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. Nor, according to the Church, would the exception bar government enforcement of general laws

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[207] *Id*.

[208] Hosanna-Tabor Oral Argument *supra* n. 199 at 4-5.

[209] *Hosanna-Tabor*, 132 S.Ct. at 710. *See also Petruska*, 462 F.3d 294 (relating to gender discrimination).

restricting eligibility for employment, because the exceptions applies only to suits by or on behalf of ministers themselves.[210]

Thus, the Court concluded, "[t]he case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[211]

The Court's Bottom Line: Courts Cannot Establish Selection Criteria for Ministers

The Court therefore distinguished other potential legal disputes between clergy and religious organizations. The ministerial exception, it made clear, does not involve employees other than clergy, and may well not implicate a large range of legal disputes brought by clergy, e.g., a dispute over whether the religious organization paid the full salary and benefits expected in the employment contract. Standing even farther afield, and not mentioned by the Court, are cases that involve clergy or religious organizations, but that are brought by third parties, such as child-sex-abuse victims.

The bottom line is that the government may not establish selection or retention criteria for ministers. That means religious organizations are free, under the First Amendment, to discriminate by sex, disability, age, or race against their ministers. Further, they can fire a minister at will, without having to worry about the federal or state anti-discrimination laws. But the Court did not hold that religious organizations operate autonomously with respect to any body of law other than the federal anti-discrimination laws.

The Court Laid to Rest the So-Called "Church Autonomy Doctrine"

Before the Supreme Court took up the issue, some courts misnamed the ministerial exception issue as a "church autonomy doctrine."[212] In the same vein, some religious organizations have attempted to avoid institutional liability for sexual abuse, assault, and harassment by their clergy by arguing that their decisions regarding clergy—even when clergy engage in inappropriate sexual behavior—are protected by what they have styled a "church autonomy doctrine." In fact, the Court had never employed "autonomy" to describe its Religion Clause doctrine.[213]

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[210] *Hosanna-Tabor*, 132 S.Ct. at 710.

[211] *Id*.

[212] Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 654 (10th Cir. 2002).

[213] Marci A. Hamilton, Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 BYU L. REV. 1099, 1112-13 (2004). *See also* Marci A. Hamilton, The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up, 29 CARDOZO L. REV. 225 (2007).

As I explained in my amicus brief to the Court, "autonomy" is at odds with the Court's longstanding doctrine of "ordered liberty," and it should not be adopted for purposes of the ministerial exception the Court was inevitably going to embrace in one form or another. I pointed out that the lower courts have routinely rejected the so-called autonomy defense in clergy sexual misconduct cases. The United States Court of Appeals for the Second Circuit explained:

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract [or, we would add, their liability arising from the commission of a tort], are equally under the protection of the law, and the actions of their members subject to its restraints.[214]

In the *Hosanna-Tabor* decision, the majority never used the term "autonomy," continuing the long tradition of never employing a "church autonomy doctrine." In fact, only two members of the Court mentioned the term at all.[215] Therefore, I think it is safe to say that there is no such doctrine under the First Amendment and those lower courts and litigants who have used it in the past need to adopt a more nuanced approach to First Amendment doctrine.

RECOMMENDATION: There Is Still Room for Fairness in Employment for Ministers

The *Hosanna-Tabor* decision clarified that the ministerial exception is not jurisdictional and that the right to discriminate extends beyond ordained clergy to other employees. However, the Court left the doctrine in such a way that every case, other than those involving ordained clergy, will have to be decided on a case-by-case fact basis. Perich was a "minister" for purposes of the Court's analysis, but the next teacher in a religious school may not be. Right now, many employees of religious schools do not know whether they are protected from invidious discrimination or not.

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[214] Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431-32 (2d Cir. 1999) (quoting Watson v. Jones, 80 U.S. 679, 714 (1871)). *See also Bollard*, 196 F.3d at 947-48; Sanders v. Casa View Baptist Church, 134 F.3d 331, 337-38 (5th Cir. 1998), *cert. denied*, Baucum v. Sanders, 525 U.S. 868 (1998); In re Archdiocese of Milwaukee, 485 B.R. 385 (Bankr. E.D. Wis. 2013); Doe v. Liberatore, 478 F. Supp. 2d 742, 772 (M.D. Pa. 2007); Doe v. Archdiocese of Denver, 413 F. Supp. 2d 1187, 1194 (D. Colo. 2006); Dolquist v. Heartland Presbytery, 342 F. Supp. 2d 996, 1005 (D. Kan. 2004); Smith v. Raleigh Dist. of the North Carolina Conf. of the United Methodist Church, 63 F. Supp. 2d 694, 705-06 (E.D.N.C. 1999); Doe v. Hartz, 52 F. Supp. 2d 1027, 1078 (N.D. Iowa 1999); Smith v. O'Connell, 986 F. Supp. 73, 77 (D. R.I. 1997); Rashedi v. General Bd. of Church of the Nazarene, 54 P.3d 349, 354 (Ariz. Ct. App. 2002); Moses v. Diocese of Colorado, 863 P.2d 310, 319-20 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); Carnesi v. Ferry Pass United Methodist Church, 826 So. 2d 954 (Fla. 2002), *cert. denied*, 537 U.S. 1190 (2003); Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436 (Tenn. 2012); Petrell v. Shaw, 902 N.E.2d 401, 406 (Mass. 2009); Turner v. Roman Catholic Diocese of Burlington, 987 A.2d 960, 975-76 (Vt. 2009); Roman Catholic Diocese v. Morrison, 905 So. 2d 1213, 1236-38 (Miss. 2005); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208, 1232 (Me. 2005); Malicki v. Doe, 814 So. 2d 347, 351 n.2, 360- 62 (Fla. 2002); Odenthal v. Minnesota Conference of Seventh-Day Adventists, 649 N.W.2d 426, 436 (Minn. 2002); C.J.C. v. Corp. of the Catholic Bishop, 985 P.2d 262, 277 (Wash. 1999); F.G. v. MacDonell, 696 A.2d 697, 701 (N.J. 1997); Strock v. Pressnell, 527 N.E.2d 1235, 1237 (Ohio 1988).

[215] *Hosanna-Tabor*, 132 S.Ct. at 711-716 (Alito, J., concurring).

From the perspective of the Civil Rights Commission, it is my view that the most troubling part of this doctrine should be the clash of cultures in which ministers now find themselves. As American citizens, they share in our cultural assumption that organizations, businesses, and the government may not engage in invidious discrimination. In all likelihood, they also likely presume, that a religious organization is less likely to engage in invidious discrimination, at least when the discrimination is not driven by theology. Thus, while a minister cannot be surprised that only men can be priests in the Catholic Church or rabbis in Orthodox Jewish congregations, he or she can be very surprised when they are fired based on race, disability, or age.

I have spoken to a number of victims of discrimination by religious institutions, and they are invariably shocked that they had fewer rights against invidious discrimination in a religious institution than they did in a secular institution. They assumed not only that they did not shed their civil rights at the church door, but also that a religious institution simply would not engage in bare gender, race, disability, or age discrimination unconnected to theological tenets. Yet, cases that were brought prior to *Hosanna-Tabor* were decided alleging such discrimination in every category.[216] When the employees lost these cases based on the ministerial exception, they felt wronged.

The federal government has the authority and power to, at least, reduce the likelihood of such surprise and betrayal. It is my view that the federal (and state) civil rights laws should be amended to require that religious organizations must disclose before employment whether the employee is a "minister" for purposes of the ministerial exception and, therefore, whether the employee will be protected by or foreclosed from the state or federal civil rights laws.

Religious organizations also should not be permitted to include in their employee materials for ministers a non-discrimination policy without consequences. Consistent with the *Hosanna-Tabor* decision, suits based on fraud or misrepresentation should be available if religious organizations mislead applicants. The Internal Revenue Code also should be amended to provide that any religious organization that misleads employees regarding the availability of civil rights protections loses its tax-exempt status.[217]

I have no doubt that lawyers for religious organizations are likely to advise them that they should oppose any bill that requires them to disclose liability under the civil rights laws. But, as we have learned so well in the clergy sex abuse arena, many times a lawyer's advice to religious

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[216] *See* Rweyemau v. Cote, 520 F.3d 198 (2d Cir. 2006) (holding a provision discriminating based on race unconstitutional when applied to certain religions institutions); *Petruska*, 462 F.3d 294 (holding that, although Title VII prohibits gender discrimination, the Equal Protection Clause prevents the application of Title VII to ministerial functions within religious institutions); Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev., 768 N.W.2d 868 (Wisc. 2009) (holding that the ministerial exception applies when a teacher at a religious elementary school brings an age discrimination claim); *Hosanna-Tabor* 132 S.Ct. 694 (holding that the ministerial exception barred a disability claim); *McKelvey*, 800 A.2d at 858 (holding that a genuine issue of fact existed as to whether sexual harassment claims could be brought without violating the First Amendment).

[217] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

organizations that includes a lack of transparency can later subject the organization to charges stemming from such immoral and self-serving behavior. Religious organizations need to pursue transparency and fairness in this arena, as well as the child protection arena to be able to demand respect and allegiance in the public square.

Michael A. Helfand

As expressed by the Commission, the focus of this briefing is to explore tensions between two competing values: non-discrimination and religious liberty. This discussion comes at a crucial time as we face a new set of debates over the role of religion in a liberal democracy. While many such debates have explored the extent to which government should grant *religious individuals* exemptions from generally applicable laws,[218] a new wave of debates have increasingly focused on the unique role played by *religious institutions* in our constitutional order. Indeed, at the center of many of these new debates stand competing views regarding the extent to which religious institutions and organizations should be afforded constitutional exemptions from statutes and public policies that protect individuals from various forms of discrimination. Such constitutional protections - often referred to collectively under the umbrella of the "church autonomy doctrine"[219] - generally provide religious institutions with a right to direct their own internal affairs free from government interference.[220] However, critics worry that granting religious institutions with unbridled discretion might lead to wide-ranging discrimination and misconduct.[221]

Within the larger framework of this briefing, I would like to address the more narrow issue of church autonomy, outlining four points about how we might think about questions related to religious institutions going forward by considering (1) the constitutional value of religious institutions in a liberal democracy, (2) the appropriate limits on the constitutional protections

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[218] Debates regarding exemptions for religious individuals continue to play an important role in the general discussion over the role of religion in the United States. *See, e.g.*, Elane Photography, LLC v. Willock, No. 30,203 (N.M. Ct. App. May 31, 2012) (holding a photographer liable under New Mexico's Human Rights Law for refusing to photograph a same-sex marriage).

[219] *See, e.g.*, Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238 (10th Cir. 2010) (referencing the "church autonomy doctrine"); Petruska v. Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006) (same). The phrase "church autonomy doctrine" is typically associated with Douglas Laycock who famously deployed the term in his seminal article Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). However, Laycock has noted that he did not coin the phrase, but instead borrowed it from the title of Paul G. Kauper's *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347. *See* Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 254 (2009).

[220] *See, e.g.*, Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 115 (1952); Watson v. Jones, 80 U.S. 679, 728-29 (1872).

[221] *See, e.g.*, Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. (forthcoming 2013), *available at* http://ssrn.com/abstract=2026046; Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2004-05 (2007); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099 (2004).

afforded religious institutions, (3) the relationship between misconduct and religious discrimination, and (4) how we might leverage the value of religious institutions to address conflicts between law and religion.

In summary, I believe that as a liberal democracy we must provide religious institutions with the strongest of protections to decide matters of religious faith and doctrine. Religious institutions are afforded such protections by the First Amendment because they provide an infrastructure for individuals to pursue matters of faith in concert with others. And to the extent individuals join religious institutions in order to pursue matters of faith, such institutions should be afforded constitutional protection in order to make rules and develop doctrine geared to accomplish those goals.

(1) The Value of Religion and Religious Institutions in a Liberal Democracy

To address the scope and limits we place on religious freedom requires that we articulate the core value of religion and religious institutions in a liberal democracy. Stripped to its essentials, a liberal democracy must affirm the right of individuals to develop and revise their own vision of what it means to live, as the philosophers say, the good life. This right ensures that individuals can lead sincere and authentic lives, making their own decisions on matters of faith and identity free from government intrusion.

Of course, thinking through who we are and what we believe is not something typically done in isolation. We invariably work through these deeply personal questions of faith and identity while in conversation, often embracing values and ideals shared by others. More narrowly, many people conclude that they can only accomplish their religious goals by joining with others who share their core faith commitments. In fact, the Supreme Court has long recognized that the value of religious institutions is premised on their importance to the faith of individual citizens,[222] focusing on how religious institutions provide the infrastructure that allows individuals to pursue their deeply held religious objectives.[223]

This is precisely why the Supreme Court originally understood the value of religious institutions as based upon the "implied consent" of their membership.[224] The argument was quite

[222] Watson v. Jones, 80 U.S. 679, 728-29 (1872) ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.").

[223] See Richard W. Garnett, Do Churches Matter: Towards an Institutional Understanding of the Religion Clauses, 53 VILL. L. REV. 273 (2008).

[224] Watson v. Jones, 80 U.S. 679, 729 (1872) ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.").

straightforward. Because individuals voluntarily join religious institutions to pursue religious objectives in concert with others, the institution is granted "implied consent" by the membership to make rules and develop doctrine that promotes those goals. In turn, individuals can utilize religious institutions as a resource to develop their own vision of what it means to live a good life.

Of course, religious institutions can provide this infrastructure only so long as they can speak on matters of religious faith, doctrine and practice free from government intervention. The Supreme Court captured this core intuition in 1952, endorsing a "freedom for religious organizations, an independence from secular control or manipulation - in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[225] The Supreme Court returned to this core constitutional commitment in *Hosanna-Tabor v. EEOC*, where the Court emphasized that the First Amendment "gives special solicitude to the rights of religious organizations."[226]

In sum, a liberal democracy protects religion so citizens can decide who they want to be and what they want to believe. And a liberal democracy values religious institutions because they provide the necessary infrastructure to enable individuals to achieve their religious goals. This is precisely why we protect religious institutions; individuals implicitly consent to empower religious institutions to make rules and develop doctrine that promote their shared religious objectives. Accordingly, both religious individuals and religious institutions must be protected from governmental attempts to hijack decisions over substantive religious matters such as faith and doctrine.

(2) Providing Limits on the Rights of Religious Institutions

It is one thing to say that government should not interfere with the right of religious institutions to develop their own religious faith and doctrine. It is quite another to say that all decisions made by religious institutions should be shielded from any form of government oversight. Indeed, if we protect religious institutions because they promote the religious objectives of their membership, then such protection should end where religious institutions engage in conduct that fails to promote such objectives.

This is precisely the limitation on religious institutional autonomy the Supreme Court advocated in the early half of the 20th century. In 1929, for example, the Supreme Court noted that it would not defer to the decisions of religious institutions where they evinced "fraud, collusion or arbitrariness."[227] Such a limitation made quite a lot of sense given the reasons why we value religious institutions. Individuals ask religious institutions to make rules and develop doctrine that

[225] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 115 (1952).

[226] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 697 (2012).

[227] Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929).

help their membership achieve lofty religious objectives like faith and salvation. But individuals do not ask religious institutions to make decisions premised on fraud or collusion. When religious institutions engage in such conduct they cease to have constitutional protection.

The Supreme Court, however, has expressed unwillingness to impose these side constraints on religious institutions.[228] The worry here is that reviewing the decisions of religious institutions for fraud or collusion would require courts to investigate matters of internal religious doctrine and practice in violation of the Establishment Clause of the First Amendment. But it may be high time to revisit that conclusion, especially given the damaging impact of this judicial reluctance.[229] For example, claims of discrimination leveled by employees against religious institutions often boil down to accusations of pretext; the religious institution claims to have terminated an employee on the basis of protected religious considerations, while the employee claims that the religious considerations are simply a pretextual ploy to disguise prohibited forms of discrimination. While courts typically refuse to address claims of pretext on the grounds that resolving them would lead to judicial entanglement in questions of religious doctrine, such refusals are based on an over-expansion of the Establishment Clause, which should only prevent judicial intervention where a religious institution makes decisions on the basis of religious doctrine and not where religious doctrine is simply a pretext for other forms of discrimination.[230]

In sum, religious institutions should be afforded the strongest of protections when they make sincere and authentic decisions about religious matters, such as faith, doctrine and practice. Such substantive religious decisions must remain beyond the reach of government except under the most extreme and compelling of circumstances. However, if we value religious institutions because of how they promote religious objectives then we need a method for determining when they engage in conduct which undermines those very goals. And courts are far better suited to engage in that inquiry than we currently allow.

(3) Preventing the Slide Towards Religious Discrimination

There is a tendency, unfortunately, to contemplate issues of religious freedom by focusing exclusively on these instances of fraud or collusion. On one level, this is understandable as some institutions, under the cloak of religion, have engaged in conduct so reprehensible that it becomes difficult to look at the larger picture. But focusing exclusively on the bad is problematic not simply because it pushes policymakers to throw out the proverbial baby with the bathwater, but because

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[228] *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *see also* Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514, 1541 (11th Cir. 1993) (noting that "[i]n *Serbian Diocese* ... the Court cast doubt upon the continuing vitality of the *Gonzalez* dictum").

[229] For my extended argument on this point, see Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=2141510.

[230] *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=2022560.

it has also led to a resurgence in proposed policies that seem to be infected with a significant dose of anti-religious discrimination.

Here I have in mind, for example, recent attempts in San Francisco to ban circumcision. While the proposal itself provides little evidence of animus, the cartoon series "Foreskin Man" - published by one of the very organizations promoting the circumcision ban[231]- tells quite a different story. To quote from Los Angeles Times columnist Mitchell Landsberg, "The image of a bearded, black-hatted Jew with an evil grin and a bloody blade seems straight out of the annals of classic European anti-Semitism."[232] Reconsidered in this light, one cannot help but worry that initiatives to ban circumcision are simply well-disguised attempts to discriminate against religious practices.

In a similar vein, consider the recent wave of anti-Sharia legislation in the United States. While sometimes couched in neutral terms, the goal of such legislation has been to undermine the religious infrastructure of the American Muslim community by prohibiting courts from considering Islamic law. A recent Kansas court actually deployed the state's newly enacted anti-Sharia law to void an Islamic prenuptial agreement because doing otherwise, claimed the court, would perpetuate Islamic law's "basic denial of due process" that grants the husband unilateral power to effectuate a divorce. Of course, the court deftly avoided explaining how refusing to enforce an agreement that required the husband to pay a substantial sum to the wife further perpetuated an allegedly discriminatory system whereby the *husband* exercised too much authority.

Such logical gaps begin to make one worry that what motivates some legislative enactments and judicial opinions is not protecting the weak from discrimination, but targeting religion - especially minority religions - for prejudicial treatment on the basis of unfounded animus. Such proposals have gained traction precisely because advocates are able to focus popular attention on the very worst of religion. But while we must respond swiftly and unapologetically to all forms of religious misconduct, we cannot allow religious misconduct to drive the conversation. Doing so too easily arms those who would capitalize on instances of misconduct to fuel their discriminatory agenda.

(4) Applying Implied Consent

Notwithstanding these worries of growing religious discrimination, we must also avoid caricaturing all laws that restrict religious conduct as discriminatory. In many instances, laws that promote important public policies clash with the desire of individuals to act in accordance with their own religious conscience. Instances of true conflict between competing values are not a

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[231] Matthew Hess, *Monster Mohel*, FORESKIN MAN 1(2) (MGMbill 2010), *available at* http://www.foreskinman.com/no2panel02.htm.

[232] Mitchell Landsberg, *Campaign Against Circumcision Evokes Images of Anti-Semitism*, LOS ANGELES TIMES (June 4, 2011), *available at* http://articles.latimes.com/2011/jun/04/local/la-me-circumcision-20110604.

cause for embarrassment. Instead, they require that we mine the underlying logic of the constitutional protections afforded religious institutions so as to properly balance the competing values at stake.

By way of example, consider the Department of Health and Human Services promulgation of the so-called "contraception mandate,"[233] which laudably protects the reproductive rights of women by requiring covered employers to include contraception methods in employees' insurance policies.[234] However, in enacting this policy, the Department of Health and Human Services has provided limited exemptions to religious institutions and organizations who believe complying with the mandate will require them to violate the religious consciences.[235] Accordingly, this debate pits two competing and important values against each other: enhancing reproductive rights and protecting religious conscience.

Evaluating the requests of religious employers for exemption from the contraception mandate requires that we extend the underlying logic behind the constitutionally protected autonomy granted religious institutions. Religious institutions provide the infrastructure to many religious individuals to pursue religious objectives in concert with others. To achieve these religious objectives, individuals join religious institutions and, via "implied consent," grant those institutions authority to make rules and develop doctrine that promotes those shared religious goals.

Now the very idea that individuals implicitly grant authority to a religious institution to make decisions on religious matters is predicated on a basic assumption: the individuals must know the institution is religious and understand that the institution's purpose is to achieve religious objectives. Applied in the context of the contraception mandate, determining which employers should receive exemptions as "religious employers" requires us to consider to what extent

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[233] 42 U.S.C. § 300gg-13(a)(4) (Supp. 5 2011) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— ... (4) with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.").

[234] *See* Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines, available at* http://www.hrsa.gov/womensguidelines/ (Guidelines outlining the "contraception mandate"). *See also* Health Resources and Services Administration, *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost* (Aug. 1, 2011), *available at* http://www.hhs.gov/news/press/2011pres/08/20110801b.html (press release detailing the Guidelines).

[235] 45 C.F.R. § 147.130(a)(iv)(A) (2012) ("In developing the binding health plan coverage guidelines ... the Health Resources and Services Administration ... may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines."); *see also* 45 C.F.R. § 147.130(a)(iv)(B) (2012) (defining a "religious employer" for purposes of the regulation). The Department of Health and Human Services has subsequently proposed new rules for public comment that expand the scope of religious exemptions provided. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8,456, 8,458-9, 8,474 (Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.131).

employees were cognizant of their employer's religious objectives and therefore impliedly consented to the authority of their employer to make rules to achieve those objectives.

Adopting such an approach provides wider protection to companies, organizations and institutions that openly and obviously incorporate religion into their day-to-day operations. In such instances, employees can be assumed to understand the primary goal of their employer - to achieve religious objectives such as faith in salvation in concert with others. And in such circumstances, joining the institution can constitute implied consent to the institution's authority over matters touching upon religious faith and doctrine. By contrast, institutions that do not make their religious objectives clear to others cannot claim to have constitutionally protected autonomy predicated on the implied consent of their employees. Employees that do not know of their employers religious objectives cannot be presumed to have consented to the institution's authority over such matters.

The key to an "implied consent" analysis is that it focuses on the factual context of each employer, asking whether religion is truly part and parcel of the institutional culture. What such an analysis eschews is the inflexible criteria adopted by the Department of Health and Human Services to determine what employers receive exemptions as religious employers.[236] Most notably, an "implied consent" approach wholly rejects the categorical claim that for-profit organizations cannot be exempted from the contraception mandate on the assumption that such organizations do not "exercise religion."[237] Instead, using "implied consent" as our guide, we should inquire whether a particular employer - whether a non-profit or a for-profit - openly and obviously pursues religious objectives in a manner clear to its employees. Indeed, some small corporations and institutions - such as schools[238] or companies[239] - may pursue religious objectives such as faith and salvation as their primary goal. And, in so doing, they seek to incorporate religion into the day-to-day operations of their institution - a fact that should give us significant pause before we dismiss their claims of religious conscience and impose rules that require violating their core religious commitments.

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[236] 45 C.F.R. § 147.130(a)(iv)(B). As noted above, the Department of Health and Human Services has subsequently proposed new rules for public comment that expand the scope of religious exemptions provided. *See* http://www.gpo.gov/fdsys/pkg/FR-2013-02-06/pdf/2013-02420.pdf.

[237] This is the argument the government has made in some of its briefs in the course of litigating claims for preliminary injunctions against the contraception mandate. *See, e.g.*, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 2-3, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE) ("Hobby Lobby is a for-profit, secular employer, and a secular entity by definition does not exercise religion."); Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 2, Tyndale House Publishers., Inc. v. Sebelius, Civ.A. 12-1635 RBW, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) ("Tyndale is a for-profit employer that cannot "exercise religion" under RFRA and the Free Exercise Clause.").

[238] Anna Bitong, *Church Files Suit Against Dismissed Teachers*, THOUSAND OAKS ACORN (Feb. 7, 2013), *available at* http://www.toacorn.com/news/2013-02-07/Front_Page/Church_files_federal_suit_against_dismissed_teache.html.

[239] Tyndale House Publishers, Inc. v. Sebelius, Civ.A. 12-1635 RBW, 2012 WL 5817323, at *7 (D.D.C. Nov. 16, 2012) (noting how the plaintiff seeking an injunction against the contraception mandate holds a voluntary "weekly chapel service for its employees").

To be sure, just because institutions "exercise religion" does not mean that such exercise of religion should always win the day. Indeed, some values are simply too important - and simply too compelling - to provide religious institutions exemptions. To determine what values qualify as compelling requires careful consideration and thoughtful balancing. But all such inquiries demand that we adopt nuanced evaluation of the claims at stake to ensure that we arrive at the best judgment possible so as to maximize the rights of all individuals.

John D. Inazu

Thank you for the invitation to address the Commission on the important issue of civil liberties and antidiscrimination principles.

I am an associate professor of law and political science at Washington University in St. Louis. My research and scholarship focuses on the First Amendment rights of speech, religion, and assembly.[240]

I'd like to begin by calling attention to the punctuation in the Commission's title for this briefing: "Peaceful coexistence?" The question mark—a kind of qualification—helpfully points us to the limits of politics, to the recognition that our most difficult laws and policies unavoidably trade costs and benefits. That is certainly the case with the subject of today's briefing. On the one hand, our government is formally committed to equality of opportunity for all citizens, regardless of characteristics like race, gender, and sexual orientation. On the other hand, our constitutional tradition displays a vibrant and longstanding commitment to the right of individuals to form and participate in private groups of their choosing, free from state orthodoxy and coercion. Significant constitutional values are at stake on both sides, and whether these values can peacefully coexist is not a foregone conclusion.

I would like to focus on three points in my testimony: (1) the constitutional importance of groups; (2) the importance of specifying the harms caused by groups and the costs of addressing those harms; and (3) the dangers of the "all-comers" logic endorsed by *Christian Legal Society v.*

[240]Portions of this testimony draw from John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012).

Martinez.[241]

1. The Constitutional Importance of Groups

We value groups for many reasons, but we value them constitutionally—under the First Amendment—because we believe that they help secure self-realization, self-governance, and dissent from majoritarian politics. Most of us believe the groups that we form (or at least some of them) are for us and not for the state to control—they are, in a sense, private. And we control our private groups by deciding for ourselves on their meaning and value. We are rightly skeptical of the government's ability to interpret the significance of the practices of our groups—too often, what looks like a public disturbance is a civil rights protest, what sounds like a wail is a prayer, what tastes like bread is a Eucharistic celebration.

We guard against uncharitable interpretations of the internal practices of private groups by creating and enforcing strong pluralist protections for our ability to form and gather as groups. This pluralist vision draws upon our constitutional text and the history that informs it. We see it embedded in the Madisonian notion of faction.[242] It is captured in debates in the First Congress over the language of the First Amendment.[243] It embraces Justice Jackson's challenge that:

We apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse, or even contrary, will disintegrate the social organization. . . . Freedom to differ

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[241] Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971, 2980 (2010). The relevant facts of *Martinez* will likely be set forth in other testimony in this briefing, but I will rehearse them briefly in this footnote. The litigation leading up to Martinez began in 2004, when the Christian Legal Society ("CLS") chapter at the University of California, Hastings College of the Law in San Francisco sought to become a recognized student organization. Hastings typically granted "official recognition" to private student groups, making clear that it "neither sponsor[ed] nor endorse[d]" the views of those groups and insisting that they inform third parties that they were not sponsored by the law school. Hastings withheld recognition from CLS because the group's Statement of Faith violated the religion and sexual orientation provisions of the school's Nondiscrimination Policy. Specifically, CLS required that its members adhere to a theological creed, which included a belief in Christianity and compliance with a sexual conduct code that limited sexual activity to marriage between a man and a woman. Because of these views, the school denied CLS travel funds and funding from student activity fees. It also denied them the use of the school's logo, use of a Hastings email address, the opportunity to send mass emails to the student body, participation in the annual student organizations fair, and the ability to reserve meeting spaces on campus. Hastings subsequently asserted that its denial of recognition stemmed from an "accept-all-comers" policy that required student organizations to accept any student who desired to be a member of the organization. CLS filed a federal lawsuit asserting violations of expressive association, free speech, free exercise of religion, and equal protection. On appeal, a divided Supreme Court rejected these arguments. Justice Ginsburg's majority opinion asserted that CLS's speech and association claims "merged," which allowed her to resolve the dispute entirely within a free speech limited-public-forum analysis. She concluded that Hastings' all-comers policy was "a reasonable, viewpoint-neutral condition on access to the student-organization forum." Detailed citations are available in John D. Inazu, "Justice Ginsburg and Religious Liberty," 63 *Hastings Law Journal* 1213 (2012).

[242] *See* James Madison, *Federalist* No. 10.

[243] *See generally*, Inazu, *Liberty's Refuge*, at 21-25 (describing debates over the First Amendment's assembly clause).

is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[244]

This pluralist vision confronts the façade of the well-ordered and stable society that thrives on an imagined consensus. It reveals that our politics are dynamic rather than static and that the complexities of living together are always contingent and open-ended.

The private groups of civil society foster communities of meaning that enable individuals to challenge, and even to reject, prevailing consensus norms. This dissenting function sustains critiques of state-enforced orthodoxy. The alternative sphere of meaning created by dissenting groups has played a central role in many of the country's most important social movements, including the abolitionist, suffragist, labor, and civil rights movements. While the ideals of these movements fit comfortably within contemporary political discourse, in their time they posed significant threats to prevailing norms and state orthodoxy.

As these movements demonstrate, the emergence and development of our dynamic political ideals depends upon strong constitutional protections for private groups. This insight is recognized in our own era as well. Kenneth Karst insists that "one of the points of any freedom of association must be to let people make their own definitions of community."[245] William Galston suggests that "liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value."[246] And David Richards reflects: "the best of American constitutional law rests, I have come to believe, on the role it accords resisting voice, and the worst on the repression of such voice."[247]

Religious groups have often exemplified this pluralist vision. As Michael McConnell has noted, religious freedom embodies "counter-assimilationist" ideals that allow people "of different religious faiths to maintain their differences in the face of powerful pressures to conform."[248] Professor McConnell has also observed that "genuine pluralism requires group difference, and

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[244]West Virginia Board of Education v. Barnette, 319 U. S. 624, 641-642 (1943).

[245]Kenneth L. Karst, "The Freedom of Intimate Association," 89 *Yale Law Journal* 629, 688 (1980). *See also* Roberts v. United States Jaycees, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

[246]Wiliam A. Galston, Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice 3 (2002).

[247]David A. J. Richards, Fundamentalism in American Religion and Law: Obama's Challenge to Patriarchy's Threat to Democracy 13 (2010).

[248]Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," 57 *University of Chicago Law Review* 1109, 1139 (1990).

maintenance of group difference requires that groups have the freedom to exclude, as well as the freedom to dissent."[249] Secretary of State Hillary Clinton recently reinforced this same idea:

Religious freedom is not just about religion. It's not just about the right of Roman Catholics to organize a mass or Muslims to hold a religious funeral or Baha'is to meet in each other's homes for prayer, or Jews to celebrate high holy days together. As important as those rituals are, religious freedom is also about the right of people to think what they want, say what they think and come together in fellowship without the state looking over their shoulder.[250]

This pluralist vision requires that we extend broad protections not only to formal, political, expressive groups but also to groups that are informal, pre-political, and organized for other than expressive purposes. Without these protections, the grand experiment of permitting genuine political difference comes to an end. Because while some political expressions occur spontaneously, most do not. Most expressions flow out of groups of people who gather to eat and talk and share and pray long before they make political speeches or enact agendas. Indeed, almost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity.[251]

2. Underspecifying Rights and Harms

Given the significant constitutional values at stake, our laws and policies should specify compelling reasons for coercively imposing consensus norms upon private groups *and* account honestly for the rights and values that would be sacrificed by the imposition of those norms. To be sure, the autonomy of private groups will sometimes yield to important antidiscrimination goals. The norms and laws that arose during the Civil Rights Era led to significant advances in equality of opportunity (though that goal is far from fully realized). Employment discrimination and public accommodations laws played an important role in these developments. The social changes enabled by and reflected in these laws helped to break coercion in public and commercial spaces. With

[249]Michael W. McConnell, "The New Establishmentarianism," 75 *Chicago-Kent Law Review* 453, 466 (2000).

[250]Hillary Rodham Clinton, Address to Carnegie Endowment for Peace (July 30, 2012). *See also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.").

[251]*See, e.g.*, John Hope Franklin and Alfred A. Moss Jr., *From Slavery to Freedom: A History of African Americans* 377 (1994) (describing "moments of informality" spread across clubs, literary parties, and other events that created "a cohesive force" among the leaders of the Harlem Rennaisance); Linda Lumsden, *Rampant Women: Suffragists and the Right of Assembly* 3 (1997) (describing suffragist gatherings organized around banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes); Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971 (2010) (No. 08-1371) (describing "gay social and activity clubs, retreats, vacations, and professional organizations" that fostered "exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy.").

respect to racial integration during the Civil Rights Era, the law also broke the segregationist hold in some private spaces, including private educational institutions. But the social changes connected with antidiscrimination norms do not by themselves justify the application of those norms across all groups and institutions.

The Supreme Court has sometimes failed to specify the values at stake in cases pitting antidiscrimination norms antidiscrimination norms against the constitutional value of pluralism, most recently in *Christian Legal Society v. Martinez*.[252] Let me address first the problem of underspecifying the harms caused by private group autonomy. *Martinez* never detailed the particular harms caused by exclusion from membership in this small group of Christian law students. It never explained why those harms approximated the political, economic, and social harms addressed by civil rights legislation and precedent. Such harms could, of course, exist. For example, I have argued in my scholarship that antidiscrimination laws might justifiably limit the autonomy of private noncommercial groups when exclusion from membership meaningfully curtails access to broader social or economic participation.[253] If membership in the Christian Legal Society at Hastings College of the Law was a prerequisite to the most desirable legal jobs—a feather in the cap surpassing even membership on the *Hastings Law Journal*—then the Christian Legal Society might well lose its constitutional protections.

But these situations will be exceedingly rare among the private noncommercial groups in civil society today, and it is hard to imagine that they were at play with a small Christian group at a public law school in San Francisco. The state's reasons for constraining these groups should be defended with precision rather than with broad platitudes. Equality of opportunity is a crucial part of our constitutional ethos, but it is not self-justifying in all of its applications. Moreover, equality of opportunity ought to focus on genuine access to power and resources, not on the important but

[252]Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971, 2980 (2010).

[253]*See* Inazu, *Liberty's Refuge*, at 166-175.

distinct interests in dignity and self-respect.[254] Even very real injuries to dignity and self-respect seldom trump the First Amendment.[255]

Martinez not only failed to specify the harms caused by exclusion from membership in the Christian Legal Society; it also failed to account for the constitutional values at stake in the group's right to exist on its own terms in the public forum. In this regard, it is useful to highlight with some precision the facts underlying *Martinez*. In addition to withholding modest funding and the use of its logo, Hastings College of the Law denied the Christian Legal Society the opportunity to send mass e-mails to the student body, to participate in the annual student organizations fair, and to reserve meeting spaces on campus.[256] These activities do not amount to sponsorship or state support. They are means of participation in the free exchange of ideas.[257] As the Supreme Court noted in an earlier case:

If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by the denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.[258]

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[254]Nor did the Christian Legal Society at Hastings College of the Law threaten to undermine the democratic theory of free speech advanced by Owen Fiss and others. *See, e.g.,* Owen M. Fiss, *The Irony of Free Speech* 16 (1996) (expressing concern for private expression that would "make it impossible for ... disadvantaged groups even to participate in the discussion."). In fact, given the prevailing orthodoxies at Hastings and in San Francisco, the democratic theory of free speech may well have been best served by protecting rather than constraining the Christian Legal Society. *See* Catholic League for Religious and Civil Rights v. City and County of San Francisco, 624 F.3d 1043 (2010) (en banc) (discussing San Francisco resolution calling the Catholic position on the adoption of children by gay couples "absolutely unacceptable," "hateful and discriminatory," "both insulting and callous," showing "a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors").

[255]See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (speech may not be restricted "because [it] may have an adverse emotional impact on the audience"); Sorrell v. IMS Health Inc., 131 S.Ct. 2653, 2670 (2011) ("Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain." (quoting Snyder v. Phelps, 131 S.Ct. 1207, 1220 (2011)). *See also* Village of Skokie v. National Socialist Part of America, 373 N.E.2d 21, 24 (Ill. 1978) (permitting the wearing of swastikas in parade through village with high concentration of Holocaust survivors) ("We do not doubt that the sight of [the swastika] is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech.").

[256]The monetary subsidy to the Christian Legal Society at Hastings totaled $250 in travel funds, which were financed by vending machine sales commissions. Joint Stipulation of Facts for Cross-Motions for Summary Judgment 37, Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006).

[257]*See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 840 (1995) ("Student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission.").

[258]Healy v. James, 408 U.S. 169, 181-82 (1972).

As the Court stressed in that case, "the college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas.'"[259] The university ought to be about inquiry, not orthodoxy.

These core ideas of the public forum doctrine were not the only constitutional values ignored in *Martinez*. Neither free exercise nor association rights offered *any* protection to the religious group. The practical irrelevance of these two rights in *Martinez* cannot be overstated—in each case, it wasn't that the Christian Legal Society lost on a balancing analysis; rather, the Court didn't even bother to apply the analysis.

3. The All Comers Logic

My comments thus far have focused on general constitutional principles and values. But it is important in the context of this briefing to highlight the particular dangers of the "all-comers" policy that requires recognized student groups to accept any student who wants to be a member of the group. As a practical matter, most groups will have little problem with such a policy.[260] The Black Law Students Association, the Women's Law Students Association, and the Law School Republicans can generally agree to open membership policies because their membership largely self-selects. Nothing in their organizational documents requires that they maintain a formal exclusionary position. But groups that require a commitment to certain beliefs or practices for membership—groups like conservative religious organizations—will face significant consequences. Because these groups will be unwilling to alter their commitments, the all-comers policy will operate against them like a classic prior restraint—ensuring that they are forced out of the forum before their ideas and values ever manifest.[261] When implemented at public universities, the all-comers policy undermines the fundamental principles of the public forum doctrine.

The consequences of the all-comers rationale are spreading. Two recent Ninth Circuit opinions echo its logic. In *Truth v. Kent*, the court concluded that a high school Bible club violated a school

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[259]Healy v. James, 408 U.S. 169, 180 (1972).

[260]It is true that the litigation surrounding the all-comers policy occasionally invoked arguments and counterarguments about "takeover" scenarios in which a majority of students hostile to a group's mission would flood its membership and destroy the group—Republican students would take over the Democratic student group, pro-choice students would take over the pro-life group. But those scenarios, while not impossible, are largely implausible. Most people have better things to do with their time, and in a genuine public forum, interest groups coalesce most naturally and most efficiently around more constructive goals.

[261]There is, of course, one other kind of student group that is obviously vulnerable under an "all-comers" policy: fraternities and sororities that make membership decisions on the basis of gender. But champions of all-comers policies across the country have usually exempted these groups. Vanderbilt University's policy is illustrative—it has successfully forced a number of conservative religious groups out of its student forum, while exempting fraternities and sororities from the restriction on gender-based discrimination. *See* "Schools Work to Balance Gay, Religious Rights," *Wall Street Journal* (February 22, 2012). Vanderbilt's policy is described at http://vanderbilt.edu/about/nondiscrimination/faq.php. It is critiqued in a short video, "Exiled from Vanderbilt," produced by the Foundation for Individual Rights in Education. The video features strong critiques from Vanderbilt Law Professor Carol Swain, country music star Larry Gatlin, and journalist Jonathan Rauch. The trio includes a gay man and an African-American woman—the all-comers policy doesn't just threaten straight white men.

district's nondiscrimination policies because the club's requirement that its members "possess a 'true desire to . . . grow in a relationship with Jesus Christ' inherently excludes non-Christians."[262] Four years later, the Ninth Circuit relied on *Martinez* in *Alpha Delta v. Reed* to suggest that a public university might deny official recognition to Christian student groups that limit "their members and officers [to those who] profess a specific religious belief, namely, Christianity."[263] The entire California State University system has instituted the all-comers policy blessed by *Martinez*.[264] And the "neutrality" rationale is spreading to other contexts as well: the Second Circuit has recently upheld a ban on religious worship as "viewpoint neutral" under the public forum doctrine.[265]

Conclusion

The balance between the liberty of private, noncommercial groups and antidiscrimination principles may never reach a "peaceful coexistence." But our constitutional commitments give us better and worse ways of attempting to strike that balance. At the very least, we should expect a constitutional discourse that openly acknowledges the various interests at stake in such decisions. But we should also hope for the robust constitutional protection of pluralism that allows private groups to flourish and holds open the possibility of genuine political difference.

Thank you for the opportunity to offer these comments.

Ayesha N. Khan

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[262]Truth v. Kent. Sch. Dist., 542 F.3d 634 (9th Cir. 2008).

[263]Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795-96 (9th Cir. 2011), *cert denied*, 132 S.Ct. 1743 (2012).

[264]*See* Memorandum from Chancellor Charles B. Reed, December 25, 2011 *available at* http://www.calstate.edu/eo/EO-1068.html (mandating all-comers policy for all campuses in the California State University system). It is worth noting that the California policy, like Vanderbilt's policy, exempts fraternities and sororities ("The prohibition on membership policies that discriminate on the basis of gender does not apply to social fraternities or sororities or other university living groups."). Unlike Vanderbilt, the California State University system is a government actor and subject to the constraints of the First Amendment. The exemption of fraternities and sororities likely makes the policy vulnerable to a *free exercise* challenge by student religious groups in spite of *Martinez* and even under the attenunated free exercise framework established by Employment Division v. Smith, 494 U.S. 872 (1990). For a roadmap for this kind of free exercise challenge, see Amicus Brief of Constitutional Law Professors in Support of Appellees (November 21, 2012) in *Stormans v. Selecky* (United States Court of Appeals for the Ninth Circuit, Nos. 12-35221, 12-35223).

[265]Bronx Household of Faith v. Board of Educ. of City of New York, 650 F.3d 30 (2d Cir. 2011) (upholding public school board policy prohibiting use of school property for "religious worship services"). The Supreme Court has elsewhere imposed questionable limits on the predicate question of what constitutes a public forum. *See* Locke v. Davey, 540 U.S. 712, 715 (2004) (state-run scholarship program is not a public forum). *But cf.* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (public forum principles apply with equal force to fora that are "metaphysical," as opposed to "spatial or geographic."); Putnam Pit v. City of Cookeville, 221 F.3d 834 (6th Cir. 2000) (applying public forum analysis to a website).

Chairman Castro, Vice-Chairman Thernstrom, and other esteemed members of the Commission, thank you for the invitation to address you on legal issues concerning the intersection between religious liberties and nondiscrimination principles.

My name is Ayesha Khan. I am the Legal Director of Americans United for Separation of Church & State, a nonprofit organization based here in Washington, DC. At Americans United, I lead a seven-lawyer team in litigating cases around the country. Our litigation program is designed to advocate for a healthy separation between religion and government, in the belief that this separation fulfills the vision of our nation's Founders and serves as a linchpin of our democratic government.

In keeping with this principle, we have an active *amicus curiae* practice, submitting more than a dozen friend-of-the-court briefs every year in important cases pending before the federal courts of appeals and state supreme courts. My organization submitted *amicus* briefs in both *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[266] and *Christian Legal Society v. Martinez*,[267] cases that are of special interest to this panel.

Today, I will start by summarizing the positions that Americans United advanced, and the decisions that the Supreme Court rendered, in those cases. I will then take a step back and discuss the broader landscape in which religious individuals and organizations have sought to obtain exemptions from legal requirements. Finally, I will close with a discussion of how social and legal norms are subject to considerable evolution in this area.

Christian Legal Society v. Martinez

In *Christian Legal Society*, Americans United joined with the American Jewish Committee and the Union for Reform Judaism in submitting an *amicus* brief in defense of the Hastings College of Law's decision to require university-approved student groups to admit all students—regardless of their race, gender, religion, or sexual orientation—as a condition of obtaining law-school funds, using the law school's name and logo, and receiving various other benefits.

We argued that universities have a strong interest in barring exclusionary practices by recognized on-campus students' organizations because a principal purpose of providing these organizations with meeting space and financial assistance is to enable students to experience an on-campus educational laboratory for democratic values in action. Opportunities to participate in the organizational life of these students groups, alongside people of different races, genders, and religions, teach students critical interpersonal and leadership skills that are both necessary for participation in a democratic society and helpful to a student's career and professional opportunities.

We argued that this interest of the university was especially important because these educational opportunities have historically been denied to many students on account of their race, religion,

[266] 132 S.Ct. 694 (2012).

[267] 130 S.Ct. 2971 (2010).

gender, or sexual orientation. We recounted how America's institutions of higher learning have a long, sad history of excluding racial and religious minorities. From the 1920s to the late 1940s, for example, many universities imposed admissions quotas on Jews; Princeton totally excluded blacks; and Harvard and Yale admitted only a handful of each.[268] And the minority students who were admitted to study were then often denied access to extracurricular organizations and social clubs.[269] Given this history, we argued, it made eminent sense for Hastings to decline to extend official recognition and funding to student groups that seek to discriminate on account of religious faith.

The United States Supreme Court agreed, upholding the law school's policy by a 5-4 vote. The Court explained—with Justice Ginsburg writing, and the ever-important Justice Kennedy joining—that Hastings, through its nondiscrimination policy, "is dangling the carrot of subsidy, not wielding the stick of prohibition."[270] The Court concluded that the law school's policy was reasonable given the special characteristics of the school environment: the all-comers requirement ensured that all students had access to all leadership, educational, and social opportunities afforded by the law school, including by its officially recognized and subsidized student groups; the requirement allowed the law school to avoid making intrusive inquiries into—or judgments about—any student group's motivation for excluding members; the policy served the law school's educational objective to bring together individuals with diverse backgrounds and beliefs, thereby encouraging tolerance and cooperation; and it allowed the law school to avoid subsidizing discriminatory conduct that the people of California have determined to be unacceptable for public institutions.[271]

The Court also took comfort in the fact that the Christian Legal Society retained substantial alternative channels to meet and communicate. It could still gain access to school facilities to conduct meetings, and could use chalkboards and generally available bulletin boards to advertise events. And the group did, in fact, host a variety of activities, and even increased its members, the year after the law school denied it official recognition.[272]

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC

In *Hosanna-Tabor*, the issue was whether a parochial school's termination of a teacher's employment was governed by the Americans with Disabilities Act. The school sought to take advantage of the "ministerial exception," a court-created doctrine that exempts religious entities from nondiscrimination statutes under the theory that religious institutions should be able to select their ministers and other key personnel without governmental involvement. Before *Hosanna-Tabor*, the

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[268] MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970, at xviii (1979).
[269] Id.

[270] *Christian Legal Soc'y*, 130 S.Ct. at 2986.

[271] *Id.* at 2989-91.

[272] *Id.* at 2991.

lower courts had employed a variety of tests for ascertaining whether an employee was covered by the exception.

We submitted a brief—joined by the American Civil Liberties Union, the National Council of Jewish Women, the Sikh Council on Religion and Education, and the Unitarian Universalist Association—arguing that the ministerial exception should shield employment decisions that are religiously driven, but should not pave the way for discrimination unmoored from religious tenets. Drawing that distinction would not embroil the courts in religious questions, we argued, as the pretext inquiry is familiar to American courts, and in most cases requires no analysis of religious doctrine. If, in a particular situation, a pretext inquiry would require consideration of religious doctrine, the court could abstain; but that possibility does not justify blanket abstention even when pretext can be divined without entanglement.

The Court did not adopt our approach. Rather, it declined to adopt any precise legal formula for when the ministerial exception will shield an employment decision from legal scrutiny. Instead, the Court issued a case-specific ruling: On the basis of "the formal title given [the teacher] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that [the teacher] was a minister covered by the ministerial exception."[273]

The Broader Arena

Hosanna-Tabor and *Christian Legal Society* present only the tip of the vast iceberg of situations in which religious groups and individuals have sought to evade antidiscrimination provisions.

Landlords—in Alaska, California, Massachusetts, and elsewhere—have refused to rent property to persons living together out of wedlock, claiming the right to an exemption from anti-discrimination ordinances prohibiting discrimination on the basis of marital status.[274]

Many businesses that normally provide their services to the general public have declined to comply with antidiscrimination statutes protecting gay people. A medical provider refused to provide fertility treatments to a lesbian.[275] A photography company refused to photograph a same-sex commitment ceremony.[276] And a physician in Kentucky refused to hire gay people, in violation

[273] Hosanna-Tabor Evangelical Lutheran Church & Sch., 132 S.Ct. at 708.

[274] Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937 (Alaska 2004); Smith v. Fair Emp't & Hous. Comm'n, 12 Cal. 4th 1143 (Cal. 1996); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994).

[275] N. Coast Women's Care Med. Grp., Inc. v. San Diego Superior Court, 44 Cal. 4th 1145 (Cal. 2008).

[276] Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012), *cert. granted*, 2012- NMCERT-8 (N.M. Aug. 16, 2012).

of an ordinance that prohibits employers from discriminating in hiring on the basis of sexual orientation.[277]

Students enrolled in public-university counseling programs have sought exemptions from the American Counseling Association's ethical code's prohibition on discrimination against gay people.[278]

In these situations, as in *Christian Legal Society* and *Hosanna-Tabor*, the antidiscrimination statutes did not themselves provide an exemption, so the courts were obliged to ascertain whether an exemption was required by another state or federal statutory or constitutional provision.

But several antidiscrimination statutes *do* in fact provide exemptions. For example, Title VII exempts religious organizations from complying with the prohibition against religious discrimination.[279] So does the federal Fair Housing Act.[280]

Some of these exemptions go beyond the prohibition against religious discrimination; like the ministerial exception, they allow religious organizations to discriminate on any grounds, religious or otherwise. Washington State's human rights law, for instance, exempts all religious nonprofits from all antidiscrimination requirements.[281] Religious nonprofits are likewise wholly exempt from California's Fair Employment & Housing Act, and are therefore permitted to discriminate on any basis.[282] Litigation arises only when an antidiscrimination statute does not authorize exemptions, or when a religious group or individual seeks an exemption beyond that provided by the statute.

Religious individuals and entities have sought exemptions not just from antidiscrimination statutes, but from a wide range of other legal and ethical requirements:

The issue frequently arises in the context of women's reproductive freedom. Pharmacies and pharmacists have refused to dispense medications to which they are religiously opposed, despite local ordinances requiring pharmacies to dispense all prescribed medications.[283] Religious nonprofits have sought religious exemptions from state statutes requiring the provision of insurance coverage for contraception to the same extent that other prescription medications are

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[277] Hyman v. City of Louisville, 53 F. App'x 740 (2002).

[278] Ward v. Polite, 667 F.3d 727 (6th Cir. 2012); Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011).

[279] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[280] Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 657 F.3d 988 (9th Cir. 2011).

[281] Ockletree v. Franciscan Health Sys., No. 11-cv-05836-RBL, 2012 WL 6146673 (W.D. Wash. Dec. 11, 2012).

[282] Methodist Hosp. of S. Cal. v. Superior Court, No. B134748, 2002 WL 479750 (Cal. Ct. App. Mar. 29, 2002) (unpublished); Kelly v. Methodist Hosp. of S. Cal., 22 Cal. 4th 1108 (Cal. 2000).

[283] *See, e.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).

covered.[284] And both for-profit and nonprofit entities have sought exemptions from the Affordable Care Act's requirement that women be provided with coverage for contraception.[285]

Muslim taxicab drivers in Minnesota have sought an exemption that would allow them to decline passengers who are carrying alcohol.[286]

Muslim women have sought to avoid being photographed without a veil for their driver's license, and to wear a veil while testifying in court (thereby affecting a jury's ability to rely on facial expressions to assess credibility).[287]

Religious businesses and organizations have sought exemptions from health and safety codes, labor laws, zoning requirements, and other regulatory schemes.[288]

Individuals have sought religion-based exemptions from the nation's drug laws—the most famous such case being *Employment Division v. Smith*, in which the Supreme Court declined to grant such an exemption under the Free Exercise Clause.[289]

And parents have sought to avoid criminal or civil liability for harms that result from their decisions to heed a religious requirement to rely on spiritual rather than medical care for the treatment of their children's illnesses.

Parents also seek exemptions from school-related requirements:

In *Wisconsin v. Yoder*, the Amish won the right to an exemption from state compulsory- education laws.[290]

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[284] *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal. 4th 527 (Cal. 2004).

[285] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *denying injunction pending appeal*, 133 S.Ct. 641 (2012); Legatus v. Sebelius, — F. Supp. 2d —, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012).

[286] Metropolitan Airports Comm'n Meeting Minutes 4-5, Apr. 16, 2007, *available at* http://metroairports.org/mac/appdocs/meetings/Fc/Minutes/FC_M_782.pdf (last visited Mar. 11, 2013).

[287] Council on American-Islamic Relations v. Callahan, No. 09-13372, 2010 WL 1754780 (E.D. Mich. Apr. 29, 2010); Muhammad v. Paruk, 553 F. Supp. 2d 893 (E.D. Mich. 2008); Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003).

[288] *See, e.g.*, Univ. of Great Falls v. N.L.R.B., 278 F.3d 1335 (D.C. Cir. 2002); Affordable Recovery Hous. v. City of Blue Island, No. 12-cv-4241, 2012 WL 2885638 (N.D. Ill. July 13, 2012).

[289] 494 U.S. 872 (1990).

[290] 406 U.S. 205 (1972).

Parents of public-school students have sought to have their children excused from attending classes or school programs in which religiously objectionable information is included in the curriculum.[291]

Parents have likewise sought religious exemptions from statutes that require their children to receive certain vaccinations as a condition of attending public school.[292]

And employees regularly invoke Title VII's reasonable-accommodation requirement in seeking religious exemptions from workplace requirements:

Police officers seek exemptions from performing certain activities, such as guarding abortion clinics, to which they are religiously opposed.[293]

And there are scores of cases in which employees—such as police officers, correctional officers, and mass-transit employees—have sought exemptions from clothing and grooming requirements on religious grounds.[294]

In each of these situations, the courts have evaluated the facts, the relevant statutory and constitutional provisions, the burdens imposed by the regulation in question, any harm that would result to third parties if an exemption were to be granted, and other criteria pertinent to the particular situation. In the end, the sought-after exemption has been granted in some cases; in others, it has been denied. And rightfully so: it is simply untenable to rely on a one-size-fits-all approach in circumstances as varied as these.

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[291] *See, e.g.*, Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008) (public-school curriculum intended to encourage respect for gay persons and couples did not violate parents' or students' free-exercise rights); Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (rejecting plaintiff's religious objections to health curriculum that included family-life instruction and AIDS education; curriculum satisfied rational-basis review); Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (public high school's mandatory AIDS-awareness assembly did not violate plaintiffs' free-exercise rights), *abrogated on other grounds by* Martinez v. Cui, 608 F.3d 54 (1st Cir. 2010).

[292] *See, e.g.*, Hadley v. Rush Henrietta Cent. Sch. Dist., No. 05-CV-6331T, 2007 WL 1231753 (W.D.N.Y. Apr. 25, 2007); Boone v. Boozman, 217 F. Supp. 2d 938 (E.D. Ark. 2002); Huffman v. State, 204 P.3d 339 (Alaska 2009).

[293] *See* Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998) (city reasonably accommodated police officer's religious objection to guarding an abortion clinic when it provided him the opportunity to transfer, without reduction in pay or benefits, to a district without an abortion clinic); *see also* Endres v. Ind. State Police, 349 F.3d 922 (7th Cir. 2003) (state police did not violate Title VII or Free Exercise Clause for terminating officer who refused, on religious grounds, to work at casino); Fields v. City of Tulsa, No. 11-cv-115-GKF-TLW, 2012 WL 6214578 (N.D. Okla. Dec. 13, 2012) (police department did not violate First Amendment when it disciplined an officer who refused to attend, or to order subordinates to attend, a community event at the Islamic Society of Tulsa); Endres v. Ind. State Police, 794 N.E.2d 1089 (Ind. Ct. App. 2003) (police officer's discharge for refusing to work as riverboat gaming agent did not materially burden religious freedom), *vacated in part*, 809 N.E.2d 320 (Ind. 2004).

[294] Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (upholding prohibition on employees' body piercings).

The Role of Evolving Social, Religious, and Legal Norms[295]

The courts' decisions in these cases have been influenced not just by the facts and law pertinent to any given situation, but also by evolving social, religious, and legal norms.

For example, as mentioned above, parents of today's public-school students often seek exemptions on religious grounds from curricula that include objectionable content.[296] But in earlier years, litigants did not seek exemptions; they sought to have the challenged material stricken altogether.[297] When that failed, parents turned their sights to obtaining opt-outs.

Litigants' arguments have also been greatly influenced by changes in religious norms. The evolution of religious and social thought—and its concomitant effect on judicial decision-making—is particularly notable in the civil-rights arena. As formerly targeted minority groups have gained greater public acceptance, religious thought, and litigants' positions, have evolved accordingly. Courts have likewise shown sensitivity to the dynamic relationship between social norms and religious thought.

Racial Discrimination. From the colonial period until the ratification of the Thirteenth Amendment, supporters of slavery frequently relied on scripture to argue that slavery was not only justified, but required, by religious doctrine.[298] Slavery's supporters argued that "'the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah's son Ham, cursed by God himself and doomed to be a servant forever on account of an ancient sin.'"[299] A related belief was that "negroes were human but that unlike whites they were not created in the image of God and [were] one of several inferior races created by God after Adam."[300] Defenders of slavery also emphasized "that God's Chosen (Abraham, Isaac, and Jacob) owned slaves and that Leviticus

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[295] Much of the discussion in this section is taken from an *amicus curiae* brief submitted by Americans United and various other groups in Hollingsworth v. Perry, No. 12-144, a case currently pending before the U.S. Supreme Court. The brief was principally written by Christopher Handman and his team at Hogan Lovells US LLP, in Washington, DC—a team that rightfully gets the credit for anything of value, but not the blame for any errors, contained in this portion of my testimony.

[296] *See supra* note 292 and accompanying text.

[297] *See, e.g.*, Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (rejecting argument that home economics, history, and social studies textbooks advanced secular humanism or inhibited theistic religion in violation of Establishment Clause); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985) (public-school board's refusal to remove book from sophomore English curriculum did not violate Free Exercise Clause or constitute an establishment of religion).

[298] William N. Eskridge Jr., Noah's Curse: How Religion Often Conflates Status, Belief and Conduct to Resist Antidiscrimination Norms, 45 GA. L. REV. 657, 666-67 (2011).

[299] DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 12 (1978) (quoting GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 85 (1944).

[300] JOHN D. SMITH, THE BIBLICAL AND "SCIENTIFIC" DEFENSE OF SLAVERY XXV-VI (1993).

required the Israelites to secure 'bondsmen' from among the 'heathen' surrounding Israel" that were to be "inherit[ed] . . . for a possession."[301]

These scriptural justifications were not embraced by extremist sects alone. They reflected the dominant viewpoint of nearly every major religious group in the United States at the time. In fact, when abolitionists began to mount challenges to slavery, clergy of all denominational stripes were among the institution's most ardent defenders.[302] Following Lincoln's Emancipation Proclamation, ninety-six religious leaders from eleven different denominations issued a proclamation of their own, entitled "An Address to Christians Throughout the World," demanding the preservation of slavery.[303]

The biblical defense of slavery took hold in the courts as well. For example, in *Scott v. Emerson*, the Missouri Supreme Court counseled:

When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence, and instruction in religious truths are considered . . . we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God ... a means of placing that unhappy race within the pale of civilized nations.[304]

Even the United States Supreme Court accepted a religiously rooted notion of African-Americans as inferior, noting that this inferiority "was regarded as an axiom in morals as well as in politics, which no one thought of disputing."[305]

When slavery was outlawed by the Thirteenth Amendment, those opposed to equal rights for former slaves simply modified their reading of scripture: If the Bible no longer could be read to condone slavery, it could at least be read to mandate segregation.[306] And just as with slavery, these arguments gained widespread acceptance, including within the judiciary. In *West Chester & Philadelphia Railroad Co. v. Miles*, the Pennsylvania Supreme Court opined that "following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix."[307] Thus the legal basis for segregation: "When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men

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[301] Eskridge, *supra* n. 298 at 667 (emphasis added).

[302] *Id.* at 669.

[303] *Id.*

[304] 15 Mo. 576, 587 (Mo. 1852).

[305] Dred Scott v. Sandford, 60 U.S. 393, 407 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[306] Eskridge, *supra* n. 298 at 673-74.

[307] 55 Pa. 209, 213 (Pa. 1867).

to follow the law of races established by the Creator himself . . . ."[308] Other courts repeatedly relied on this passage in upholding Jim Crow laws.[309]

But as laws supporting segregation began to fall, the arguments shifted again: they began to focus more on religious liberty and the associational freedom of white Christians not to associate with non-whites.[310] After the Supreme Court struck down the "separate but equal" doctrine in *Brown v. Board of Education*, Southern churches created religious academies so that white Christians would not have to attend desegregated schools.[311] When the Treasury Department rescinded those private schools' tax-exempt status, Southern fundamentalists protested that the government was infringing on their religious liberty to run segregated schools as the Bible demanded.[312]

As late as 1983, Bob Jones University made the same argument before the United States Supreme Court in defending its segregationist admissions policy.[313] As you undoubtedly know, the Court rejected the university's position. Around that same time, the Court referred to *Dred Scott* as one of the three worst decisions in history.[314]

Gender Discrimination. Similar arguments grounded in religion and morality have been advanced to support laws discriminating against women.[315] As one scholar has noted: "There is assumed to be a literal scriptural foundation for a patriarchal family governance structure of husband as 'head' of the household," with his "wife as caregiver/homemaker and submissive or deferential to the husband's authority."[316]

As with race, this belief structure influenced judicial decision-making. In *Bradwell v. Illinois*, for example, a member of the United States Supreme Court opined that Illinois could deny women admission to the state bar because "[t]he natural and proper timidity and delicacy which belongs to

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[308] *Id.* at 214.

[309] *See, e.g.*, Berea Coll. v. Commonwealth, 94 S.W. 623, 628 (Ky. 1906); Bowie v. Birmingham Ry. & Elec. Co., 125 Ala. 397, 409 (Ala. 1900); State v. Gibson, 36 Ind. 389, 405 (Ind. 1871).

[310] Eskridge, *supra* n. 298 at 672-75.

[311] U.S. COMM'N ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS 1 (1982).

[312] See Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation and Debt Management Generally of the S. Comm. on Finance, 96th Cong. 18 (1979).

[313] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602-03 (1983).

[314] *See* South Carolina v. Regan, 465 U.S. 367, 412 (1984).

[315] Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 75-86 (1991).

[316] Linda C. McClain, The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality, 69 FORDHAM L. REV. 1617, 1643 (2001).

the female sex evidently unfits it for many of the occupations of civil life."[317] That God ordained women to be homemakers, not lawyers, provided the key justification for this view: "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[318]

Over time, however, many religious groups modified their views and some even embraced the precise opposite of their old approach to women's rights issues. Many Protestant churches, for example, now ordain women and embrace gender-neutral policies,[319] and have introduced programs to address discrimination against women within the church.[320]

And in largely parallel fashion over the past four decades, the United States Supreme Court has rejected earlier, religiously based views regarding the place of women in society. In *Mississippi University for Women v. Hogan*, for example, the Court held that any test for determining the validity of gender-based classifications "must be applied free of fixed notions concerning the roles and abilities of males and females."[321] And in *Frontiero v. Richardson*, the Court, repudiating Justice Bradley's concurrence in *Bradwell*, noted the "long and unfortunate history of sex discrimination" in America.[322]

Sexual-Orientation Discrimination. Until recently, many religions vehemently opposed homosexuality and homosexual behavior—and the law followed suit. Between 1879 and 1961, most American states and the federal government adopted statutes criminalizing sodomy and imposing civil disabilities on gay people.[323] These laws were premised, at least in part, on the view that same-sex sodomy is a carnal sin and contrary to biblical purity rules.[324]

The anti-gay rhetoric, and action, only intensified as the gay-rights movement began to emerge. In 1965, "the Roman Catholic Church . . . almost single-handedly blocked sodomy reform in New York based upon the Church's view that sodomy is a carnal sin."[325]

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[317] 83 U.S. 130, 141 (1872) (Bradley, J., concurring in the judgment).

[318] *Id*.

[319] *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 44 (2011).

[320] See Elisabeth S. Wendorff, Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread, 3 S. CAL. L. & WOMEN'S STUD. 135, 147-48 (1993).

[321] 458 U.S. 718, 724-25 (1982).

[322] 411 U.S. 677, 684 (1973).

[323] Eskridge, *supra* n. 298 at 689.

[324] *Id.* at 689-90.

[325] *Id.* at 690.

In 1972, Mormon activists in Idaho convinced that state to reverse course and *reinstate* a sodomy ban it had just repealed.[326] In 1986, the President of the Southern Baptist Convention preached that "God Himself created AIDS to show His displeasure with homosexuality."[327] And two years later, Southern Baptists adopted a formal resolution condemning homosexuality as an "abomination in the eyes of God."[328]

But more recently, religious teachings have shifted—some quite dramatically.[329] In 1978, less than a decade after the Stonewall Riots ushered in the gay-rights movement, the Presbyterian Church issued a comprehensive statement concluding, after reexamining scripture, that the "Sin of Sodom" was rape (rather than gay sex) and that "St. Paul's condemnations refer to dissolute behaviors rather than to any and all homosexual relations."[330] By 1986, most mainstream Protestant denominations had decided that the Bible does not support criminal sanctions against consensual same-sex relations.[331]

Some religious denominations have gone much further. During the last three decades, most mainstream Protestant denominations, including the Presbyterian Church, the Episcopal Church, the United Methodist Church, the Quakers, the Unitarian Universalist Association, the American Lutheran Church, the United Church of Christ, and the Disciples of Christ have announced that LGBT people are entitled to equal treatment and have issued statements beseeching their members not to reject LGBT congregants.[332] During this same period, Reform Jews, Unitarians, and the United Church of Christ began ordaining openly gay rabbis and ministers.[333] The Episcopal Church followed suit in 1989.[334]

Indeed, even some groups that previously resisted gay rights have embraced a more tolerant stance of late. In 1994, the Vatican issued a statement that LGBT persons "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided."[335] And the Southern Baptist Convention has questioned the vehemence of its earlier condemnations. In 2009, the editor of the *Baptist Standard* asserted that expelling LGBT members

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[326] *Id.* at 692.

[327] *Id.* at 695.

[328] *Id.* at 695-96 (quoting ORAN P. SMITH, THE RISE OF BAPTIST REPUBLICANISM app. D, at 221 (1997)).

[329] *See generally* Eskridge, *supra* n. 298 at 693-704.

[330] *Id.* at 700-01.

[331] *Id.* at 699.

[332] *Id.* at 699-700.

[333] *Id.* at 707.

[334] *Id.*

[335] Eskridge, *supra* n. 298 at 704 (quoting CATECHISM OF THE CATHOLIC CHURCH, No. 2358, at 566 (1994)).

from the church was not "redemptive" because it singles out one sin while turning a blind eye to others.[336]

The United States Supreme Court's rulings have tracked this evolution. In *Bowers v. Hardwick*, the Court upheld Georgia's criminal prohibition on oral and anal sex as valid under the Due Process Clause.[337] The majority opinion held that moral disapproval of homosexuality provided a rational basis for the law. Rejecting the argument that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was "an inadequate rationale to support the law," the Court wrote: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[338] Chief Justice Burger's concurring opinion added citations to religious condemnation of same-sex relations and forceful statements that "[c]ondemnation of [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards."[339]

Bowers, of course, did not last long. The Court presaged its demise just ten years later in *Romer v. Evans*.[340] There, the Court held that a Colorado constitutional amendment that would have removed all legal protections for gay men and lesbians as a class had no "legitimate governmental purpose."[341] The Court reached that conclusion without so much as mentioning *Bowers* or the supposedly legitimate interest in enshrining the community's moral and religious views that *Bowers* had endorsed, and that the *Romer* dissent insisted should control the case.[342]

Finally, in *Lawrence v. Texas*, the Supreme Court squarely rejected *Bowers* in the strongest possible terms.[343] In striking down Texas's criminal ban on same-sex intercourse, the Court directly rejected any argument that moral and religious disapproval could suffice as a rational basis for Texas's law. "[R]eligious beliefs, conceptions of right and acceptable behavior, and . . . . ethical and moral principles . . . . do not answer the question before us," it explained.[344] "The issue is whether the majority may use the power of the State to enforce these views on the whole society through

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[336] *Id.* at 705-06 (quoting Marv Knox, Editorial, *It's Time to Talk About Homosexuality*, BAPTIST STANDARD (July 11, 2009), http://www.baptiststandard.com/opinion/editorial/9802-editorial-its-time-to-talk-about-homosexuality).

[337] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[338] *Bowers*, 478 U.S. at 196.

[339] *Id.* at 196-97 (Burger, C.J., concurring).

[340] 517 U.S. 620 (1996).

[341] *Id.* at 635.

[342] *See id.* at 636, 640-43 (Scalia, J., dissenting).

[343] 539 U.S. at 564-78 (stating that "*Bowers* was not correct when it was decided, and it is not correct today").

[344] *Id.* at 571.

operation of the criminal law."[345] Ultimately, the Court concluded that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[346]

This trajectory can also be seen in the context of gay marriage. To be sure, for the Catholic Church, Mormons, Southern Baptists, and some other groups, marriage equality has become "the new Maginot Line for homosexuality."[347] But moral and religious condemnations of same-sex marriage have otherwise waned in recent years. A number of groups, including the Episcopal Church, the United Assembly of Hebrew Congregations (Reform Jews), the Unitarian Universalist Church, the United Church of Christ, and the Quakers, now embrace marriage equality.[348]

Other groups have taken more incremental approaches. In 2004, the Presbyterian General Assembly passed a resolution supporting laws recognizing same-sex relationships.[349] In 2009, the Evangelical Lutheran Church in America voted by a substantial majority to "commit to finding ways to allow congregations that choose to do so to recognize, support and hold publicly accountable, lifelong, monogamous, same-gender relationships."[350]

Of course, "the shift of religious discourse toward acceptance of gay people has continued at different paces for different denominations."[351] Change has not come overnight, but neither did the abolition of slavery, desegregation, or women's rights. The bottom line is that "the tension between equal rights for gay people and liberty for religious people has been obliterated for a good many denominations and reduced for others," and "the evolution continues."[352]

I mention this history not to suggest that the Christian Legal Society and the Hosanna-Tabor Evangelical Lutheran Church and School are akin to litigants who have advanced religious arguments to justify slavery, segregation, gender discrimination, and homophobia. I offer it simply to illustrate that religious, social, and legal norms about discrimination are far from static. So the

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[345] Id.

[346] *Id.* at 578 (emphasis added).

[347] Eskridge, *supra* n. 298 at 708.

[348] *Faith Positions*, HUMAN RIGHTS CAMPAIGN, *available at* http://www.hrc.org/resources/entry/faith-positions (last visited Mar. 11, 2013).

[349] *Stances of Faiths on LGBT Issues: Presbyterian Church (USA)*, HUMAN RIGHTS CAMPAIGN, *available at* http://www.hrc.org/resources/entry/stance-of-faiths-on-lgbt-issues-presbyterian-church-usa (last visited Mar. 11, 2013).

[350] *Stances of Faiths on LGBT Issues: Evangelical Lutheran Church in America*, HUMAN RIGHTS CAMPAIGN, *available at* http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-evangelical-lutheran-church-in-america (last visited Mar. 11, 2013) (quotation marks omitted).

[351] Eskridge, *supra* n. 298 at 704-05.

[352] *Id.* at 709.

kinds of exemptions that we consider necessary today may be deemed impermissible, and even morally repugnant, tomorrow.

Conclusion

In sum, the courts have done a reasonably competent job of rendering fair-minded, case-specific decisions about whether an exemption is appropriate in any given situation. Their conclusions have been influenced not just by pertinent facts and law, but also by changing religious and social norms. And that is as it should be.

Daniel Mach

Members of the Commission, thank you for the invitation to participate in today's briefing. I am honored to be here on behalf of the ACLU to address issues of religious liberty and civil rights. I am pleased to submit this written statement for the record.

The American Civil Liberties Union (ACLU) is an organization with over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide. The ACLU is a nonprofit, nonpartisan organization working daily in the courts, Congress, state legislatures, and communities across the country to defend and preserve the principles embodied in the Constitution and our nation's civil rights laws.

The issues addressed by the Commission today lie at the heart of the ACLU's mission. For nearly a century, the ACLU has fought to safeguard religious liberty. We work ardently to bolster the two complementary protections enshrined in the Religion Clauses of the First Amendment, defending the free exercise right to religious belief and expression,[353] and promoting the Establishment Clause guarantee that government not play favorites with faith. At the same time, the ACLU has stood firm in opposing discrimination in this country, fighting for decades to secure civil rights and equality for all.

You have invited me to address two recent Supreme Court decisions that touch upon the intersection of these fundamental rights and liberties, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[354] and *Christian Legal Society v. Martinez*.[355] Although doctrinally distinct, each involves claims by religiously affiliated organizations seeking an affirmative constitutional right to act, pursuant to deeply held beliefs, in a way that would otherwise be barred by governmental antidiscrimination rules. In *Hosanna-Tabor*, the Court reiterated what every lower court to address the issue had already concluded - namely, that the First Amendment gives houses of worship and affiliated institutions wide latitude when selecting their ministers. In

[353] *See* www.aclu.org/defendingreligion.

[354] 132 S.Ct. 694 (2012).

[355] 130 S.Ct. 2971 (2010).

Christian Legal Society, on the other hand, the Court rejected a student group's claimed constitutional exemption to a public university's nondiscrimination policy, holding that state entities have broad discretion not to affiliate with and fund discrimination. Taken together, the decisions evince a respect for both religious liberty and civil rights.

Hosanna-Tabor v. EEOC

In *Hosanna-Tabor*, the Supreme Court ruled that churches may assert a legal defense, called the "ministerial exception," in response to employment discrimination claims brought by their ministers. The case involved a lawsuit under the Americans with Disabilities Act (ADA) filed by the Equal Employment Opportunity Commission (EEOC) and Cheryl Perich, a teacher at a private religious school operated by the Hosanna-Tabor Evangelical Lutheran Church. Perich and the EEOC claimed that the school illegally fired Perich after she took a leave of absence to treat her narcolepsy and in retaliation for asserting her ADA right to be free from disability-based discrimination. The Court held, however, that Perich was a minister of the church and that her discriminatory termination claim was therefore barred by a constitutionally mandated ministerial exception. According to the Court, this exception exists to "ensure[] that the authority to select and control who will minister to the faithful - a matter strictly ecclesiastical - is the church's alone."[356]

Describing the sources of the ministerial exception, the Supreme Court explained that "[t]he Establishment Clause [of the First Amendment] prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[357] These dual protections ensure that religious entities enjoy considerable autonomy in the choice of ministers - that is, the selection of leaders who can perform the requisite religious functions in accordance with the faith's beliefs, teachings, and mission. Such judicial deference over matters of doctrine is critical to ecclesiastical independence and, therefore, to religious liberty as a whole.

Although the ACLU would have drawn slightly different lines, we fully embrace these basic principles underlying the *Hosanna-Tabor* decision, recognizing that a constitutionally grounded ministerial exception serves crucial religious-liberty interests.

In assessing the exception, however, it is important to understand its reach and limits. These are evident from the *Hosanna-Tabor* decision itself, the special constitutional concern for religious autonomy in the choice of ministers recognized by the Court, and the particular facts of Perich's situation.

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[356] 132 S.Ct. at 709 (internal quotation marks and citation omitted).

[357] *Id.* at 703.

First, the Court emphasized that "the exception applies only to suits by or on behalf of ministers themselves."[358] Religious institutions cannot assert the ministerial exception as a defense to lawsuits brought by employees who are not ministers. The Court's ruling in *Hosanna-Tabor* does not, therefore, give religious institutions a blank check to discriminate against employees who are not ministers.

Second, while the "ministerial exception is not limited to the head of a religious congregation," it plainly does not cover every employee of a religious institution, many of whom have no duties that relate to ministering to the flock.[359] Whether an employee qualifies as a minister for purposes of this exception is based on a combination of factors relating to the nature of the employee's position, duties, and responsibilities. In *Hosanna-Tabor*, the Court relied on the fact that the church held Perich out as a minister, and she considered herself to be one. She undertook religious training and education to gain the position, and she was then "commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach."[360] In addition, Perich's "job duties reflected a role in conveying the Church's message and carrying out its mission," including teaching religion, leading prayer, and occasionally leading chapel services.[361] The Court noted that each of these considerations, taken alone, may have been insufficient grounds upon which to invoke the ministerial exception, but found the combination of factors to be persuasive evidence that Perich was a minister. This multi- factor, nuanced analysis ensures that religious institutions may not skirt employment discrimination laws simply by giving all employees the title of "minister" or assigning each employee a few religious duties.

In fact, the Supreme Court expressly reaffirmed in *Hosanna-Tabor* that "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important."[362] In light of that interest, the Court's decision is crafted to honor the vital relationship between church and minister, while protecting the vast majority of employees from the type of discrimination that is antithetical to American values. Religious institutions that violate time-honored statutory protections against employment discrimination may (like all other employers) still be held accountable in court by most employees.

Third, religious institutions may assert the ministerial exception only as a defense in employment discrimination cases. The exception does not grant churches blanket immunity from all other legal claims brought against them. Indeed, the Supreme Court declined to recognize wholesale

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[358] *Id.* at 710.

[359] *Id.* at 707.

[360] *Id.*

[361] *Id.* at 708.

[362] *Id.* at 710.

immunity for other claims, such as breach of contract or tortious conduct, that might be brought by ministers against their religious employers.[363]

Fourth, the ministerial exception does not shield houses of worship from enforcement of all other laws. For example, as the church in *Hosanna-Tabor* itself conceded, "the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings" or "government enforcement of general laws restricting eligibility for employment," such as child-labor laws.[364]

Ultimately, while the *Hosanna-Tabor* decision embraces an essential component of religious liberty - the right of churches to select their religious leaders - it signals no dramatic shift in the legal landscape. In confirming the existence of a constitutionally grounded ministerial exception, the Supreme Court broke scant new ground, following the unanimity of opinion in the federal courts of appeals, all of which had previously recognized some version of the ministerial exception.[365] As to the subsidiary question about which the lower courts had, to some extent, disagreed - the question of who qualifies as a "minister" to trigger the exception - the Supreme Court provided little concrete guidance.[366] The lower courts are still in the early stages of applying *Hosanna-Tabor*,[367] and the decision's legacy remains uncertain. In the end, it should stand as a vital, albeit limited, guarantee of church autonomy that leaves intact the government's constitutional ability to protect the health, safety, and welfare of its citizens.

Christian Legal Society v. Martinez

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[363] *Id. See also*, *e.g., Second Episcopal Dist. African Methodist Episcopal v. Prioleau*, 49 A.3d 812, 816-18 (D.C. 2012) (declining to dismiss breach of contract claim by pastor against church, where claim could be decided using "neutral principles of law").

[364] *Hosanna-Tabor*, 132 S.Ct. at 710.

[365] *Id.* at 705 (noting that "the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers.").

[366] *Id.* at 707 (expressly declining to "adopt a rigid formula," instead reviewing a variety of factors in the case and concluding that "the exception covers Perich, given all the circumstances of her employment").

[367] In the year since the Supreme Court's decision, litigants have invoked *Hosanna-Tabor* in a variety of circumstances, with mixed results: Claims brought by employee plaintiffs with duties and responsibilities similar to Perich's typically have been dismissed, s*ee*, *e.g.*, *Temple Emanuel of Newton v. Mass. Comm'n*, 975 N.E.2d 433, 443-44 (Mass. 2012) (dismissing age discrimination claims by teacher of religious subjects at religious school); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 673-64 (N.D. Ill. 2012) (dismissing suit by "called" teacher at Lutheran school); *Kirby v. Lexington Theological Seminary*, No. 2010-CA-001798-MR, -- S.W.3d ---, 2012 WL 3046352, at *5 -*6 (Ky. App. July 27, 2012) (dismissing discrimination claims by "called" teacher who served as instructor of Church and Society), while actions brought on behalf of clearly non-ministerial employees have been allowed to proceed, *see*, *e.g.*, *Dias v. Archdiocese of Cincinnati*, No. 1:110CV-00251, 2013 WL 360355, at *4 (S.D. Ohio Jan. 30 , 2013) (allowing computer technology coordinator to sue archdiocese school for pregnancy discrimination).

In *Christian Legal Society v. Martinez (CLS)*, the Supreme Court considered whether a public university - the University of California's Hastings College of the Law - could be compelled to provide official recognition and benefits to student clubs that violate the school's nondiscrimination policy.

Unlike in *Hosanna-Tabor*, the Court in *CLS* addressed not whether religious groups have a constitutional right to discriminate in the selection of leaders and members, but rather whether such groups have an affirmative right to do so *with* government money and support. The Court rejected the claimed right, holding that a public university has the constitutional authority to lend its name and funds only to those groups or activities that are open to all students.[368]

Hastings, like a number of other public and private schools, grants official recognition only to student groups that agree not to discriminate in membership, a requirement known as an "all-comers" policy. Officially recognized groups enjoy a variety of benefits unavailable to other private organizations, including eligibility for school funding, the use of the law school's name, preferential access to classroom space for meetings, and access to the school's student activities fair. The Hastings nondiscrimination policy was challenged by the Christian Legal Society, a student club that excludes from membership and leadership positions any students who do not share CLS's religious beliefs or who engage in "unrepentant homosexual conduct."[369] CLS alleged that the policy infringed its First Amendment rights of speech, association, and religion.

CLS surely had every right to expect the university to apply its nondiscrimination policy in an evenhanded way; indeed, had there been evidence that Hastings officials had held CLS to a higher standard than other student groups by allowing other groups to violate the all-comers policy with impunity, the Supreme Court likely would have found in CLS's favor. But CLS could not make such a showing, and CLS was left seeking "not parity with other organizations, but a preferential exemption from Hastings' policy."[370] That is, CLS claimed a right to the benefits of official recognition, without having to comply with the nondiscrimination rules applicable to every other recognized student group. The First Amendment, the Court reasoned, conferred no such right on CLS.

To be sure, as the Supreme Court recognized, CLS - like any group of students at a public university - does enjoy significant First Amendment rights, but under Hastings' policy CLS had ample opportunity to meet on campus, gain access to campus facilities, and use bulletin boards and other means of communicating with students.[371] And, in fact, CLS had continued to exist as an unofficial student organization at Hastings, expressing its views, recruiting members, holding regular

[368] *CLS*, 130 S.Ct. at 2978.

[369] *Id.* at 2980.

[370] *Id.* at 2978.

[371] *Id.* at 2991.

meetings and other events on campus, and excluding whomever it wished. But CLS was asking for more, and the Court found no basis for mandating a special exemption from the Hastings policy. "The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be," the Court concluded, "[b]ut CLS enjoys no constitutional right to state subvention of its selectivity."[372]

Because the Hastings policy conditioned the denial of benefits on certain *conduct* (the act of discriminating against certain members of the law school community) and not merely on *expression* (the views of the student groups) the Court held the policy was viewpoint-neutral.[373] This was true, the Supreme Court reasoned, even if the policy ultimately affected some groups more than others. As the Court explained, "[e]ven if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, '[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.'"[374]

The Court also found the nondiscrimination rule to be a reasonable one, declining CLS's invitation to second-guess the university's policy decisions. Among other things, the policy promotes the basic principle of equality and fairness, in the crucial context of a public university.[375] Because of the central role that access to education plays in personal and professional development, eliminating discrimination in education has long been recognized as a government interest of the utmost importance.[376] As the Supreme Court had noted in an earlier case, "ensuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective," and "nowhere is the importance of such openness more acute than in the context of higher education."[377]

Again, it is important to remember that the Hastings policy furthered these goals not by silencing exclusionary groups like CLS, not by driving them off campus, but rather by choosing not to subsidize them. When a public university decides that the advantages associated with official recognition should be granted only to those organizations that do not discriminate, it furthers a

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[372] *Id.* at 2978.

[373] *Id.* at 2994.

[374] *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)).

[375] *Id.* at 2989 ("[T]he open-access policy 'ensures that the leadership, educational, and social opportunities afforded by [recognized student organizations] are available to all students.'") (quoting Brief for Hastings at 32, and citing Brief for American Civil Liberties Union at 11).

[376] *See*, *e.g.*, Norwood v. Harrison, 413 U.S. 455, 469 (1973) (holding that Mississippi could not give textbooks to students attending racially segregated private schools because "discriminatory treatment exerts a pervasive influence on the entire educational process"); *see also*, *e.g.*, Bob Jones Univ. v. U.S., 461 U.S. 574, 604 (1983) ("[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education.").

[377] Grutter v. Bollinger, 539 U.S. 306, 331-32 (2003) (internal citations and quotation marks omitted).

compelling interest in preventing government resources from being used to perpetuate inequality. It also secures equal rights and opportunities for its students. As the Court recognized, polices like the one challenged in *CLS* "ensure [] that no Hastings student is forced to fund a group that would reject her as a member."[378]

While the Hastings policy requires recognized groups to admit "all comers," some other colleges and universities have more traditional nondiscrimination policies that prohibit recognized groups from denying membership based on a list of protected characteristics such as race, sex, religion, sexual orientation, gender identity, disability, or veteran status. Although the *CLS* case expressly addressed only the Hastings all-comers policy, the decision suggests that the traditional nondiscrimination policies should readily pass constitutional scrutiny, as well. As Justice Stevens noted in his concurrence, such a policy, like the all-comers policy, is "plainly legitimate": It is "content and viewpoint neutral," restricting official recognition on the basis of student groups' conduct, not "on the basis of their convictions."[379]

In fact, in *Alpha Delta Chi-Delta Chapter v. Reed*,[380] the only post-*CLS* decision to address the issue, the U.S. Court of Appeals for the Ninth Circuit upheld San Diego State University's traditional nondiscrimination policy.[381] A Christian fraternity and sorority challenged that policy, which conditions funding and various other benefits on student groups' agreement not to discriminate on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability. Closely following the Supreme Court's reasoning in *CLS* and finding no material difference between an all-comers policy and a more traditional one, the court of appeals in *Alpha Delta Chi* rejected the plaintiffs' First Amendment claims. That the challenged policy incidentally burdens some groups more than others, the court held, is of no moment: "San Diego State's nondiscrimination policy does not 'target speech or discriminate on the basis of its content,' but instead serves to remove access barriers imposed against groups that have historically been excluded."[382] And, as in *CLS*, San Diego State's policy did not require student organizations to accept unwanted members and leaders, but merely conditioned school benefits on the agreement not to discriminate. Echoing the Supreme Court, the court of appeals concluded, "Plaintiffs are free to express any message they wish, and may include

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[378] *CLS*, 130 S.Ct. at 2989.

[379] *Id.* at 2996 (Stevens, J., concurring).

[380] 648 F.3d 790 (9th Cir. 2011).

[381] Although the court of appeals rejected a facial challenge to the policy, it remanded the case to the district court to determine whether, in practice, the university had selectively enforced the policy against the plaintiffs. *Id.* at 803-04.

[382] *Id.* at 801.

or exclude members on whatever basis they like; they simply cannot oblige the university to subsidize them as they do so."[383]

In the wake of *CLS*, several state legislatures have considered,[384] and in some cases passed,[385] laws intended to undo the Supreme Court's decision. Such legislation typically strips universities of the ability to adopt nondiscrimination policies of the sort upheld by the Supreme Court. In so doing, the bills undermine the many important interests recognized by the Court, forcing colleges and universities to underwrite discriminatory acts and limiting the educational opportunities available to students. In light of the pernicious history of discrimination in education and related opportunities in this country, universities should continue to have the right[386] to refuse to lend their sponsorship and resources, including funding, to groups that exclude other members of the university community.

Conclusion

Viewed in tandem, the Supreme Court's decisions in *Hosanna-Tabor* and *CLS* help delineate the nature and scope of some of our most cherished rights. In *Hosanna-Tabor*, the Court recognized a vital, if cabined, sphere of church autonomy in the selection of ministers and the setting of doctrine. The fundamental right of religious liberty demands that America's religious communities enjoy considerable independence in these areas. In *CLS*, on the other hand, the Supreme Court reiterated that religious freedom is not unlimited and does not, for example, confer a right to have the government support and subsidize a group's exclusionary conduct. A contrary result would undermine our nation's longstanding commitment to equality and civil rights.

Any efforts to expand *Hosanna-Tabor* beyond its confines, or to circumvent *CLS* through legislation, should be met with deep skepticism. Without a doubt, religious liberty is a fundamental and defining feature of our national character: In the United States, we have the right to a government that neither promotes nor disparages religion generally, nor any faith in particular; we have the absolute right to believe what we want about God and the universe, right and wrong; and

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[383] *Id.* at 803.

[384] *See*, *e.g.*, S.B. 802, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 534, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 360, 2013 Leg., 83d Reg. Sess. (Tex. 2013).

[385] *See* Ohio Rev. Code Ann. § 3345.023 (2011); Va. Code Ann. § 23-9.2:12 (2013).

[386] The Supreme Court has recognized the fundamental importance of academic freedom to the survival of a free society. "This means the exclusion of governmental intervention in the intellectual life of a university." *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (internal quotation marks and citations omitted). And as the Court recently acknowledged, "[a] college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process." *CLS*, 130 S.Ct. at 2988-89.

we have the right to act on those beliefs - but not when those actions harm the rights and well-being of others.

Religious freedom, while essential, does not confer an unfettered right to ignore antidiscrimination laws. In the past, religious beliefs have been invoked to support differential treatment on the basis of race[387] and gender,[388] for example. While those beliefs may no longer be common, there is no doubt that they were once as sincerely held as those asserted in many of the conflicts we see today. In the earlier struggles, the courts understood that respect for church autonomy to set doctrine and select faith leaders is fully compatible with rigorous enforcement of civil rights protections. The Supreme Court's recent decisions in these areas again recognize that due regard for ecclesiastical independence does not require wholesale religious exemptions from antidiscrimination laws and principles.

Edward Whelan

Thank you for inviting me to testify before this Commission on the important topic of the conflict between non-discrimination principles and civil liberties.

I offer my views in my capacity as president of the Ethics and Public Policy Center and as director of EPPC's program on The Constitution, the Courts, and the Culture. I am testifying on my own behalf, and my statements are not to be imputed to EPPC as an institution.

The title of this hearing asks whether non-discrimination principles and civil liberties can peacefully co-exist. I respectfully submit that, by its very nature, the imposition of a non-discrimination principle on nongovernmental actors intrudes, at least to some degree, on civil liberties. At the simplest level, the embodiment in law of the principle that, in performing lawful Action A—say, providing a service or hiring an employee—a person should not discriminate on

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[387] *See*, *e.g.*, Bob Jones Univ. v. United States, 468 F. Supp. 890, 897 (D.S.C. 1978) ("The religious belief involved is plaintiff's conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof."), *rev'd in part*, 461 U.S. 574 (1983); Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966) (noting restaurant owner's argument that Civil Rights Act "violates his freedom of religion under the First Amendment 'since his religious beliefs compel him to oppose any integration of the races whatever'"), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968); Loving v. Virginia, 388 U.S. 1, 3 (1967) ("'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for [interracial] marriages. The fact that he separated the races shows that he did not intend for the races to mix.'") (quoting trial court opinion).

[388] *See*, *e.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1391 (4th Cir. 1990) (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be "heads of households" could be held liable under equal pay laws); E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the "heads of households" violated Title VII).

the basis of Category X means that the person no longer has the full liberty to perform Action A as she pleases.

As I trust is obvious, this elementary observation says nothing about whether the imposition of a particular non-discrimination restriction on how a person performs a particular type of action is justified. Nor does it speak to whether the resulting intrusion on liberty is trivial or significant. It merely points out the inevitable conflict.

As a guide to thinking through whether and when non-discrimination principles ought to apply, I offer these considerations:

1. Traditional liberalism distinguishes between the rules that the government must follow and the rules that apply to the conduct of ordinary citizens. It is one thing to impose a regimen of "fair" conduct on the government and on governmental actors, which do not have any countervailing civil liberties at stake. It is a very different matter to impose the same regimen on ordinary citizens, whose civil liberties include religious liberty, free speech, freedom of association, and a general autonomy to act, within broad bounds, as they see fit, without interference from the government.

The flourishing of civil society depends on recognizing and respecting this distinction between the norms applicable to the government and the norms applicable to the citizenry. By contrast, the failure to recognize and respect this distinction leads to what one critic has fairly labeled "totalitarian liberalism"—a liberalism that seeks to occupy the totality of human affairs and that "tends to imply that institutions such as the family, the Church, and other agencies exist only with the permission of the state, and, to exist lawfully, must abide by the dictates or norms of the state." Philip Tartaglia, "At the Door of the Temple: Religious Freedom and the New Orthodoxy," *Public Discourse* (June 27, 2012).

2. "That's discrimination!" seems to have become for many Americans an observation that stifles more careful thinking about what line-drawing is legitimate and about the proper limits on the application of non-discrimination norms. But, as law professor Richard W. Garnett points out, "discrimination" is "just another word for decision-making, for choosing and acting in accord with or with reference to particular criteria." Richard W. Garnett, "Confusion About Discrimination," *Public Discourse* (Apr. 5, 2012). Thus, we speak approvingly of someone with "discriminating tastes"—someone, that is, who values the true, the good, and the beautiful over the false, the bad, and the ugly.

A threshold question (a necessary but not sufficient condition) in deciding whether to adopt a norm of nondiscrimination is whether and when a particular form of discrimination is *wrongful* or *invidious*.

3. The paradigmatic case of a wrongful basis of discrimination is race. We abhor discrimination on the basis of race because we recognize that a person's race does not detract from (or add to) his stature as a being made in the image and likeness of God or (in more secular terms) his equal

dignity as a human being. We especially abhor racial discrimination against African-Americans because we recognize, and grieve over, our nation's ugly legacy of slavery and of state-enforced racial segregation.

It is worth emphasizing, however, that our legal system's condemnation of discrimination on the basis of race is far from absolute. In particular, under the rubric of "affirmative action," our legal system currently allows and encourages racial discrimination, both by the government and by private actors, against non-Hispanic whites and against Asian Americans in educational admissions and against non-Hispanic whites in employment. To a much lesser extent, there are some job assignments—e.g., an FBI agent infiltrating a group of racist terrorists—for which race may well be regarded as a permissible criterion.

My point at this hearing is neither to defend nor dispute these departures from the norm of non-discrimination on the basis of race, but merely to highlight that our legal system's ban on racial discrimination has some significant exceptions.

4. Other bases of discrimination commonly prohibited under federal law are qualitatively different from race.

Take sex, for example. For various reasons, we regard sex-segregated restrooms, sex-segregated athletic competitions, and single-sex schools very differently from race-segregated restrooms, race-segregated athletic competitions, and single-race schools. Most of us don't disapprove of a woman who wants to be part of a women-only book club or of a boy who wants to join the Boy Scouts.

If the increasingly common disparagement of traditional religious believers is any indication, it would also seem that, for many Americans, discrimination on the basis of religion does not carry the same moral stigma as discrimination on the basis of race. The fact that a person is free to choose and change her religious beliefs in a way that she is not free to change her race may well account for some of the difference. But a growing hostility against traditional religion would also seem an important factor.

5. Insofar as the social attitudes that sustained invidious discrimination have evolved, prohibitions on discrimination may be a very costly way of achieving very little. Employers, for example, will generally harm themselves when they engage in irrational discrimination. Thus, as one leading scholar puts it, "Competitive markets with free entry offer better and more certain protection against invidious discrimination than any anti-discrimination law." Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 9 (Harvard University Press 1992). Similarly, thanks in part to advances in technology, customers for goods and services enjoy an increasingly broad range of available providers and incur much lower search costs in choosing among providers.

Further, as many scholars have argued, prohibitions on discrimination may well have unintended consequences that undermine their objectives. For example:

By making it harder to fire certain workers, employment discrimination law tends to make these workers less attractive prospects at the hiring stage. An employer would prefer to hire someone who can be easily fired (should that prove necessary) than an otherwise identical applicant whose firing would be subject to legal scrutiny. Thus, protection against discriminatory firing acts as a kind of tax on hiring those to whom it is extended.

Ian Ayres & Peter Siegelman, "The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas," 74 Tex. L. Rev. 1487, 1487-1488 (1996).

I do not contend that it is a simple or uncontroversial matter to translate the general considerations that I have outlined into a set of non-discrimination norms, and I will not attempt to do so here. Instead, I would like to explore more concretely the clash between non- discrimination principles and civil liberties. Let's look at a real-life case:

Elaine Huguenin and her husband Jonathan own Elane Photography, a business providing photography services, in Albuquerque, New Mexico. Elane Photography has a policy against photographing events that communicate messages inconsistent with the Huguenins' Christian beliefs. In 2006, Ms. Huguenin received an e-mail from a potential customer, Vanessa Willock, inquiring about photography for Ms. Willock's upcoming same-sex commitment ceremony. Ms. Huguenin informed Ms. Willock that Elane Photography would not provide the service.

Ms. Willock then filed a discrimination claim with the New Mexico Human Rights Commission. That agency found that Elane Photography had violated state law by discriminating on the basis of sexual orientation, and it ordered Elane Photography to pay Ms. Willock more than $6,600 in attorney fees and costs. More than six years later, Elane Photography's appeal of that order is now pending before the New Mexico supreme court.

Let's consider at the same time a hypothetical variant:

Assume now that the owner of the photography business is a gay man, John Doe, who will photograph same-sex commitment ceremonies but who refuses to photograph male-female weddings. Mr. Doe therefore informs a potential customer, Jane Poe, that he won't photograph her wedding. Ms. Poe files a discrimination claim with the New Mexico Human Rights Commission, which finds that Mr. Doe violated state law by discriminating on the basis of sexual orientation and which orders him to pay Ms. Poe more than $6,600 in attorney fees and costs.

Do these results make any sense? Consider:

1. As First Amendment expert Eugene Volokh has explained, event photography "involves a substantial degree of artistic judgment and expression on the photographer's part," and the photographer's creative expression is protected by the First Amendment. Further, "the right to be

free from compelled speech includes the right not to create First-Amendment-protected expression … that you disagree with." Eugene Volokh, "Wedding Photographer May Be Required (on Pain of Legal Liability) to Photograph Same-Sex Commitment Ceremonies," Volokh Conspiracy (June 4, 2012). In other words, both Elane Photography (and the Huguenins) and the hypothetical John Doe have a strong free-speech claim under the First Amendment to discriminate, on the basis of sexual orientation or on other bases, against potential customers for whom they would prefer not to exercise their expressive capacities.

2. Elane Photography's policy against photographing same-sex commitment ceremonies reflects the religious beliefs of its owners, the Huguenins. Whether or not the Huguenins have an *enforceable* religious-liberty right (under the Free Exercise Clause of the First Amendment, under New Mexico's Religious Freedom Restoration Act, or under some other provision of law), there can be no question that imposing on them an obligation to photograph same-sex ceremonies intrudes on their religious beliefs.

The same, of course, might well be true for Mr. Doe—if, that is, his own practice is driven by his religious beliefs.

3. No sensible person seeking artistic photographic services for an event would want a photographer who is hostile to the event. The potential customers, Ms. Willock and Ms. Poe, would likely have been *worse off* if the photographers had concealed their objections and grudgingly provided their services. Because there are alternative providers of photography services, the customers were instead able to find willing and able substitutes.

4. To be sure, in addition to the trivial inconvenience of an e-mail exchange, Ms. Willock and Ms. Poe each incurred what might be called the dignitary injury of being told that the photographer had a policy against photographing her event. But in our pluralistic society, it should be no surprise that nearly everyone will be disapproved of by some of the people some of the time. As a general rule, it is difficult to see how the desire to avoid encountering disapproval would justify imposition of a regime in which customers dragoon unwilling providers rather than a regime in which customers obtain the services they want from willing providers. It is also difficult to see why it is better to reward thin-skinned plaintiffs for running to court (or, even worse, to a "human rights commission") than to encourage the healthy growth of thicker skin.

In his famous Memorial and Remonstrance of 1785, James Madison celebrated that the "American Theatre" had discovered the "true remedy" for the "disease" of "Religious discord" that had so afflicted the "old world" of Europe: "equal and compleat" religious liberty. In a warning that resonates across the centuries, Madison declaimed: "If with the salutary effects of this system [of "equal and compleat" liberty] under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly."

The clash between non-discrimination principles and religious liberty in particular has been exacerbated by the Obama administration's hostility to a robust conception of religious liberty and

by its determination to subordinate religious liberty to its ideology of sexual absolutism. The so-called HHS contraception mandate provides a prime example.

In implementing President Obama's signature health-care legislation, the Department of Health and Human Services announced in January 2012 that it will require many employer-provided health-insurance plans to include in the preventive services that they cover all FDA-approved forms of contraception, including those contraceptives that sometimes operate as abortifacients, and sterilization services. For those employers who have religious objections to providing some or all of the mandated coverage, this HHS contraception mandate clearly violates their rights under the 1993 federal Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment. Even worse, it displays an illiberal contempt for the religious views of those whom it seeks to coerce.

The case against the HHS mandate under RFRA is quite simple. Under RFRA, the federal government "may *substantially burden* a person's *exercise of religion* only if it demonstrates that *application of the burden to the person* (1) is *in furtherance of a compelling governmental interest*; and (2) is the *least restrictive means* of furthering that compelling governmental interest." Let's consider the italicized elements in logical order.[389]

It is clear that an employer is engaged in an *exercise of religion* when she, for religious reasons, refuses to provide health insurance that covers contraceptives or abortifacients. RFRA itself defines *exercise of religion* broadly to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Further, RFRA was adopted against a backdrop of prominent Supreme Court cases in which the *exercise of religion* consisted of abstentions like not working on the Sabbath (*Sherbert v. Verner* (1963)), not sending one's children to high school (*Wisconsin v. Yoder* (1972)), and not taking part in the production of armaments (*Thomas Review Board* (1981)).

It is equally clear that the HHS mandate *substantially burdens* objecting employers' exercise of religion. An employer who violates the HHS mandate incurs an annual penalty of roughly $2000 per employee—vastly more than the five-dollar fine that substantially burdened the religious rights of the fathers in *Yoder* who refused to send their children to high school. Under the Supreme Court case law that RFRA incorporates, that penalty for noncompliance with the HHS mandate puts the

[389] For a fuller version of the case I outline here, together with citations to supporting authorities, see my *Notre Dame Law Review* essay "The HHS Contraception Mandate vs. the Religious Freedom Restoration Act," 87 Notre Dame L. Rev. 2179 (2012).

same kind of burden on religious rights as a direct fine for holding religious beliefs against contraceptives or abortifacients.[390]

The question whether the government can demonstrate that *application of the burden to the objecting employer* is *in furtherance of a compelling governmental interest* involves a more complicated analysis, but the answer in the end is clearly no. For starters, by HHS's own account, there is already widespread access to contraceptives, via pre-existing employer-based insurance plans, community health centers, and public clinics (as well as the countless pharmacies and doctors who dispense contraceptives). No one can seriously maintain that there is a general problem of lack of access to contraceptives. Just as the Supreme Court has recently declared that "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced,"[391] it surely does not have a compelling interest in each marginal employer by which its goal of increased provision of contraceptives is advanced.

Indeed, the Obama administration effectively concedes this point by exempting so many employers from the HHS mandate for purely secular reasons. For example, employers offering so-called "grandfathered" plans, estimated to cover nearly 100 million Americans in 2013, are not subject to the HHS mandate. Nor are the many businesses which employ fewer than 50 full- time employees and which decline to provide them group health insurance. It is absurd for anyone to contend that the Obama administration has a compelling interest in imposing the mandate on objecting religious employers when it obviously perceives no such interest in imposing it on all these other employers.

The HHS mandate also clearly flunks the *least restrictive means* test. (In order to satisfy RFRA, it would have to meet *both* the *compelling governmental interest* test and the *least restrictive means* test.) The question under this test is whether imposing the HHS mandate on an employer who has religious objections to providing insurance coverage for contraceptives or abortifacients furthers the government's interest in increasing access to contraceptives *via the means that is least restrictive of the religious liberty of the objecting employer*.

The question virtually answers itself. There are lots of alternative means by which the government could increase access to contraceptives without conscripting objecting employers: for example,

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[390] There should be no dispute that making an exercise of religion illegal and subjecting it to massive fines imposes a substantial burden on that exercise of religion. But in muddled and convoluted reasoning, the minority of courts that, in addressing RFRA challenges to the HHS mandate on the merits, have rejected those challenges have purported to do so on the ground that the mandate does not impose a substantial burden. In reality, what those courts have done, in violation of governing Supreme Court precedent, is to impose their own views of the range of permissible religious beliefs about what constitutes improper complicity in immoral conduct and to disqualify the challenger's exercise of religion from any protection under RFRA for being beyond that range.

[391] Brown v. Entertainment Merchants Ass'n, 564 U.S. 1, 16 n. 9 (2011). The Court's statement might be better understood to mean that the government *cannot be presumed* to have a compelling interest in each marginal percentage point by which its goals are advanced. The difference is immaterial here.

direct government provision of contraceptives, government payment to third-party providers, mandates on contraceptive providers, and tax credits or deductions or other financial support for contraceptive users. Instead of pursuing any of these alternatives, the Obama administration has adopted the single means that is *most* restrictive of the religious liberty of objecting employers.

The HHS mandate also violates the Free Exercise Clause. The HHS mandate is not neutral and generally applicable, and therefore does not qualify for the low bar of *Employment Division v. Smith*, because (as I discuss above) employers are exempt from it for purely secular reasons.[392] The HHS mandate is therefore subject under the Free Exercise Clause to the same standard that RFRA imposes, and it fails for the same reasons.

Even more troubling than the Obama administration's violations of RFRA and the Free Exercise Clause is the fact that its conduct was willful and deliberate. Before it finalized the HHS mandate, the administration received thousands and thousands of comments explaining the impact that the mandate would have on employers who had religious objections to providing insurance coverage for contraceptives or abortifacients. Without conducting any review of the legality of the mandate under RFRA and the First Amendment, the administration bulldozed ahead. At the very least, it did so *despite* the mandate's impact on objectors. But there is ample reason to believe that the Obama administration found it *desirable* to trample the consciences of many Americans, as the HHS mandate is part of a broader pattern of the Obama administration's hostility to religious liberty and of its determination to subordinate religious liberty to its ideology of sexual absolutism. For example:

- In the international arena, the administration has reduced religious liberty to a shriveled concept of individual religious worship and has instead aggressively promoted its LGBT initiative at the expense of religious liberty. See, e.g., Thomas F. Farr, "Religious Freedom Under the Gun," *Weekly Standard*, July 16, 2012.

- In *Hosanna-Tabor Evangelical Lutheran Church v. EEOC* (2012), the Department of Justice contested the very existence of a "ministerial exception" to federal anti-discrimination laws, despite the fact that that exception had been uniformly recognized by the federal courts of appeals. According to the Obama Department of Justice, religious organizations, in selecting their faith leaders, are limited to the same freedom-of-association right that labor unions and social clubs have in choosing their leaders. At oral argument, even Justice Kagan called DOJ's position "amazing," and in its unanimous ruling the Court emphatically rejected DOJ's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."

- Despite the fact that its own independent review board ranked the U.S. Conference of

[392] *See, e.g.*, Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012) (a rule is not neutral and generally applicable for purposes of Employment Division v. Smith if it is "riddled with exemptions" or "permit[s] secular exemptions but not religious ones").

Catholic Bishops far above other applicants for a grant to assist victims of human trafficking, HHS political appointees denied the grant because USCCB won't refer trafficking victims for contraceptives and abortion. See Jerry Markon, "Health, abortion issues split Obama administration and Catholic groups," *Washington Post*, Oct. 31, 2011.

- Against the backdrop of an escalating clash between gay rights and religious liberty, the Obama administration irresponsibly abandoned its duty to defend the federal Defense of Marriage Act. When President Obama finally cast aside his professed opposition to redefining marriage, he opened the way for an intensification of the vitriolic attacks on traditional religious believers (and others) who continue to hold the position that he had so recently claimed to embrace.

The administration's hostility to religious liberty is part of its broader "progressive" vision. In that vision, the moral propositions associated with traditional religious beliefs are dismissed as irrational and bigoted, and religious institutions and believers are deemed to have value, and to be tolerated, only insofar as they serve the interests of the state and conform themselves to its norms. In the progressive dystopia, in the name of diversity everyone must be the same.

By dragooning employers to be the vehicle for increasing access to contraceptives and abortifacients, the Obama administration is putting many Americans to a grave test of conscience—and it is doing so *gratuitously*, for an end that could be easily accomplished through other means. The American tradition of broad religious liberty has operated to minimize the instances in which Americans have understood their religious identities and duties to be in conflict with their identities and duties as citizens. But in defiance of Madison's warning, President Obama has chosen to "contract the bounds of Religious freedom" of those who object to providing coverage for contraceptives or abortifacients.

As Madison would recognize, the HHS mandate is a folly that deserves the severe reproach of all Americans.

The spread of same-sex marriage also threatens to sharply exacerbate the conflict between nondiscrimination policies and religious liberty.[393]

A scholarly consensus has emerged that the redefinition of marriage to include same-sex couples will generate widespread clashes between existing laws that bar discrimination on the basis of sex/gender, marital status, or sexual orientation (most of which were never designed to reach claims by parties to same-sex marriages) and religious liberty. See, e.g., *Same-Sex Marriage and*

[393] With the permission of The Becket Fund for Religious Liberty, this part of my testimony draws heavily (including in extensive verbatim passages) from the amicus brief that it submitted in the pending marriage cases in the Supreme Court. See Brief *Amicus Curiae* of The Becket Fund for Religious Liberty, submitted in Hollingsworth v. Perry, No. 12-144, and United States v. Windsor, No. 12-307.

Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds. 2008).

An episode just two weeks ago illustrates the potential severity of that clash: Responding to complaints that a civil-unions bill failed to provide any meaningful protection for religious objectors, Colorado state senator Pat Steadman displayed his contempt for religious liberty by declaring:

"So, what to say to those who say religion requires them to discriminate. I'll tell you what I'd say. Get thee to a nunnery and live there then. Go live a monastic life away from modern society, away from people you can't see as equal to yourself, away from the stream of commerce where you may have to serve them."

Vincent Carroll, "Civil unions or a nunnery? Please," *Denver Post*, Feb. 13, 2013.

Unless robust protections for religious liberty are adopted and maintained, religious people and institutions will face a wave of private civil litigation under anti-discrimination laws. Consider, for example, the litigation that can reasonably be threatened under public-accommodation laws, housing-discrimination laws, and employment-discrimination laws.

Public-accommodation laws. Religious institutions often provide a broad array of programs and facilities to their members and to the general public, such as hospitals, schools, adoption services, and marital counseling. Religious institutions have historically enjoyed wide latitude in choosing what religiously motivated services and facilities they will provide, and to whom they will provide them. This wide latitude has both protected liberty of conscience and maximized the number of organizations that can provide for the needs of society. But giving legal recognition to same-sex marriage without robust conscience exemptions will restrict that freedom in at least two ways.

First, most states include gender, marital status, or sexual orientation as protected categories under public accommodation laws.[394] Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. For example, some laws require church halls be treated as public accommodations if they are rented to non-members.

This risk is greatest for those religious organizations that serve people with different beliefs. Unfortunately, the more a religious organization seeks to minister to the general public (as opposed to just co-religionists), the greater the risk that the service will be regarded as a public accommodation giving rise to liability.

Some of the many religiously motivated services that could be subjected to public accommodation laws are health-care services, marriage counseling, family counseling, job training programs, child

[394] See Appendix to Becket Fund Amicus, at 1a-101a (listing state laws).

care, gyms and day camps, life coaching, schooling, adoption services, and the use of wedding ceremony facilities.

Religious business owners face the same risks, as my discussion of Elane Photography illustrates.

Housing-discrimination laws. Religious colleges and universities frequently provide student housing and often give special treatment to married couples. Legally married same-sex couples could reasonably be expected to seek these benefits, but many religious educational institutions would conscientiously object to providing similar support for same-sex unions. Housing discrimination lawsuits would result.

Under federal law, gender discrimination in housing is prohibited. See 42 U.S.C. § 3604. There are some limited exemptions for religious institutions, see 42 U.S.C. § 3607, but they would not automatically cover all conflicts triggered by legal recognition of same-sex marriage—and determining their scope would require costly litigation. Similarly, state and local housing laws ban discrimination on the basis of gender, marital status, and sexual orientation—and the religious exemptions are also limited.

In several states, courts have required landlords to facilitate the unmarried cohabitation of their tenants, over strong religious objections. If unmarried couples cannot be discriminated against in housing due to marital status protections, legally married same-sex couples would likely have even stronger protection.

Employment-discrimination laws. Religious organizations that object to same-sex marriage may also face private lawsuits when one of their employees enters into a civilly-recognized same-sex marriage. For many religious institutions, an employee's entering a same-sex marriage would constitute a public repudiation of the institution's core religious beliefs in a way that less public relationships do not. Some employers will respond by changing the terms of employment for those employees. These employees may then sue under laws prohibiting gender, sexual orientation, or marital status discrimination in employment. If the employee is a "minister," or the relevant statute includes an exemption, then the defendant religious employer could raise an affirmative defense. But where the employee does not qualify as a minister and no legislative exemption is in place, the employer will be exposed to liability for any alleged adverse employment action.

Moreover, if same-sex marriage is adopted without protections, religious employers who provide insurance for spouses of employees may be automatically required to provide insurance for all legal spouses—both opposite-sex and same-sex—to comply with anti-discrimination laws. Thus, after the District of Columbia passed a same-sex marriage law without strong conscience protections, the Catholic Archdiocese of Washington saw no choice but to stop offering spousal benefits to any of its new employees.

Adoption of same-sex marriage will also subject religious people and institutions to a variety of penalties imposed by the federal, state, and local governments:

Exclusion from government facilities and fora. Religious institutions that object to same-sex marriage will face challenges to their ability to access a diverse array of government facilities and fora. This is borne out in the reaction to the Boy Scouts' requirement that members believe in God and not advocate for, or engage in, homosexual conduct. Because of this requirement, the Boy Scouts have had to fight to gain equal access to public after-school facilities.[395] They have lost leases to city campgrounds and parks,[396] a lease to a government building that served as their headquarters for 79 years,[397] and the right to participate in a state-facilitated charitable payroll deduction program.[398] All of this has happened despite the Supreme Court's decision in *Boy Scouts v. Dale* (2000) recognizing that the Boy Scouts have a constitutional right, under the First Amendment, to maintain their policies. If same-sex marriage is adopted without robust protections for conscientious objectors, religious organizations that object to same-sex marriage could expect to face similar penalties, notwithstanding any constitutional rights that they may have.

Loss of licenses or accreditation. A related concern exists with respect to licensing and accreditation decisions. In Massachusetts, for example, Boston Catholic Charities, a large and longstanding religious social-service organization, faced the loss of its state license to operate as an adoption agency because it refused on religious grounds to place foster children with same- sex couples. Rather than violate its religious beliefs, Catholic Charities shut down its adoption services. This sort of licensing conflict would only increase after judicial recognition of same-sex marriage, since many governments would require all civil marriages to be treated identically.

Similarly, religious colleges and universities have been threatened with the loss of accreditation because they object to sexual conduct outside of opposite-sex marriage. In 2001, for example, the American Psychological Association, the accrediting body for professional psychology programs, threatened to revoke the accreditation of religious colleges that prefer co-religionists, in large part because of concerns about codes of conduct that prohibit sex outside of marriage and homosexual behavior. Where same-sex marriage is adopted without strong religious protections, religious colleges and universities that oppose same-sex marriage will likely face similar threats. And the same issue will also affect licensed professionals.

Disqualification from government grants and contracts. Religious universities, charities, hospitals, and social service organizations often serve secular government purposes through contracts and grants. For instance, religious colleges participate in state-funded financial aid

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[395] Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (challenge to Boy Scouts' use of school facilities).

[396] Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006) (equal access to boat berths denied to Scouts).

[397] Cradle of Liberty Council, Inc. v. City of Philadelphia, 851 F. Supp. 2d 936, 939 (E.D. Pa. 2012).

[398] Boy Scouts of Am. v. Wyman**,** 335 F.3d 80 (2d Cir. 2003) (Boy Scouts could be excluded from state's workplace charitable contributions campaign).

programs, religious counseling services provide marital counseling and substance abuse treatment, and religious homeless shelters care for those in need.

Many contracts and grants require recipients to be organized "for the public good" and forbid recipients to act "contrary to public policy." If same-sex marriage is recognized without specific accommodations for religious organizations, those organizations that refuse to approve, subsidize, or perform same-sex marriages could be found to violate such standards, thus disqualifying them from participation in government contracts and grants. For example, religious universities that oppose same-sex marriage could be denied access to government programs (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that adopt an aggressive view of applicable anti-discrimination standards.

Religious organizations opposed to same-sex marriage also face the loss of government social service contracts. After the District of Columbia adopted same-sex marriage, Catholic Charities stopped providing foster care services for the city because it had to choose between continuing its program and violating its religious beliefs regarding the recognition of same-sex marriages. And in Illinois, a state court held that Catholic Charities was required to place children for adoption with couples in civil unions or forgo its annual contracts with the state. If same-sex marriage is given legal recognition without accommodation for religious objectors, many religious organizations will be forced either to extend benefits to same-sex spouses or to stop providing social services in partnership with government.

Loss of state or local tax exemptions. Most religious institutions have charitable tax-exempt status under federal, state and local laws. But without conscience protections, that status could be stripped away, based solely on a religious institution's conscientious objection to same-sex marriage. Whether the First Amendment could provide an effective defense to this kind of penalty is an open question.

Loss of educational and employment opportunities. Individual religious believers would also face an array of penalties. In Vermont, individual town clerks may be fired if they seek to avoid issuing civil union licenses to same-sex couples for religious reasons, and at least twelve justices of the peace in Massachusetts lost their jobs because they could not facilitate same-sex marriages. The situation is particularly acute for state-employed professionals like social workers who face a difficult choice between their conscience and their livelihood.

Students in counseling programs at public universities face similarly stark choices. When Julea Ward, a Master's in Counseling student in her final semester at Eastern Michigan University, told her professors that she had no problem counseling individual gay and lesbian clients but could not in good conscience assist them with their same-sex relationships, she was expelled for violating the school's anti-discrimination policy. See *Ward* v. *Polite*, 667 F.3d 727 (6th Cir. 2012) (reversing grant of summary judgment against Ward on her First Amendment claims).

The sweeping application of non-discrimination principles poses an increasingly severe threat to civil liberties, especially to our first liberty of religious freedom. There is an urgent need to rethink when and how non-discrimination norms ought to apply and to provide robust protections for civil liberties.

Lori H. Windham

Chairman Castro, Vice-Chair Thernstrom, and other esteemed members of the Commission. Thank you for your consideration of this issue and for inviting me to speak today.

I am here today representing The Becket Fund for Religious Liberty, where I serve as Senior Counsel. At the Becket Fund, we protect religious freedom for all religious traditions, including Buddhists, Christians, Hindus, Muslims, Jews, and others. We have defended a mosque facing discrimination from its neighbors in Tennessee, a Santeria priest banned from animal sacrifice in Texas, a synagogue forbidden from expanding in California, and Amish homebuilders facing jail time for their religious practices in New York. We also represented a Lutheran church before the Supreme Court in *Hosanna-Tabor v. EEOC*. We believe that the legal protections at stake in that case are critical to the preservation of religious freedom in our nation.

Today's discussion asks whether civil liberties and anti-discrimination norms can be reconciled. The answer is yes—in most cases, greater religious freedom and greater freedom of speech further the same interests as our anti-discrimination laws. They allow small and politically weak groups to maintain their missions and their voices. Cases like *Hosanna-Tabor v. EEOC* demonstrate how we can protect both our constitutional freedoms and our diverse society.

That's probably not the response you'll hear from everyone today, and the decision has come under sharp criticism in some quarters. But the Supreme Court did not vote 9-0 in *Hosanna-Tabor* because none of the justices care about our anti- discrimination laws. They did so because the balance between the two has already been struck; it has been struck by our First Amendment. And for 40 years under this particular legal doctrine, that balance has worked well.

In *Hosanna-Tabor*, the Solicitor General's office attempted to upset that balance by arguing the ministerial exception did not exist. Justice Kagan criticized that attempt at oral argument, calling it "amazing." She joined her eight colleagues in rejecting that argument in a unanimous opinion.

The lesson of *Hosanna-Tabo*r is not that religious freedom is absolute, nor that anti-discrimination laws are unimportant. The lesson of that unanimous decision is this: if the separation of church and state means anything, it means that the government should not be picking ministers. And so in the special relationship between a religious body and its

ministers, the government's interest is at its weakest, and religious freedom is at its peak.[399] When we begin to look at other relationships, other positions, other actions, the conversation will necessarily be different. I'm sure the Commission will be hearing a great deal about those situations today, and I would like to touch on them briefly at the end of my statement.

I. *Hosanna-Tabor* and the Protection of Religious Freedom

By now, I am sure you're aware of the background of the *Hosanna-Tabor* decision. The case was a conflict between a Lutheran church and school, Hosanna- Tabor, and one of the teachers at that school, Cheryl Perich. Ms. Perich taught both secular and religious subjects and was charged with transmitting the faith to the students in her care. She was a commissioned minister of the church, a qualification required to teach at the school, unless no qualified commissioned ministers were available. Hosanna-Tabor terminated Ms. Perich by a vote of the congregation to rescind her "call" as a commissioned minister.

The church terminated her for insubordination and refusal to use the church's dispute resolution mechanism. One of the church's religious teachings, common to many religious groups, is that church members should settle their disputes within the church.[400] Thus, although the termination was made for religious reasons, Ms. Perich claimed that the religious reasons were pretextual. She sued the church for retaliation under the Americans with Disabilities Act, claiming that the termination was retaliation for her threat to bring a disability discrimination claim, since prior to the termination she had been on medical leave. Perich asked for back pay, frontpay, attorneys' fees, and reinstatement.[401] In response, the church argued that the federal courts were not fit to adjudicate the claim. For the past 40 years, the federal appellate courts have recognized what is known as the ministerial exception, a doctrine stating that the civil courts should not interfere in employment disputes between churches and their ministers.

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[399] I'm using the terms "church" and "minister" because they are terms the Supreme Court uses. In this situation, both are terms of art and not limited to Christian denominations. As Justices Alito and Kagan explained in their concurrence, "The term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S.Ct. 694, 711 (2012).

[400] The religious basis for this teaching among many Christian denominations, including The Lutheran Church—Missouri Synod, is found in 1 Corinthians 6:1-7: "If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints?"

[401] Perich abandoned her reinstatement claim at the Supreme Court, but still sought frontpay, compensatory damages, punitive damages, and other remedies. *Hosanna-Tabor,* 132 S.Ct. at 709.

The Supreme Court unanimously ruled in the church's favor. Surveying the history of the religion clauses, the Court concluded that the First Amendment prohibits the government from selecting ministers. Perich, because of the religious nature of her work and religious qualifications required for that work, was a minister, and therefore the courts lack the power to decide whether or not the church had a good reason for removing her from that religious position. The ministerial exception prohibits the courts from reinstating ministers who have been terminated, and also from penalizing churches for the selection or termination of a particular minister.[402]

The idea that the ministerial exception exists is not controversial, a fact demonstrated by the unanimity of the Supreme Court's decision. As we said to the Court, "This case is about institutional separation—the least controversial core of separation of church and state. The government cannot control the internal affairs of churches any more than churches can control the institutions of government."[403] Every organization represented on this panel recognizes that the exception should exist in some form.[404] The disagreement lies in its extent and its substance.

The Supreme Court demonstrated that it is not necessary—indeed, it is not constitutionally permissible—to sacrifice religious freedom in order to preserve anti- discrimination laws. *Hosanna-Tabor* does not teach that the interests served by anti-discrimination laws are unimportant—the Supreme Court, both as a unanimous body and as individual justices, have emphasized the importance of antidiscrimination laws again and again. *Hosanna-Tabor* does teach that the selection of ministers is a matter of religious, rather than government, concern and expertise.[405] As the Supreme Court explained, "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception

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[402] *See Hosanna-Tabor,* 132 S.Ct. at 709. Monetary penalties, such as those sought in *Hosanna-Tabor*, can be particularly worrisome for minority faith groups, whose congregations may be quite small and religious tenets unfamiliar to judges and juries asked to determine their claims. *See infra* at 8.

[403] Hosanna-Tabor v. EEOC, Reply Br. 10 ("Reply Br.") (citing *Hosanna-Tabor v. EEOC,* Brief amici curiae of Professor Eugene Volokh, et al. 5-27).

[404] *See* Brief amici curiae of Professor Eugene Volokh, et al. 2-5 (amici, including Christian Legal Society, arguing for strong conception of the ministerial exception rooted in history); Brief amici curiae of Americans United for Separation of Church and State, et al. 5-6 (amici, including American Civil Liberties Union, stating that ministerial exception is rooted in "important religious-liberty concerns," but "should be no broader than necessary").

[405] As we explained to the Supreme Court: "Claims of discrimination in selection of ministers are necessarily claims that churches applied impermissible criteria, or misapplied acceptable criteria, to inherently religious decisions. The government can have no compelling interest in a church's criteria for choosing ministers. This is simply a matter beyond the authority of government . . . . This case turns on the government's alleged interest in the criteria for choosing religion teachers; that interest is nil." Reply Br. 13.

instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[406]

Again, this is neither a new nor minority view—it is the view that ten state supreme courts and twelve federal circuit courts took in the last 40 years,[407] and it is the view of a unanimous U.S. Supreme Court. It is an understanding of our laws and our constitution steeped in history. As the Supreme Court's decision explains, one of the primary concerns underlying both religion clauses was Americans' desire to appoint their own ministers and not revert to the European systems they had fled, where such positions were filled by the national government.

Seemingly the only group not to recognize the ministerial exception was the EEOC. Before the Supreme Court, the solicitor general's office argued that no ministerial exception existed, and that, despite the religion clauses, churches had no more constitutional protections than labor unions or social clubs.[408]

For some, this idea might be acceptable. Some will doubtless reject the notion that religious organizations should have any unique protection, over and above the free speech and associational rights that every group enjoys. But for religious believers of many different faiths, the idea that they would not have such rights is unthinkable. That is not only because religious freedom is singled out for special protection in our Constitution, but also because, for many, religion is a fundamental and organizing principle of life, commanding conscience and informing moral choices. To say that religious exercise has no unique freedoms, that religious bodies are accorded no special rights of their own, is to plunge our government into the business of regulating religious bodies, and to strongly curtail the rights of those for whom religion directs life decisions, both personal and public, individual and collective.[409]

By respecting the balance struck by our First Amendment, we protect the best of the American tradition. We allow our religious organizations and our religious individuals to be free. In doing so, we strengthen society and support our commitments to both freedom and diversity.

II. *Hosanna-Tabor* and the Protection of Religious Diversity

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[406] *Hosanna-Tabor*, 132 S.Ct. at 709 (internal citation omitted).

[407] All circuits to address the question agreed that the "ministerial exception" existed, based upon Supreme Court precedent. They disagreed on how that exception should be interpreted, the circuit split which prompted Supreme Court review. *See* Hosanna-Tabor v. EEOC, Pet. for a writ of certiorari 11-25.

[408] The Supreme Court criticized this argument directly in its opinion. *Hosanna-Tabor,* 132 S.Ct. at 706.

[409] For a more in-depth discussion of this problem, see Stephen L. Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* (2000).

It is far too narrow to view Hosanna-Tabor as a conflict between the First Amendment and anti-discrimination law. It is instead a case where the protection of religious freedom promotes religious diversity.

At the heart of the ministerial exception lies the freedom for religious groups to select which voices will carry their message. As justices Kagan and Alito explained in their concurrence, "religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'"[410] That critical function would be lost if the state were permitted to interfere in the selection of a religious group's leaders, or second-guess the selection of its speakers.

By permitting religious groups, small and large, to control their message, we permit them to join our public discourse and to share their own religious teachings. Such protections may be especially important for new, small or unfamiliar groups, who do not have the public goodwill or political notice that larger groups may enjoy.[411]

Without the right recognized in *Hosanna-Tabor,* many fundamental and longstanding religious practices would be unlawful. As we told the Supreme Court, "Without constitutional protection, federal, state, and local employment laws would prohibit many common religious practices—including the all-male clergy among Catholics and Orthodox Jews, rules about ethnicity and descent in some branches of Judaism, Islam, Hinduism, Zoroastrianism, and Native American religions, and in states that prohibit marital-status discrimination, celibacy rules. Although some anti-discrimination laws contain exemptions that allow religious organizations to hire on the basis of *religion*,[412] these exemptions do not protect hiring on the basis of any other protected category. And they do not prevent ministers willing to claim discrimination on the basis of other categories from demanding that courts second- guess the church's assessment of their religious qualifications. The constitutional ministerial exception is thus essential to the right of churches to choose their own ministers."[413]

The ministerial protection has protected a wide variety of religious groups, including Orthodox Jews, the African Methodist Episcopal Church, the Salvation Army, Seventh-Day Adventists,

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[410] *Hosanna-Tabor*, 132 S.Ct. at 712.

[411] Similar concerns prompted Congress to pass the Religious Freedom Restoration Act, protecting religious individuals and groups from general laws that infringe upon their faith, and the Religious Land Use and Institutionalized Persons Act, which protects religious individuals and groups in cases involving land use and prisoners' rights. *See infra* at 9-10.

[412] 42 U.S.C. §12113(d) (Supp. 2009) (Americans with Disabilities Act); 42 U.S.C. §2000e-1(a), §2000e-2(e)(2) (2006) (Title VII).

[413] *Hosanna-Tabor,* Pet'r's Opening Br. 18-19.

and practitioners of traditional Native American spirituality.[414] Without that protection, each of these groups, and many others, would be subject to intrusive government oversight of their minister selection and overwhelmed with litigation.

There are difficult cases on the other side of the equation, too—I'm sure we will hear some today—where religious groups make seemingly questionable decisions and claim the shield of the ministerial exception. But just as we understand that free speech means occasionally tolerating speech we would prefer to silence, so, too, free exercise means occasionally permitting actions that we would rather prohibit. Our constitutional rights will not protect us for long if they are designed to target the worst offenders, rather than to protect the freedom of each citizen.

Despite the occasional hard case, the answer is not to pit religious freedom against anti-discrimination norms, but to recognize that supporting religious freedom promotes diversity. It allows opposing viewpoints to thrive, dissenting voices to call our leaders to account, and religiously inspired people to bring about social change.

We have a proud tradition of such movements in the United States. These go back to our earliest days. And protections for minority religious groups—both the ministerial exception, and protections for conscientious objectors to general laws—have paid great dividends. During the colonial era, many Americans harbored deep suspicions of Quakers, who criticized the religious practices of others, refused to swear allegiance to the new nation, and did not bear arms in an era where every able-bodied man was expected to contribute to the common defense. Quakers, with their refusal to take oaths and their refusal to take up arms, provided some colonies with their first introduction to religious dissent. Some governments reacted badly—Quakers often paid for their refusal with jail time—but the nation gradually came around to the idea that those willing to risk jail for their principles were likely to make better citizens, not worse ones.[415] Colonies gradually began to accept the notion of religious protections for Quakers, and George Washington showed mercy to Quakers who refused to bear arms in the Revolutionary War.[416] This protection for the Quakers would benefit our nation later—the Quakers went on to play a public and prominent role in the abolitionist movement, and have continued to fight for civil rights and social justice to this day. And the Quakers are not alone—religious groups have

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[414] *See, e.g.,* Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299 (4th Cir. 2004) (applying ministerial exception to selection of kosher supervisor at Orthodox Jewish nursing home); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (applying ministerial exception to hiring decisions for an internship and associate minister position); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (applying ministerial exception to case involving former minister); Hopkins v. DeVeaux, 781 F. Supp. 2d 1283 (N.D. Ga. 2011) (applying ministerial exception to AME Church in case by former minister); Stately v. Indian Cmty. Sch. of Milwaukee, Inc., 351 F. Supp. 2d 858 (E.D. Wis. 2004) (applying ministerial exception to case involving school based on Native American spiritual principles).

[415] This description is drawn from the longer account in Kevin Seamus Hasson, *The Right to Be Wrong* 45-67 (2005).

[416] *Id.*; *see also* Margaret Hope Bacon, The Quiet Rebels: the Story of Quakers in America 73 (1969).

been active in many important, and initially unpopular, social causes. Religious groups were active in the abolitionist movement, served as a central organizer of the civil rights movement, and continue to provide social services and act as a voice for the disadvantaged.[417]

Religious groups, including small and unpopular religious groups, have existed in and served our nation throughout its history, and continue to do so today. "[V]irtually every religion in the world is represented in the population of the United States."[418] Most individual congregations are small—half the churches in America have fewer than 50 regularly participating adults.[419] Judges and juries cannot be expected to be familiar with the teachings and makeup of each of these groups, and that unfamiliarity can cost a small congregation dearly. This is one of reasons why disputes over theological matters and the selection of ministers should not be entrusted to the judicial system. The modern ministerial exception is both a consequence of and a protection for religious diversity.

This idea is at work in the *Hosanna-Tabor* decision, and it should also apply to less formal religious groups such as student groups organizing on college campuses. Without the right to govern their membership policies and select their own leaders, they cannot guarantee that their leaders will embody their message. We may not always like the messages such groups send, but our First Amendment does not ask whether people say things we agree with, only whether they possess a fundamental right to do so. If the First Amendment allowed us to interfere with unpopular speech we disagreed with, we could never even get to the point where we could discuss same-sex marriage as a society, and the civil rights movement would have faced even more arduous barriers.

Hosanna-Tabor might at first blush appear to be a conflict between religious freedom and anti-discrimination laws. But our Constitution, by protecting religious freedom, fosters both individual rights and diversity. As the unanimous Supreme Court said: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."

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[417] *See, e.g.*, Carter, *supra*, at 83-98 (describing religious participation in social movements); John T. Noonan, Jr., *The Believer and the Powers that Are* 169-93 (1987) (discussing religious roots of Abolitionist movement); *id.* at 449-53 (discussing the history of the civil rights movement, including the importance of the SCLC and contributions from the American Friends Service Committee); American Friends Service Committee: Our Work, *available at* http://afsc.org/our-work (last visited Mar. 8, 2013) (describing organization's work to promote peace and social justice). *See also* Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (2000) (describing the group's great contribution to civil liberties).

[418] *Hosanna-Tabor*, 132 S.Ct. at 711 (Alito, J., concurring).

[419] See Mark Chaves, Congregations in America 18 (2004).

III. Lessons from *Hosanna-Tabor* and Other Conflicts

Although I am here to address *Hosanna-Tabor v. EEOC*, the lessons drawn from this case can apply to other situations. As I mentioned above, the ministerial exception is distinct from the larger question of religious exemptions from general laws, but both are critical and historically important protections for religious freedom. We have seen an increase in the conflicts between religious freedom and government regulation. These conflicts take many forms. At the Becket Fund, we have defended Amish farmers facing charges because their traditional home building methods, although they have stood the test of time, do not meet modern building codes geared for technological innovation. We have asked the Supreme Court to hear a case for a Hutterite community in Montana which was specifically targeted by a state law mandating unemployment insurance coverage for its members—even though no member had ever filed a claim and the community holds all its property in common and takes care of its sick and injured itself.

Protection for religious freedom, even when it conflicts with otherwise applicable law, is an important part of our nation's history.[420] Such protections help religious groups, including minority faiths, to thrive. Without such protections, the Amish could be forced to give up their way of life,[421] Jehovah's Witnesses could be forced to bear arms,[422] Seventh-Day Adventists and Jews could face a choice between their livelihood and keeping the Sabbath.[423]

These are not hypothetical issues; each is based upon a well-known case. Nor are they isolated problems. We have seen local laws abused to prohibit unpopular religious practices, such as when a Texas city tried to stop our client, a Santeria priest, from carrying out animal sacrifice. We have seen it in national laws, such as the HHS Mandate, which requires religious colleges, social service organizations, and religious business owners to violate their faith by providing coverage for contraceptives and abortion-causing drugs.

Protection for religious freedom is fully consistent with the American tradition of democracy and respect for the rule of law. The idea of conscientious objection to general laws is not a recent

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[420] See, e.g., Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990).

[421] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[422] Conscientious objection to military service is protected by statues, the first of which was enacted during the Civil War. *See* Hasson, *supra*, at 51-52. During World War II, Jehovah's Witnesses faced mob violence for their religiously motivated refusal to bear arms and to salute the flag. Their struggles against general laws regulating speech have been responsible for a number of key First Amendment decisions. *See, generally,* Peters, *supra*.

[423] *See* Sherbert v. Verner, 374 U.S. 398 (1963) (protecting right of Seventh Day Adventist to refuse Saturday work); Braunfeld v. Brown, 366 U.S. 599 (1961). In *Braunfeld*, the Supreme Court upheld the law as justified by compelling interest, even though it placed heavy burdens on religious exercise. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435 (2006) (discussing *Braunfeld* in the exemption context).

invention; it has a long and distinguished history. In the modern era, Congress has been so concerned about this issue that it has passed several important pieces of civil rights legislation, including the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act.[424] All were passed w ith broad bipartisan majorities. These laws recognize that conscience matters, that religious practice should be protected, and that one-size-fits-all legislation can create problems in a nation of diverse religious beliefs.

The conscientious objection model embodied in our history and in our law provides guidance for the questions being discussed today. When we allow those with sincere religious beliefs to live their faith—even if it requires an exemption from otherwise applicable laws—our nation is richer for it. Religious minorities are protected, and religious groups are free to serve their communities and our nation.

[424] *See* 42 U.S.C. § 1996 (AIRFA); 42 U.S.C. § 2000bb (RFRA); 42 U.S.C. § 2000cc (RLUIPA).

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Alan Brownstein is a professor of law at the University of California, Davis School of Law where he holds the Boochever and Bird Chair for the Study and Teaching of Freedom and Equality. While the primary focus of his scholarship relates to church-state issues and free exercise and establishment clause doctrine, he has also written extensively on freedom of speech, privacy and autonomy rights, and other constitutional law subjects. His articles have been published in numerous academic journals including the Stanford Law Review, Cornell Law Review, Northwestern Law Review, UCLA Law Review and Constitutional Commentary. He is a member of the American Law Institute and serves on the Legal Committee of the Northern California American Civil Liberties Union and the Litigation Committee of the American Association of University Professors. Professor Brownstein is a frequent invited lecturer at academic conferences and regularly participates as a speaker or panelist in law related programs before civic, legal, religious, and educational groups. He has testified on several occasions before California Assembly and Senate Committees on legislation promoting religious liberty and bills that raise Establishment Clause concerns.

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Following law school, DeGirolami clerked for Judge William E. Smith of the U.S. District Court for the District of Rhode Island and Judge Jerome Farris of the U.S. Court of Appeals for the Ninth Circuit. His professional experience includes service as an Assistant District Attorney in Cambridge, Massachusetts. Prior to joining the St. John's faculty, he taught legal research and writing as an Associate-in-Law at Columbia Law School, and then served as a Visiting Assistant Professor and Scholar in Residence at Catholic University's Columbus School of Law. He received his J.S.D. and LL.M. from Columbia Law School, his J.D. from Boston University School of Law, his M.A. from Harvard University, and his B.A. from Duke University.

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Prior to joining the Pepperdine Law faculty, Professor Helfand was an associate at Davis Polk & Wardwell LLP, where his practice focused on complex commercial litigation. Before entering private practice, Professor Helfand clerked for the Honorable Julia Smith Gibbons of the U.S. Court of Appeals for the Sixth Circuit.

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Ms. Khan has made countless media appearances and public presentations, having been a guest on *ABC World News Tonight*, *NBC Nightly News*, *MSNBC's HardBall with Chris Mathews*, Fox TV's *O'Reilly Factor*, CNN's *Prime News and The World Today* and NPR's *Morning Edition*, *All Things Considered*, and *The Tavis Smiley Show*. And she has been quoted in almost every newspaper with a national circulation, including *The Washington Post*, *The New York Times*, *Int'l Herald Tribune*, *The Atlanta Journal-Constitution*, and *Chicago Tribune*.

Before coming to Americans United, Ms. Khan worked at the ACLU's National Project, where she litigated complex, class-action cases designed to improve conditions in prisons and jails throughout the country. Prior to that, Ms. Khan was a litigation associate at Covington & Burling LLP in Washington, DC.

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Edward Whelan is president of the Ethics and Public Policy Center. He directs EPPC's program on The Constitution, the Courts, and the Culture. His areas of expertise include constitutional law and the judicial confirmation process. As a contributor to National Review Online's Bench Memos blog, he has been a leading commentator on nominations to the Supreme Court and the lower courts and on issues of constitutional law. He has written essays and op-eds for leading newspapers, opinion journals, and academic symposia and law reviews.

In 2011, the *National Law Journal* named Mr. Whelan among its "Champions and Visionaries" in the practice of law in D.C. The *National Law Journal* praised Mr. Whelan for "pioneer[ing] the field of legal blogging" and for offering "commentary [that] infuses national debates over judicial nominees, Supreme Court ethics and appellate court decisions."

Mr. Whelan has served in positions of responsibility in all three branches of the federal government. He is a former law clerk to Supreme Court Justice Antonin Scalia and to Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit. From 2001 to 2004, Whelan was the Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice. He also served on Capitol Hill as General Counsel to the U.S. Senate Committee on the Judiciary.

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In 2011, Lori joined her colleagues at the Becket Fund and Prof. Doug Laycock in representing Hosanna-Tabor Evangelical Lutheran Church and School before the U.S. Supreme Court. They secured a unanimous victory in what the *Wall Street Journal* called "the most important religious liberty case in a half century."

Lori is a graduate of Harvard Law School, where she was a member of the Harvard Legal Aid Bureau and was formally recognized for her completion of more than 1,000 pro bono hours. While in law school, she clerked with the Civil Rights Division of the U.S. Department of Justice. She earned her B.A. in Political Science *summa cum laude* at Abilene Christian University. She is a member of the Board of Visitors of Abilene Christian University and was named the 2009 ACU Young Alumnus of the Year for her work defending religious freedom.