

## **SUMMARY: RELIGIOUS LIBERTY IN A POLARIZED AGE**

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Americans are deeply polarized, and recently the list of issues that divide them has come to include a basic constitutional value: religious freedom. Recent years have seen multiple high-profile cases of laws clashing with religious tenets and practices. In several such cases—the Obamacare contraception mandate, same-sex marriage versus religious objectors—cultural conservatives claim religious liberty as against progressive laws. But the positions flip concerning treatment of Muslims, where many conservatives favor discriminatory restrictions on a religion through, for example, President Trump’s travel ban.

In these cases, divides over religious liberty increasingly trace, and even intensify, the divides over the underlying policy issues: sexual morality, health policy, immigration, national security. In public debate, it increasingly seems, supporting LGBT nondiscrimination laws means rejecting any religious-liberty challenges to them; likewise with respect to, say, immigration restrictions.

This book argues for resisting that trend. Religious liberty is supposed to mitigate our deep differences, not reinforce them. Americans must renew the commitment to religious freedom for all persons—their “equal title to the free exercise of religion” (the Virginia Declaration of Rights, an important source for the First Amendment). That proposition has two parts. First, we should place a strong value on religious freedom, which I define as the ability of people to live consistently with their religious beliefs and identity, presumptively free from government penalty for doing so. We have to balance that freedom with protection of other deep values: we should protect same-sex couples and religious objectors. But religious freedom should receive heavy weight in the balance. Second, that strong freedom must extend equally to all faiths. We need to protect Muslims and conservative Christians. Today more than ever, Americans need to affirm what Justice Oliver Wendell Holmes called “freedom for the thought we hate.”

### **CHAPTER DESCRIPTIONS**

#### **Ch. 1. INTRODUCTION/SUMMARY**

This chapter introduces the thesis and arguments: that religious liberty should reduce polarization rather than (as today) intensify it. (See abstract above.)

#### **Part I. The Problem**

#### **Ch. 2. THE NATURE OF POLARIZATION**

It is well recognized that cultural-political polarization has intensified in recent years: more than at any time in decades, members of the two parties “describe each other ... as selfish,

as threats to the nation, even as unsuitable marriage material.” This chapter traces the nature, causes, and effects of this polarization. Polarization and alienation have increased for (at least) two reasons. First, increasingly a host of divides (cultural-religious-political) align with rather than cut across each other. Such “sorting” reduces points of commonality and sympathy between opponents. This helps aggravate the second feature: “negative polarization,” defined by hostility to the other side rather than a positive program. The resulting harms include political gridlock, popular disillusionment, and a vicious cycle: polarization incentivizes each side to attack each other further. Nevertheless, there is ample evidence for the existence of a large group of people who do not fall neatly into the two camps. The arguments in this book aim not only at that group, but at those within each camp who seek to reach out to the other.

### Ch. 3. HOW TODAY’S RELIGIOUS FREEDOM DEBATES AGGRAVATE POLARIZATION

In recent years, religious-freedom matters have come to reinforce and intensify polarization, rather than reaffirming our liberty to disagree deeply and live consistently with our deep beliefs. The chapter traces major recent developments in religious-freedom law, including the Supreme Court’s rejection of mandatory accommodations of religion in *Employment Division v. Smith* (1990); federal and state enactments of religious freedom restoration acts (RFRA) in response; the rise and intensification of cultural and legal wars over sex and family, destroying consensus over RFRA; and the political and legal manifestations of anti-Muslim bias in anti-mosque campaigns, “anti-Sharia” laws, and President Trump’s travel ban. These disputes reflect and reinforce polarization, in multiple ways. Both the right and the left treat religious freedom selectively. Many conservatives proclaim their support for religious freedom but then reject it for Muslims, as evidenced by e.g., “anti-sharia” laws, efforts to block mosques, support for Trump’s travel ban, etc. But many progressives dismiss religious-liberty claims by conservative Christians not just in specific situations, but very broadly: e.g. the U.S. Civil Rights Commission rejecting out of hand any religious-liberty claims against nondiscrimination laws. In addition, religious-liberty disputes now align with other conservative/progressive divides, on the underlying issues (economic regulation, Obamacare, immigration). Such alignment of multiple divides, as already noted, undercuts even the limited sympathies each side might have had for the other. Thus religious-freedom clashes now aggravate other clashes rather than calming them.

### **Part II. Arguments for Religious Freedom for All**

This section sets forth three arguments from our constitutional tradition for principles of strong religious freedom for all.

### Ch. 4. RELIGIOUS FREEDOM, CIVIC DIVISION, AND CIVIC ALLEGIANCE

A key purpose of religious liberty in our tradition is to calm polarization and division—not aggravate them as is the case today. Penalizing people for their deepest commitments inflames

anger and alienation; protecting religious freedom calms them. At its worst, the alienation caused by impositions on religious freedom can significantly weaken government's legitimacy or its citizens' allegiance; conversely, protecting citizens' other allegiances can cement their allegiance to the society even when other factors are working to weaken it. The chapter traces these arguments throughout our tradition, including in the present.

#### Ch. 5. CIVIL LIBERTY: RELIGIOUS FREEDOM AND PERSONAL IDENTITY

Religious commitment is a deep and pervasive form of personal identity. Through what other single institution or belief system can a person do all the following things: raise and educate her children, mark births and deaths, meet regularly for sessions of inspiration and teaching, seek personal counseling from a leader, receive moral guidance for her conduct, and devote time to serving others? The importance of religious identity can be seen through its parallels to committed same-sex relationships. Both sets of claimants seek to protect (1) a pervasive aspect of one's life that is (2) manifested in conduct as well as orientation/belief, (3) manifested in public settings rather than merely in private-insular settings (i.e. manifested in civil society, not just in the closet/bedroom or the worship service), and (4) vulnerable to hostile and burdensome regulation by others who view the conduct as evil. These features justify giving substantial protection to religious commitment (and also to same-sex relationships). This comparison also offers an example of the kind of reciprocal sympathy we need to cultivate in polarized times.

#### Ch. 6. RELIGIOUS FREEDOM AND COMMON-GOOD ARGUMENTS

In a polarized society, defending the institution of religious freedom may depend on showing that it does not merely serve adherents' private interests, but also benefits society or the common good, at least as a general matter. Claims of religious freedom, especially religious accommodation, are often seen as simply conflicting with the common good. But this is too simple. A substantial body of evidence shows that religious practice on net makes individuals (among other things) happier, healthier, and more active and responsible citizens and assists in rehabilitation, avoiding crime, and other behaviors—all of which have benefits in turn for society. There is also evidence that religious organizations are especially effective in mobilizing social capital to serve others (although substantially more research remains to be done). To the extent that religious freedom preserves space for these activities, it likewise contributes to the common good. Even organizations that depart from social norms in some ways can still be effective contributors to the common good in other ways—for example, by serving distinctive populations or using distinctive methods. The chapter connects the ideas to a sometimes-overlooked strain in America's religious-freedom tradition: protecting voluntary religious communities as important seedbeds for developing necessary civic virtue. See, e.g., George Washington, John Adams, Tocqueville. (Analogously, I argue, *Obergefell v. Hodges* found support for extending marriage rights to same-sex couples in the common good—couples' care for each other and for children—and not just in personal autonomy.) Of course, the common good does also support

boundaries on religious freedom (see chapters 7, 9). Moreover, at some point a religious community's wrongdoing undercuts its claim that its activities overall promote the common good (a caution that some organizations need to heed today).

### **Part III. Doctrines and Applications**

For religious-liberty protection to play a positive role a divided society, it must be strong but also sensible. This in turn requires several features: (1) The strong standard of protection must apply to all faiths. (2) Threats to religious liberty can come from multiple sources—outright hostility, but also indifference or lack of awareness—and legal principles must protect against all of them. (3) There are boundaries on the scope of religious freedom based on the interests of others and of society; but in defining the boundaries, courts and legislatures should weigh religious freedom strongly.

#### **Ch. 7. GENERAL RELIGIOUS-FREEDOM PRINCIPLES**

The next two chapters (8 and 9) develop specific principles of religious freedom for recurring contexts. This chapter makes a more general argument, defending provisions that protect religious exercise, across the board, not just against government targeting but against substantial burdens imposed by generally applicable laws. It defends religious freedom restoration acts (RFRA), federal and state, and offers principles for balancing religious freedom with harms to others and society.

#### **Ch. 8. MUSLIMS AND OTHER RELIGIOUS MINORITIES**

Turning specifically to claims by Muslims and other religious minorities, the chapter raises a reciprocity argument (much like that in Chapter 5 concerning LGBT rights and religious freedom). Many conservative Christians dismiss Muslim claims, but in doing so they undercut the logic and credibility of their own claims. Government actions hostile to one large, historic, and diverse faith—Islam—can easily set precedent for actions hostile to another. Claims by Muslims and other classic religious minorities dramatize the multiple sources of threats to religious liberty. Sometimes government actions are facially or overtly hostile; other times the prejudice is more subtle and requires looking behind the face of a law; finally, sometimes Muslims, like conservative Christians, need protection through exemptions from serious burdens imposed by generally applicable laws. The chapter examines the details of various disputes involving Muslims, including barriers to mosque construction, statutes prohibiting so-called Sharia law, and Trump's travel ban. Although the latter did not mention Muslims on its face, there is strong evidence it was motivated by intent to harm them. Courts reviewing laws that harm a race or sex are willing to look behind the law's face to find hostile intent or gerrymandering; the same principle should apply to religious freedom.

#### **Ch. 9. NONDISCRIMINATION LAWS AND RELIGIOUS FREEDOM**

This chapter analyzes in detail clashes between nondiscrimination laws and the religious-freedom claims of both nonprofit religious organizations and for-profit businesses. It considers, among other things, means of protecting the important interests of both sides (see the parallels traced in Chapter 5). First, and most directly, legislatures should adopt “fairness for all” proposals: nondiscrimination legislation protecting LGBT people combined with meaningful exemptions for religious organizations (not just houses of worship but also schools and social services). Both sides have been recalcitrant, but both could benefit from such solutions: LGBT people by securing protection in several states where they lack it, religious conservatives by heading off the passage of such legislation without exemptions.

Second, courts deciding religious-freedom cases, and legislatures drafting exemptions, should weigh the competing interests by considering various factors (outlined in Chapter 7), including the severity of the harm and the religious activity’s proximity to the core of religion (protection of houses of worship should be near absolute, protection of for-profit claimants much narrower). As Chapter 7 argued, not every effect on other individuals should be deemed sufficient to defeat protection of religious conduct. But effects from religious conduct can be limited by factors such as notice of the religious claimant’s policy and the availability of alternative providers. The chapter applies these factors to controversies over religious nonprofit activities, including adoption and foster care and the 2016 proposed California bill to penalize religious colleges that follow traditionalist rules on same-sex or transgender behavior. It also defends carefully defined protections for small wedding vendors (who do not shed their right to follow their religious identity when they enter the marketplace, even though the state has strong regulatory interests too). Finally, the chapter considers objections such as analogies between sexual-orientation discrimination and racial discrimination.

\*\* ADD A CHAPTER ABOUT (1) FUNDING CASES, (2) GOVERNMENT SYMBOLS/PRAYER CASES?

CONCLUSION

## Religious Freedom, Civic Division, and Civic Allegiance

Chapter 3 described how in modern America, the way religious-freedom questions are addressed frequently serves to aggravate polarization, not to calm it. That is because, among other things, each of the two warring sides treats religious-freedom protections in a selective manner, supporting them vigorously for groups it finds sympathetic, but not for those it finds unsympathetic. Religious-liberty disputes replicate the underlying fights and even aggravate them. Conversely, each side now resents that the other not only errs in its substantive position, but also is willing to trample liberty or equality rights to promote it.

This dynamic flies in the face of one of the key purposes of religious liberty: to provide a set of ground rules so that people of fundamentally different views can coexist. Religious liberty should give room, within reason, for all persons to express and live consistently with their deepest views. We may clash on the underlying issues, from healthcare to immigration. But we can all enjoy civil liberties, and support those liberties for each other. That sense of security—a sense that one’s deepest commitments will not be penalized—provides a calming effect on polarization. But conversely, denying religious freedom, or protecting it selectively, creates alienation and inflames polarization.

At its worst, the alienation caused by impositions on religious freedom can significantly weaken the government’s legitimacy or its citizens’ allegiance. Attacking the religious liberty of members of a group may undercut their loyalty to the state; conversely, protecting that liberty can cement the group members’ allegiance even when other factors are working to weaken it. A state will earn greater civic loyalty from its citizens when it respects their higher loyalties; it will provoke resentment when it disregards them. This proposition likewise has significance for our angry, polarized times.

The point applies to civil liberties in general. As far back as Plato’s *Crito*, arguments appear that one is obliged to obey the law and the state because of the benefits they provide. Socrates says he will obey the ruling of the jury that sentenced him to death because, among other things, Athens’s laws have contributed to his birth, nurture, and education.<sup>1</sup> Concrete protection of civil liberties, through legislation and judicial rulings, can be among the most important benefits that the state provides, and for which people are grateful. In congregational prayers, before Thanksgiving Day turkey, and in other settings, we frequently express thanks that we live in

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<sup>1</sup> Plato, *Crito*, 50d-51d ; Richard Dagger and David Lefkowitz, “Political Obligation,” *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2014/entries/political-obligation>.

nation that allows us to practice our faith, or follow our other beliefs. The argument from gratitude has been resurrected in modern form to serve as one asserted ground for an obligation to obey the law.<sup>2</sup>

On the other hand, critics have objected that gratitude to the state is too weak to support such a wide-ranging obligation. Moreover, one might object that civil liberties, at least against government action, are a right rather than a benefit: the government that recognizes such liberties does no more than its duty, meriting no gratitude.

Nevertheless, there certainly is some relationship between people's civil liberties and their political allegiance. Liberty will often spur allegiance as a matter of emotion and psychology even if it doesn't compel it as a matter of logic. And even if ideally liberty is the baseline—no more than the state's duty—reality is often far different. Immigrants from repressive regimes view freedom as a blessing and a benefit. All of us tend to see it that way when we contemplate that we might have been born in a far more repressive place or time. In any event, even if protection of civil liberties does not affirmatively compel a duty of allegiance to the law, the converse is relevant: suppression of civil liberties will tend to reduce, even destroy allegiance.

Religious liberty poses the question of allegiance in an especially sharp way. As Michael Sandel observes, issues concerning religion and the state frequently involve "the problem of encumbered selves, claimed by duties they cannot renounce, even in the face of civil obligations."<sup>3</sup> "Believers, under this view, always have a dual allegiance—divided loyalties between divine and (subordinate) earthly authorities."<sup>4</sup> James Madison, indeed, began his most famous argument for religious freedom with the proposition that duties to the Creator are "precedent, in order of time and degree of obligation, to the claims of civil society.... [E]very man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign."<sup>5</sup> Because religious duties have special force for many people, the state has special reason to avoid provoking a conflict with them absent strong reasons to do so.

The argument that respect for religious allegiances begets civic allegiance runs throughout the American religious-freedom tradition; and this chapter traces that theme. But

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<sup>2</sup> A.D.M. Walker, "Political Obligation and the Argument from Gratitude," *Philosophy & Public Affairs* 17:3 (Summer 1988), 191-211, <https://www.jstor.org/stable/2265244>. Admittedly, the prayer of thanks expresses gratitude to God, not the state. But in most religious traditions, the deity tells believers to obey the law when the state is recognizing liberties including that of worship. So obligation can run indirectly to the state through direct gratitude to God.

<sup>3</sup> Michael J. Sandel, "Religious Liberty—Freedom of Conscience or Freedom of Choice?," *Utah Law Review* (1989): 597, 610.

<sup>4</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford U. Press, 2d ed. 2013), 82.

<sup>5</sup> Memorial and Remonstrance against Religious Assessments, ¶ 1, [http://press-pubs.uchicago.edu/founders/documents/amendl\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendl_religions43.html).

the argument is especially powerful and familiar today with respect to Muslims. In 2005, after one round of attacks in France and Britain by home-grown radicals, an article in *The New Republic* asked “[w]hy Americans haven’t turned to terrorism.” The answer:

[L]argely because U.S. freedom, even after September 11, is the freedom to be inviting to Islam. For American Muslims, the opportunity for a publicly visible—and, more importantly, normative—expression of religion removes a tremendous source of frustration that exists in both European and Middle Eastern countries.<sup>6</sup>

Put in positive terms, religious freedom for Muslim Americans deepens and invigorates their affection for the nation. Unfortunately, the commitment to their freedom, although it’s just as vital today, is under assault.

### **The European Background: Reformation Conflicts**

The historical backdrop to the American religious-freedom tradition was, of course, the era of conflict in Europe throughout the 1500s and 1600s, caused largely by the split of Christianity into Protestantism and Roman Catholicism.

[VERY BRIEF SUMMARY OF THE REFORMATION CONFLICTS ON THE CONTINENT AND IN ENGLAND]

#### ***Freedom of Conscience for One Side, or for All?***

One tendency evident in the Reformation conflicts is that the combatants could invoke freedom of religion and conscience for themselves while refusing to extend it to their opponents. Henry VIII executed Thomas More for refusing to affirm the King’s marriage and his supremacy over the Church, and More became a martyr for the cause of freedom of conscience. As Pope John Paul II put it in declaring More (already a saint) the patron of statesmen and politicians: “[More’s] defence of the Church’s freedom from unwarranted interference by the State is at the same time a defence, in the name of the primacy of conscience, of the individual’s freedom vis-à-vis political power.”<sup>7</sup> This is the More who refused to fault anyone else who swore the oath but whose “conscience so moves me in the matter” that he could not swear; the More who died “the

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<sup>6</sup> Spencer Ackerman, “Religious Protection,” *The New Republic*, Dec. 11, 2005, <https://newrepublic.com/article/63821/religious-protection>.

<sup>7</sup> Pope John Paul II, Apostolic Letter, Proclaiming Saint Thomas More Patron of Statesman and Politicians, #5 (Oct. 31, 2000), [http://w2.vatican.va/content/john-paul-ii/en/motu\\_proprio/documents/hf\\_jp-ii\\_motu-proprio\\_20001031\\_thomas-more.html](http://w2.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_20001031_thomas-more.html).



King's good servant, but God's first"; the More who playwright Robert Bolt gave the line: "[T]he loyal subject is more bounden to be loyal to his conscience than to any other thing."<sup>8</sup>

But just few years earlier, as Lord Chancellor, More had taken a hard, coercive line against heretics espousing Lutheran ideas. He became "personally active in the task of detecting heretics and policing printers and booksellers": he promulgated bans on heretical literature, enforced them with raids on booksellers, and captured or interrogated some of the half-dozen individuals who were burned for heresy before Henry's break with Rome.<sup>9</sup> Those victims became martyrs for Protestants' religious freedom, eulogized (sometimes with inaccuracies) in literature like *Foxe's Book of Martyrs*.<sup>10</sup> These facts do not particularly impugn More's character or sainthood; like all of us including the best among us, he was a person of his times. Certainly More's acts against conscience do not undercut the validity of his witness in favor of conscience.

The point is simply that Tudor culture wars contained invocations of freedom of religion and conscience—yet each side asserted its own religious freedom and denied the other's. Each treated religious freedom as a tool, not a principle, to be embraced or spurned depending on what would advance the underlying cause. That tendency recurs over later decades. And as we will see, it turns an assertion of freedom into something else: an instrument of policy, one means (among others) of advancing the favored faith.

The American colonists brought Reformation attitudes and conflicts with them, including the propensity to assert religious freedom "for me but not for thee." Most notably, the Puritans began journeying to North America in the early 1630s because they feared persecution at home for their resistance to the high-Church and anti-Calvinist direction of the Church of England.<sup>11</sup> But having sought their own freedom of conscience, the Puritans denied it to others in Massachusetts. The colony's authorities banished Anne Hutchinson and others for promoting individualist, "inner light" interpretations of Scripture; when one of those banished, Mary Dyer, reentered Massachusetts along with two Quaker preachers in 1659, they were captured and hanged on Boston Common. The hangings were just the most stringent example of a pervasive silencing of dissenting views. The "Puritan mistake," in Douglas Laycock's words, was to support

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<sup>8</sup> Peter Ackroyd, *The Life of Thomas More* (Doubleday 1998), 361, 405; Robert Bolt, *A Man for All Seasons* (Random House 1962), 153.

<sup>9</sup> John A. Guy, "Sir Thomas More and the Heretics," *History Today*, Feb. 1980, 11, 13-15, <http://www.historytoday.com/john-guy/sir-thomas-more-and-heretics>.

<sup>10</sup> John Foxe, *Acts and Monuments of the Christian Church*, vol. 2 (1563; 1844 ed.), XX-XX [around 315].

<sup>11</sup> By 1637 three preachers were indeed convicted, of seditious libel and treason, and they were punished with branding or the cutting off of the ears.

“only or principally for people of one’s own views”;<sup>12</sup> as already noted, that is not truly religious liberty.

### ***Reformation Conflicts and Allegiance***

Reformation-era Europe raised the problem of allegiance as well as resentment. Thomas More was certain that Protestant heresy was fatal to society: England, he feared, would go the way of “parts of Germany” where (he judged) Protestants had not merely “pulled down the churches” and “tossed out the blessed sacrament” but had “refused all good laws[,] ... rebelled against all rulers,” and left “so many thousands slain / that the land lieth in many places in manner desert and desolate.”<sup>13</sup> Elizabeth I’s officials, who executed roughly 130 priests and 60 Catholic laypersons between 1581 and 1603, were likewise certain that Catholicism posed the threat of rebellion. They were right to a point. The papal bull of 1570 declaring Elizabeth a heretic also absolved her subjects of allegiance to her, and while most English Catholics were ready combine loyalty to faith and Crown, Catholic missionaries “were sent [to England] by superiors and rulers with every intention of arousing civil war and of using their work as a basis for the imposition of a foreign Catholic monarch.”<sup>14</sup>

But those in power also made potential rebels by repression. Then the threat of rebellion caused continued repression, causing further rebellious threats. The cycle of repression and rebellion—who could tell which came first?—could only be broken by a commitment to religious freedom. Governments had to change their premises: first to reject the assumption that erroneous theology led to bad action, and second to refrain from punishing even actions, such as worship or preaching, unless they caused significant and unavoidable public harm.

## **The Development of Religious Liberty in America through the First Amendment**

### ***Religious Freedom in States***

Despite the prevalence of establishments and forced religious uniformity in New England and the South, a minority model of relatively full religious freedom appeared early on—resting significantly on the wager that freedom would better secure citizens’ allegiance. In 1636 Roger Williams, a devout but unconventional Calvinist, was banished from Massachusetts Bay by the Puritan authorities and founded the colony of Rhode Island. We know Williams today primarily for his argument that religious freedom and church-state separation would help true

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<sup>12</sup> Douglas Laycock, “Religious Liberty as Liberty,” *Journal of Contemporary Legal Issues* 7 (1996): 313, 352-53.

<sup>13</sup> Thomas More, “Dialogue Concerning Heresies,” in *Works*, vol. 6, 427-28 (quoted in Eamon Duffy, *Reformation Divided: Catholics, Protestants, and the Conversion of England* (Bloomsbury, 2017), 32).

<sup>14</sup> A.G. Dickens, *The English Reformation* (Penn State U. Press, 2nd ed. 1989), 366; Diarmid MacCulloch, *The Reformation: A History* (Penguin, 2005), 334, 392.

religion, protecting the “garden” of the church from being invaded” by the “wilderness” of the world.<sup>15</sup> But the royal charter granted to Williams and others on July 15, 1663 also connected religious freedom and allegiance. It said that the colony’s founders had it “much on their hearts ... to hold forth a lively experiment”

that a most flourishing civil state may stand and best be maintained ... with a full liberty in religious concernments; and that true piety rightly grounded upon gospel principles, will give the best and greatest security to sovereignty, and will lay in the hearts of men the strongest obligation to true loyalty.<sup>16</sup>

Eventually other colonies began to relax or eliminate restrictions on the exercise of dissenting religions. In 1774, Virginia was still placing Baptist preachers in jail, which so enraged the young James Madison that he described it as “[t]hat diabolical hell-conceived principle of persecution” that “vexes me the most of any thing whatever.”<sup>17</sup> Within two years, however, Virginia gave up on punishing Baptists and adopted its Declaration of Rights providing that “All men retain an equal title to the free exercise of religion according to the dictates of conscience.”<sup>18</sup> Similarly, Massachusetts’ newly adopted state constitution of 1780 declared that “no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.”<sup>19</sup> Indeed, each of the thirteen states included a provision guaranteeing freedom of religious worship or exercise in its post-independence constitution.<sup>20</sup>

These rights had limits, of course. Several states joined Massachusetts in saying explicitly that freedom of worship or religious exercise was bounded by “public peace” or “safety,” the rights of others, or even “[public] happiness.”<sup>21</sup> Some such boundaries are inherent in the concept of freedom in an ordered society where others must be able to exercise their rights too. But there were other disabilities (even in relatively tolerant states) that would be entirely unacceptable today: Rhode Island originally banned Jews from even living in the colony, and

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<sup>15</sup> Cite Tim Hall; Edwin Gaustad; Mark deWolfe Howe.

<sup>16</sup> Charter of Rhode Island and Providence Plantations, July 15, 1663, [http://avalon.law.yale.edu/17th\\_century/ri04.asp](http://avalon.law.yale.edu/17th_century/ri04.asp).

<sup>17</sup> James Madison to Williams Bradford, 24 Jan. 1774, in Madison, *Papers*, vol. 1 (DATE), 106, [http://press-pubs.uchicago.edu/founders/documents/amend1\\_religions16.html](http://press-pubs.uchicago.edu/founders/documents/amend1_religions16.html).

<sup>18</sup> Virginia Declaration of Rights, § 16.

<sup>19</sup> Massachusetts Constitution of 1780, Part I, Declaration of Rights, Art. II.

<sup>20</sup> Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion,” *Harvard Law Review* 103 (1990): 1409, XXX (cataloging and quoting the provisions).

<sup>21</sup> *Id.* at XXX.

Quaker Pennsylvania limited its religious freedom protections to those who believed in “one almighty God.”<sup>22</sup>

Finally, at the time of the founding several states, mostly in New England, coupled freedom of worship for all with retaining their systems of compulsory tax support for Christian clergy.<sup>23</sup> In 1810 the Massachusetts Supreme Judicial Court upheld this system as consistent with the free exercise provision, reasoning that there is a “distin[ction] between liberty of conscience and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection [of one’s person and property].”<sup>24</sup>

For all of these limits, however, basic freedom of worship and religious exercise had advanced far by the time of the founding. The evangelical revivals of the middle third of the 1700s—the Great Awakening—helped hasten this basic-level freedom, in two ways. First, they spread the influence of a voluntarist theology, under which the individual Christian “is to receive his Christianity from Christ alone”—in the words of Elisha Williams, a Puritan writer affected by the new theology—and not from civil government.<sup>25</sup> “Christ alone is lord of the conscience,” said the Presbyterians, a fast-growing sect in the mid-18th century.

Apart from theology, however, the simple growth of dissenters’ numbers meant that their resentment would create more serious social disruption. [MORE]

These two rationales—theological integrity and social peace—came together in Virginia in the 1780s to finish off all efforts in the state to preserve taxes to support religion. Into the 1770s, the colony had enforced an establishment of Anglicanism through both preferential tax support and restrictions on dissenting preachers. Revolution against England understandably led to disestablishment of the English church, ending both its tax preferences and the coercion against others. But in the wake of corruption, economic depression, and social conflict in the years after independence, Governor Patrick Henry in 1784 proposed to reinstate subsidies for clergy, albeit in a way that would adhere to “the liberal principle [of] abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians.”<sup>26</sup> Under the “general assessment” bill, the taxpayer could designate “what society of Christians [he] shall

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<sup>22</sup> Cites.

<sup>23</sup> Massachusetts Constitution, *supra*, Part I, Art. II (authorizing each town to provide “for the support and maintenance of public Protestant teachers of piety, religion, and morality”).

<sup>24</sup> *Barnes v. First Church in Falmouth*, 6 Mass. 400, XXX (1810) (adding that challenges to the system “mistake a man’s conscience for his money”).

<sup>25</sup> Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744; XX ed.), XX.

<sup>26</sup> Bill for Establishing a Provision for Teachers of the Christian Religion (1784) [CITE].

direct the money to be paid”; if he made no designation, the payment would go to local “seminaries of learning” (an 18th-century term for secondary-level schools).<sup>27</sup>

The general assessment bill tried to support religion (to help it “correct the morals of men [and] preserve the peace of society”) in a way that would be non-preferential and thus non-divisive. But Baptists opposed compelled support for their own clergy in Virginia as in Massachusetts. Some Presbyterians agreed. James Madison, who opposed the bill, helped block its progress in the legislature in 1784-85 in order to gather time to oppose it. The next year, he wrote one of several petitions to the legislature to reject the general assessment, which the legislature did. Madison then helped push through the Bill for Establishing Religious Liberty, which Jefferson had drafted but which had been languishing.

Madison’s “Memorial and Remonstrance against Religious Assessments” eloquently set forth the various substantive rationales that contributed to religious freedom and disestablishment in the founding period. True, the document is not conclusive evidence of the First Amendment’s original meaning; the Supreme Court has given it too much weight in several of its decisions.<sup>28</sup> The fact that Virginia rejected clergy subsidies does not mean that Madison achieved the same result on the national stage in the First Amendment—let alone that he achieved even more broadly a “wall of separation between church and state.”<sup>29</sup> But the Memorial and Remonstrance does show Madison using his characteristic skills—thoroughness in reasoning, appreciation for the concerns of widely varying constituencies—to express the whole range of arguments, civil and theological, principled and pragmatic. Official establishment, he said, put civil duties above religious duties as individuals of differing faiths understood those duties; it undermined the “purity and efficacy of religion” by making clergy dependent on government; and [OTHERS].

Among his insights, Madison saw that the general assessment, despite its intent, was bound to be divisive rather than unifying. The tax, he warned,

will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.<sup>30</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Reynolds v. United States*, 98 U.S. 145 (1879); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>29</sup> *Everson*, 330 U.S. at XX.

<sup>30</sup> M & R para. 11, <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

Conversely, “equal and compleat liberty” in religious matters would calm religious division, or at least its harmful effects:

Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State.<sup>31</sup>

Because Madison was farsighted enough to imagine a significant presence of non-Christians in Virginia, he could see the general assessment as favoritism—divisive favoritism—for Christianity over other faiths:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? ...

Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.<sup>32</sup>

Calming the harmful effects of religious disagreement was among the major rationales for adopting religious freedom and disestablishment. [MORE]

### ***The Constitution and First Amendment***

Even more so than in the states, the adoption of limits on the federal government in the U.S. Constitution reflected a purpose to avoid the divisive effects of government impositions on the religious decisions of a diverse population. The founders disagreed on other potential rationales for religious freedom: for example, on whether government involvement in religious matters was bad for religion itself, or whether government promotion of religion was essential for promoting civic virtue. But they could all agree that for the federal government to try to impose or encourage uniformity across a religiously diverse nation would create resentment and division. No religious position with meaningful content could command anything close to a national consensus.

This rationale played a significant role in the background of the original Constitution’s only religion clause: the statement in Article VI, section 2, that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Test oaths went back far in European and American history. Catholics were disqualified because they allegedly

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* paras. 3, 4.

could not be trusted to be loyal to the government, and atheists because they allegedly could not be deterred from immoral acts by the prospect of divine punishment. At the time of the Constitution's adoption, several states still had religious-oath requirements for government office.<sup>33</sup>

As Gerard Bradley has documented, many delegates at the Philadelphia Convention who voted for the ban on federal religious tests simultaneously supported such tests in their states.<sup>34</sup> But the delegates believed, in large numbers, that there was too great a risk that any test Congress chose would be divisive. "While the state tests were a known, fixed entity and were utilized by almost all states," Bradley notes, "the debated federal test was an unknown quantity to be flushed out by future Congresses."<sup>35</sup> Thus, "[t]he no-test clause was sold as a constitutionalized Golden Rule with a Machiavellian spin to it: 'Constrain yourself as you would constrain others.' This is how conditions of pluralism ultimately accounted for article VI."<sup>36</sup>

The First Amendment also reflected the judgment that religious freedom could minimize fear or resentment of government and cement citizens' allegiance. With the enactment of the Constitution, religious minorities expressed fear that the ban on religious tests for office was too narrow a guarantee: that the strengthened federal government the Constitution created could interfere with religious beliefs and practices in multiple other ways. Madison admitted that the lack of a guarantee of religious and other rights had "alarmed many respectable Citizens."<sup>37</sup> After ratification, he introduced what became the Bill of Rights—including what became the religion provisions—so that the Constitution's supporters could "[p]rove [they were] sincerely devoted to liberty and a republican government" and rebut charges that they "wish[ed] ... to lay the foundation of an aristocracy or despotism."<sup>38</sup>

Some scholars, Bradley included, conclude from this history that the no-tests clause and the Establishment Clause reflect nothing more than this pragmatic judgment that federal action concerning religion would be divisive. Accordingly, they say that the First Amendment, as merely a specific statement about federal power over religion, contains no general statement of principle and, among other things, cannot logically be incorporated to restrict states.<sup>39</sup> Those

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<sup>33</sup> Cites/details.

<sup>34</sup> Gerard V. Bradley, "The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself," *Case Western University Law Review* 37 (1987): 674, 689-90 (listing delegates who voted for federal ban but supported religious tests in their states).

<sup>35</sup> *Id.*, 710.

<sup>36</sup> *Id.*, 703.

<sup>37</sup> Letter from James Madison in the Fredericksburg (Va.) Herald (Jan. 29, 1789), in *The Papers of James Madison*, vol. 11 (ed. Robert A. Rutland and Charles F. Hobson, University Press of Virginia 1977), 428-29.

<sup>38</sup> 1 Cong. Register 423-37 (June 8, 1789) (statement of Mr. Madison).

<sup>39</sup> "[T]he rejection of religious tests did *not* stem from the delegates' condemnation of them as a matter of principle." Bradley, *supra*, XXX.

conclusions do not necessarily follow, for several reasons. First, originalist interpretation of the Religion Clauses arguably should focus on the text's public meaning—that is, the meaning of “free exercise” and “no establishment”—rather than how the framers thought it would apply to specific cases. Second, even if the framers' mindset governs, they arguably had consensus about the basic right to exercise religion—as shown by the presence of such a clause in every state constitution—even as they disagreed on other issues like religious tests for office. Finally, substantive rationales for religious freedom almost certainly underlay the incorporation of the First Amendment against state laws through the Fourteenth Amendment.<sup>40</sup>

### **Division and Allegiance in the Ongoing Religious-Freedom Tradition**

Government's scope and power grew again in the 20th century in response to the crises of economic depression and world war. Amid that growth, the Supreme Court again recognized the connection between liberty and allegiance in *Board of Education v. Barnette*,<sup>41</sup> when it protected Jehovah's Witnesses who objected, because of religious beliefs, to saluting the American flag. “Assurance that rights [of conscience] are secure,” the Court said, “tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support.”<sup>42</sup> Today the Court's words remain relevant as we bitterly debate government's role in promoting goals like national security, health care, or LGBT equality. Accommodation of traditionalists' religious conscience can smooth the way in the legal protection of LGBT rights. Protection of Muslims' equality can bolster the credibility of government's steps against terrorism.

U.S. foreign policy today also recognizes that government cements allegiance when it protects religious liberty. Under the International Religious Freedom Act of 1998,<sup>43</sup> American policy is to “[p]romote freedom of religion and conscience throughout the world as a fundamental human right and as a source of stability for all countries.”<sup>44</sup> We should follow the lesson at home too. Government takes a dangerous risk if it penalizes people for their religious identity or practices for less than the most pressing public purposes. To do so foments fear and jealousy toward government and ignores the history that led to religious-freedom guarantees in the first place.

The deep divisions stemming from the Reformation persisted in America long after the Constitution made commitments to equal religious freedom. Through the 1800s and well into the 1950s, Protestants charged that Catholics could not affirm democracy and religious freedom,

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<sup>40</sup> Kurt Lash; Akhil Amar; etc.

<sup>41</sup> 319 U.S. 624 (1943).

<sup>42</sup> *Id.* at 636 (1943).

<sup>43</sup> 22 U.S.C. §§ 6401-6483.

<sup>44</sup> U.S. Department of State, Religious Freedom, <http://www.state.gov/j/drl/irf/>.



since Popes had explicitly criticized those concepts and had articulated the position that “error has no rights.”<sup>45</sup> From the start, American Catholics countered this charge by showing an allegiance to the American system; but Protestants remained highly suspicious. Only after World War II did Catholics achieve full participation in American public life, in part because it became explicit that they supported church-state separation and opposed favored status for the Church. In 1960, theologian John Courtney Murray explained how Catholics could support these positions even though they fell short of Catholic theological ideals. The actual “experience of the Church in America,” Murray said,

has proved to be satisfactory when one scans it from the viewpoint of the value upon which the Church sets primary importance, namely, her freedom in the fulfillment of her spiritual mission to communicate divine truth and grace to the souls of men, and her equally spiritual mission of social justice and peace.<sup>46</sup>

It was quite “satisfactory” that under the American system of limited government, the Church and its members simply had room to follow the faith. Disestablishment eliminated the Church’s privilege, but also the “enmity and envy, the coinage in which the Church paid for privilege.”<sup>47</sup> Murray concluded that by and large, “it has been good for religion, for Catholicism, to have had simply the right of freedom.”<sup>48</sup>

### **Not “Whatever Calms Division”—But “Religious Freedom, to Calm Division”**

Before I turn to the implications of this tradition for today’s issue, I should make one clarification. The argument here is not that the First Amendment should be interpreted to require “whatever will reduce division in a given case.” That suggestion has appeared on the Supreme Court and in academic commentary. In several opinions, Justice Stephen Breyer proposed that a dominant consideration in determining the Establishment Clause’s scope should be to “protect the nation’s social fabric from religious conflict.”<sup>49</sup> For example, he cast the deciding votes on official displays of the Ten Commandments—upholding one display, forbidding another—largely according to whether the particular display “tend[ed] to promote the kind of social conflict the

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<sup>45</sup> See, as one of the latest articulations, Pius XII’s 1953 statement: “[T]hat which does not correspond to truth or to the norm of morality objectively has no right to exist, to be spread or to be activated.” *Ci riesce*, Address to Catholic Jurists (Dec. 6, 1953), <http://www.ewtn.com/library/papaldoc/p12ciri.htm> (adding the qualifier that “failure to impede this with civil laws and coercive measures can nevertheless be justified in the interests of a higher and more general good” such as avoidance of violence).

<sup>46</sup> John Courtney Murray, S.J., *We Hold these Truths: Catholic Reflections on the American Proposition* (Sheed and Ward, 1960), 75.

<sup>47</sup> *Id.*, 76.

<sup>48</sup> *Id.*

<sup>49</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).

Establishment Clause seeks to avoid.”<sup>50</sup> In another case, dissenting from the Court’s approval of vouchers for children attending religious schools, Breyer argued that such programs will “promote division among religious groups” because the criteria for determining schools’ eligibility to participate will include some and exclude others on controversial grounds.<sup>51</sup>

But Breyer’s emphasis on preventing divisiveness mistakes a purpose for a principle. The founding generation did not enact a provision commanding whatever would minimize religious divisiveness. Rather, the First Amendment enacts a method, a strategy for reducing division: namely, to leave religion as much as possible to the choices of private individuals and groups. Calming division, reducing resentment, and disaffection is a purpose for freedom of religion; but it does not dictate its scope.

Recall Madison’s “Memorial and Remonstrance against Religious Assessments,” which objected that the general assessment would “destroy that moderation and harmony which the forbearance of our laws to intermeddle with religion has produced amongst its several sects.”<sup>52</sup> But how exactly did Madison define the evil in question? “Torrents of blood have been split in the old world,” he said—not by the existence of religious discord, but “by the vain *attempts of the secular arm to extinguish religious discord, by proscribing all difference in religious opinions.*”<sup>53</sup> The evil was not the existence of religious disagreements, even sharp ones. As Madison recognized in *Federalist No. 10*, “a zeal for differences in religious opinion” was among those sources of faction “sown in the nature of man.”

Rather, the evil in Madison’s eyes was the government’s attempts to *extinguish* discord or *proscribe* differences—that is, to interfere with individuals’ choices between those competing, discordant faiths. Accordingly, the way to address, and even manage, religious contention was to protect and preserve the choice of each individual in religious matters against government interference. In Madison’s words, “Time has at length revealed the true remedy.... [E]qual and compleat liberty, if it does not wholly eradicate [religious conflict], sufficiently destroys its malignant influence on the health and prosperity of the State.”<sup>54</sup> The Religion Clauses represent a wager that if all sects were guaranteed full, equal freedom to worship and practice their faith,

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<sup>50</sup> *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (upholding Texas Capitol display that had gone unchallenged on legal grounds for 40 years, which suggested that “few individuals ... are likely to have understood [it as] a government effort to favor a particular religious sect”). He provided the deciding vote to strike down a Kentucky courthouse display erected in the 1990s, reasoning that “in today’s [religiously diverse] world, ... a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that [Texas’s] longstanding, pre-existing monument has not.” *Id.* at 703 (citing *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 868-72 (2005)).

<sup>51</sup> *Zelman*, 536 U.S. at 724-25 (Breyer, J., dissenting).

<sup>52</sup> *Memorial & Remonstrance*, *supra*, para. 11.

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> *Id.*

then contention among them—while still sharp—would not be destructive to civil government or society.<sup>55</sup>

The fundamental goal of the Religion Clause is to prevent government from making people suffer because of their religious faith. The imposition of such suffering is connected to social polarization and conflict, in at least two ways. When government imposes such suffering, it increases polarization and resentment. And conversely, an increase in societal polarization increases the likelihood that governments will impose such penalties and suffering (we are seeing that now, as each side of the deep divide becomes less sympathetic to its opponents and more willing to use law to penalize them). But in the end, the key purpose of the Religion Clauses is to avoid suffering: in Douglas Laycock’s words, to ensure that “all these [conflicting] groups can live together in peace and equality, cooperating in the task of self-governance, with no one forced to suffer for their faith or lack of one.”<sup>56</sup> The founding wager is that this equal freedom—Madison’s “equal and compleat liberty”—will calm the harmful effects of polarization.

### **Civic Division, Civic Allegiance, and Religious Freedom Today**

Today religious freedom continues to have a connection to the government’s legitimacy and to religious citizens’ allegiance.

#### ***Muslims***

Begin with current disputes concerning treatment of Muslims. As already noted, America has the capacity to distinguish itself from Europe in the eyes of devout Muslims, and avoid the kind of alienation seen in Europe, by following its tradition of robust religious freedom.<sup>57</sup> A robust version would, for example, protect Muslims’ rights to follow their practices (hijabs, beards) in public settings and would avoid subtle, not just blatant, forms of state discrimination against them.<sup>58</sup>

The argument that devout Muslims could affirm American institutions of freedom—an Islamic counterpart to John Courtney Murray’s Catholic argument—appeared in the early 2000s in Imam Feisal Abdul Rauf’s book *What’s Right with Islam Is What’s Right with America*.<sup>59</sup> Abdul Rauf “aim[s] to demonstrate ... that America is substantively an ‘Islamic’ country, by which I mean a country whose systems remarkably embody the principles that Islamic law requires of a

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<sup>55</sup> On this concept of a wager, see Christopher L. Eisgruber, “Madison’s Wager: XXX,” *University of Chicago Law Review* XXX (1995): XXX.

<sup>56</sup> Laycock, *supra*, [80 Minn. L. Rev.] at 1089.

<sup>57</sup> See *supra* at n.XX.

<sup>58</sup> See Chapter 8 *infra*.

<sup>59</sup> HarperSanFrancisco, 2005.

government.”<sup>60</sup> For Imam Abdul Rauf, America is “Shariah compliant” because the Constitution and the Declaration of Independence protect the five values declared fundamental in Sharia: “life, mind (that is, mental well being or sanity), religion, property (or wealth), and family lineage (and progeny).”<sup>61</sup> The “religion” value, he says, is secured by freedom of religion. Although American separation might keep religion and the state too “distant” from each other from an Islamic perspective, nevertheless the approaches are broadly consistent because American separation is hospitable to religious values:

Muslims and Americans can agree that separation of church and state is substantively different from separation of religion and state. We can agree also that this means that state powers should not be used to further one religion or religious belief over any other but to encourage and protect people of any and all religions to practice their faith freely.<sup>62</sup>

In other words, freedom to practice their faith is sufficient for Muslim Americans, much as Murray said it was for the American Catholic Church.

Affection for America among its Muslim residents can also correlate with respect among Muslims elsewhere. In a 2016 speech to the Islamic Society of Baltimore, President Obama asked, “How do we keep our country strong and united? How do we defend ourselves against organizations that are bent on killing innocents?” He answered:

[A]s Americans, we have to stay true to our core values, and that includes freedom of religion for all faiths. I already mentioned our Founders, like Jefferson, knew that religious liberty is essential not only to protect religion but because religion helps strengthen our nation – if it is free, if it is not an extension of the state....

[T]he best way for us to fight terrorism is to deny these organizations legitimacy and to show that here in the United States of America, we do not suppress Islam. That’s how we show the lie that they’re trying to propagate.<sup>63</sup>

Obama’s argument has factual support. To take just one example, in a 2011 Gallup report, 80 percent of Egyptians said “that for Western societies to demonstrate respect for Muslim

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<sup>60</sup> *Id.*, 80.

<sup>61</sup> *Id.*, 86.

<sup>62</sup> *Id.*, 108.

<sup>63</sup> Obama to Islamic Society of Baltimore, Feb. 13, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/03/remarks-president-islamic-society-baltimore>.

societies, it is ‘extremely important’ to protect the rights of Muslim minorities in Western societies.”<sup>64</sup> [OTHER SUPPORT]

Respect abroad in turn reinforces affection at home. Given the close connections of globalization, American Muslims—especially young people—are the targets of persuasion from abroad. Experiencing robust religious freedom, with other aspects of equal liberty, can negate the power of destructive efforts at persuasion from abroad.

Unfortunately, popular conservatism has embraced anti-Muslim discrimination and a minimalist (at best) view of Muslim religious liberty. George W. Bush, for all his controversial anti-terrorism policies, made important gestures of respect for Muslim faith. But the last decade has brought Donald Trump’s travel ban (based on the claim that “Islam hates us”), state statutes aimed at prohibiting the nonexistent threat of Sharia law in America, and local government efforts to stop the construction of mosques.<sup>65</sup> Some of these initiatives have been blocked in court, but they still have harmful effects.

### ***Conservative Christians***

Increasingly, it will be important to head off broadly analogous dangers with respect to conservative Christians as well. If the screws tighten on their institutions—denial of any government assistance available to other institutions, withdrawal of tax exemptions, widespread imposition of mandates—they will become increasingly alienated. That will accelerate the disturbing levels of polarization and of distrust in government among Americans.<sup>66</sup>

Already white evangelicals have been willing to support the profane Donald Trump as president, in significant part because he promised to head off religious-liberty threats that evangelical colleges and other institutions might face under a Hillary Clinton administration. White self-declared evangelicals supported Trump at a rate of 81 percent in 2016, five percentage points above their support for Mitt Romney in 2012; the 5 percent difference, Michael Wear has shown, would have tipped the balance in Michigan, Florida, and probably other states.<sup>67</sup> A recent survey of evangelicals indicates that far more of the 81 percent voted against Clinton than for

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<sup>64</sup> Abu Dhabi Gallup Center, *Muslim Americans: Faith, Freedom, and the Future* (August 2011), at 54, [https://virtuecenter.s3.amazonaws.com/files/2012-08-27-17/MAR\\_Report\\_ADGC\\_Bilingual\\_072011\\_sa\\_LR\\_web.pdf](https://virtuecenter.s3.amazonaws.com/files/2012-08-27-17/MAR_Report_ADGC_Bilingual_072011_sa_LR_web.pdf).

<sup>65</sup> See Chapter 8 *infra*.

<sup>66</sup> Pew Research Center, Public Trust in Government: 1958-2014, <http://www.people-press.org/2014/11/13/public-trust-in-government/> (percentage of Americans who trust government to do the right thing declined from 75 percent in 1964 to 20 percent in 2013).

<sup>67</sup> Michael Wear, “Why did Obama win more white evangelical votes than Clinton? He asked for them.,” *Washington Post*, Nov. 22, 2016, [https://www.washingtonpost.com/posteverything/wp/2016/11/22/why-did-obama-win-more-white-evangelical-votes-than-clinton-he-asked-for-them/?noredirect=on&utm\\_term=.ec5673efe476](https://www.washingtonpost.com/posteverything/wp/2016/11/22/why-did-obama-win-more-white-evangelical-votes-than-clinton-he-asked-for-them/?noredirect=on&utm_term=.ec5673efe476).

Trump—reflecting, in part, their fear of what a Clinton administration might do—and that religious liberty ranked high on their list of concerns. When persons with evangelical Christian beliefs of all races (white, black, Hispanic) who voted for Trump were asked the most important reason for their vote, religious liberty was tied for the third most frequent answer (11 percent)—well above the supposed litmus-test goals of limiting abortion, taxes, or LGBT rights, and behind only the economy and immigration. For white evangelicals overall (both supporters and opponents of Trump, religious liberty ranked as the fourth most frequent answer—slightly behind national security, and again well above abortion, taxes, or gay rights.<sup>68</sup> Even John Fea, a historian highly critical of his fellow evangelicals for voting for Trump, recognizes that Clinton “did not seem willing to support” a pluralism that would protect religious traditionalists, and that the future of evangelical colleges “may have been in jeopardy [from intensified nondiscrimination regulations] had [she] won the presidency.”<sup>69</sup>

In 2015, Donald Verilli, President Obama’s solicitor general, was asked at oral argument in *Obergefell v. Hodges* whether recognizing same-sex marriage would lead to stripping tax exemptions from religious colleges who rejected such marriages (on analogy to the racist college in *Bob Jones*). He replied: “[I]t’s certainly going to be an issue. I—I don’t deny that.”<sup>70</sup> This ominous answer played heavily in 2016 “in both the conservative blogosphere and in publications catering to religiously traditionalist audiences,” because it raised the “the possibility that the schools and institutions educating young Christian kids by the millions could face the choice between compromise and financial crisis.”<sup>71</sup> The threats were only confirmed when California in summer 2016 seriously considered enacting a law stripping state aid from students attending colleges with same-sex-discriminatory policies.<sup>72</sup>

The support for Donald Trump may be just the first manifestation of the unrest that will come when the large group of socially conservative Christians fears an existential threat. One of the purposes of religious liberty is to reduce such alienation and existential fear.

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<sup>68</sup> Jeremy Weber, “Billy Graham Center Explains Survey on Evangelical Trump Voters,” *Christianity Today*, Oct. 18, 2018, <https://www.christianitytoday.com/news/2018/october/evangelicals-trump-2016-election-billy-graham-center-survey.html>.

<sup>69</sup> See John Fea, *Believe Me: The Evangelical Road to Donald Trump* (Eerdmans 2018), 23-28, 72, 140-41.

<sup>70</sup> *Obergefell* O.A. Tr. 38.

<sup>71</sup> David Bernstein, “The Supreme Court oral argument that cost the Democrats the presidency,” *Washington Post*, Dec. 7, 2016, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm\\_term=.e9c500597ca9](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/?utm_term=.e9c500597ca9); David French, “The True Sin of American Evangelicals in the Age of Trump,” *National Review*, Mar. 13, 2018. <https://www.nationalreview.com/2018/03/evangelicals-support-donald-trump-political-realities-2016-election/>.

<sup>72</sup> Anshu Siripurapu, “Lara drops key parts of bill on religious colleges,” *Sacramento Bee*, Aug. 10, 2016, <https://www.sacbee.com/news/politics-government/capitol-alert/article94875902.html>.

In speaking to the Islamic Society in Baltimore, President Obama said:

In our lives, we all have many identities. We are sons and daughters, and brothers and sisters. We're classmates, Cub Scout troop members. We're followers of our faith. We're citizens of our country. And today, there are voices in this world, particularly over the Internet, who are constantly claiming that you have to choose between your identities—as a Muslim, for example, or an American. Do not believe them. If you're ever wondering whether you fit in here, let me say it as clearly as I can, as President of the United States: You fit in here—right here. You're right where you belong. You're part of America, too.<sup>73</sup>

These remarks are eloquent and true about Muslims. They also hold for conservative Christians and their religious organizations. In the coming years, they will increasingly face laws that, in a practical sense, force them to compromise between their religious identity, as they conscientiously understand it, and their role in civil society, including both charitable work and the economy. The laws' texts will not contain the term "conservative Christian." But they will still create the conflict of identities, and there still will be a powerful reasons for government to seek ways to avoid imposing the conflicts.

Today—as at other times in our history, but now more than ever—religious liberty has a crucial purpose of ensuring that "all [the conflicting] groups can live together in peace and equality, cooperating in the task of self-governance, with no one forced to suffer for their faith or lack of one."<sup>74</sup>

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<sup>73</sup> Obama, *supra* note XX.

<sup>74</sup> Laycock, 80 Minn. L. Rev. at 1088-89.

## General Free Exercise Principles

The previous three chapters presented arguments why religious freedom should be strongly protected for all, as one remedy for the ills of a polarized society. For religious-liberty protection to play that role, it must be strong but also sensible. This in turn requires several features: (1) The strong standard of protection must apply to all faiths: all have an “equal title to the free exercise of religion,” in the words of the Virginia Declaration of Rights.<sup>1</sup> (2) Threats to religious liberty can come from multiple sources—outright hostility, but also indifference or lack of awareness—and legal principles must protect against all of them. (3) There are boundaries on the scope of religious freedom based on the interests of others and of society; but in defining the boundaries, courts and legislatures should weigh religious freedom strongly.

The next three chapters discuss how to translate the commitment to equal religious freedom into principles of law. Chapter 8 discusses principles for protecting unpopular and minority religions—Muslims especially, but also others—against discrimination. Chapter 9 discusses in detail the conflicts between non-discrimination laws and claims of religious freedom.

This chapter makes a more general argument, defending provisions that protect religious exercise, across the board, against substantial burdens imposed by law even when the law is generally applicable and does not target religion. Whether to protect against such burdens has been the chief source of controversy in modern religious-freedom cases. (By contrast, it is widely agreed that the government may not constitutionally discriminate against religious conduct, or against a particular religion. Chapter 8 will say much more about that agreed principle, in the context of government discrimination toward Muslims and other minority religions.)

### I. Burdens from Generally Applicable Laws

But nondiscrimination cannot exhaust the protection of religious exercise. Protecting religious freedom for all requires meaningful protection even against a law that is broadly applicable and does not single out religion. Such protection might come through court-declared constitutional rights, as the U.S. Supreme Court did before the 1990 *Smith* decision<sup>2</sup> and as some state courts do today. Protection might come through general statutes (religious freedom

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<sup>1</sup> Chapter 4 (p. XX).

<sup>2</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990) (rejecting most constitutionally mandated exemptions from neutral, generally applicable laws).



restoration acts, or RFRA) that require strong justification for a substantial burden on religious exercise. Or it might come through legislative protection targeted to a specific situation.

In earlier periods of history, prohibitions of religious practice may have come chiefly from laws targeting a disfavored religion, as part of promoting a favored one. But even the founding generation was well aware of conflicts that did not involve targeting—cases where a minority religious practice clashed with a general rule that reflected the assumptions (sometimes the religious assumptions) of the majority. And from nearly the beginning Americans acted to protect religious freedom in such conflicts. Military conscription reflects the government’s need, legitimate in principle, for self-defense; but colonies and (from its earliest inception) Congress exempted pacifist objectors. Required oaths for jurors, witnesses, and public officials reflect the need to impress the solemn importance of truth-telling and integrity; but both the Constitution and various colonial and state laws made room for alternative methods of solemnization for Quakers and Mennonites, who view oath-taking as violating the commands of Jesus.

### **A. Equal Freedom**

Recognizing exceptions from generally applicable laws is necessary to ensure that minority religions actually have equal freedom. Because laws tend to reflect the majority’s values, rules that make no religious distinctions on their face will nevertheless have an unequal impact on different faiths. For example, wearing headgear is not a religious duty for most Christian groups, but it is for observant Jews, Sikhs, and other minorities, who are therefore disproportionately harmed by facially neutral uniform requirements.

Legislators or regulators can adopt exemptions in specific laws: for example, a police department might allow Sikh officers to wear turbans instead of official caps. But such case-by-case decisions will themselves tend to reflect political sympathy for some groups over others. The Court in *Employment Division v. Smith* conceded that “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.”<sup>3</sup> Thus, the mechanisms to ensure equal freedom should include a protective standard applied by courts to all groups—whether the standard stems from a constitutional provision or a federal or state RFRA. Such a standard allows “the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process.”<sup>4</sup> The standard works to protect whoever is the minority, against the unnecessarily burdensome effects of (typically majoritarian) laws.

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<sup>3</sup> *Id.* at 890.

<sup>4</sup> Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1132 (1990).

Empirical studies confirm that RFRA and other exemption standards disproportionately protect minority faiths. A survey of 10th Circuit cases involving the federal RFRA from February 2012 to February 2017 found that Muslims, Native Americans, fundamentalist Mormons, and Hindus were significantly overrepresented in cases compared to their share of the population (respectively, 11.86, 6.78, 5.08, and 3.39 times their population share), while Christians were underrepresented (0.70 of their population share).<sup>5</sup> Those numbers understate the difference, for they include a large, “anomal[ous]” group of cases challenging a single government action: the Obama contraception mandate. Excluding the contraception cases, the percentage of RFRA claims for Muslims was 17.07 times their population share, and for Native Americans 9.76 times their share, but for Christians only 0.28 of their share.<sup>6</sup>

While classic religious minorities invoke RFRA far out of proportion to their population share, their success rate usually is no lower than that of other faiths, at least not in the leading empirical compilation of federal free-exercise decisions by Sisk, Heise, and Morriss.<sup>7</sup> In contrast to classic minority faiths, at least during the period 1986-1995, two affiliations “consistently and significantly associated with a negative outcome” were Catholics and Baptists.<sup>8</sup> (As this book emphasizes in several places, the traditionalist wings of those groups face significant hostility in some places and settings.<sup>9</sup>) The one exception among classic minority faiths is Muslims (whose mistreatment is likewise noted throughout this book): Sisk and Heise found that from 1996 to 2005, “with other variables held constant,” Muslims had a likely success rate of only 22 percent compared with 38 percent for non-Muslims.<sup>10</sup> Outside the case of Muslims, it is simply erroneous to assert, as some scholars have done, that exemption claims will more likely succeed for “the kinds of worship that the Justices of the Supreme Court are accustomed to” than for “non-mainstream denominations, sects, and cults.”<sup>11</sup>

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<sup>5</sup> Luke W. Goodrich and Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Decisions*, 48 *Seton Hall. L. Rev.* 353, 369-74 (2018).

<sup>6</sup> *Id.* at 374-75. The figures in text exclude prison cases, but Muslims and Native Americans were likewise overrepresented, and Christians underrepresented, in those cases. *Id.* at 376-77.

<sup>7</sup> Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 *U. Colo. L. Rev.* 1021, 1036 (2005) (“religious minorities did not experience disproportionately unfavorable treatments in the federal courts of the 1980s and 1990s, under our study”).

<sup>8</sup> *Id.* at 1037.

<sup>9</sup> Chapters 3, 5, 9.

<sup>10</sup> Gregory C. Sisk and Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 *Ia. L. Rev.* 231, 231 (2012). On mistreatment of Muslims, see chapters 3, 8.

<sup>11</sup> Mark Tushnet, “Of Church and State and the Supreme Court”: *Kurland Revisited*, 1989 *Sup. Ct. Rev.* 373, 382–83.

Specific decisions also show how federal and state RFRA protect religious minorities.<sup>12</sup> The Supreme Court has used the federal RFRA to protect drug use in worship services by the tiny O Centro sect of Brazilian religion and a half-inch beard worn by a Muslim prisoner.<sup>13</sup> In the lower courts, a five-year-old Native American student got the right to wear his hair long in school, over officials' objections about security and hygiene (objections they did not apply to girls).<sup>14</sup> A Jehovah's Witness with modest resources got the right to a bloodless liver transplant available out of state, which the state Medicaid program otherwise would not reimburse, and which she needed to stay alive.<sup>15</sup> Sikhs have been able to wear required ceremonial knives (kirpans), appropriately dulled and securely sheathed, when working in government jobs,<sup>16</sup> and to wear beards and turbans as non-combat soldiers.<sup>17</sup> Muslim women have been able to challenge restrictions on wearing veils at work,<sup>18</sup> and pat-down searches by male guards when female guards were available.<sup>19</sup>

Yet state RFRA have become highly controversial in the last five years and now cannot be enacted anywhere except in the deepest red states. A proposed Georgia RFRA and clarifying amendments to Arizona's preexisting statute fell victim to governors' vetoes; Indiana's RFRA barely squeaked through after a firestorm, only because amendments were added eliminating the right to present a religious defense to non-discrimination laws in the commercial context. Only Arkansas and Mississippi have enacted RFRA recently.<sup>20</sup> The firestorms arise, of course, primarily over potential claims by religiously traditionalist wedding vendors (photographers, bakers, florists) to be able to refuse to provide goods or services celebrating a same-sex wedding. But as Christopher Lund has remarked, such cases involving "discrimination or sexual morality or the culture wars" are just "a small fraction of RFRA and state RFRA cases overall. A single fractious issue, highly unrepresentative of the bulk of the cases, is driving the discussion on both the left and the right."<sup>21</sup>

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<sup>12</sup> See, e.g., Christopher C. Lund, RFRA, State RFRA, and Religious Minorities, 53 San Diego L. Rev. 163, 165-71 (2016).

<sup>13</sup> *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006); *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

<sup>14</sup> *A.A. v. Needville Indep. School Dist.*, 611 F.3d 248 (5th Cir. 2010).

<sup>15</sup> *Stinemetz v. KHPA*, 252 P.3d 141 (Kan. App. 2011).

<sup>16</sup> *Tagore v. United States*, 735 F.3d 324, 325-26 (5th Cir. 2013) (reversing district court dismissal of RFRA case and remanding, on ground that government had not shown a security risk).

<sup>17</sup> *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (entering TRO, which eventually led to military providing accommodation).

<sup>18</sup> *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 267-69 (3d Cir. 2010); *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009).

<sup>19</sup> *Forde v. Baird*, 720 F. Supp. 2d 170, 172, 178 (D. Conn. 2010).

<sup>20</sup> CITE(S).

<sup>21</sup> Lund, 53 San Diego L. Rev. at 164-65.

A RFRA in a state like Mississippi is particularly likely to benefit classic minorities out of proportion to traditionalist Christians. That is because—to reemphasize—the dynamic of a RFRA is to protect whoever is in the minority in a particular jurisdiction. When Mississippi’s RFRA was introduced, it could not undermine gay-rights laws in the state;<sup>22</sup> there were none to undermine. Since then, three cities (Jackson, Magnolia, and Clarksdale) have passed gay-rights ordinances.<sup>23</sup> Even taking those into account, the greatest effect by far of a Mississippi RFRA is to give claims to religious minorities, many of them non-Christians, against laws passed in a state whose officials have frequently been indifferent or hostile to minorities. Liberals who are sympathetic to religious minorities like Muslims or Sikhs should welcome the irony that a red-state religious-freedom law is likely to give claims to those groups predominantly.

### **B. Meaningful Freedom**

Equality is important; but is not sufficient. Equality is little comfort without a baseline guarantee of actual freedom; equality alone could allow equal suppression of all religions. Therefore religious freedom requires protection, in some form and to some degree, from generally applicable laws, not just from those targeting religion.

For one thing, with respect to the religious believer’s most important concern—his or her ability to practice the faith—it does not matter whether the restriction comes from a law that singles out religion or one that applies to other conduct as well. Justice O’Connor put the point well in describing the effect that peyote prohibitions have on a Native American worshiper:

[T]hat person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.... [L]aws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.<sup>24</sup>

Put differently: Even if a law does not prohibit the free exercise of religion on its face, it can do so in its application. As Stephanie Barclay and Mark Rienzi put it, “[R]eligious exemption requests are just a version of what is generally thought of as one of the most common, modest, and preferred modes of constitutional adjudication: the as-applied challenge.”<sup>25</sup> Freedom of association can be violated by the application of an otherwise valid law prohibiting discrimination

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<sup>22</sup> For the claim that it would do so, see Letter from Ira C. Lupu *et al.* to Philip Gunn, Speaker, Mississippi House of Representatives, March 10, 2014, at [https://mirrorofjustice.blogs.com/files/2014-03-10-letter\\_by\\_religious\\_liberty\\_scholars\\_opposing\\_mississippi\\_bill\\_2681.pdf](https://mirrorofjustice.blogs.com/files/2014-03-10-letter_by_religious_liberty_scholars_opposing_mississippi_bill_2681.pdf).

<sup>23</sup> Nick Morrow, Human Rts. Campaign, Aug. 14, 2018, <https://www.hrc.org/blog/clarksdale-mississippi-passes-lgbtq-inclusive-non-discrimination-ordinance>.

<sup>24</sup> *Smith*, 494 U.S. at 893, at 901 (O’Connor, J., concurring in the judgment).

<sup>25</sup> Barclay and Rienzi, 59 B.C. L. Rev. at 1597; see *id.* at 1608-23.

in public accommodations;<sup>26</sup> so can freedom of speech.<sup>27</sup> The state can require drivers to display a license plate with the state's message, but not if the driver raises an ideological objection to the message; the same holds for requiring public-school students to recite the Pledge of Allegiance.<sup>28</sup> Protecting religious exercise against the burdensome application of a law, by recognizing a religious exemption, has the same virtue of as-applied decision-making in other contexts. It leaves the law, and government power, in place for all but the circumstances involving the challenger. As Justice Rehnquist explained:

If [the challenger] prevails, the Court invalidates the statute, not in toto, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds.<sup>29</sup>

While targeting may have been the most frequent form of restriction on religion in previous eras, today conflicts with general laws are far more frequent, because of the expansion of government's role. For much of our history, it was relatively easy for government to leave religion largely alone, since most private activities were left largely alone. For many decades, government regulation (mostly through criminal statutes and common law doctrines) focused primarily on the basic protection of direct libertarian interests: life, liberty, and property. Religious believers and groups had no more right than anyone else to invade these interests. In the words of James Madison, the prime congressional mover behind the First Amendment, religious exercise should be free insofar as "it does not trespass on private rights or the public peace."<sup>30</sup> Proponents of religious liberty in the founding period certainly spoke of limits on it: but in doing so they referred to serious societal interests, arguing for example that magistrates were "obliged to maintain society and punish all those who destroy the foundations, as murderers and robbers do."<sup>31</sup> Likewise, when Thomas Jefferson wrote (in his famous letter to the Danbury Baptists) that a citizen has "no natural right in opposition to his social duties,"<sup>32</sup> he wrote from

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<sup>26</sup> *Boy Scouts of Am v. Dale*, 530 U.S. 640 (2000) (violation from forcing an expressive organization to accept a leader whose actions conflict with the organization's message).

<sup>27</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (violation from forcing parade organizers to accept a group whose message they oppose).

<sup>28</sup> *Wooley v. Maynard*, 430 U.S. 705 (1977); *Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>29</sup> *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting).

<sup>30</sup> Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in 9 *The Writings of James Madison* 98, 100 (Gaillard Hunt ed., 1910).

<sup>31</sup> Pierre Bayle, *Philosophical Commentary on These Words of Christ: Compel Them To Come In*, in Pierre Bayle's *Philosophical Commentary: A Modern Translation and Critical Interpretation* 7, 167 (Amie Godman Tannenbaum trans., 1987).

<sup>32</sup> Thomas Jefferson, Letter to the Danbury Baptist Association (Jan. 1, 1802), reprinted in *The Republic of Reason: The Personal Philosophies of the Founding Fathers* 135 (Norman Cousins ed., 1958).

the premise that one does not violate a social duty if he neither “picks my pocket nor breaks my leg.”<sup>33</sup>

In the modern welfare state, however, government pervasively regulates nearly all aspects of society and the economy. Every expansion of regulation means a potential contraction of religious freedom, unless there is some form of protection from otherwise applicable regulation. Measures such as RFRA respond to this threat by requiring government to show some degree of necessity before it regulates religious practice. To be clear: The growth of government regulation is constitutionally legitimate and in many ways wise and necessary. And growth in regulation is bound to shrink religious exercise to some extent, as with other activities. But if there are no exemptions, the expansion of regulation will drastically shrink religious exercise and undercut the constitutional guarantee.

The Bill of Rights was enacted to protect certain freedoms against an expanded government—the new federal government replacing the Articles of Confederation. Later, at the New Deal, the Court allowed a new round of expansion of government’s prima facie powers—generally renouncing review of economic regulation—and instead relied anew on “the first ten amendments” to preserve the sphere of liberty.<sup>34</sup> Free exercise of religion stands among the rights that the Court undertook to preserve at the very moment it effectively recognized a larger role for government in a complex society. The New Deal Justices identified religious exercise as one of the four freedoms having a “preferred place,” meaning they were “susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.”<sup>35</sup> For free exercise to remain meaningful in a world of active government, some such test of necessity must apply even when the restriction stems from a general, secular law.

### **C. RFRA: Neither Radical nor Ineffective**

For years, since before *Employment Division v. Smith*, critics have attacked the compelling-interest test for free exercise claims. Some, like Marci Hamilton, claim that it radically constricts government's ability to regulate religious conduct: that it “elevate[s] all religions ... above all other social concerns and thereby place[s] in jeopardy [a] vast myriad of community and social concerns.”<sup>36</sup> Ira Lupu, by contrast, has for twenty years called the RFRA standard a “failure,” claiming it is “highly likely to be ... predominantly statist”—that “will pretend to be

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<sup>33</sup> “The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.” Thomas Jefferson, Notes on the State of Virginia [CITE].

<sup>34</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

<sup>35</sup> *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Barnette*, 319 U.S. at 639 (referring to all four freedoms although deciding the case based on freedom of speech).

<sup>36</sup> Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 *Nexus: A Journal of Opinion* 33-34 (1997).

sensitive to religious practice, while nearly always deferring to needs of government.”<sup>37</sup> One governor vetoing a RFRA somehow raised both the “radical” and “meaningless” objections simultaneously.<sup>38</sup>

The truth is somewhere in between: the compelling-interest approach has had some substantial effects but not radical ones. When taken seriously by courts, it has operated as Douglas Laycock proposes: as “a balancing test, but with the thumb on the scale in favor of constitutional rights.”<sup>39</sup> Empirical surveys covering three decades show that in religious-exemption claims invoking strict scrutiny, the government wins in roughly two-third to three-quarters of the cases. Adam Winkler, comparing the results of strict scrutiny under various claims from 1990 through 2003, found that free exercise claims (including under RFRA) were the least likely to invalidate the government action: the government won 59 percent of the time, 74 percent if the category involved only challenges to generally applicable laws (where strict scrutiny is triggered only by a RFRA).<sup>40</sup> Other studies show similar results.<sup>41</sup>

Those are not high success rates for religious claimants. RFRA may have been under-enforced; that has been so for RFRA’s counterpart, the Religious Land Use and Institutionalized Persons Act (RLUIPA), according to the most comprehensive case survey.<sup>42</sup> At least exemption claims clearly have not produced the “anarchy” of which *Employment Division v. Smith* warned. But the success rates are also far from meaningless. As noted above, federal and state RFRA

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<sup>37</sup> Ira C. Lupu, *The Failure of RFRA*, 20 Ark. Little Rock L. Rev. 575 (1998); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 Harv. J.L. & Gender 35, 37 (2015).

<sup>38</sup> Govt. Pete Wilson, Veto Message to California Assembly, Bill No. 1617 (Sept. 28, 1998) (asserting that compelling interest test in proposed state RFRA would have “untold consequences” and result in “wholesale invalidation” of laws, and also that the Act was “unnecessary” and meaningless because test already applied under California Constitution).

<sup>39</sup> Laycock, Rutgers J.L.R.

<sup>40</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 857-58, 861 (2006). By contrast, the government won only 22 percent of free speech cases. *Id.* at 844.

<sup>41</sup> Barclay and Rienzi, 59 B.C. L. Rev. at 1640 (government prevailed in 50 percent of RFRA appellate cases from 2014-17, 71 percent if contraception-mandate cases excluded); Goodrich and Busick, 48 Seton Hall. L. Rev. at 379-80 (government prevailed in 56 percent of cases, 75 percent if contraception cases excluded); Gregory C. Sisk, Michael E. Heise, and Andrew P. Morriss, *Searching for the Soul of Judicial Decision-Making: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St. L.J. 491, 544-45, 555 (2004) (finding 35.6 percent success rate for “free exercise/accommodation” cases in federal courts (appellate and trial) from 1986 to 1995); Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 Cardozo L. Rev. 415, 419-20, 422 (1999) (finding 25 percent success rate for religious claimants in RFRA’s first three years).

<sup>42</sup> Douglas Laycock and Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urban L.J. 1021 (2016).

have protected a number of minority religious practices.<sup>43</sup> Protection is important to those faiths—and to the larger faiths that have succeeded in important cases.

It makes sense that application of the compelling-interest test in exemption cases should be strong but not radical or absolute. Other cases governed by strict scrutiny typically involve government discrimination, whether between different races, different religions, or the different content of speech. The court then tends to focus on the lack of "fit" between legislative purposes and means. The law's purpose often sounds important in the abstract, but that is undercut by the fact that the government does not pursue it with respect to all citizens. There is no compelling interest in discriminating; alternatively, the law is not precisely drawn to achieve the compelling interest asserted. Accordingly, discriminatory laws almost always fail strict scrutiny. This also means that the court frequently accepts (if only for argument's sake) that the government interest is important in the abstract. In protecting animal sacrifices by the Santeria group, the Supreme Court did not deny that public health or anti-cruelty norms could justify some prohibitions on killing animals; it said those norms could not justify prohibiting Santeria killings while leaving others alone.<sup>44</sup> In striking down the "Son of Sam" law denying criminals the proceeds from books about their crimes, the Court found a compelling interest in "denying criminals of the profits of their crimes," but no such interest in limiting that denial to profits from books or other forms of speech about the crime.<sup>45</sup>

The matter differs somewhat for generally applicable laws restricting conduct. The more broadly the government applies a restriction, the more credible is its assertion of social need. Thus, it's unsurprising that even the compelling interest test would give religious conduct less than absolute protection from generally applicable laws, but virtually absolute protection against discrimination or targeting.

Nevertheless, "compelling interest" should remain a significant hurdle for the government even in cases involving truly general restrictions on conduct. One key is that the religious claimant seeks not to strike down the law altogether, but only to secure an exemption from its terms. Again, therefore, the ruling will not threaten the government's underlying interest in the abstract. Rather, it will only protect the particular claimant and others similarly situated, a result often far less disruptive to the government's regulatory purposes. Unless the government

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<sup>43</sup> See *supra* p. \_\_\_.

<sup>44</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546, 547 (1993) ("A law cannot be regarded as protecting an interest 'of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation omitted).

<sup>45</sup> *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-21 (1991). See also *Eu v. San Francisco City Democratic Cent. Comm.*, 489 U.S. 211, 226-28, 231-32 (1989) (finding compelling state interest in preserving a stable electoral system and fair elections, but holding that these could be served by more direct and narrowly tailored terms than intrusive regulation of political parties' internal affairs).



can show a serious harm from the exemption itself, then it must follow the “less restrictive means” of exempting the religious believer while continuing to enforce the law in general.<sup>46</sup> This structure of analysis makes it possible to avoid many conflicts between religion and government; the believer can practice her faith, and the government can achieve its goal in the other 99 percent of cases.

Moreover, the compelling-interest test entails that certain governmental interests are insufficient in the first place. The law in question must at least relate to “public safety, peace, and order,” in the words of *Yoder* and *Sherbert*, the two decisions that serve as the model for RFRA.<sup>47</sup> For example, to the extent that preservation or zoning ordinances reflect interests in aesthetics and not in safety or non-disruption, they are categorically insufficient.<sup>48</sup>

RFRA has effects beyond litigation results. Representatives of religious believers and organizations report that religious-freedom legislation gives them leverage in negotiating with government: it forces officials to consider religious claims they would otherwise dismiss. To take just one example: After RFRA’s passage, the Illinois prison system adopted rules ensuring religiously compliant diets for Jewish, Muslim, and other prisoners. After the Supreme Court struck down RFRA as applied in states in 1997, the prison system moved to withdraw the rules; but after Illinois passed its own RFRA in 1998, the process halted and the rules remained.<sup>49</sup> The presence or absence of RFRA-like legislation had a decisive impact on administrators’ behavior.

The success rates for RFRA claims, as shown by Barclay and Rienzi’s survey, stayed roughly the same after *Hobby Lobby*.<sup>50</sup> This belies the warning of *Hobby Lobby*’s critics that the majority opinion had “weaponized” RFRA.<sup>51</sup> Critics charged that the opinion could produce “a radical shift from decades of law involving claims for religious exemptions”—that it “afford[s] *more* protection for religion than has ever been provided under the First Amendment.”<sup>52</sup> The

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<sup>46</sup> RFRA requires the government to show that “application of the burden to the person” is the least restrictive means to a compelling interest. 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 430-32; see also *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

<sup>47</sup> *Yoder*, 406 U.S. at 230; *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

<sup>48</sup> See *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77, 79-80 (D.D.C. 1994) (protecting church homeless shelter from zoning law when it had operated safely for 10 years); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (exempting church from landmark ordinance).

<sup>49</sup> See Presentation by Laurie Tockey, President, Illinois Conference of Prison Chaplains, DePaul University, Chicago, Apr. 30, 1999 (author’s notes from presentation).

<sup>50</sup> Barclay and Rienzi, at 1641 (“Our findings do not demonstrate a dramatic drop in government win rates post-*Hobby Lobby*.”).

<sup>51</sup> <https://religionnews.com/2016/06/08/the-weaponization-of-religious-liberty/>

<sup>52</sup> Marty Lederman, The one (potentially) momentous aspect of *Hobby Lobby*: Untethering RFRA from free exercise doctrine, Balkinization, July 6, 2014, <https://balkin.blogspot.com/2014/07/hobby-lobby-part-xviii-one-potentially.html> (emphasis in original); Micah Schwartzman, Richard C. Schragger, and Nelson

dispute here concerns the extent to which RFRA incorporated all of the results of free exercise cases decided before *Employment Division v. Smith*. After first applying the compelling-interest test to require exemptions in *Sherbert* and *Yoder*, the Court in the 1980s began to reject claims.<sup>53</sup> If RFRA incorporated all of that later case law—merely turning the clock back to the day *Smith* was decided—its use of the term “compelling interest” would indeed have been nearly meaningless. Indeed, one critic of *Hobby Lobby*, Marty Lederman, argued just that: that although Congress used the language of strict scrutiny, it “did not intend to prescribe strict scrutiny.”<sup>54</sup> So, he and other critics argue, *Hobby Lobby* misconstrued RFRA when it gave the statute any significant force.

The dispute came to a head over *Hobby Lobby*’s treatment of one pre-*Smith* decision, *United States v. Lee*.<sup>55</sup> There the Court had rejected claims by Amish employers to be free from paying Social Security taxes for their employees (also Amish). The Court held that unlike the situations where exemption claims had been upheld, “the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”<sup>56</sup> At the end of the opinion, the Court added that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”<sup>57</sup> In *Hobby Lobby*, the government relied on *Lee*, but the Court answered that *Lee* had “turned primarily on the special problems associated with a national system of taxation”—where “allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos”—while in contrast, under the contraception mandate employers did not pay into a single national pool but bought insurance more specifically for their employees.<sup>58</sup> As to *Lee*’s statement about commercial-activity exemptions, the Court answered that “*Lee* was a free exercise, not a RFRA, case, and the statement [in *Lee*], if taken at face value, is squarely inconsistent with the plain meaning of RFRA,” which does not exclude commercial regulations from the statute’s reach.<sup>59</sup>

In fact, the Court was right not to follow all of the language of *Lee*—but that does not mean RFRA is now “radical.” There is a sensible middle, one that also interprets RFRA’s text

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Tebbe, The New Law of Religion, Slate, July 3, 2014, <https://slate.com/news-and-politics/2014/07/after-hobby-lobby-there-is-only-rfra-and-thats-all-you-need.html>.

<sup>53</sup> See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones v. University v. United States*, 461 U.S. 574 (1983); etc.

<sup>54</sup> Lederman, *supra*.

<sup>55</sup> 455 U.S. 252.

<sup>56</sup> *Id.* at 259-60.

<sup>57</sup> *Id.* at 261.

<sup>58</sup> 134 S. Ct. at 2784.

<sup>59</sup> *Id.* at 2784 n.43.

faithfully. The explicit statutory purpose is “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.”<sup>60</sup> This statement connects the test to the pre-*Smith* precedents, but at the point where the protection they gave was most vigorous, and religious claimants won. Still, those decisions did not give an absolute right. *Sherbert* protected eligibility for unemployment benefits for a Saturday worshiper who refused Sabbath work, but it suggested the state could deny benefits if a practice made the employee “a nonproductive member of society.”<sup>61</sup> *Yoder* protected the Amish from sending their children to school after age 14, but only because of a showing that Amish vocational education prepared them successfully for work; the Court still emphasized the important interest in requiring and regulating education.<sup>62</sup> These decisions instituted a case-by-case “close scrutiny,” hospitable to exemptions, but not an absolute right.

But some pre-*Smith* decisions with any plausible reading of RFRA’s key terms, and *United States v. Lee* is among them. The Court there assessed the consequence not of a limited exemption for social security objections by the Amish, but a broad exemption for all objectors to taxes. As the Court later held unanimously, reliance on such a general interest conflicts with RFRA’s explicit text requiring the government to justify “the application of the burden to the person.”<sup>63</sup> Justice Stevens, concurring in *Lee*, concluded that the majority’s logic meant there was “virtually no room” for an exemption from a generally applicable tax law—a foreordained result likewise irreconcilable with RFRA’s text. And as Laurence Tribe observed, RFRA’s phrase “least restrictive means” did not even appear in *Lee*, which used the “looser standard” that the government could deny any exemption that “unduly interfere[d] with its interest.”<sup>64</sup> RFRA’s text should be shaped by previous rulings—but not by a ruling like *Lee*, if the text is to mean anything.

Professor Lupu says that RFRA’s are inevitably “unprincipled, ad hoc, inconsistent, [and] subject to manipulation.”<sup>65</sup> It would take too long to rebut that charge, but his criticism of *Hobby Lobby* is illustrative. The Court there ultimately held that the government could pursue its goal of cost-free contraceptive coverage for employees through a less religiously restrictive means: the same accommodation the government had already adopted for nonprofit religious objectors like colleges and social services. Employees would receive the same cost-free coverage; it would be provided separately by the employer’s insurer, who could afford to do so because, under the government’s own premises, covering contraception saves costs on net. The same mechanism

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<sup>60</sup> 42 U.S.C. § 2000 bb(b).

<sup>61</sup> 374 U.S. at 410.

<sup>62</sup> 406 U.S. at 235-36.

<sup>63</sup> 42 U.S.C. § 2000bb-1(b); *O Centro*, 546 U.S. at 430-32.

<sup>64</sup> Laurence H. Tribe, *American Constitutional Law* 1261 (2d ed. 1988).

<sup>65</sup> Lupu, 38 Harv. J.L. & Gend. at 37.

could work for closely held for-profit objectors.<sup>66</sup> This narrow resolution commanded a majority, but broader propositions did not: and as a result, admittedly, *Hobby Lobby* did not end litigation over the contraception mandate.<sup>67</sup>

But Professor Lupu is wrong to complain that after *Hobby Lobby* there still is no interpretive approach to RFRA “that will square its history with its text, or produce a consistent practice of drawing on pre-*Smith* decisions.”<sup>68</sup> As I’ve just argued, there is a posture—“close scrutiny”—that avoids both absolute protection and statist deference and also fits with how the text treats the pre-*Smith* decisions. Moreover, as Professor Lupu acknowledges, “legal uncertainty and a splintered Supreme Court are not unique to the enterprise of religious exemptions.”<sup>69</sup>

Even more important, however, consider what the Court’s use of RFRA in *Hobby Lobby* accomplished. The contraception mandate ranks among the bitterest clashes of the culture wars: a “perfect storm” that whipped up people on one side to protest in front of the chain’s stores, and on the other side to accuse the government of a totalitarian assault on their conscience. The polarized political process had produced no solutions to the for-profit dispute—which meant either that women with modest resources would lack access to contraception (if the mandate were repealed) or that family business owners would be forced to spend their resources insuring what they believed to be the killing of human beings (if the mandate survived without exemptions). Although *Hobby Lobby* was controversial, the alternatives would have been even more so. RFRA worked, as it was intended, to strike a “sensible balanc[e]” between religious freedom and the interests of others and society.<sup>70</sup> On an issue with deeply entrenched combatants—an increasingly common situation in our nation—the decision exemplified how RFRA standards can guide courts and disputants toward resolutions respecting the interests of both sides.

## II. “Harms to Third Parties”: Relevant but Not Conclusive

In recent years, opponents of religious accommodation have focused on how it may cause “harm to third-parties,” particularly to individuals who do not share the protected religious belief. This argument became central to the opposition to protecting the companies in *Hobby Lobby*. The federal government asserted that exempting them would contravene a compelling interest

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<sup>66</sup> *Hobby Lobby*, 134 S. Ct. at 2782-83 & n.38. For self-insured employers, coverage would be by a third-party administrator, who would be compensated out of the ACA insurance exchanges.

<sup>67</sup> See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (remanding for consideration of means to modify nonprofit accommodation to remove nonprofits’ objections even to more limited involvement).

<sup>68</sup> Lupu, 38 Harv. J. L. & Gend. at 91-92.

<sup>69</sup> *Id.* He cites the Court’s treatment of affirmative action; one might cite other topics as well.

<sup>70</sup> 42 U.S.C. § 2000bb(a)(5).

under RFRA because it would deny female employee the important benefit of contraception coverage. Scholars and amici went further, asserting that this harm, or shifting of costs, would violate the Establishment Clause.<sup>71</sup>

Thus, arguments asserting third-party harms take two forms: First, if the law contains no exemption and the religious adherent raises a RFRA or other religious-freedom challenge, the government (or private litigants) might assert a compelling interest in preventing third-party harms. Second, if the law contains an exemption, or a court considers declaring one, the opponents of the exemption might argue that it would violate the Establishment Clause. Both of these contexts require examining the nature and severity of (1) the burden on religious exercise if no exemption is created and (2) the effect on others if one is created. But identifying these two considerations does not prescribe how to compare them. How significant must the third-party harms be to overcome religious claims?

My answer is that harms to others should not be conclusive. They can certainly warrant denying exemption, but they do not end the inquiry: a number of other factors must be considered. In particular, Establishment Clause limits on religious exemptions should not be strict. An exemption is not unconstitutional merely because it has negative effects on others: the burdens on others must be significantly disproportionate to the burdens that it removes from religious exercise.

Obviously harms to others are relevant: religious freedom does not protect killing someone in a ritual sacrifice, or defrauding others because the perpetrator perceives a religious duty. But at least three problems complicate the concept of harms. The first is definitional: what counts as “causing harms” or “shifting costs”? In a complex society, almost any action could count. For that reason, scholars of John Stuart Mill’s “harm” principle acknowledge that taken alone it is “largely an empty formula,” with one concluding that “[c]laims of harm have become so pervasive that the harm principle has become meaningless.”<sup>72</sup>

The definitional problem has expanded because the scope of government has increased greatly. As noted above, founding-era statements on the line between religious freedom and

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<sup>71</sup> See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343 (2014); Frederick Mark Gedicks and Andrew Koppelman, The Costs of the Public Good of Religion Should Be Borne by the Public, 67 Vand. L. Rev. En Banc 185 (2014), <https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2014/06/Gedicks-Koppelman-Response.pdf>; Micah Schwartzman et al., *Hobby Lobby* and the Establishment Clause, Part III: Reconciling *Amos* and *Cutter*, Balkinization (Dec. 9, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause-9.html>, archived at <http://perma.cc/VWZ6-JEA6>.

<sup>72</sup> Joel Feinberg, Harm to Others 203 (1984); Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109, 113 (1999).

social duties reflect a limited conception of government’s role: as when Pierre Bayle defended magistrates’ power and duty “to maintain society and punish all those who destroy the foundations, as murderers and robbers do,” and Thomas Jefferson spoke of religious freedom for those actions that “neither pic[k] my pocket nor brea[k] my leg.”<sup>73</sup> This framework prohibited various harms, but it also left a large zone of freedom in which religious organizations and individuals could act, in ways that affected others but were not defined as a legal harms.

But the welfare-regulatory state declares much broader legal harms. For example, at-will employment has given way to extensive regulation of the employment relationship: government declares it a legal harm when an employee is barred from unionizing or is discriminated against based on a prohibited characteristic. As I’ve already said, the legitimate expansion of regulation will inevitably, legitimately shrink the scope of free religious practice (as with other behavior). But if any harm is enough, and the government can call anything a harm, then religious freedom will shrink dramatically.

The contraception mandate is a prime example of modern government declaring a legal entitlement unknown to the common law: guaranteed insurance coverage (for contraception) without cost-sharing. There were good reasons to create the entitlement. But it also created new conflicts with the religious tenets of organizations and individuals, and government should not be able to win those conflicts by fiat—just by declaring the entitlement. The Supreme Court correctly recognized this in *Hobby Lobby*. The extent to which a denial of a benefit materially affects others, the Court said, “will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means” of advancing it.<sup>74</sup> But it cannot be, the Court added,

that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. [If that were so, then by] framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.<sup>75</sup>

A related problem is that of reciprocal cost-shifting. Ronald Coase taught us that for many legal conflicts, it is too simple to say that A is inflicting harm on B and therefore must be restrained: rather, “[w]e are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A.... The real question that has to be decided is: should A be allowed to

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<sup>73</sup> Bayle, *supra* note XX; Jefferson, *supra* note XX.

<sup>74</sup> 134 S. Ct. at 2781 n.37.

<sup>75</sup> *Id.*

harm B or should B be allowed to harm A? The problem is to avoid the more serious harm”<sup>76</sup>— or at least, to choose an appropriate baseline for determining which harm to avoid. Take an example of the Coasean question applied to religious exemptions: Does a religious organization harm an employee by firing her, or would the employee harm the organization by insisting on continued employment when the organization believes that would not serve its mission? The “ministerial exception” to Title VII clearly gives the second answer when the employee is a minister; there is more debate about non-ministerial employees. But the issue cannot be resolved simply by reference to “harm.”

The third problem with a flat no-harm criterion is its conflict with precedent. Many familiar, accepted religious accommodations involve clear effects on individual third parties; the ministerial exception is just one example.

- Draft exemptions shift effects from the pacifist to another person who must be drafted.
- The clergy-penitent privilege may shift harm to the crime or tort victim who loses the benefit of testimony.
- Title VII’s religious-hiring exemption in Title VII, unanimously held permissible in *Corporation of Presiding Bishop v. Amos*,<sup>77</sup> allows a religious organization to fire or refuse to hire employees, in any job, who are non-adherents of the faith.
- Protecting faith-based homeless shelters or food pantries from overly restrictive zoning regulations<sup>78</sup> can have some effect on neighbors’ property values.

These and other examples vindicate *Hobby Lobby’s* warning that many well-accepted religious protections would be eliminated if it were impermissible to affect third parties.

The next section briefly explores various factors, besides the existence of harm, that make an accommodation appropriate or not.<sup>79</sup> I then turn to asserted Establishment Clause limits on accommodations.

### **A. Harms and Government Interests**

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<sup>76</sup> R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 2, 2 (1960). See Stephanie H. Barclay, *First Amendment Categories of Harm 29-32* (unpublished manuscript) (applying Coase to religious-exemption issues).

<sup>77</sup> 483 U.S. 327 (1987).

<sup>78</sup> The very point of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, is to protect such activities. See *also* *Chosen 300 Ministries v. City of Philadelphia*, 2012 WL 3235317 (E.D. Pa. 2012) (entering preliminary injunction for feeding ministry under Pennsylvania RFRA).

<sup>79</sup> For similar factors, see Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 *Notre Dame L. Rev.* 1375 (2016).

### **1. Immediacy and concentrated nature of the harm**

It does matter that a harm is immediate and concentrated. There is a difference between saying that a person cannot (for religious reasons) assault another or trespass on her property and saying that she cannot ingest drugs at a worship service because some of the supply might later be illegally trafficked and end up harming others. Both cases involve asserted harms to others, but the harms in the drug case are indirect, dependent on contingent chains of events, and diffused throughout society. Modern government can regulate to head off indirect or diffuse harms; but when the regulation substantially burdens religious exercise, that application should be subject to stringent review to show that the harm will be severe and the regulation necessary to prevent it. A wide range of commentators acknowledge that religious freedom is a “public good” and that “[t]he costs of permissive accommodations may be imposed on the public or one of its broad subsets.”<sup>80</sup> In contrast, direct, particularized harms to an individual are more likely to justify denying an exemption.

### **2. Proximity to core of religious exercise**

But even actions with particularized effects on another must be protected in some circumstances. We can see this, for example, in employment disputes involving religious organizations. Both the ministerial exception and the Title VII religious-hiring exemption allow religious organizations to deny a specific individual employment—an individualized, and potential serious effect—but the Court has unanimously upheld both provisions (indeed, unanimously *requiring* the ministerial exception). These hiring decisions are protected because they are part of the organization’s internal governance and self-definition, which are crucial to shap[ing] its faith and mission.”<sup>81</sup>

This argument for religious organizational freedom applies not only to houses of worship and to employees who are members of the church. It also applies, with at least some force, to non-members who agree to work for a non-profit organization with a meaningful religious mission. The organization depends upon those employees, too, to carry out its “faith and mission”; their loyalty to the mission is a crucial element of the exercise of religion. And they too have chosen to associate with the organization. As even scholars skeptical of accommodation have acknowledged, there is often a “reasonable expectation that employees who work for

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<sup>80</sup> Gedicks and Koppelman, 67 Vand. L. Rev. En Banc at 187; Alan Brownstein, Taking Free Exercise Rights Seriously, 57 Case W. Res. L. Rev. 55, 129, 130 (2006) (arguing that “[c]onstitutional guarantees, such as freedom of speech or freedom of religion, are public, political goods” and “the state is often required to incur expenses in order to allow other rights such as freedom of speech to be exercised”).

<sup>81</sup> *Hosanna-Tabor*, 132 S. Ct. at 707; see *id.* at 706 (referring to “the internal governance of the church” and “a religious group’s right to shape its own faith and mission through its appointments”). See also *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (right to decide “matters of church government as well as those of faith and doctrine”).



churches and religious-affiliated non-profits understand that their employers are focused on advancing a religious mission.”<sup>82</sup> It is important to ensure that employees have reasonable notice of the organization’s religious nature and policies. But when such notice exists, the organization’s interest in ensuring employees adhere to its norms is a strong one.

On the other hand, exemptions must be more limited when they affect employees or customers in the commercial marketplace. Non-profits that serve explicitly religious purposes are generally closer to the core of religious exercise than are for-profit businesses selling ordinary secular products. By their very identity, these non-profits carry out the mission of a religious community. And in extending further from the core of religious exercise, for-profit exemptions can affect vastly more persons: the religious non-profit sector covers perhaps 6-7 percent of jobs, but the for-profit sector probably covers ten times that.<sup>83</sup> The state therefore has a heightened interest in regulating the for-profit sector to ensure full participation by all people in economic life, and fair competition for profits. Moreover, sincerity of religious purpose can be presumed more safely with a religiously affiliated non-profit than with a profit-making business.<sup>84</sup> And expectations differ in the two contexts: while people should certainly expect that a religiously affiliated school or social service may run on religious principles, they have less reason to expect this of the ordinary commercial business.

Businesses and their owners can certainly have serious religious interests. The Supreme Court correctly held in *Hobby Lobby* that closely held for-profit corporations could “exercise religion” and therefore raise claims under RFRA.<sup>85</sup> But it makes sense that there will be broader protections for non-profits with significant religious purposes, and narrower protections for ordinary commercial businesses run by religious individuals.

### **3. Severity of the harm**

Of course, a key question ultimately is the severity of the harm. Even a diffuse harm may be very serious: consider, for example, a serious threat to national security or public safety. Conversely, even a relatively individualized harm may be minimal. The nature and severity of the harm is a crucial question in cases involving conflicts between religious freedom and gay rights: I discuss these in Chapter 9.

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<sup>82</sup> Micah Schwartzman et al., *Hobby Lobby* and the Establishment Clause, Part III: Reconciling *Amos* and *Cutter*, Balkinization (Dec. 9, 2013), archived at <http://perma.cc/VWZ6-JEA6> (emphasis added).

<sup>83</sup> For the derivation of this number, see Thomas C. Berg, Religious Accommodation and the Welfare State, 38 Harv. J.L. & Gender 103, 127 n.23 (2015).

<sup>84</sup> See, e.g., *Amos*, 483 U.S. at 344 (Brennan, J., concurring) (“The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation.”).

<sup>85</sup> 134 S. Ct. at 2769-72.

#### **4. Less restrictive means**

Finally, under RFRA, the government must show that its restriction not only serves a compelling interest but does so by the least restrictive means. *Hobby Lobby* held that the mechanism for coverage by the insurer or third-party administrator was an available, less restrictive means. In many such cases, there are other mechanisms as well to diffuse the costs of accommodation: increased subsidies to employees, or tax incentives to encourage providers to offer goods or services at lower prices.<sup>86</sup> For example, the Trump HHS has now added employees whose religious employers refuse contraception coverage to the definition of “low-income family” members eligible for Title X subsidized contraception.<sup>87</sup>

The focus on “less restrictive means” has the advantage of encouraging government to find pragmatic solutions to accomplish its goals without substantially burdening religion. In the contraception cases, the Obama administration, under pressure from RFRA lawsuits, devised a creative mechanism to accommodate objections by religious non-profits; then the Court, in deciding *Hobby Lobby*, applied the mechanism to closely-held for-profits. Without RFRA’s mandate to explore means of accommodating religious objections, there would have been little or no legal pressure for the administration or the Court to engage in this problem solving.

#### **B. Establishment Clause**

When the question is whether the Establishment Clause bars an exemption meant to protect religious exercise, the factors just discussed apply—but they should be weighed with deference to the exemption. The clause places some outside limits on how far a statutory exemption may go, but those limits should be lenient.

It is clear that an exemption provision is not invalid simply because it singles out religious practice for protection, even if that imposes some costs on others. As already noted, the *Amos* decision unanimously approved an exemption that immediately harmed others (Title VII’s exemption of religious organizations from liability for religious discrimination in employment). The Court emphasized “there is ample room for accommodation of religion,” and that a law does not advance or sponsor religion “merely because it *allows* churches to advance religion.”<sup>88</sup> Another unanimous decision, *Cutter v. Wilkinson*,<sup>89</sup> approved the provision of the Religious Land

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<sup>86</sup> See, e.g., *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (listing such options concerning contraception; Brownstein, *supra* note 20, at 128-29 (generally discussing means of diffusing effects among larger public).

<sup>87</sup> HHS, Proposed Rule, Compliance with Statutory Program Integrity Requirements (amending 42 CFR 59.2) (June 1, 2018) (Final Rule issue November 7, 2018).

<sup>88</sup> *Amos*, 483 U.S. at 337-38 (emphasis in original).

<sup>89</sup> 544 U.S. 709 (2005).

Use and Institutionalized Persons Act (RLUIPA) that protects state prisoners' exercise of religion unless the prison can show a compelling interest in restricting it.

There are Establishment Clause limits on exemptions, and third-party harms figure in those limits. *Estate of Thornton v. Caldor, Inc.*,<sup>90</sup> for example, invalidated a statute imposing an absolute duty on employers to grant an employee's request for his Sabbath day off. And *Cutter*, while upholding RLUIPA's prison provisions, laid out a three-part Establishment Clause test that includes whether the accommodation in question takes "adequate account of the burdens [it] may impose on nonbeneficiaries."<sup>91</sup> The *Cutter* test, however, should not be a stringent one. An exemption should not be struck down unless the direct, immediate burdens it imposes on others are clearly disproportionate to the burdens it removes from religious practice. For several reasons, there should be a great disparity between the two factors.

### ***1. Theoretical/historical distinction between accommodations and establishments***

First, the theoretical and historical foundations for calling an accommodation an establishment are shaky, and they support only a modest Establishment Clause limit. Historically, exemptions of religious practice from government regulation were not typical components of establishment: exemptions were created to protect minority faiths, not the established majority. "Exemptions protect minority religions," Douglas Laycock has shown, "and they emerged only in the wake of toleration of dissenting worship," as part of "a political commitment to free exercise," not to establishment.<sup>92</sup>

Frederick Gedicks and Rebecca Van Tassell argue that "[p]ermissive accommodations that require unbelievers and nonadherents to bear the costs of someone else's religious practices constitute a classic Establishment Clause violation."<sup>93</sup> They point out that classic establishments "imposed legal and other burdens on dissenters and nonmembers that [they] did not impose on members."<sup>94</sup> But this analogy is weak. Historic establishments pressured dissenters to attend the favored church or required them to pay taxes for its support. Such requirements differ from regulatory exemptions in the very ways that are at issue. Compulsion to attend a church is compulsion to engage in a religious practice, something that no regulatory exemption requires.

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<sup>90</sup> 472 U.S. 703, 708-10 (1985).

<sup>91</sup> 544 U.S. at 720.

<sup>92</sup> Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 *Notre Dame L. Rev.* 1793, 1796, 1803 (2006); accord Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1511 (1990) ("There is no substantial evidence that [religious] exemptions were considered constitutionally questionable.").

<sup>93</sup> Gedicks and Van Tassell, *supra*, at 363.

<sup>94</sup> *Id.*

Required tax support for the favored religion removes no legal burden on that faith and thus serves no free exercise interest. By contrast, most exemptions from regulation serve free exercise interests.

The difference between exemptions and compelled support is plain in the law. The Court has said there is an especially strong, “historic and substantial,” Establishment Clause interest in preventing compelled support for clergy.<sup>95</sup> If regulatory exemptions were analogous to subsidies, then the clergy context would be the least appropriate one for exemptions. But the law is exactly the opposite: the ministerial exemption was affirmed unanimously in *Hosanna-Tabor*, and within its domain it is absolute, the strongest religious-freedom exemption in American law. Clergy and worship services present the strongest context for exemption—and the weakest one for subsidies. That is because exemptions, unlike compelled subsidies, serve interests in religious autonomy, for which clergy and worship are the core contexts.

There is a second disconnect between exemptions and establishments. Proponents of the “third-party harm” theory hasten to say that they only to object to accommodations that impose concentrated costs on a narrow, defined group: as already noted, they would permit government to accommodate when the cost can be spread among the broader population.<sup>96</sup> (If even diffuse costs were forbidden, all accommodations would be forbidden.) But tax-financed subsidies are the epitome of a widely spread cost: all taxpayers bear a small incremental share. The limit that “third-party harm” proponents adopt to save their theory undercuts the central analogy on which they rely.

There is a more pertinent historical case concerning the constitutionality of religious exemptions that immunize harm to third parties. It is “benefit of clergy,” the arrangement by which clerics in the medieval church were immune from civil jurisdiction—triable only in church courts—for any felonies they committed.<sup>97</sup> King Henry II’s attempt to shrink this privilege and prosecute “criminous clerks” in royal courts for rapes, murders, and thefts lay at the core of his confrontation with Archbishop Thomas Becket in the mid-12th century.<sup>98</sup> Although benefit of clergy had shrunk in impact by the time the American colonies were founded,<sup>99</sup> its original form can easily be seen as a feature of establishment.<sup>100</sup> Unlike compelled worship or financial

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<sup>95</sup> *Locke v. Davey*, 540 U.S. 712, 725 (2004); *id.* at 722 (“[W]e can think of few areas in which a State’s antiestablishment interests come more into play.”).

<sup>96</sup> See *supra* at note 80.

<sup>97</sup> See, e.g., George W. Dalzell, *Benefit of Clergy in America & Related Matters* 9–15 (1955); Theodore F.T. Plucknett, *A Concise History of the Common Law* 439–41 (5th ed. 1956).

<sup>98</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 255–64 (1983); Plucknett, *supra* note XX, at 439.

<sup>99</sup> Dalzell, *supra* note XX, at 16–23; Plucknett, *supra* note XX, at 441.

<sup>100</sup> For example, an Indiana court in 1820 rejected a convicted murderer’s claim to a reduced sentence under benefit of clergy, saying: “The benefit of clergy ... originated with that of sanctuary in the gloomy

support, benefit of clergy involved the feature relevant to accommodations: exemption of religious actors from secular regulation when they had caused harm to others.

But the analogy to benefit of clergy does not mean rejecting most modern exemptions, for the two are quite different. First, benefit of clergy shielded wrongdoers from state jurisdiction even when there was no particularized conflict between the law in question and the demands of faith. Neither clerics nor the church argued that faith or mission called them to engage in felonies. Rather, the church asserted a purely jurisdictional claim: autonomy to resolve cases in its own courts. Such a claim is strong with respect to internal matters of church governance (again, the ministerial exception is absolute within its scope). But a religious organization cannot have such absolute protection in contexts where third parties are significantly affected. In those contexts, exemptions should—and the large majority do—avoid a particularized conflict between the civil law and a religious claimant’s tenets or identity.

Second, benefit of clergy blocked the government from preventing serious, direct harms to the person and property of other individuals: murder, rape, theft. We might argue over baselines of harm in other cases: is the religious employer harming its employee who it disciplines, or is the employee violating a norm of loyalty to the employer’s mission? But under any plausible baseline, acts of violence or theft impose (serious) harm on others. By contrast, most exemptions today concern laws that reflect the more extensive aims of the modern welfare state (laws that extend to situations where baselines are contested.) Thus, the analogy to benefit of clergy raises again the problem of defining the relative limits of regulation and the countervailing right to free exercise of religion. The proper balance recognizes modern government’s expanded power but does not simply call any effect on others an impermissible harm.

## ***2. Deference to legislative judgments***

Second, when the question is whether a statutory exemption is permissible, the policy of deference to government’s balancing of goals cuts in favor of the exemption. If modern regulators have leeway to define legal harms in order to pursue varying interests, then they should have leeway to protect religious freedom among those interests. It would make little sense, for example, to say that a state that recognized same-sex marriage could not simultaneously exempt religious adoption agencies or counseling organizations, in order to balance the two rights. Why would it be any different if the legislature creates exemptions in response to a court decision ordering same-sex marriage than if the legislature had enacted the accommodation at the time it recognized marriage equality legislatively?

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days of popery.... The statutes of England on the subject are local to that kingdom ... and are certainly not adopted as the laws of our country.” Dalzell, *supra* note XX, at 238 (citing Fuller v. State, 1 Blackf. 66).

The expansion of regulation in the modern state has narrowed the effective scope of the free exercise of religion, and within some range government clearly has discretion to do so. But the expanded state should likewise narrow the scope of the non-establishment rule. The government should similarly have discretion to reduce the effects that its own expansion has on religious freedom—including effects caused by the declaration of new legal harms involving third parties. Otherwise, the expansion of the state is a one-way ratchet, allowing government to shrink free exercise but not to preserve it.

Establishment Clause review of the balance between religious accommodation and other rights should not be stringent. As Michael McConnell has observed, “when legislatures adjust the benefits and burdens of economic life among the citizens, they regularly impose more than a de minimis burden for the purpose of protecting important interests of the beneficiary class”: consider, for example, the duty of reasonable accommodation of disabilities.<sup>101</sup> The legislature should have as much latitude to protect religion as it has to protect these other important values.<sup>102</sup> Moreover, because “[a]ny comparison of benefits and burdens will admittedly suffer the problem of comparing apples and oranges,” the analysis cannot be highly rigorous: “The courts should be satisfied if they have examined the legislative accommodation and determined that the burden on nonbeneficiaries is not obviously disproportionate. Deference to legislative judgment is appropriate here; secular economic interests are not under-represented in the political process.”<sup>103</sup>

### **3. Case law**

The “significantly disproportionate burdens” standard gives the best account of the Establishment Clause case law. [OMITTED FOR THIS PRESENTATION]

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<sup>101</sup> Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 *Geo. Wash. L. Rev.* 685, 704 (1992).

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

<sup>103</sup> *Id.* at 705.