Commissioner Peter Kirsanow Statement

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

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

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

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

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

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


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

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

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


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

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


Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize “the right of the individual, married or single, to be free from unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (emphasis in original). Our precedents “have respected the private realm of family life which the state cannot enter.” These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State [citations omitted].
everyone has the ability to engage in sexual conduct without cost or consequence, whether in money, unwanted children, or hurt feelings. An individual’s sexual behavior is considered an act of self-creation and something that goes to the deepest level of their identity. Criticism of an individual’s behavior is considered an attack on the dignity of the person. Naturally, this worldview is at odds with many aspects of traditional morality grounded in sexual restraint.

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

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

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


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


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

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

But those who claim to know what God wills in some human context, and that that will should be obeyed, are (as I have said) going beyond what can be affirmed about D on the basis of philosophical argumentation. They are claiming (like Plato, but relying unlike him upon some definite revelation) that God positively favours both the basic goods and human adherence to the principles and requirements of practical reasonableness in the pursuit of those goods; that the evils and disorders of this world are not favoured so, but are merely tolerated by God for the sake of some positive good (what, and how attained, we do not know); and that friendship with God, some sharing in God’s life and knowledge and love-of-goods, is available to those who positively favour what God positively favours. In the context of such beliefs—and it is only in such a context that claims about the authoritativeness of God’s will for man are plausibly made—the question ‘Why should God’s will be obeyed?’ has no bite.
breaking the moral law, or to applaud breaking the moral law. In a predominantly Judeo-Christian society, this worldview is most closely reflected in the Ten Commandments. Although believers realize that they break the Ten Commandments both through what Christians often call “sins of omission” and “sins of commission,” they are not free to change “Thou shalt not bear false witness” to something more congenial. Instead, they are told to repent of their sin and to try to avoid repeating it.

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

I. **Secularism and Religion**

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

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

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

11 *Id.* at 114.

12 *Id.* at 111-113.

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

14 *Id.* at 120-21.
Not only do the secularists believe the providentialists are wrong, but, Smith says, they regard the providentialist view as a heresy.\textsuperscript{15} Naturally, the heretics vehemently disagree.

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

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

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

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

Conversely, impassioned critics, including many ordinary Americans citizens, saw the decisions as radical and transformative. Here the understandings of the cultural elite and less privileged Americans parted: thus John Jeffries and James Ryan observe that “the controversy over school prayer revealed a huge gap between the cultural elite and the rest of America.\textsuperscript{15}Id. at 123.

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

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

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

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

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

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

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

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19 *Town of Greece*, 134 S.Ct. at 1822-23.
20 *Id.* at 1824.
22 See *id.* at 216-220.
23 *Id.* at 251.
rooted in moral judgments opposed by secularists are invalid, especially anything to do with sexual liberty, but it is perfectly fine if moral judgments are invoked to support their favored political positions, such as amnesty for illegal immigrants.

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

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

24 See supra note 4.


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


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

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

e. Tr. 395:14-18 (Chauncey: Many clergy in churches considered homosexuality a sin, preached against it and have led campaigns against gay rights.);
play, especially in regard to same-sex marriage, but the courts choose one over another while pretending to be neutral.\textsuperscript{27} It is permissible for a pro-same-sex marriage campaign to be animated by the belief that same-sex marriage is morally good, but it is impermissible for a pro-traditional marriage campaign to be animated by the belief that same-sex marriage is morally wrong.\textsuperscript{28}

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

\textsuperscript{27} Id. at 1002.

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

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

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

\textsuperscript{29} Smith, supra note 9, at 126.

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

\textsuperscript{30} Id. at 125.
This sense of resentment is fed by the memory that for much of American history, religious reasons and arguments were freely used in political discourse. Rawls argues that during the Founding, Reconstruction, and the New Deal, “all three seem to rely on, and only on, the political values of public reason.” Yet earlier, Rawls himself says that “the limits of public reason” do not “apply only in official forums,” but rather to all political discourse by citizens. Using that definition, how can one claim that public reason alone was used during the Civil War and Reconstruction? Reconstruction would not have taken place absent the Civil War, and absent a consensus formed in the North during the Civil War that slavery was evil. This consensus likely would not have existed absent the leadership of Abraham Lincoln, who not only invoked religious imagery in his oratory, but made theological arguments. Unwilling to cede much ground here, but also unwilling to distance himself from Lincoln, Rawls argues that Lincoln’s many actions referencing or appealing to God either “[do] not violate public reason . . . since what he says has no implications on constitutional essentials or matters of basic justice. Or whatever implications it might have could surely be supported firmly by the values of public reason.” Rawls is a dean of modern liberalism. Yet even his attempt to explain why American public discourse must now be secularized when it was not so in the past collapses in an unconvincing mess that amounts to, “Religion can only legitimately be invoked when it is helpful to my positions.” In this respect he has many devout disciples among the American legal caste. Furthermore, an objective reading of Lincoln’s actions and speeches does not support Rawls’ position that those actions and speeches did not affect “constitutional essentials [nor] matters of basic justice.” For example:

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

31 Political Liberalism at 234.
32 Id. at 217-218.
33 Id. at 254.
Lincoln’s decision to free the southern slaves should not be considered as distinctly separate from the establishment of the 13th Amendment. In that respect, the decision affected both constitutional essentials and basic justice. His September 1862 decision to free the Confederate slaves, ultimately resulting in the Emancipation Proclamation - which he must have known would likely make it impossible to come to a peaceful rapprochement with the Confederacy - was a sharp departure from his August 1862 letter to Horace Greeley. In that letter, he wrote, “If I could save the Union without freeing any slave, I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.”

Perhaps this was simply Lincoln’s effort to pacify the public. Yet in making a momentous decision that would in some way signify that the war would be a fight to the death, Lincoln gave his Cabinet a providential explanation for his decision. This was not just a discussion between two citizens as to the right course of action (and Rawls thinks even that should be governed by public reason). This was a decision made by the highest elected official in the land in his official capacity - the paradigmatic example of when public reason should be used. It involved a matter of basic justice and would affect constitutional essentials. In Rawls’s mind, Lincoln should have relied upon public reason. And Lincoln did not. Surely the fact that perhaps the greatest American president relied on a divine explanation for a decision that began to commit the United States to emancipation for all is as significant as what senators said or did not say during debates over the 13th Amendment.

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

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

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

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

II. Hosanna-Tabor v. EEOC

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

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

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


\(^{38}\) Id. at 700.

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

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

40 Hosanna-Tabor, 132 S.Ct. at 701.
42 Id. at 12.
43 Id. at 11.
45 Id. at 37.
46 Hosanna-Tabor, 132 S.Ct. at 706.

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

According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances [compelling ordination of women by the Catholic Church or Orthodox Jewish seminaries] by invoking the constitutional right of freedom of association—a right “implicit” in the First Amendment. The EEOC and Perich thus see no need—and no basis—for a special rule grounded in the Religion Clauses themselves. … The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and Perich’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club.
ruled on the existence of a ministerial exception, “ten state supreme courts and twelve federal circuit courts” had recognized it in the previous forty years. The government’s arguments demonstrate the extent to which the EEOC failed to respect the autonomy of religious groups, and how ambitious is its vision for the reach of antidiscrimination laws. Had the EEOC prevailed, it would have energetically applied the nondiscrimination statutes to require religious groups who had fired ministers like Perich to reinstate those ministers in lay positions. Given the EEOC’s energy and ambition regarding the scope of the antidiscrimination laws, it likely would have extended the enforcement of the antidiscrimination laws even beyond those bounds envisioned in its brief.

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

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

Windham Statement, infra at 284.


Hosanna-Tabor, 132 S.Ct. at 706.

Id. at 707.

Id. at 707.

Id. at 707.

Id. at 710-11.

Id. at 711-12.
reasonable suggestion, but I share Justice Thomas’s concerns that so doing might excessively 
entangle the courts in determining the religion’s beliefs, practices, and internal governance.

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

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

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

\textsuperscript{55} Hamilton Statement, infra at 232.
\textsuperscript{56} Id. at 231.
\textsuperscript{57} Id. at 231.
\textsuperscript{58} Id. at 231.
Judaism under conditions accepted by the seminary, even though in another context this would be considered discrimination on the basis of race or ethnicity.\textsuperscript{59}

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

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

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

\textsuperscript{60} \textit{Rweyamamu v. Cote}, 520 F.3d 198 (2\textsuperscript{nd} Cir. 2008).

\textsuperscript{61} Id. at 200

\textsuperscript{62} Petruska v. Gannon University, 462 F.3d 294, at 307 (3\textsuperscript{rd} Cir. 2006).

\textsuperscript{63} Id. at 307-08.

\textsuperscript{64} Id. at 310.

\textsuperscript{65} \textit{Bishops and Their Ministry}, The Diocese of Milwaukee, available at http://www.diomil.org/about-bishops-and-their-ministry/.
invidious discrimination undoubtedly occur, they likely occur far less frequently than the statement implies.

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

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


Today we often hear that it [wall of separation between church and state] means that the state needs to be protected from religion, and that religion should have no place in government or society.

Jefferson and the Founders thought the opposite. They knew that the State was always tempted to take over everything — including the religious side of people’s lives. So they put a protection in the Constitution that the government could not favor any religion over another… and could not prohibit the free exercise of religion.

They wanted churches and religions to be protected from the government — from Leviathan. Why? Because they knew that what people believed and their freedom to live out and practice one’s most deeply held beliefs was at the very heart of this radical and fragile experiment they had just launched into the world.

67 DeGirolami Statement, infra at 214.

68 Helfand Statement, infra at 235.

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

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

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

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


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

73 Windham Statement, *infra* at 288-89.
III. Same-Sex Marriage and Religious Liberty

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

\(^\text{74}\) See, e.g., Matt. 5:31, 1 Cor. 5:1-5, 6:9-11.

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


What we have come to call the gay marriage debate is not directly about homosexuality, but about marriage. It is not about whom to let marry, but about what marriage is. It is a pivotal state in a decades-long struggle between two views of the meaning of marriage.

The conjugal view of marriage has long informed the law—along with the literature, art, philosophy, religion, and social practice—of our civilization. . . . It is a vision of marriage as a bodily as well as an emotional and spiritual bond, distinguished thus by its comprehensiveness, which is, like all love, effusive: flowing out into the wide sharing of family life and ahead to lifelong fidelity. In marriage, so understood, the world rests its hope and finds ultimate renewal.

A second, revisionist view has informed the marriage policy reforms of the last several decades. It is a vision of marriage as, in essence, a loving emotional bond, one distinguished by its intensity—a bond that needn’t point beyond the partners, in which fidelity is ultimately subject to one’s own desires. In marriage, so understood, partners seek emotional fulfillment, and remain as long as they find it.

\(^\text{77}\) Id. at 12.
its decision in *Obergefell v. Hodges*\(^78\), with Chief Justice Roberts’s dissent articulating the conjugal view.\(^79\)

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

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

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

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

\(^79\) *Id.* at 2613 (Roberts, C.J., dissenting).

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

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

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

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81 Id. at 4-5.
82 Id. at 6.
84 Whelan Statement, infra at 277.
85 Paul Coleman, Memorandum of Alliance Defending Freedom to the U.S. Commission on Civil Rights, at 7 (Apr. 19, 2013) (on file with the Commission).

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

In April 2011 the Charity Tribunal found against the last remaining Catholic adoption agency following a High Court decision. The tribunal stated that “religious conviction in the sphere of personal belief is protected in both domestic and European equality law, so that acts of devotion, worship, and prayer (including ceremonies) are exempt from equality obligations.” However, the Tribunal went on to state that there is an “essential distinction between private acts of worship such as blessings and the provision of a public service such as an adoption agency.
offense against absolute truth itself, because they believe the same-sex marriage is a falsehood about the nature of marriage, and they are assisting in perpetrating that falsehood.\textsuperscript{86}

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

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

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

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


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

\textsuperscript{88} Feldblum, supra note 2, at 142-43.

[G]ay people—of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice. … It seemed to me the height of disingenuousness, absurdity, and indeed, disrespect to tell someone it is permissible to “be” gay, but not permissible to engage in gay sex. What do they think being gay means?
beliefs.\textsuperscript{89} Apparently this is how Justice Kennedy views the conflict. But it is not so straightforward.

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

\textsuperscript{89} Brownstein Statement, \textit{infra} at 177 (“I suggest that the right of same-sex couples to marry and religious liberty rights share a common foundation as important personal autonomy rights”).


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

\textsuperscript{91} Lawrence v. Texas, 539 U.S. 558, 586 (Scalia, J., dissenting) (2003).

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

\textsuperscript{92} Obergefell v. Hodges, 135 S.Ct. 2584, 2604-05; \textit{id.} at 2622-23 (Roberts, C.J., dissenting).
can claim that same-sex marriage is "deeply rooted in this Nation’s history and tradition". In the end, as even Justice Kennedy tacitly admits in his opinion, these decisions are based in the policy preferences of the Court’s majority. Perhaps the decisions in these cases are good public policy, but that does not mean they recognize actual constitutional rights.

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

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

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94 Obergefell v. Hodges, 135 S.Ct. 2584, 2598 (“When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”); id. at 2628 (Scalia, J., dissenting) (“Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its “reasoned judgment,” thinks the Fourteenth Amendment ought to protect.”).
96 In situations involving federal action, the Religious Freedom Restoration Act applies, and many states have RFRAs that apply to state action. We will not discuss those situations here.
97 See infra at VI.
98 Feldblum, supra note 2 at 153.
Kennedy uses similar language about dignitary harms in *Obergefell*.

Elevating nondiscrimination norms may smuggle something akin to Rawls’ concept of “self-respect” as a basic requirement of the just society into our constitutional order. Rawls urges that the adoption of his “two principles” will lead to increased self-respect among individuals. He writes:

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

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

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

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

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

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


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

103 Rawls himself notes in a later work that the United States’ political settlement may rely on a thinner overlapping consensus than he envisions in his ideal society. *See* John Rawls, *Political Liberalism* 149 (2005).
citizens, he will have to content himself with equality before the law. Equality before the law is not nothing, but it is not necessarily the sort of societal respect contemplated by Rawls. Nor does it bestow societal approval upon all one’s life choices and therefore build up one’s self-esteem.

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

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

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

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

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

IV. The HHS Mandate and Religious Liberty

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

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

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


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

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

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

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

\textsuperscript{109} Id. at 8726 (“The Department received over 200,000 responses to the request for comments on the amended interim final regulations.”).

\textsuperscript{110} Whelan Statement, infra at 276.

\textsuperscript{111} Whelan Statement, infra at 277.


\textsuperscript{113} U.S. Commission on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties, Mar. 22, 2013, at 91 [hereinafter “Transcript”] (“Women’s equality is at stake in the contraceptive cases”).
Similarly, if a woman believes that insurance coverage of contraceptives and abortifacients is a great benefit to her financial well-being, she is free to find employment at one of the many, many employers who have no qualms about providing such things. As Professor Richard Epstein writes:

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

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

a. For-Profit Businesses

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

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

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

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


devices that may cause early abortions, including Plan B (the “morning-after” pill) and Ella (the “week-after” pill).\footnote{Brief for Respondent at 9-10, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (2013); Brief for Petitioners at 5, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (2013).}

Plan B, Ella, and some IUDs can cause early abortions by preventing implantation of a human embryo. That is a scientific fact and the government has conceded it.\footnote{See Donna Harrison, M.D., Emergency Contraception Can Cause Abortion, THE PUBLIC DISCOURSE (Dec. 10, 2013), available at http://www.thepublicdiscourse.com/2013/12/11685/; Brief for Petitioner at 9 n. 4, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (2013) (“a copper IUD … possibly [prevents] implantation (of a fertilized egg in the uterus) [Plan B] may inhibit implantation … by altering the endometrium … [Ella] may also work by altering the endometrium in a way that may affect implantation…”).} The question, then, is whether it is licit to end this nascent human life. That question may of course be answered without recourse to divine revelation but it is a moral question that many faiths take very seriously and believe affect a person’s eternal destiny. Similarly, Christian churches that teach that the use of artificial contraception is a sin may seem odd and backward but their teaching rests on their understanding of the human person’s relationship and duty to God and other people.\footnote{Charles J. Chaput, O.F.M., Archbishop of Philadelphia, Comment to the U.S. Commission on Civil Rights, at 3 (2013)(on file with the Commission); see also Pope Paul VI, HUMANAE VITAE 11-14 (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.} There is no scientific dispute. It is a purely moral and religious dispute and one in which the government has no right to pronounce judgment and no compelling interest in breaking the consciences of believers.

The government argued that because of their corporate status, for-profit businesses cannot invoke RFRA.\footnote{Brief for Petitioner at 12-13, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354).} They argued that RFRA protects only individuals, churches, and religious communities.\footnote{Id. at 13.} The text of RFRA provides: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.”\footnote{42 U.S.C. § 2000bb-1.} In an attempt to avoid having the courts apply strict scrutiny to the challenged rule the government tried to side-step the problem by removing Hobby Lobby from the covered entities. “Person” is not defined in the statute, although several other terms are defined. Thus, the government argued that for-profit corporations are not “persons.” However, the “Dictionary Act” provides “In determining the meaning of any Act of Congress, unless the context indicates otherwise — … the words ‘person’ and ‘whoever’ include
corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”

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

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

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

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

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

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


nothing in principle that would prevent for-profit corporations from being forced to pay for abortions.\textsuperscript{129}

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

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

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

\begin{quote}
HHS concedes that a nonprofit corporation can be a ‘person’ within the meaning of RFRA.... This concession effectively dispatches any argument that the term ‘person’ as used in RFRA does not reach the closely held corporations involved in
\end{quote}

\textsuperscript{129} Id. at 75-76.

\textsuperscript{130} Robert P. George, \textit{Comment to the U.S. Commission on Civil Rights}, at 3 (2013)(on file with the Commission).

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

these cases. No known understanding of the term ‘person’ includes some but not all corporations.  

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

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

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132 Id. at 2768-69.
133 Id. at 2769.
134 Id. at 2769.
137 Id. at 2770-71.
138 Id. at 2771 (“If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.”).
140 I realize, as Eugene Volokh writes, that there are distinctions between the two lines of cases. Eugene Volokh, Sebelius v. Hobby Lobby: Corporate Rights and Religious Liberties, 40-41 (2014).

Congress has historically imposed particularly stringent limits on the electoral advocacy of corporations and labor unions. Those restrictions reflect “a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,” and this Court has consistently “respect[ed]” that judgment. FEC v. Beaumont, 539 U.S. 146, 155 (2003) (quoting FEC v. National Right to Work Comm., 459 U.S. 197, 209-210 (1982). In particular, because of the numerous advantages that the corporate form confers, a corporation’s ability to pay for electoral advocacy has “little or no correlation to the public’s support for the corporation’s political ideas.” McConnell, 540 U.S. at 05 (quoting Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 660 (1990)).
question of corporate form. Justice Kennedy wrote, “The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker . . .”\textsuperscript{142} In the contraceptive mandate cases involving for-profit businesses the government argues that the owners of the corporations must provide contraceptives to their employees because they have availed themselves of the benefits of the corporate form.\textsuperscript{143} The government does not address why a corporation can exercise one First Amendment right but cannot exercise another. As Justice Alito wrote in \textit{Hobby Lobby}, we protect the constitutional rights of corporations because corporations consist of people, and we are bound to protect their constitutional rights.\textsuperscript{144} It is true, as Justice Ginsburg writes in her dissent, “Corporations . . . ‘have no consciences, no beliefs, no feelings, no thoughts, no desires.’”\textsuperscript{145} But the people who own and operate corporations do, and that is why we protect the constitutional rights of corporations.\textsuperscript{146}

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

\textbf{i. For-Profit Businesses and RFRA}

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

\begin{itemize}
\item \textsuperscript{142} \textit{Citizens United}, 558 U.S. at 365.
\item \textsuperscript{143} \textit{Brief for Petitioner at 12-13, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354)} (“Granting the relief respondents seek for profit-making corporate entities engaged in commercial activity would expand the scope of RFRA far beyond anything Congress contemplated; would disregard deeply engraved principles of corporation law that should inform the interpretation of RFRA as they do federal statutes generally”).
\item \textsuperscript{144} \textit{Hobby Lobby, 134 S.Ct. at 2768}.
\item \textsuperscript{145} \textit{Id. at 2794} (Ginsburg, J., dissenting, \textit{quoting} \textit{Citizens United v. Federal Election Comm’n}, 558 U.S. 310, 466 (citations omitted) (2010) (Breyer, J., concurring in part and dissenting in part)).
\item \textsuperscript{146} \textit{Volokh, supra} note 140 at 41-42.
\item \textsuperscript{147} \textit{Brief for Petitioner at 13, Sebelius v. Hobby Lobby Stores, Inc., 134 S.Ct. 678 (2014) (No. 13-354)} (“[Applying RFRA to \textit{Hobby Lobby}] would deny to thousands of employees (many of whom may not share the Greens’ religious beliefs] statutorily-guaranteed access to benefits of great importance to health and well-being.”)
\item \textsuperscript{148} \textit{Citizens United, 558 U.S. at 361-62}.
\end{itemize}
explicitly religious and sincere.\(^{149}\) It does not have to seem reasonable to the court—that is outside the court’s competence. If the person’s practice is both religious and sincere you must examine whether the government’s action is truly burdensome. “[T]he substantial burden inquiry evaluates the coercive effect of the governmental pressure on the adherent’s religious practice and steers well clear of deciding religious questions.”\(^{150}\) Justice Alito wrote, “we have little trouble concluding” that the Mandate constitutes a substantial burden.\(^{151}\) The business owners are forced to choose between funding an act they believe to be intrinsically evil and being subject to ruinous fines.\(^{152}\)

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

\(^{149}\) Korte, 735 F.3d at 682-683.

\(^{150}\) Id. at 683.


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

\(^{153}\) Korte, 735 F.3d at 685-86.

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


\(^{155}\) Korte, 735 F.3d at 686.
approved contraceptives without cost-sharing.”156 The Court simply assumed that the government’s interest was compelling.157

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

157 Id. at 2780.
158 Korte, 735 F.3d at 686.
159 Griffin Statement, infra at 220 (“the federal contraceptive mandate has unfolded as a war between religious freedom on one side and women’s equality on the other”).

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

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

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

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


163 *Id.* at 433.

164 *Id.* at 439.
significant reason."\textsuperscript{165} Women who are employed, who are the ones covered by the Mandate, already have extensive access to contraceptives through insurance.\textsuperscript{166} It is questionable that the government’s interest in extending free contraceptives to the small number of employed women who do not receive coverage through their health plan is sufficiently weighty to constitute a compelling interest. Furthermore, “[R]ates of unintended pregnancy are highest among groups the Mandate will not affect—the poorest adolescents and women who are already served by myriad federal and state programs. The [IOM] Report itself makes this observation; it notes that non-use of contraceptives is particularly likely among women who ‘have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group.’”\textsuperscript{167} It is also questionable whether covering emergency contraception without cost-sharing will reduce unintended pregnancies, either because the women who take emergency contraception already are at low risk of pregnancy, or because some women change their behavior in response to the availability of emergency contraception.\textsuperscript{168}

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

\textsuperscript{165} Alvaré, \textit{supra} note 161 at 427.

\textsuperscript{166} \textsc{Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps} 109 (2011) [hereinafter \textsc{IOM 2011 Report}] (“A more recent 2010 study of employers found that 85 percent of large employers and 62 percent of small employers offered coverage of FDA-approved contraceptives.”).

\textsuperscript{167} Alvaré, \textit{supra} note 161 at 424, quoting \textsc{IOM 2011 Report} at 102.

\textsuperscript{168} Tal Gross, Jeanne LaFortune, Corinne Low, \textit{What Happens the Morning After? The Costs and Benefits of Expanding Access to Emergency Contraception}, 33 \textsc{J. Pol’y Analysis \& Management} \textbf{1}, 70, at 84 (2013).

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

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

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

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

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171 Id. at 2781-82.
many exceptions already, it can hardly argue against exempting these plaintiffs.” The Court did not address this issue in regard to the least-restrictive-means test in Hobby Lobby but it may have occasion to do so in future litigation.

b. Religious Groups

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

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

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

174 Korte, 735 F.3d at 686.
177 A religious order which counts as one of its members the late Father Theodore Hesburgh, C.S.C., president emeritus and a charter member of this Commission.
EBSA Form 700 and [delivering] it to their insurer or third-party administrator (TPA);\textsuperscript{179} or notifying the Secretary of HHS that it is an eligible organization and objects for religious reasons to providing some or all contraceptive coverage.\textsuperscript{180} If the organization follows the latter procedure it must provide information to HHS that allows HHS to identify the organization and arrange for its TPA or insurer to provide contraceptive coverage.\textsuperscript{181} HHS then uses EBSA Form 700, or, if the second option is used, simply notifies the TPA or insurer that the employer meets certain criteria established by HHS and has religious objections to providing contraceptives in its insurance plan.

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

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


\textsuperscript{181} Id. at 41344.

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

\textsuperscript{183} Geneva College v. Secretary of U.S. Dep’t of Health and Human Services, 778 F.3d 422, 429 (3rd Cir. 2015)(“The submission of the form has no real effect on the plan participants and beneficiaries.”).

\textsuperscript{184} One wonders how this will work in practice. Will insurance companies change the cost of insurance plans just for objecting organizations?

\textsuperscript{185} Little Sisters of the Poor, 794 F.3d at 1165, 1166.

\textsuperscript{186} Id. at 1158.

\textsuperscript{187} Id. at 1166.
However, “the Departments concede they lack authority to enforce those [federal] requirements as to self-insured “church plans,” which are group health plans established by a church or association of churches covering the church’s or association’s employees. Organizations that provide health care coverage for employees through self-insured church plans are exempt from regulation under ERISA [citations omitted].”

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

i. Religious Groups and RFRA

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

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

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

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188 Id. at 1166.
189 26 C.F.R. § 54.9815-2713A.
190 Id.; 45 C.F.R. § 156.50.
191 Geneva College v. Secretary U.S. Dep’t of Health and Human Services, 778 F.3d 422, 435 (3rd Cir. 2015).
193 See, e.g., East Texas Baptist University v. Sebelius, 2013 WL 6838893, at *11 (S.D. Tex. 2013) (“The government does not contend that the plaintiffs’ religious beliefs about abortion, abortifacients, or forced complicity through facilitation are insincerely held, unreasonable, or “fringe.”).
194 Id.
quoted earlier, the only ones of consequence, consist of only 95 words. Signing the form and mailing it to Meritain and Aetna could have taken no more than five minutes.”

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

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

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

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195 University of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014) (Posner, J.).
196 26 C.F.R. § 54.9815-2713A.
197 26 C.F.R. § 54.9815-271A; 45 C.F.R. § 156.50.
198 Geneva College v. Secretary U.S. Dep’t of Health and Human Services, 778 F.3d 422, 433 (3rd Cir. 2015).

[Although the “accommodation” legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the “accommodation” requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that “shifting responsibility” does not absolve or exonerate them from the moral turpitude created by the “accommodation”; to the contrary, it still substantially burdens their sincerely-held beliefs.]
As of this writing, the Second\textsuperscript{200}, Third\textsuperscript{201}, Fifth\textsuperscript{202}, Sixth\textsuperscript{203}, Seventh\textsuperscript{204}, Tenth\textsuperscript{205}, and District of Columbia\textsuperscript{206} courts of appeal have ruled against religious organizations’ challenges to the revised accommodation. The Eighth Circuit has ruled in favor of religious organizations’ challenge to the revised accommodation.\textsuperscript{207}

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

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

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

\textsuperscript{200} Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2nd Cir. 2015).
\textsuperscript{201} Geneva College v. Burwell, 778 F.3d 422 (3rd Cir. 2015).
\textsuperscript{202} E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449(5th Cir. 2015).
\textsuperscript{203} Michigan Catholic Conf. v. Burwell, 755 F.3d 372 (6th Cir. 2014).
\textsuperscript{204} Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015).
\textsuperscript{205} Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015).
\textsuperscript{206} Priests for Life v. Burwell, 772 F.3d 229 (D.C. Cir. 2014).
\textsuperscript{207} Sharpe Holdings, Inc., v. Burwell, 801 F.3d 927 (8th Cir. 2015).
\textsuperscript{208} See, e.g., Geneva College v. Burwell, 778 F.3d at 435-444; Little Sisters of the Poor, 794 F.3d at 1173-74; Priests for Life, 772 F.3d at 246-46; E. Tex. Baptist Univ., 793 F.3d at 459-63; Mich. Cath. Conf., 775 F.3d at 387-90.
\textsuperscript{209} University of Notre Dame v. Burwell, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring).
\textsuperscript{210} University of Notre Dame v. Sebelius, 743 F.3d 547, 556 (7th Cir. 2014) (Posner, J.).
excused from military service, but only on condition that you identify a specific non-Quaker who must serve in your place.”

In the Tenth Circuit, Judge Baldock dissented in part, arguing that the accommodation substantially burdens self-insured organizations. The majority argued, “Plaintiffs and the dissent emphasize that the TPA may arrange or provide coverage only after a religious non-profit organization opts out. We consider this to be an uncontested and unremarkable feature of the accommodation scheme.” The majority did not consider this to be a substantial burden, reasoning that the ACA requires insurance plans to include contraception (this elides the law a bit, as it is only the regulations that mandate the provision of contraceptives) and that therefore the accommodation shifts the burden of compliance from the objecting organization to its TPA.

The dissent objected that the mechanics of the relationship between self-insured organizations and their TPA make the objecting organization the but-for cause of the coverage of contraception and that this is the same situation in which the Hobby Lobby plaintiffs found themselves. Unlike organizations that use an insurance plan rather than self-insuring, self-insured organizations can actually prevent their insurance from covering contraceptives at all. The self-insured organizations are in a position in which they follow the law and violate their consciences, or disobey the law and face crippling fines. The dissent writes:

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

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

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

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

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

213 Id. at 1182-83.

214 Id. at 1211.
entitlement to receive, contraceptive coverage wholly unenforceable and thus illusory - unless and until the self-insured plaintiffs opt out.\textsuperscript{215}

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

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

\textsuperscript{215} \textit{Id.} at 1211.
\textsuperscript{216} Priests for Life v. Burwell, 772 F.3d 229,254-56 (D.C.Cir.2014).
\textsuperscript{217} Michigan Catholic Conference v. Burwell, 2015 WL 4979692 (6th Cir. 2015).
\textsuperscript{218} Little Sisters of the Poor Home for the Aged v. Burwell, Order Denying Hearing En Banc, 799 F.3d 1315, 1316-18 (10th Cir. 2015) (Hartz, J., dissenting).
\textsuperscript{219} \textit{Id.} at 1317.
\textsuperscript{220} \textit{Id.} at 1317-18.

Where did [the panel majority] go wrong? It does not doubt the sincerity of the plaintiffs’ religious belief. But it does not accept their statements of what that belief is. It refuses to acknowledge that their religious belief is that execution of the documents is sinful. Rather, it reframes their belief. It generalizes the belief as being only opposition to facilitating the use and delivery of certain contraceptives to which they object. Under this reframing, the plaintiffs have no religious objection to executing the forms; it is just that executing the forms burdens their religious opposition to certain contraceptives. The burden would be akin to that caused by a tax on sales of religious tracts at the church bookstore, where the church has no religious objection to paying a tax but complains that the tax will make it harder to spread the Gospel. After so framing the plaintiffs’ belief, the panel majority then examines the particulars of the governing law and decides that executing the documents does not really implicate the plaintiffs in the use of delivery of contraceptives. If one accepts this reframing of plaintiffs’ belief, the analysis of the panel majority may be correct; perhaps one could say that the exercise of this reframed belief was substantially burdened. But it is not the job of the judiciary to tell people what their religious beliefs are.
whether the government interest in providing cost-free contraceptives is compelling is the same as the analysis for for-profit institutions. There is one additional wrinkle in the case of religious organizations. The government’s interest in regard to forcing the Little Sisters of the Poor, Catholic Charities, and similar religious organizations is particularly undermined by the exemption granted to houses of worship. The District Court noted in Zubik:

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

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

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

quoted *Walz v. Tax Commission* in support of the proposition that “[R]eligious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause.”

However, Walz was not, as are the religious non-profits challenging the accommodation, a religious organization claiming it had been unjustly excluded from the class of religious organizations that received a particular benefit. (It is worth noting that the Court in *Walz* declined to characterize the tax exemption as a benefit, but rather as a way of respecting the independence of both church and state.) Rather, Walz argued that including churches in a broad class of non-profit organizations that were eligible for a property tax exemption violated the Establishment Clause.

Contra the Seventh and Third Circuits, the Court’s decision in *Walz* has nothing to say about whether it is constitutionally permissible for the government to provide an exemption to a Catholic diocese, but not to a Catholic high school within that diocese. Judge Posner’s comment that “The establishment clause does not require the burdens (or the benefits) that laws of general applicability impose on religious institutions” responds more to a worry expressed in Justice Douglas’s lone dissent than to anything expressed in the majority or concurring opinions.

Incidentally, Justice Harlan wrote in concurrence:

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

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

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

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

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

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


227 *Id.* at 694.
number of religious organizations that would be exempted from the contraception mandate. It is clear that the Administration was primarily interested in maximizing the number of women entitled to contraception coverage and only secondarily concerned with the possible religious liberty ramifications. In discussing the various possible tests and how likely they would be to limit the number of religious organizations that qualified for an exemption, an IRS official wrote to a White House policy official:

I have always seen prongs 1-3 as limiters on the broader pool [of religious institutions] that could meet prong 4 (26 USC sec. 6033(a3)(A)(i) and (iii)). Especially prong 3 (primarily serves persons who shares its tenets). The soup kitchen that is in the tax-exemption group ruling, for example, that is most likely an integrated auxiliary of a church (tax-exempt; affiliated; funded by the church) for purposes of 6033, does not limit the persons it services.

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

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

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

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

231 Id. at App. 12, e-mail from Sarah Ingram to Jeanne Lambrew and Ellen Montz, July 19, 2012.
drugs and devices their faith teaches are morally objectionable should be left up to the churches and the religious institutions, not the government.

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

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

V. Christian Student Groups and Religious Liberty

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


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

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

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

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

IV-AACF eagerly welcomes students and faculty from all faith backgrounds to participate as members, but we require each student member to affirm a statement of faith that outlines the basic tenets of Christianity. This requirement acts as a safeguard to ensure that student leaders of AACF will maintain the group’s vision and integrity.
abstain from sex outside of heterosexual marriage. In some cases, university administrators have taken issue with the requirement that full members and officers abstain from sex outside of heterosexual marriage, arguing that it discriminates on the basis of sexual orientation and therefore violates the school’s nondiscrimination policy (which is sometimes presented as an “accept all comers” policy). Universities have taken this position even though the requirement to abstain from sex outside of heterosexual marriage is directed at conduct, not sexual orientation per se, and applies to people of all sexual orientations. Oddly, according to public comments, universities have often taken these adverse actions against Christian student groups even though there is no aggrieved student who has been denied a leadership role in the group based on these criteria.

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

Vanderbilt’s administration changed its non-discrimination policy to forbid student organizations from taking religious criteria into consideration when determining leadership positions. The leaders of student organizations were required to sign an affirmation of the non-discrimination policy. The student leaders of Vanderbilt Catholic could not in conscience sign the affirmation since religious criteria are the most important ones for leadership in the organization. … The result is there is no registered Catholic student organization at Vanderbilt.

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


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

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

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

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

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

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

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

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

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

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

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

241 Id.

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

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

243 Transcript at 65-66 (“at Hastings there is no CLS chapter because of this. Other organizations have also suffered the end of an organization on a particular campus whenever that group has been derecognized”).
this official expression of disapproval has contributed to a climate that encourages actions that would be considered harassment if directed toward a more fashionable minority.244

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

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

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

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

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

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

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

245 See Colby Statement, infra at 186-89.
organizations that engage in many of the same activities as do traditional churches. They organize worship services, Bible studies, mentoring programs, religious retreats, and so on. Particularly in evangelical Christianity, which tends to have loose church structures, para-church organizations like InterVarsity are almost indistinguishable from churches. Student leaders of these groups, although not ministers in the way we typically think of them, fulfill many of the same functions. Therefore, by establishing what criteria student groups may and may not use in selecting their student leaders, universities are in a very real sense selecting ministers. This public universities may not do without violating both Religion Clauses. Given that employment discrimination laws are not even implicated in these situations, only a university nondiscrimination policy, it seems that Hosanna-Tabor would apply with extra force. And even though private universities are not under the same constraints it would be wise for them to respect their students’ religious beliefs.

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

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

247 Id. at 704 (2012).

248 See Colby Statement, infra at 194-205.

249 See Inazu Statement, infra at 244-46.

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

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

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

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

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

251 Colby Statement, infra at 186.


253 Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 805-806 (9th Cir. 2011) (Ripple, J., concurring) (emphasis added), cert. denied, 132 S.Ct. 1743 (2012).
govern their membership policies and select their own leaders, they cannot guarantee that their leaders will embody their message.”254

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

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

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

254 Windham Statement, infra at 288.
square. Other groups are not threatened by an all-comers policy because their membership largely self-selects. Groups organized around a belief system do not have this luxury.

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

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

VI. Sexual Orientation Discrimination and Racial Discrimination

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

257 Inazu Statement, infra at 246.

258 Id.

259 See Smith v. Fair Employment & Housing Com’n., 913 P.2d 909 (Cal. 1996); see also Donohue v. Fair Employment & Housing Com’n., 2 Cal. Rptr.2d 32 (Cal. App. 2 Dist. 1991).
In many of the situations involving discrimination against same-sex couples the religious party has made it clear that they do not object to serving a gay or lesbian person, but rather object to being forced to condone the person’s sexual behavior. The religious party is happy to serve and associate with the gay or lesbian person in other contexts but believes it is sinful to assist in celebrating or condoning their sexual behavior.260

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

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


[W]hen Robert Ingersoll came into the store to ask Barronelle to design the floral arrangements for his wedding ceremony, she politely told him she could not do it “because of [her] relationship with Jesus Christ.” As she explains, Barronelle believes that “biblically marriage is between a man and a woman.” After prayer and thoughtful consideration, Barronelle concluded that her religious beliefs prohibit her from participating in a same-sex union by using her artistic talents to create floral arrangements for the ceremony.

Stutzman politely and respectfully told Robert that she could not create the floral arrangements for his wedding because of her faith and then the two chatted for a while. She gave Robert recommendations for other florists, they hugged, and Mr. Ingersoll left the store. …

It never occurred to Barronelle that someone might consider her decision not to create floral arrangements for Robert Ingersoll’s wedding as illegal. Barronelle has gladly served gay and lesbian clients for many years, expressing the same warm demeanor and artistic passion to them as she did all other clients. Mr. Ingersoll and Mr. Freed were no exception. Indeed, they were longstanding clients of Arlene’s Flowers and Barronelle had served them for nearly nine years, knowing full well they were gay. But she could not participate in a same-sex marriage ceremony as a matter of conscience because of her deeply held, biblical belief that marriage is a union between one man and one woman. (citations omitted)

261 Brownstein Statement, infra at 178.

262 Id. at 178-179; see also Lambda Legal, Peaceful coexistence—Freedom of Worship is not a License to Discriminate, at 12 (April 21, 2013) (on file with the Commission).
procure a hotel room. Does the government have a similar interest in ensuring that gay couples
have their first choice of wedding cake baker or that Reverend and Mrs. Kettle’s bed-and-breakfast
accepts honeymooning gay couples? Probably not. And unlike the parade of horrors advanced
by some commenters, most religious objections to participating in same-sex weddings have been
quite narrowly drawn and involve only an objection to assisting with a wedding celebration or to
engaging in activities that appear to condone same-sex sexual activity.\textsuperscript{263}

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

Chai Feldblum addresses the dignitary harm inflicted:

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

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

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


\textsuperscript{265} Feldblum, \textit{supra} note 2 at 42.

\textsuperscript{266} John Rawls, \textit{A THEORY OF JUSTICE} 155 (1999).
choices and life-plan. Demands by same-sex couples that objecting vendors serve them apparently reflect a need for public validation of lifestyle choices. Tolerance, or even a willingness to serve them in some contexts but not others, is apparently insufficient.

Feldblum’s admission that she can go down the street to another vendor illustrates that pure homophobia, as opposed to a religiously-based refusal to assist with certain aspects of homosexual relationships, is not remotely as pervasive or intense as was racial discrimination. As Professor Brownstein wrote in his statement he does not support analogizing discrimination against same-sex couples to racial discrimination because “racism has played such a uniquely invidious role in American history. The goal of purging racial discrimination has no equal and no counterpart.”

The disparity between the harms suffered by the two groups is perhaps why arguments that robust religious freedom protections will lead to a harmfully “segregated and contentious” society are unconvincing. Racial segregation was mandated by law and enforced by violence. It was sometimes impossible for businesses to serve an integrated clientele even if they wanted to. No state in the union has a law that says, “You may not serve gay and lesbian customers.” Neither do angry mobs attack gay and lesbian couples who present themselves at wedding cake shops. (It is in fact more likely that angry mobs will attack the businesses of religious dissenters.)

We will have a more contentious society if we force people to contribute their talents to events and to appear to condone behavior they believe is fundamentally immoral. In this instance, it is more conducive to civil harmony to allow people to freely exercise their religious convictions. This holds true whether the situation at issue is a baker who declines to bake a wedding cake for a same-sex couple or a landlady who declines to rent an apartment to an unmarried heterosexual couple.

VII. Justice Scalia’s Prescience

It was Justice Scalia’s melancholy fate to serve as our American Cassandra. This is no slur on the justice but an observation on our society. As long ago as 1996, he characterized the majority’s

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267 Brownstein Statement, infra at 179.
268 Lambda Legal, Peaceful coexistence—Freedom of Worship is not a License to Discriminate (April 21, 2013), Appendix A, at 12 (on file with the Commission).
269 Bernstein, supra note 3 at 42 (2003).

[] In the South, state and local government remained firmly in the hands of segregationists who could pressure businesses to retain Jim Crow. Federal antidiscrimination law instead provided business owners - of whom many had found Jim Crow to be a costly nuisance - with the wherewithal to integrate, by freeing them from the threat of retaliation by local officials.
271 Remember that Cassandra did indeed possess the gift of prophecy thanks to Apollo, but the god cursed her so she would never be believed.
decision in *Romer* as “an act, not of judicial judgment, but of political will,”\(^{272}\) and questioned how state denial of preferential treatment for gays and lesbians differed from state prohibition of polygamy.\(^{273}\) In *Lawrence v. Texas*, Justice Scalia wrote that the majority’s decision overruling *Bowers* called all morals legislation into question, including laws banning same-sex marriage,\(^{274}\) and that Justice O’Connor’s effort to salvage a basis for state preference for traditional opposite-sex marriages would likely be unavailing.\(^{275}\) And in *United States v. Windsor*, Justice Scalia wrote:

> The penultimate sentence of the majority’s opinion is a naked declaration that “[t]his opinion and its holding are confined” to those couples “joined in same-sex marriages by the State.” I have heard such “bald, unreasoned disclaimer[s]” before. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects,” - with an accompanying citation of *Lawrence*. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here - when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: the only thing that will “confine” the Court’s holding is its sense of what it can get away with [citations omitted].\(^{276}\)

Justice Scalia was right. With the benefit of hindsight, it is clear that the majorities in *Romer*, *Lawrence*, and *Windsor* believed same-sex marriage to be a moral imperative, although they were unable to root it in any firm constitutional footing. Perhaps fearing a *Roe*-like backlash that might have led to a successful constitutional amendment, however, they proceeded incrementally. The incremental approach has two benefits: one, it gradually accustomed the public to an ever-more


\(^{273}\) *Id.* at 648-51.


State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . . The impossibility of distinguishing homosexuality from other traditional “morals” offenses is precisely why *Bowers* rejected the rational-basis challenge. “The law,” it said, “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed [citations omitted].”

\(^{275}\) *Lawrence*, 539 U.S. at 600-02.

radical conception of sexual liberty; two, it allowed a new generation to come of age (and the older, more conservative generation to die off) in a society that in law and popular culture treated discrimination on the basis of same-sex sexual conduct as the equivalent of racial discrimination.277 Then in Obergefell v. Hodges the Court delivered the killing stroke to state support for traditional marriage, grandly declaring, “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”278 I join Justice Scalia in declaring that if I were forced to sign onto an opinion that began with such meaningless twaddle, I would put a bag over my head.279 Whatever it might be, Constitutional law it is not.

There is likewise little reason to doubt Justice Scalia’s prediction that the expanded right to sexual liberty will stop at same-sex marriage. Justice Roberts too has come to share Justice Scalia’s gloomy outlook on the prospective constitutionalization of a right to polygamy.280 There is little reason not to share their pessimistic outlook. For example, in late 2013, a federal district court ruled that Utah’s prohibition of polygamy had no rational basis and was therefore unconstitutional.281 Almost simultaneously there has been a raft of articles in mainstream publications discussing the prevalence of polyamory and suggesting it is “the next sexual revolution.”282 As alternative lifestyles continue to gain public acceptance, they too will come under the aegis of antidiscrimination laws and create their own religious liberty conflicts.

More pertinent to this statement is the threat Obergefell poses to religious liberty. There have already been many conflicts between same-sex marriages and religious liberty. Now that same-sex marriage has been elevated to the status of a constitutional right these conflicts will become more common and more severe. In his dissenting opinion, Chief Justice Roberts objected that same-sex marriage was nowhere contemplated in the Constitution. Rather, the Court’s decision in Obergefell reflected the policy preferences of a majority of the Court, which through the exercise

277 Children born when Romer was decided in 1996 turned 18 in 2014.
279 Id. at 22 (Scalia, J., dissenting).
280 Id. at 2621-22 (Roberts, C.J., dissenting).
of raw judicial power they elevated to the status of a fundamental right.\textsuperscript{283} Justice Scalia echoed the Chief Justice’s concerns:

[I]t is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact - and the furthest extension one can even imagine - of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.\textsuperscript{284}

This is dangerous. If the Supreme Court can create fundamental rights it can also destroy them.\textsuperscript{285} If “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions,”\textsuperscript{286} and therefore we must defer to our somberly-garbed philosopher-kings’ judgment as to the boundaries of liberty, what is to prevent five members of the Supreme Court from determining that the founding generation simply did not understand how oppressive religion could be? That is, in fact, what my colleagues suggest in the findings and recommendations included in this report. My colleagues state in Finding 7, “2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly; 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate; . . . 6) a basic [civil] right as important as the freedom to marry should not be subject to religious beliefs”. My colleagues do not even pretend to neutrality and instead simply declare that they are wiser than the accumulated wisdom of millennia of the world’s major faiths. It appears from the recommendations that they believe religious beliefs and practices that conflict with the sexual revolution should be cabined as much as possible. The entire point of having limited and enumerated constitutional powers and a Bill of Rights was to restrain the power of government and to protect inalienable rights regardless of changing fashions. In the wake of\textit{ Obergefell}, it is impossible to be confident that those limits and protections will last. Justice Alito

\textsuperscript{283} \textit{Obergefell}, 135 S.Ct. at 2612 (Roberts, C.J., dissenting).

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of injustice.”

\textsuperscript{284} \textit{Id.} at 2627 (Scalia, J., dissenting).

\textsuperscript{285} \textit{Id.} at 2625-26 (Roberts, C.J., dissenting).

\textsuperscript{286} \textit{Id.} at 2598 (Kennedy, J.).
has no such confidence, warning, “If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.”

And the liberty that the Obergefell majority creates differs from the older and earlier liberties in that it is not the right not to be forced to do something, but the right to force others to do something for you. As the Chief Justice wrote, “Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.” Justice Thomas was even more explicit, stating, “Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. . . . Yet the majority invokes our Constitution in the name of a ‘liberty’ that the Founders would not have recognized, to the detriment of the liberty they sought to protect.”

Justice Thomas later discusses why Loving v. Virginia is inapposite - namely, because the Lovings were prosecuted for cohabiting together in Virginia after being married in another jurisdiction. No same-sex couples were being threatened with imprisonment for cohabiting together.

In their dissenting opinions, which Justice Scalia joined, Justices Thomas and Alito both warned about the effect same-sex marriage will have on religious liberty. Justice Thomas warned:

In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today’s decision may change the former, but it cannot change the latter. It appears all but inevitable the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our Nation’s tradition. Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice. [citations omitted]

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287 Obergefell, 135 S.Ct. at 2643 (Alito, J., dissenting).
288 Id. at 2612 (Roberts, C.J., dissenting).
289 Id. at 2631 (Thomas, J., dissenting).
290 Id. at 2636-37 (Thomas, J., dissenting).
291 Id. at 2638 (Thomas, J., dissenting).
Justice Alito echoed him, stating:

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their beliefs will be respected. We will soon discover whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.  

There is no reason to doubt the Justices’ vision of the future. The majority’s findings and recommendations lend credence to the Justices’ warnings.

**VIII. Why Should Religious Liberty Take Precedence?**

The core of the dispute between partisans of sexual liberty and traditional religious believers is whether the two rights are of equal importance. In our constitutional order, the first reason that religious liberty takes precedence over sexual liberty is that this is enshrined in our Constitution. The First Amendment establishes the right to free exercise of religion, free speech, free association, and freedom of assembly. It does not establish the right to coerce other people into expressing approval of one’s self-expression.

But why does the Constitution enshrine religious liberty as a “first freedom”? And why should we continue to treat it as a fundamental right that often trumps conflicting rights or government interests? After all, religious liberty sounds nice but nondiscrimination sounds nice too. The answer is that we accept that religious claims may actually be true, and if they are true, a person’s duty to God may be seen as weightier than his duty to the state. It is not unreasonable to believe in God, and it is impossible for the government or any person to remain truly undecided on the question. Either the government will act as though God may exist, or the government will act as though God does not exist. And for constitutional purposes it seems likely that the Framers assumed that God did exist though they differed mightily about specifics, and that is why they enshrined religious freedom in the First Amendment. 

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292 Obergefell, 135 S.Ct. at 2642-43 (Alito, J., dissenting).


We protect religious liberty on the premise that God is real and that the true priorities of God trump the ordinary commands of man. . . .
and if the Establishment Clause is predicated on that assumption, then there is no Establishment Clause violation if the present government also assumes the possibility of God’s existence and therefore avoids burdening religious practice and expression.\textsuperscript{296}

As recently as twenty years ago there was a broad societal consensus in favor of giving heightened protection to religious liberty.\textsuperscript{297} That is why RFRA was enacted after the \textit{Smith} decision. Of course, a person cannot simply brandish, “I have a duty to God” and triumph every time his religious practices run afoul of state requirements. Nor is such an outcome contemplated under RFRA. RFRA’s compelling interest test is an attempt to balance the religious believer’s duty to God with society’s need for public order. RFRA simply places the burden on the government to prove that its interest is compelling and that infringing on the religious practice is the least restrictive means of achieving its goal.

Religious belief and conscience take precedence over a person’s self-expression. Conscience is more than self-will. As the nineteenth-century intellectual John Henry Newman wrote:

\begin{quote}
Conscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with conscience, to ignore a Lawgiver and Judge, to be independent of unseen obligations. . . . Conscience is a stern monitor, but in this century it has been superseded by a counterfeit, which the eighteen centuries prior to it had never heard of, and could not have mistaken for it if they had. It is the right of self-will.\textsuperscript{298}
\end{quote}

\textsuperscript{296} Id. at 1217-19.


The old, reactionary conception of liberty championed by Ted Kennedy really did regard religious liberty as a trump, in many instances, over laws that were enacted democratically to advance other values. The same is true of course of any other liberty: If it does not sometimes act as a trump, it does not exist; and if it does not often act as a trump, it hardly exists.

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Professor Robert George, a former member of this Commission, elaborates: “Conscience, as Newman understood it, is the very opposite of ‘autonomy’ in the modern liberal sense. It is not a writer of permission slips. . . . conscience is one’s last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action.”299 This conception of conscience stands in stark contrast to the lazy conception of conscience that is often tossed about, where “Conscience as self-will identifies permissions, not obligations. It licenses behavior by establishing that one doesn’t feel bad about doing it . . . .”300

A conscience that imposes duties and does not serve as a rationalization of one’s behavior is a stern taskmaster. Undoubtedly, even those who strive to conform their behavior to the dictates of conscience sometimes lapse into using conscience to justify their preferred behavior. But it is important to have a correct conception of what conscience is so that we can discuss why it deserves deference. It also helps us think about why some claims of conscience, such as pacifism, deserve deference, whereas others, such as polygamy, do not.

IX. The Danger of Leviathan

One reason clashes between religious liberty and nondiscrimination provisions have become commonplace is because of the growth of government. When government - both federal and state - confined itself to performing only a few functions, there was room for religious believers to organize their lives in accordance with their beliefs. When government expands into every aspect of life, conflicts between the dictates of God and the dictates of man increase. Ilya Shapiro writes:

The cultural flashpoint surrounding wedding vendors’ pleas for toleration is evidence of a more insidious process whereby the government foments social conflict as it expands its control into areas of life that we used to consider public yet not governmental. . . .

Indeed, it’s government’s relationship to public life that’s changing - in the places that are beyond the intimacies of the home but still far removed from the state, like churches, charities, social clubs, small businesses, and even “public” corporations that are nevertheless part of the private sector. Under the influence of the Obama

300 Id. at 113; see also Newman, supra note 298 at 154.

This view of conscience, I know, is very different from that ordinarily taken of it, both by the science and literature, and by the public opinion, of this day. It is founded on the doctrine that conscience is the voice of God, whereas it is fashionable on all hands now to consider it in one way or another a creation of man. . . .

Conscience is not a long sighted selfishness, nor a desire to be consistent with oneself; but it is a messenger from Him, who, both in nature and in grace, speaks to us behind a veil, and teaches and rules us by His representatives. Conscience is the aboriginal Vicar of Christ, a prophet in its informing, a monarch in its peremptoriness, a priest in its blessings and anathemas, and, even though the eternal priesthood throughout the Church could cease to be, in it the sacerdotal principle would remain and would have a sway.
administration, the Left is weaving government through these private institutions, using them to shape American life according to its vision.\textsuperscript{301}

Therefore, one way of defusing the tension between religious liberty and nondiscrimination provisions is to reduce the size and scope of government. As Commissioner Heriot noted at the briefing, the problem with universities and colleges refusing to recognize religious organizations could be partly ameliorated if the schools stopped collecting mandatory student activity fees and doling them out to preferred organizations. Similarly, the Affordable Care Act created a previously unknown crisis of conscience. If the government had not mandated that all employers with a certain number of employees provide health insurance or pay heavy fines, the cases challenging the contraceptive mandate never would have materialized.

X. The Findings and Recommendations

The findings and recommendations in this report should serve as an alarm to liberty-loving Americans. I voted in favor of these findings and recommendations only because this report has already been delayed for over three years, and was concerned that a “no” vote from me would be used as an excuse to further delay the report.

The findings and recommendations elevate the nondiscrimination laws, which with the exception of the Fourteenth Amendment are mere statutes, not constitutional provisions, over the provisions of the Constitution. The majority writes, “Civil rights protections ensuring nondiscrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence.”\textsuperscript{302} Mere “policies” are now of “preeminent importance” - a distinction not shared, it appears, by the poor Free Exercise Clause. A bit later, the majority states, “Religious exemptions to the protections of civil rights based upon classifications such as race, color, national origin, sex, disability status, sexual orientation, and gender identity, when they are permissible, significantly infringe upon these civil rights.”\textsuperscript{303} “The First Amendment’s Establishment Clause constricts the ability of government actors to curtail private citizens’ rights to the protections of non-discrimination laws and policies. Although the First Amendment’s Free Exercise Clause and the Religious Freedom Restoration Act (RFRA) limit the ability of government actors to impede individuals from practicing their religious beliefs, religious exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis.”\textsuperscript{304}

The fundamental problem with the approach embodied in the findings and recommendations is that it is in practice, if not intent, hostile to religion. It also elevates the right to sexual liberty over

\textsuperscript{301} Ilya Shapiro, \textit{Against Conscience Taxes}, CATO INSTITUTE, Sept. 10, 2015, \textit{available at} \url{http://www.cato.org/blog/against-conscience-taxes}.

\textsuperscript{302} USCCR Report, Finding #1, \textit{infra} at 25.

\textsuperscript{303} USCCR Report, Finding #3, \textit{infra} at 25.

\textsuperscript{304} USCCR Report, Finding #4, \textit{infra} at 25.
the right to religious liberty. This is the precise opposite of the choice enshrined in our Constitution. That decision cannot be truly undone by civil rights statutes or even the whims of the Supreme Court but only through the amendment process. However, statements such as the following make it clear that, in their view, religion is only acceptable if it conforms to the dictates of modern liberalism:

The Commission endorses the briefing panelists’ statements as summarized at page 26 of the Report in support of these Findings:

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

I will address each of the report’s Recommendations in turn.

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

This recommendation is so muddled that it is almost impossible to make heads or tails of it. The underlying assumption is that there is some Platonic ideal of nondiscrimination laws that must not be marred by “overly-broad” religious exemptions. That simply is not the case. All nondiscrimination laws are the product of balancing competing interests and competing costs and benefits. And in this case, there are two competing nondiscrimination interests. When examined closely, this recommendation has no substance. However, the main problem with the recommendation is that it misunderstands the applicable law. It takes a few words and phrases from RFRA, mashes them together, and somehow thinks that these tests apply to religious exemptions from nondiscrimination laws. They do not. “Narrow tailoring,” “burden,” and so forth only apply when there is government action involved, not private action. And a wedding cake baker restricting his services to opposite-sex couples is private action, not state action.

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

305 USCCR Report, Finding #7, infra at 26.

306 USCCR Report, Recommendation #1, infra at 26.

I am not sure what this recommendation means but if there is a powerful cabal plotting a Henry VII-style creation of an established church I am glad my colleagues are ready to oppose it. I hope that this recommendation means that my colleagues will defend the rights of churches and religious organizations such as Hosanna-Tabor and the Christian Legal Society to establish criteria for ministers and leaders without encountering government interference and retaliation.

In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of Employment Division v. Smith, which protect religious beliefs rather than conduct.\textsuperscript{308}

Let us try a thought experiment. In the findings, my colleagues hail the Supreme Court’s decision in \textit{E.E.O.C. v. Abercrombie}, which held that a clothing store violated Title VII when it refused to hire a young Muslim woman who wore a headscarf. Under my colleagues’ reasoning, should we consider Abercrombie to have actually been in the right? The store did not refuse to hire the applicant because she believed in the tenets of Islam but because she wore a headscarf and that conflicted with the store’s “Look Policy.”\textsuperscript{309} The applicant never mentioned her religion during her interview, so the employer did not even know for sure that she was Muslim. The “Look Policy” of a clothing store like Abercrombie is an important aspect of its business and marketing, and would doubtless be applied if, say, a nun wanted to get a second job and wanted to wear her habit at work. If the majority believes that we should protect belief but not conduct, should we amend Title VII to encompass only belief, and not conduct? And if not, why should Samantha Elauf be entitled to wear her headscarf at work despite it conflicting with her employers’ desired image, but a small bakery be fined hundreds of thousands of dollars and driven out of business for refusing to bake a wedding cake?\textsuperscript{310}

Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and \textit{only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination} [emphasis added].\textsuperscript{311}

States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that

\textsuperscript{308} USCCR Report, Recommendation \#3, \textit{infra} at 27.


\textsuperscript{311} USCCR Report, Recommendation \#4, \textit{infra} at 27.
those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.\textsuperscript{312}

These parallel recommendations would be nonsensical if they were not so dangerous. RFRA cannot “create” First Amendment Free Exercise Clause rights. Those rights already exist by virtue of the fact that \textit{the First Amendment Free Exercise Clause exists}, even if the interpretation is contested. This thus represents an attempt to limit both RFRA and the Free Exercise Clause. It is a radical proposal, in that it calls not just for stripping Free Exercise protection from the Hobby Lobbies of America, but for limiting the Free Exercise rights of individuals and religious institutions if they are considered to unduly burden favored classes in some way.

\textbf{XI. The Dangers of Secularist Intolerance}

We should exercise prudential judgment to protect religious believers’ First Amendment rights. Refusing to provide robust protection of First Amendment rights is a dangerous narrowing of our freedom. People who live in accordance with their unfashionable religious beliefs will be unable to work in many professions. When a baker or a photographer or a CEO is forced to participate in activities that offend their religious beliefs, what hope is there for a doctor, a counselor, a lawyer? Traditional believers will have very few careers where they can both make a living and live according to their faith. It is an unofficial form of the legal disabilities imposed on English Catholics following the Glorious Revolution.

And although these cases are mostly directed toward traditional Christians whose beliefs about sexuality clash with prevailing secularism, there is no reason to think that it will stop there. Secularism is a jealous god, and it will brook no others.\textsuperscript{313} Nathan Diament of the Orthodox Union made this point when explaining why his organization filed a brief opposing the HHS mandate, although Orthodox Judaism does not prohibit contraception: “Today, in America, Catholic objections to women’s use of contraceptives may be broadly unpopular; tomorrow, it may be

\textsuperscript{312} USCCR Report, Recommendation #5, \textit{infra} at 27.

\textsuperscript{313} Roger Trigg, Is Religious Freedom Special?, Comment to the U.S. Commission on Civil Rights at 9 (2013)(on file with the Commission).

Religion in general, and Christianity in particular, is, it seems, not to be brought into public places either symbolically or as part of the democratic debate. Religion has always been vulnerable because it poses an authority different from, and sometimes at odds with, secular authority. Even if that authority is democratic, the ‘will of the people,’ it dislikes being judged by other standards. The vulnerability of religion both on an institutional and individual basis, is a good reason for giving a special emphasis to freedom of religion. Yet it is also clear that once freedom of contract, freedom of conscience or other freedoms are thought sufficient, religion itself becomes marginalised.
There is an additional danger of which those who would exalt individuals’ right not to be offended above religious liberty should be aware. As they destroy the moral and religious foundations of law, they also destroy the foundations of their own most cherished ideals.\textsuperscript{315} The entire basis for nondiscrimination laws rests on the belief that all people are equal in dignity. Whence comes that dignity? There are few things as obvious in life as that people are unequal - unequal in beauty, unequal in intellect, unequal in virtue.

When the America was founded, the Founders located man’s freedom and dignity in God. But not just any god - not Baal, not Odin, not Zeus - the God of Christianity and Judaism.\textsuperscript{316} Jefferson wrote, “all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness” and “Almighty God hath created the mind free, and manifested his supreme will that free it shall remain.” Even Jefferson, one of the least religiously orthodox of the Founders, ascribed to the Judeo-Christian belief that man is created in the image of God, and that is the source of our freedom and dignity.

Why should this concern those who would elevate nondiscrimination principles over religious liberty? Because if they destroy the moral and religious assumptions underpinning the idea of human dignity, they may accidentally destroy the idea of human dignity itself. The late political scientist Samuel Huntington wrote, “Of all the objective elements which define civilizations, 315 Charles J. Chaput, O.F.M., Archbishop of Philadelphia, \textit{Comment to the U.S. Commission on Civil Rights, at 3 (2013)(on file with the Commission).}

Catholic moral convictions about abortion, contraception, the purpose of sexuality and the nature of marriage are rooted not just in revelation, but also in reason and natural law. Human beings have a nature that’s not just the product of accident or culture, but inherent, universal and rooted in permanent truths knowable to reason.

This understanding of the human person is the grounding of the entire American experiment. If human nature is not much more than modeling clay, and no permanent human nature exists by the hand of a Creator, then natural, inalienable rights obviously can’t exist. And no human “rights” can finally claim priority over the interests of the state.

\textsuperscript{316} Thomas S. Kidd, \textit{God of Liberty} 253-254 (2010).

Americans’ faith allowed them to articulate why oppression was wrong in the eyes of God, and it helped them envision a republic where individual freedom could be guided by ancient ideals of the Scriptures: charity, justice, and protection for the weak and poor.

Does the national significance of these precepts mean that America was founded as a Christian nation? Yes, in the sense that believers - the majority of whom were Christians of some kind, with an important minority of Jews - played a formative role in the creation of the American Republic. … The founders’ religious agreement was on public values, not private doctrines.
however, the most important usually is religion”. As discussed earlier in this statement, the effort to force traditional religious believers to bow to certain sexual mores is really an attempt to replace the old faith with the new. But if the old faith is destroyed, and with it the idea of human dignity, the adherents of the new faith may rue the day they did so. Secularists may believe that they are simply expanding the idea of human dignity to encompass various important facets of human behavior, but in so doing they are destroying the foundation of the idea and are unlikely to find a similarly compelling basis.

Revolutions often turn on their instigators. The Judeo-Christian belief that man is created in the image of God, the *imago Dei*, undergirds Jefferson’s proclamation that “all men are created equal”. Despite the failures of its adherents, as is the case with any set of principles, this concept is the root of the traditional Christian belief that people are ends, not means, and that therefore every person - male, female, black, white, disabled, gay, straight - is inherently dignified, despite his undoubted sins and perhaps seemingly dubious prospect of salvation. Without that foundation, the idea that everyone has equal dignity is little more than a polite fiction to be brushed aside for greater convenience.

Do you think that the Faith has conquered the World?
And that lions no longer need keepers?
Do you need to be told that whatever has been, can still be?
Do you need to be told that even such modest attainments
As you can boast in the way of polite society
Will hardly survive the Faith to which they owe their significance?

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319 Europe is rapidly jettisoning its Christian heritage and has found nothing to put in the place of it save the religion of “human rights.”
320 I call this a religion because it is designed expressly to fill the hole in people’s worldview that is left when religion is taken away. The notion of a human right purports to offer the ground for moral opinions, for legal precepts, for policies designed to establish order in places where people are in competition and conflict. However, it is itself without foundations. If you ask what religion commands or forbids, you usually get a clear answer in terms of God’s revealed law or the Magisterium of the church. If you ask what rights are human or natural or fundamental, you get a different answer depending on whom you ask, and nobody seems to agree with anyone else regarding the procedure for resolving conflicts.

Consider the dispute over marriage. Is it a right or not? If so, what does it permit? Does it grant a right to marry a partner of the same sex? And if yes, does it therefore permit incestuous marriage too? The arguments are endless, and nobody knows how to settle them.

320 T.S. Eliot, “Choruses from the Rock, VI”. 
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