Keele Law Review, Volume 4 (2022) 13-41
ISSN 2732-5679

Harm, Not Privilege

Review of: John Adenitire *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press, 2020)

Robin Fretwell Wilson[*]

Introduction

Professor John Adenitire has written a thoughtful and timely book, *General Right to Conscientious Moral Claims - Beyond Religious Privilege*,[1] in which he expertly examines the 'general right to conscientious exemption available to a person who objects to any legal obligation whatsoever on the basis of a religious or non-religious conscientious belief.'[2] In this wonderful contribution to the field, Dr Adenitire argues that a general right to conscientious moral claims 'should be considered a defining feature of a liberal democracy.'[3] Weaving connections between three legal systems—those of the US, Canada, and the UK—Dr Adenitire brings the law to bear on two central points, showing:

(1) how 'a general legal right to conscientious exemption is a defining feature of a liberal democracy which is committed to individual freedom and state neutrality between different conceptions of the good life;'[4] and
(2) that 'the general legal right is in fact recognised in the law of the US, Canada, and the UK.'[5]

More controversially, Dr Adenitire mounts a normative case for the idea that 'the general right is and should be equally available to those who object on the basis of religious and non-religious conscientious beliefs.'[6]

Dr Adenitire's book arrives at a propitious time. In the U.S., a record number of Americans are balking at receiving COVID-19 vaccinations, both for religious reasons, moral reasons, political reasons, and no reason at all.[7] Where states have removed long-

[*] Robin Fretwell Wilson is the *Mildred Van Voorhis Jones Chair in Law* at the University of Illinois College of Law, the Director of the Institute of Government and Public Affairs for the University of Illinois System, and the founder and co-director of the Tolerance Means Dialogues and the Fairness for All Initiative. A special thank you to Templeton Religion Trust for the support of the Tolerance Means Dialogues, which are discussed in this piece. This essay was written before *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which radically transforms the discussion of trade-offs between access and conscience discussed *infra*.

[1] John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge University Press 2020).
[2] ibid 308.
[3] Ibid.
[4] ibid.
[5] ibid.
[6] ibid 307.
[7] David Robson, 'Why some people don't want a Covid-19 vaccine' *BBC News* (London, 23 July 2021) <https://www.bbc.com/future/article/20210720-the-complexities-of-vaccine-hesitancy> Accessed 16 December 2021.

standing exemptions, claims for relief on other grounds bubbled up. Like the childhood game of squeezing a balloon in one place to see it expand elsewhere, when Vermont in 2016 became the first U.S. state to pull back personal belief exemptions to vaccines for school-aged children, claims for religious exemptions leapt 'from 0.5% to 3.7%'.[8]

Even before COVID-19, the question of exemptions was mired in controversy. As legislatures and ultimately the U.S. Supreme Court cemented the right of same-sex couples to marry, wedding vendors and others asserted claims not to facilitate couples' ceremonies, drawing sanctions and lawsuits.[9] In one case, the Supreme Court wiped aside the penalty imposed by a state civil rights commission because it 'presuppose[d] the illegitimacy of religious beliefs and practices',[10] when a member analogized the baker to a Nazi in a brief, saying:

> I would also like to reiterate what we said in…the last meeting [concerning Jack Phillips]. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust… I mean, we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use – to use their religion to hurt others.[11]

In these and other contexts, however, the rights of some are pitted against those of others. Sometimes society can sustain competing rights without doing violence to greater goods—without, in constitutional terms, undercutting the government's compelling interests. And sometimes society cannot. Where society can affirm competing interests, the important work of inscribing pluralism in the law is best done by lawmakers and the executive branch, not courts.

In this essay, I write from a particular vantage point, as someone who has spent 15 years in the culture war consciously assisting lawmakers to meld rights for all people together in the same law. This approach, which I call *Civil Rights Complementarity*, begins with the idea that a thick pluralism and respect for the interests of all can lead communities to craft nuanced laws that respect all members of our increasingly diverse, non-homogenous communities.

The basic tenet of Civil Rights Complementarity is that protections for one community need not come at the expense of other communities or persons. In this approach, all people are empowered to live with integrity and be fully who they are, both in private and in public. Civil Rights Complementarity can enable the embrace of new civil rights,

---

[8] Ruth Graham, 'Vaccine Resisters Seek Religious Exemptions. But What Counts as Religious?' *New York Times* (New York, 11 September 2021) <https://www.nytimes.com/2021/09/11/us/covid-vaccine-religion-exemption.html> Accessed 16 December 2021.

[9] *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (2015); see also Robin Fretwell Wilson and Tanner Bean, 'Why Jack Phillips Still Cannot Make Wedding Cakes: Deciding Competing Claims Under Old Laws' (*Berkley Forum*, 29 June 2018) <https://berkleycenter.georgetown.edu/responses/why-jack-phillips-still-cannot-make-wedding-cakes-deciding-competing-claims-under-old-laws> Accessed 16 December 2021.

[10] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

[11] 'Transcript of Colorado Civil Rights Commission Meeting held on July 25, 2014 at the Colorado State Capitol: Charlie Craig and Davide Mullins v. Masterpiece Cakeshop, INC., State of Colorado, City and County of Denver, Colorado Civil Rights Commission Meeting' (*Arizona Reporting Service* 24 July 2014) https://adfmedialegalfiles.blob.core.windows.net/files/MasterpieceHearingTranscript.pdf.

whether LGBTQ protections or access to abortion, which may be combined with protections for people who ask not to facilitate these rights.[12] Civil Rights Complementarity enhances social cohesion rather than sowing division.

Part I recognises the very real possibility that concessions for some can harm others. Faith-healing and vaccination policies are places where U.S. states have overprotected religious belief—induced by the federal government to do so. Walking those exemptions back is hard. Part II discusses the need to look for smart policies that can protect all people, not just some persons. Zero-sum propositions for abortion and objections to abortion almost always leave one side worse off, usually women. Part III covers America's culture war over women's access to contraceptive coverage and how it need not be a war at all. Finding a way forward that respects competing interests while still permitting the state to protect persons requires creativity. Here, I contrast the Obama administration's contraceptive coverage mandate with the Trump era accommodations, showcasing a clash between religion and the state that did not have to happen. Part IV reinforces the idea that all people should have the ability to be fully themselves, both in public and in private. Communities that have long felt themselves to be 'second-class citizens'[13] and religious communities should be able to sit together at one table to talk about issues that implicate us all, while respecting the dignity claims on both sides of the ledger. In Part V, I discuss how bypassing clashes is a better alternative to balancing rights. Finally, Part VI recognises that consciously muting harm allows for the extension of new protections, especially LGBT non-discrimination laws on both the federal and state levels. I discuss Representative Chris Stewart's Fairness for All Act as an exemplary start for ensuring dignity to all on a federal level.

I. The Possibility of Harm is Real

Dr Adenitire notes that there are reasons not to allow objections:[14]

> [N]ot only does the general right seem to undermine legal and democratic authority; it may allow individuals to seriously undermine hard-earned legal rights of third parties. Some US scholars have suggested that conscientious exemptions are being abused by those opposed to the expansion of rights for LGBTQ individuals, in particular the right not to be discriminated against in the receipt of services generally available to the public (e.g., custom-made wedding cakes), or as a way to circumvent the established right to access to abortion services.[15]

With a signature even-handedness, Dr Adenitire recognises that there is often harm on both sides of the ledger:[16]

> When the state refuses to grant an exemption, this may not only encroach on personal autonomy or freedom of conscience; it may occasion harm to the objectors, that is undermine their well-being. Remember that when an

[12] Robin Fretwell Wilson, 'Unpacking the Relationship Between Religious Conscience and Access: Bounded Measures, Choke Points, and Gateways' in *Law, Religion, And Health In America,* Holly Fernandez Lynch, I. Glenn Cohen, and Elizabeth Sepper (eds), (Cambridge University Press 2016).
[13] Adenitire (n 1) at 280.
[14] ibid. at 8.
[15] ibid.
[16] Adenitire (n 1) at 15.

> exemption is denied the objectors may be coerced to perform an act which they believe to be wrong. Being compelled to perform an act believed to be morally wrong goes against a person's conscience and that might undermine their well-being. In fact when individuals make a claim of conscience they are normally so committed to their beliefs that acting against them would result in a loss of personal and moral integrity with consequences, such as profound guilt and remorse, which would have an adverse effect on the person's self-conception and self-respect.[17]

The possibility of harm to one group or another is a necessary consequence of our rich diversity. Americans remain deeply spiritual[18] even as religiosity in the United States ebbs.[19] According to PEW,[20] more than 75% of Americans identify with a faith tradition. More than half say religion is 'very important' in their lives.[21]

States have implicitly recognised the centrality of faith to many families by protecting their ability to raise children in their faiths. This extends to practices that many find problematic such as corporal punishment and faith healing, refusing to vaccinate children, circumcision, and other matters.[22]

Across the US, 'parents are legally empowered to rely upon "faith-healing" practices…as an antidote to when their children contract preventable and treatable illnesses'.[23] Forty-five states exempt parents[24] from duties to vaccinate children.[25] Thus, courts lack the power to mandate vaccination of children against the wishes of the parents. Before COVID, a resurgence of once-eradicated diseases[26] led California[27] and Vermont[28] in 2016 to repeal religious and personal belief exemptions.

---

[17] Adenitire (n 2) at 14.
[18] Michael Lipka and Claire Gecewicz, 'More Americans now say they're spiritual but not religious' (*Pew Research Center,* 6 September 2017) <https://www.pewresearch.org/fact-tank/2017/09/06/more-americans-now-say-theyre-spiritual-but-not-religious/> Accessed 23 December 2021.
[19] Michael Lipka, 'A closer look at America's rapidly growing religious "nones"' (*Pew Research Center*, 13 May 2015) <https://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/> Accessed 23 December 2021.
[20] 'Religious Landscape Study' (*Pew Research Center*) <https://www.pewforum.org/religious-landscape-study/#religions> Accessed 23 December 2021.
[21] Megan Brenan, 'Religion Considered Important to 72% of Americans' (*Gallup*, 24 December 2018) <https://news.gallup.com/poll/245651/religion-considered-important-americans.aspx> Accessed 23 December 2021.
[22]Robin Fretwell Wilson, *The Contested Place of Religion in Family Law* (Cambridge University Press 2018).
[23] Paul Offit, 'Bad Faith: When Religious Belief Imperils Children' in *The Contested Place of Religion in Family Law* (Cambridge University Press 2018).
[24] William Eskridge and Robin Fretwell Wilson (eds), *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (Cambridge University Press 2018).
[25] Offit (n 23).
[26] Sarah Breitenbach 'States Make It Harder to Skip Vaccines' *Valley News* (Washington, 29 May 2016) <https://www.vnews.com/To-combat-disease-states-make-it-harder-to-skip-vaccines-2486243> Accessed 23 December 2021.
[27] Tara Haelle, 'California Vaccination Bill SB 277 Signed By Governor, Becomes Law' (*Forbes*, 30 June 2015) <https://www.forbes.com/sites/tarahaelle/2015/06/30/california-vaccination-bill-sb-277-signed-by-governor-becomes-law/?sh=10e54d5d385c> Accessed 23 December 2021.
[28] 18 V.S.A. § 1122.

Healthcare decision-making is not the only domain in which parents are given a wide berth. In 2017, forty-four states and D.C.[29] allowed corporal punishment, premised for some on Biblical passages not to spare 'the rod'. [30] Acceptable discipline stops at 'excessive force' or causing 'substantial injury'.[31]

These laws carry real costs. For example, in Idaho, child mortality rates[32] in one fundamentalist enclave, the Followers of Christ, are ten times greater than rates in the rest of the state.[33] In one cemetery alone, more than 200 of the 592 graves contain minor children.[34] The reason is simple: Idaho law permits families to treat a child's medical needs 'by faith alone'. [35]

A task force established by the Governor of Idaho to examine faith healing deaths tallied child graves in the Followers of Christ's cemetery in Canyon County. By its estimate, between 2002 and 2011, the number of child deaths in that community was ten times the rate of child deaths in the rest of Idaho.[36] A granular review shows many deaths were, in fact, preventable. The Idaho Child Fatality Review Team reported in 2013 that 'five deaths of infants less than a month old were preventable had they received medical treatment'.[37] Three years later, a task force reported two more child deaths occurred 'under circumstances where medical care would have prevented death'.[38] Accounts from individuals who have since left the Followers of Christ reinforce this view. Linda Martin, a former Follower of Christ who has family still active in the church, grew up in Idaho.[39] Throughout Martin's life, many of the children in her family died from treatable illnesses and diseases, ranging from untreated diabetes to bronchial pneumonia; 'prayer and anointing with oil' she now 'believe[s] is medical neglect'.[40] Because of the shield of immunity around faith healing, prosecutors simply do not file charges after a child dies. At least one coroner will not do autopsies on deceased children because the law requires

---

[29] D.C. Code Ann. D. II, tit. 16, Ch. 23, Subch. I, Refs & Annos.
[30] Proverbs 23:13 KJV.
[31] Offit (n 23) at Appendix 1.
[32] National Center for Health Statistics, 'Infant Mortality Rates by State' (*CDC,* 12 March 2021) <https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm> Accessed 23 December 2021.
[33] Jason Wilson, 'Letting them die: parents refuse medical help for children in the name of Christ' *The Guardian* (Idaho, 13 April 2016) <https://www.theguardian.com/us-news/2016/apr/13/followers-of-christ-idaho-religious-sect-child-mortality-refusing-medical-help> Accessed 23 December 2021.
[34] 'Religious Exemptions to Medical Care of Sick Children, Childrenshealthcare.org, <http://childrenshealthcare.org/?page_id=24> Accessed 6 July 2022.
[35] Idaho Code § 16–1627 (2016).
[36] Marisa Morrison, "Opposing pieces of faith healing legislation introduced," (March 15, 2017), <https://www.kivitv.com/news/opposing-pieces-of-faith-healing-legislation-introduced> Accessed 5 July 2022.
[37] ibid.
[38] ibid.
[39] Betsy Russell, 'Former Church Member: "The Way These Kids Die is Inhumane"' *The Spokesman Review* (Washington, 4 August 2016) <www.spokesman.com/blogs/boise/2016/aug/04/former-churchmember-way-these-kids-die-inhumane/> Accessed 23 December 2021. See also Linda Martin, Idaho Faith Healing Testimony, Idaho Legislative Interim Committee Meeting, YouTube (Aug. 4, 2016), <https://www.youtube.com/watch?v=P9N9Gyrzb80> Accessed 6 July 2022.
[40] ibid.

autopsies only when a crime is suspected.[41] Like the affirmative steps to deceive authorities during Philadelphia's measles outbreak chronicled by Offit, Donahue says that in Canyon County evidence sometimes has been altered by the time law enforcement arrives.[42] For example, a child's clothing may be changed or the child's body swaddled in a blanket or some other type of fabric.[43] Donahue became a major proponent of change after he realized the difficulty of investigating child deaths in the Followers of Christ community.[44]

Despite the tragic consequences, legislators have struggled[45] to scale back laws while leaving a zone of autonomy to parents. In 2017, Idaho's Senate Majority Leader led efforts to give the state more tools in its arsenal when parents refuse to provide treatment to their child, without success.[46] Because it is extremely difficult to walk back those protections, this is a powerful reason to be cautious when shaping duties and carve-outs from them.

Of course, it is possible to both respect parents who believe in faith healing while protecting their children from preventable injury and even death by enacting judicial bypass laws. The difficulty is having enough eyes and ears inside insular communities to know when to intervene on behalf of children. And that ultimately may require a level of trust from the very people who are resisting the application of laws to their families, beliefs and practices.

COVID-19 has tempered the American appetite for parental deference.[47] D.C. now allows minors over 11 to consent to vaccination[48] when mature enough to comprehend the need, nature, and significant risks. However, outside of D.C., most jurisdictions require parental consent 'because of the constitutional right of parents to the control and custody and care of their children',[49] but only 'up to the point of harm'.[50]

---

[41] See Idaho Code § 18-4006 (2022); A Repeal Bill, Idaho Children <idahochildren.org/a-bill-to-repeal/> Accessed 6 July 2022.
[42] Morrison (n 45).
[43] ibid.
[44] Nigel Duara, 'An Idaho Sheriff's Daunting Battle to Investigate When Children of a Faith-Healing Sect Die' *L.A. Times* (Los Angeles, 18 April 2017) <www.latimes.com/nation/la-na-idahochildren-20170418-story.html> Accessed 23 December 2021.
[45] Robin Fretwell Wilson and Shaakirrah Sanders, 'By Faith Alone: When Religion and Child Welfare Collide' in Robin Fretwell Wilson (ed), *The Contested Place Of Religion In Family Law* (Cambridge University Press 2018).
[46] ibid.
[47] Ross D. Silverman, Douglas J. Opel and Saad B. Omer, 'Vaccination over Parental Objection - Should Adolescents Be Allowed to Consent to Receiving Vaccines?' (2019) 381(2) New England Journal of Medicine 104.
[48] Minor Consent For Vaccinations Amendment Act Of 2020, 2020 District of Columbia Laws 23-193 (Act 23-532).
[49] Lois M. Collins, 'What happens when teens want the COVID-19 vaccine and parents say no?' *Deseret News* (Utah, 9 September 2021) <https://www.deseret.com/2021/9/9/22664684/what-happens-when-teens-want-the-covid-19-vaccine-and-parents-say-no-mature-minor-health-decisions> Accessed 23 December 2021.
[50] ibid.

Too often we forget or overlook the harm that flows from not exempting people from rigid—if generally applicable, neutral[51]— rules. In Kansas, a woman, a Jehovah's Witness, needed a bloodless liver transplant that was available in a neighbouring state. The state Medicaid agency prohibited 'reimbursing out-of-state procedures'[52] and 'refused to make any exception for her',[53] an outcome many see as needlessly rigid. It was also tragic. She died before a lawsuit brought under the state's Religious Freedom Restoration Act could force the agency to walk back the restriction.[54]

The possibility of harm to someone is precisely why many people believe we must not make accommodations for religious belief. Yet harm can also occur when we do not recognize or respect the 'the equal prerogatives of other communities with different internal practices'.

Younger Americans believe that allowing all people to live authentic lives, even when their views seem out of step with majority views, is a worthy and achievable goal. The Tolerance Means Dialogues bring individuals with diverse backgrounds and viewpoints together at universities and colleges to discuss ways to live with our differences. Scholarship-winning essayists explain how their acceptance of others has neither been easy nor has it come naturally. Negotiating differences takes work and strategies. These essayists describe the struggle in poignant detail, often spring-boarding from their own experience in overcoming rejection for who they are. They embrace others notwithstanding difference.[55] And they remind us that tolerance is needed not just by those who find themselves in the numerical minority but by those who are assumed to be averse to them.

Consider Arielle Brown, a graduate of the University of Illinois Urbana-Champaign who self describes as 'a Black, Christian, heterosexual woman'. She shares her experiences of 'discrimination and microaggressions.' Her 'spirituality and character were automatically rejected because it was assumed that [her] Christian identity influenced [her] to hate the LGBTQ+ community'. As Arielle notes, when others project views onto us, it 'yield[s] muted voices and invisibility'.

Arielle describes how to stand in one's truth, honestly, forthrightly, even when others might not agree. 'Self-compassion and self-acceptance' are the key:

> The more we respect and accept ourselves, the more we can respect and accept others. This is because once we have a sound sense of self, we are not

---

[51] See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 at 878-79 (1990). The Court held that the enforcement of an otherwise valid general applicability regulation that burdens religious conduct incidentally is not prohibited under the Free Exercise Clause.

[52] Christopher C. Lund, 'RFRA, State RFRAs, and Religious Minorities' (2016) 53(1) San Diego Law Review 163.

[53] ibid.

[54] Brad Cooper, 'Jehovah's Witness who needed bloodless transplant dies' *Kansas City* (Missouri, 16 May 2014) <https://www.kansascity.com/news/local/article310218.html> Accessed 6 July 2022. ('Mary Stinemetz, 66, passed away Sunday at the University of Colorado Hospital, roughly three years after she first learned she needed a liver transplant').

[55] 'Scholarship Winning Essays' (*Tolerance Means Dialogues*) <https://www.tolerancemeans.com/essays> Accessed 23 December 2021.

> forcing our opinions on others or ignoring their opinions. Instead, we have peace in who we are and we wish to share our perspective with others.[56]

Honest, candid dialogue can fundamentally change the conversation. The Tolerance Means Dialogues openly discuss how to protect the ability of 'faith communities to retain internal beliefs and practices that are "orthodox,"[57] without jeopardizing the ability to coexist with, respect, and even protect other communities.

By conjuring occasions where tolerance, diversity, and engagement are all on display, we assist people to learn from each other and strive for the 'well-being of all citizens, all neighbours'.[58]

A frank dialogue about the basic trade-offs facing civil society is needed. Equally important, those willing to repair deep rifts between communities also need inspiration. They need to believe it is possible to heal old wounds, even if against long odds.[59]

More must be done to cultivate 'a context of covenantal pluralism' by giving students, thought leaders, and communities that begin from 'profoundly different points of religious and epistemological departure' a reason and a forum to 'engage one another across their differences in a spirited way.'[60] Our scholarship-winning essayists give us the vocabulary and the tools to respect others despite differences.

II. Smart Policy Tries to Protect All People

In a plural democratic society, it is not enough to recognize that there is a possibility of harm. Rather, it is incumbent upon us to resolve the problem, even when not everybody is going to agree on what the solutions should be.

American culture and American media have an obsession with zero-sum propositions. Consider abortion and objections to abortion. Although abortion conscience clauses have existed alongside the right to abortion since *Roe v. Wade* in 1973, popular portrayals routinely land on zero-sum propositions: [61]

- women's access means that providers should have no choice; or

---

[56] Arielle Brown, 'One Can Love and Be Loved' (*Tolerance Means Dialogue*, 12 September 2018) <https://www.tolerancemeans.com/essaylist/2018/9/11/arielle-brown-graduatebruniversity-of-illinois> Accessed 23 December 2021.
[57] Tolerance Means (n **Error! Bookmark not defined.**2).
[58] ibid.
[59] Robin Fretwell Wilson, Aylin Cakan, and Marie-Joe Noon, 'From Bigotry to Tolerance' *in Who's The Bigot? Learning From Conflicts Over Marriage and Civil Rights Law* (Oxford University Press 2020).
[60] ibid.
[61] See generally, Robin Fretwell Wilson, 'When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions' 48 U.C. Davis L. Rev 703 (2015). Marriage equality is but one example. Conscience protections in the abortion arena also advanced social progress, although many overlook that history (demonstrating that Congress's inaugural healthcare 'conscience provision', the Church Amendment, prompted a 50 percent increase in the number of physicians performing abortions in their offices within months of enactment because it protected any conscientious conviction 'about abortion', encompassing both those who feel compelled to perform abortions and those who object). Robin Fretwell Wilson, 'Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights after Hobby Lobby' in Micah Schwartzman, Chad Flanders and Zoë Robinson, (eds), *The Rise of Corporate Religious Liberty* (Oxford University Press 2016) 257; Wilson (n 12).

- providers must be given choice, whatever the risk for women's access or health.

Often we are not put to such stark choices by the facts. Consider a pair of stories.[62]

In a case involving Mount Sinai Hospital, which allegedly forced a nurse to do a late-term, twenty-two-week abortion over her religious objections, federal officials ultimately intervened to enforce the Church Amendment, and Mount Sinai agreed to follow the law.[63]

The sudden reversal by major medical centres of 'long-standing polic[ies] exempting employees who refuse[d] [to help with abortions] religious or moral objections',[64] shows that some institutions can staff around objectors without compromising access. Mount Sinai Hospital staffed around nurse Cathy Cenzon-DeCarlo's religious objections to assisting with abortion without friction for years.[65] In 2009, Cenzon-DeCarlo's supervisor threatened her with termination and 'patient abandonment' charges if she refused to assist with a 22-week abortion.[66] Cenzon-DeCarlo says her superior could have assisted with the abortion, which required 'surgery within 6 hours'; the hospital said it had no 'replacement and…the patient's life was at risk'.[67]

DeCarlo says 'I had to take part in the dismemberment of a baby', and after, 'she had to reassemble the foetus to ensure no material remained in the patient'.[68]

For her, 'It was very distressing. I became a nurse to put people back together'.[69]

Mount Sinai ultimately agreed with the U.S. Department of Health and Human Services ("HHS"), which enforces federal conscience protections, to resume their prior arrangement with DeCarlo.[70] It affirmed the 'legal right of any individual to refuse to participate' in abortion procedures, regardless of emergency or elective status. Under Mount Sinai's 'alternative coverage' process, supervisors consult a list of willing providers

---

[62] Stephanie Armour, 'Two Women Spotlight Two Sides of Abortion Debate' *The Wall Street Journal* (New York, 13 April 2018) <https://www.wsj.com/articles/two-women-two-sides-of-the-debate-over-the-right-to-refuse-abortion-1523611800> Accessed 22 June 2022.

[63] *See* Letter from Linda C. Colón, Reg'l Manager, Office of the Sec'y, U.S. Dep't of Health & Human Servs. to Matthew S. Bowman, Attorney, Alliance Defending Freedom and David Reich, Interim President, Mount Sinai Hosp (1 February 2013) 2–3 <https://adfmedia.org/case/cenzon-decarlo-v-mount-sinai-hospital-resource-page> Accessed 6 July 2022; The Mount Sinai Hospital, *Nursing Clinical and Administrative Manual* at 4 (The Mount Sinai Hospital NY 2011) <http://www.adfmedia.org/files/MtSinaiPolicy.pdf>.

[64] Rob Stein, 'New Jersey Nurses Charge Religious Discrimination over Hospital Abortion Policy' *Washington Post* (Washington DC, 27 November 2011) <http://www.washingtonpost.com/national/healthscience/newjersey-nurses-charge-religious-discrimination-over-hospital-abortionpolicy/2011/11/15/gIQAydgm2N_story.html> Accessed 22 June 2022.

[65] *Cenzon-DeCarlo v. Mount Sinai Hosp.,* No. 09-3120, 2010 WL 169485, at *1 (E.D.N.Y. Jan. 15, 2010), aff'd, 626 F.3d 695 (2d Cir. 2010).

[66] Memorandum in Support of Motion for Preliminary Injunction at 1, 6, *Cenzon-DeCarlo*, 2010 WL 169485 (No. 09-3120) <https://adfmedia.org/case/cenzon-decarlo-v-mount-sinai-hospital-resource-page> Accessed 7 July 2022.

[67] ibid at 4, 8; Carpo Affidavit at 7, 11, *Cenzon-DeCarlo v. Mount Sinai Hosp.,* No. 10237-10 (N.Y. Sup. Ct. Feb. 7, 2011).

[68] Armour (n 62).

[69] ibid.

[70] *Mount Sinai Hospital* (n 634).

after an objection.[71] This may increase costs if objectors represent a significant fraction of all providers or serve on thinly staffed units. Nonetheless, the fact that Mount Sinai staffed around Cenzon-DeCarlo for years—and agreed to resume that arrangement—suggests that religious objection need not imperil access. Maintaining lists of willing providers helps avoid win-lose scenarios.[72]

In a 2011 case involving the University of Medicine and Dentistry in New Jersey (UMDNJ), twelve nurses filed suit, alleging that the UMDNJ forced them to 'assist [in] abortions or…be terminated',[73] despite federal conscience protections permitting them not to train for abortion.[74] Even though transfer was theoretically possible, 'no such jobs exist[ed] anyway, so that…objection…could only lead to…termination'.[75]

To be sure, there are costs to patients from conscience protections. In 2009, Mindy Swank went to three different hospitals for care 'after her water broke at 18 weeks—and tests showed the foetus wouldn't survive'. [76] The first hospital was bound to 'uphold Catholic health-care restrictions' after the merger creating it; the second, 'a Catholic hospital with better imaging equipment [was] restricted from helping for religious reasons', and the third was 'a public hospital with no religious affiliation [that could not obtain her records because] the Catholic hospital she had been to earlier refused to send over her required paperwork showing it was medically necessary to induce labour'. "Ms. Swank went back to the first secular hospital for the rest of her care", not realizing a clinic could have cared for her.[77] That the clinic could provide the service is something Ms. Swank should have been specifically informed of.[78]

American lawmakers have developed regulations and laws that affirm both access and religious freedom.[79] Devices like placing duties to ensure access on institutions rather

---

[71] ibid. Mount Sinai agreed to train employees and prohibit discrimination based on abortion objections; Letter from Linda C. Colón, Reg'l Manager, Office of the Sec'y, U.S. Dep't of Health & Human Servs. to Matthew S. Bowman, Attorney, Alliance Defending Freedom, and David Reich, Interim President, Mount Sinai Hosp. (n 63) at 2-3.

[72] ibid. Citing cases like *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 226, 228 (3d Cir. 2000), some contend that all objections, even those that can be staffed around, represent a '[lapse] in medical professionalism', making courts 'appropriately intolerant' of objectors. In Shelton, the court found a public hospital reasonably accommodated a Pentecostal nurse opposed to assisting with emergency abortions by offering transfer at the same pay and benefits to another unit providing no 'religiously untenable' services—a transfer Shelton refused. *Shelton*, 223 F.3d at 220, at 226. That refusal ultimately doomed Shelton's claim, not the court's 'intolerance' of religious objectors. See Catherine Weiss, 'Testimony on Refusal Clauses in the Reproductive Health Context Before the House Energy and Commerce Committee Health Subcommittee' (*ACLU,* 11 July 2002) <https://www.aclu.org/reproductive-freedom/testimony-aclu-reproductive-freedom-project-director-catherine-weiss-refusal-cl> Accessed 22 June 2022.

[73] Verified Complaint at 7–8; *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Oct. 31, 2011).

[74] 42 U.S.C.A. § 238n (2012).

[75] Verified Complaint at 7–8; *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Oct. 31, 2011).

[76] Armour (n 623).

[77] ibid.

[78] ibid.

[79] See e.g. Robin Fretwell Wilson, 'The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State' (2012) 53 B. C. L. Rev 1417; Robin Fretwell Wilson, 'The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures' (2008) 34 AM. J.L. & MED 41.

than individual providers, transfer duties, and notice to patients can all transform what is portrayed as a zero-sum proposition.[80] They can keep well both Ms. Swank and Ms. Cenzon-Decarlo.

Of course, there have to be guardrails in place.

No woman should be held hostage to a single medical provider or have her medical records and information withheld,[81] and no nurse should be made to 'dismember babies' when others are available to do the service.[82]

Lawmakers can—and have—written conditional exemptions, giving the providers the ability to step off when no one is being harmed.[83] The parties in the Mt. Sinai litigation ultimately agreed to such a rule by stipulation. U.S. District Court Judge Linares 'memorialized' the agreement of the parties that, except when the mother's life is at risk and there are no other non-objecting staff available to assist, nurses with conscientious objections will not have to assist with abortions.[84] In such rare cases, 'the only involvement of the objecting plaintiffs would be to care for the patient until…a non-objecting person can get there to take over the care'.[85] Both resolutions turn out to be win-wins, requiring that institutions staff around objectors without compromising on patient access. Such a rule would have prevented Ms. Cenzon-DeCarlo's trauma. And lawmakers can also make clear that records and health information belong to the patient and cannot be withheld.[86]

III. America's Culture War Need Not Be a War At All

Religious groups and individuals have sought religious exemptions to the duty to assist with abortions or facilitate same-sex marriages. In all these contexts, religious objectors claim a special right of entitlement to follow their religious tenets, in the face of equally compelling claims that religious accommodations threaten access and may impose significant costs on others.[87] Often this gets framed as objectors wanting a free pass from the law,[88] whether the concessions to religious believers come in the form of generalised accommodations for religious practice like those made in RFRA or specific exemptions to particular statutes. Such critics view both general and specific protections as a kind of

---

[80] Wilson (n 12).
[81] Wilson 2008 (n 79); Wilson (n 22) at 1-14.
[82] See e.g. Wilson 2012 (n 79); Wilson 2008 (n 79).
[83] Robin Fretwell Wilson, 'Matters of Conscience: Lessons for Same-Sex Marriage from the Health Care Context' in Douglas Laycock, Anthony R. Picarello Jr and Robin Fretwell Wilson (eds), *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowman and Littlefield Publishers 2008).
[84] See Transcript of Proceedings at 5–6, *Danquah v. Univ. of Med. & Dentistry* of N.J., No. 2:11-cv-06377 (D.N.J. 31 October 2011) <http://www.lifenews.com/wp-content/uploads/2011/11/newjerseynursesabortion.pdf> Accessed 22 June 2022.
[85] ibid.
[86] Wilson 2008 (n 79).
[87] Tanner J. Bean and Robin Fretwell Wilson, 'The Administrative State as a New Front in the Culture War: *Little Sisters of the Poor v. Pennsylvania*' [2020] CATO Supreme Court Review 229.
[88] Robin Fretwell Wilson, 'When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions' (2014) 48 U.C. Davis L. Rev. 703.

"get-out-of-jail free card", entitling the protected party to 'discriminate'.[89] For these critics, religious liberty accommodations are generally offensive because '[i]ndividuals (and entities) are expected to follow the laws of the land or face the consequences'.[90] In this lawlessness narrative, 'the invocation of a religious belief allows a company to opt out of a government requirement that applies to everyone else'.[91] For these critics, religious believers use generalized accommodations and specific exemptions to veto the law, hampering social change and creating unfair surprise.[92] Part and parcel of this critique is the claim that all exemptions tread on the interests of third parties.[93]

But the law itself can be the problem by setting people at loggerheads.

Finding a way forward that respects competing interests while permitting the state to accomplish its important work of protecting persons requires creativity. An example shows how this can work in practice.

The political maelstrom over the Obama administration's contraceptive coverage mandate provides a tangible illustration of a clash between religion and the state that did not have to happen.[94] Through regulations to implement provisions of President Obama's signature Affordable Care Act ("ACA")[95] proposed by an advisory group to the Health Resources and Services Administration ("HSRA"), the Obama administration directed covered (non-grandfathered) employers to pay for all FDA-approved contraceptives, citing 'compelling health and gender equity goals'.[96] The required drugs under the

---

[89] Religious Liberty Implications of D.C.'s Same-Sex Marriage Bill (18-482): Hearing Before D.C. Council, 18th Sess. at 6:57:55 (D.C. Nov. 2, 2009) (statement of Councilmember David Catania) <http://oct.dc.gov/services/on_demand_video/channel13/november2009/11_02_09_JUDICI.asx> Accessed 22 June 2022 (framing an exemption as asking for 'all of the benefits of the position [while feeling] entitled to discriminate'). Critics of exemptions wield the term 'discrimination' as if it is dispositive and universally understood. What counts as discrimination is a particularly thorny question. The economist Gary Becker classically noted how: It is difficult to use this definition in distinguishing a violation of objective facts from an expression of tastes or value. For example, discrimination and prejudice are not usually said to occur when someone prefers looking at a glamorous Hollywood actress rather than at some other woman; yet they are said to occur when he prefers living next to whites rather than living next to people of colour. At best calling one of these actions 'discrimination' requires making subtle and rather secondary distinctions. Gary S. Becker, *The Economics of Discrimination* (2nd ed, Chicago University Press 1971) 13. Whole articles and books have been devoted to exploring the nature of discrimination. See, e.g. Kenji Yoshino, *Covering: The Hidden Assault On Our Civil Rights* (Random House Publishing Group 2006) (discussing the effects of discrimination).

[90] Elizabeth Sepper, 'Doctoring Discrimination in the Same-Sex Marriage Debates' (2014) 89 IND. L.J. 703, 725.

[91] See Jeffrey Toobin, 'Arizona's Anti-Gay Bill Lives on in Hobby Lobby' (*New Yorker*, 4 March 2014) <http://www.newyorker.com/news/daily-comment/arizonasanti-gay-bill-lives-on-in-hobby-lobby> Accessed 22 June 2022.

[92] See Jennifer C. Pizer, Op-Ed., 'The Hobby Lobby Decision's Slippery Slope' (*Advocate,* 6 August 2014) <http://www.advocate.com/commentary/2014/08/06/op-edhobby-lobby-decisions-slippery-slope> Accessed 22 June 2022 (speculating that Hobby Lobby 'could mean religious interests now trump other interests in many circumstances, with believers entitled to impose their views at others' expense in ways rejected in the past' and noting that Lambda Legal 'flagged a range of potential problems for LGBT people and people living with HIV in [its] Hobby Lobby amicus brief').

[93] Toobin (n 91).

[94] Wilson 2012 (n 79).

[95] ibid.

[96] Coverage of Preventive Services under the ACA, 77 Fed. Reg. 8725, 8729 (15 February 2012) (citing Institute of Medicine, Clinical Preventive Services for Women 16 (2011)).

Coverage Mandate included four that objectors see as cutting off a life.[97] Incidentally, the fact that these drugs might act after conception was factually stipulated to in litigation.[98] The Coverage Mandate seemed tone deaf, as if the deep divisions around abortion that have riven Americans since *Roe v. Wade* did not exist.[99]

Catholic and other groups that had supported the ACA saw the Coverage Mandate as a breach of faith.[100] In the ACA, Congress nowhere mentioned abortion, abortion-inducing drugs, or drugs that would act after conception. Congress nowhere defined 'preventative care and screenings'. Congress nowhere provided the HRSA, a sub-agency of HHS, with guidance on how to arrive at these "comprehensive guidelines". Instead, HRSA looked to the National Academy of Medicine, a non-profit group of medical advisers, to make recommendations.

Churches were exempted from the beginning because, the Obama Administration believed, any church employee would share the church's values, so nobody would be

---

[97] *Burwell v. Hobby Lobby*, 573 U.S. 682, 701 (2014); Wilson 2012 (n 79).

[98] Wilson 2012 (n 79).

[99] Sarah Kliff, 'We polled 1,060 Americans about abortion. This is what they got wrong' (*Vox News*, 27 January 2016) <https://www.vox.com/a/abortion-statistics-opinions-2016/poll> Accessed 22 June 2022. A Vox poll suggests that both Democrats and Republicans agree that abortion is rare. In fact, 1,060 Americans were polled and '[t]wenty-seven percent…think fewer than 10 percent of women will have an abortion in their lifetime; 51 percent say it's fewer than 20 percent'. However, in reality and according to the Guttmacher Institute, a reproductive health-focused non-profit that supports abortion rights, more women are getting abortions — to be precise, 'about 25 to 30 percent'. Additionally, Americans exaggerate the safety risks that women getting abortions experience. 'Most people think abortion is either 'less safe' or 'about as safe' for women as giving birth. But that's not true. In actuality, bearing a child causes more serious complications and deaths for mothers than abortion does'. Similarly, the article suggests that other procedures that are not perceived as being as severe as an abortion, for example wisdom teeth removal, actually have twice as many risks as abortion. '[M]isperceptions aren't just unfortunate psychological quirks; they work together to contribute to a view of abortion as being infrequent and risky for the women who have one. That ultimately shapes the way we regulate abortion in the United States and how we judge which restrictions ought to stand'. This encourages the enactment of laws that reduce access to abortion, by explaining that the procedure was not as safe as it previously was thought and that the law is meant to make it safer for women. Gender, education and income are also a contributing factor to Americans' perception of how often abortions occur. 'Our poll finds groups of Americans that have the highest abortion rates — low-income and less educated women — tend to more accurately guess the prevalence of abortion. Demographics with lower abortion rates, meanwhile, tend to have less accurate guesses'. 'Social science shows that we tend to underestimate the frequency of experiences we hear less about. And that makes sense'.

[100] As one group that supported the ACA, the Catholic Health Association, explained: 'The impact of being told we do not fit the new definition of a religious employer and therefore cannot operate our ministries following our consciences has jolted us…From President Thomas Jefferson to President Barack Obama, we have been promised a respect for appropriate religious freedom'. See e.g. Carol Keehan, 'Something Has to Be Fixed' [2012] Catholic Health World 1. Other religious leaders asserted that the coverage mandate treats them as 'second class citizens'. See Nancy Frasier O'Brien, HHS move amounts to 'to hell with you,' bishop says as protests mount (National Catholic Reporter, 27 January 2012), https://www.ncronline.org/news/politics/hhs-move-amounts-hell-you-bishop-says-protests-mount Accessed 6 July 2022.

denied something they desire.[101] But no provision was made for faith groups or other objectors.[102]

Religious objectors vehemently opposed the Coverage Mandate. In a letter to the Senate, the Cardinal of Boston, Seán O'Malley, and the Archbishop of Baltimore, Bishop William E. Lori, said:

> 'In short, the bill does not befit a nation committed to religious liberty. Indeed, if it were to pass, it would call that commitment into question. Nor does it show a genuine commitment to expanded health coverage, as it would pressure many Americans of faith to stop providing or purchasing health coverage altogether. We oppose the bill and urge you to reject it.'[103]

Objectors said the Coverage Mandate was coercive. Under the ACA, two different penalties kick in if employers do not provide mandated coverage or compliant plans.[104] The penalties were staggering. As one example, if the University of Notre Dame dropped its coverage for all employees rather than violate its religious convictions, it would have faced an annual penalty of approximately $32,830,000.[105] Ironically, Notre Dame may nonetheless have come out ahead financially by dropping health insurance for its employees, ultimately undercutting the ACA's aims of health insurance for all.

To his credit, President Barack Obama took the pushback seriously. He directed his administration to fashion an accommodation for non-profit religious groups that took some religious objectors (although not all—most famously, closely held corporations like Hobby Lobby)[106] out of the position of providing coverage of those drugs, but provided that women would receive 'contraceptive care free of charge without co-pays, without hassle'.[107]

Under the Obama administration's accommodation for religiously affiliated employers (the "Non-profit Accommodation"), employees received coverage of the contested drugs

---

[101] 'Specifically, the Departments seek to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions'. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act (2011) 76 Fed. Reg. 46621, 46623. Whether this supposition holds is questionable. A 2016 study of 'Catholics who attend Mass weekly [found that] just 13% say contraception is morally wrong, while 45% say it is morally acceptable and 42% say it is not a moral issue'. 'Where the Public Stands on Religious Liberty vs. Nondiscrimination: 4. Very Few Americans See Contraception as Morally Wrong', (*Pew Research Center,* 28 September 2016) < https://pewrsr.ch/2XJMtl3> Accessed 22 June 2022.

[102] HHS Case Database, Beckett Religious Liberty for All (2018), <https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/?fwp_database_profit=718922d7c06d05c1e7c4894ca554492d> Accessed 17 June 2022.

[103] Seán Cardinal O'Malley and Most Reverend William E. Lori (*United States Conference of Catholic Bishops*, 14 July 2014) <https://www.usccb.org/issues-and-action/religious-liberty/upload/07-14-14-S-2578-Cardinal-O-Malley-Archbishop-Lori-to-Senate.pdf> Accessed 7 July 2022.

[104] Robin Fretwell Wilson, 'Demystifying *Hobby Lobby*' in Bill Atkin (ed), *The International Survey of Family Law* (Jordans Publishers 2015).

[105] ibid.

[106] ibid.

[107] See: Richard Wolf, 'Obama Tweaks Birth Control Rule' (*USA Today,* 10 February 2012) <http://content.usatoday.com/communities/theoval/post/2012/02/source-obama-to-change-birth-control-rule/1#.YqxQ_hrMLIU> Accessed 24 June 2022 Noting that 'White House officials took pains to avoid the word 'compromise,' [because] under the accommodation, no woman who wants access to contraceptives should be denied'.

from the federally-facilitated exchange insurer through coverage that acted as an add-on to health insurance coverage the religious employer financed.[108] In *Hobby Lobby v. Burwell*, the U.S. Supreme Court, in a 5-4 decision, found that Non-profit Accommodation itself represented a less restrictive means of accomplishing whatever compelling interest the federal government may have had in implementing the Coverage Mandate.[109]

The post-script, of course, is familiar to many. Some religious employers wanted nothing to do with Non-profit Accommodation, seeing it as part and parcel of their employer-provided coverage. For some, like the Little Sisters of the Poor, Catholic nuns who provide care for the elderly poor, filing the needed forms would initiate a causal chain ultimately making them complicit in providing drugs they see as both ending life and preventing life, actions they see as gravely immoral.[110] They objected to the mechanics of the Non-profit Accommodation.

At the end of the Obama administration, it appeared that the parties, at the Supreme Court's urging, could reach a resolution where the Little Sisters needed to 'do nothing more than contract for a plan that does not include coverage for some or all forms of contraception',[111] while women still received seamless 'cost-free contraceptive coverage'[112] from the same insurer. But finding this common ground proved too much in the Obama administration's waning hours.

Enter the Trump Administration. Just four months after taking office, in a Rose Garden event, President Donald Trump congratulated the Little Sisters for having 'just won a lawsuit' and that their 'long ordeal w[ould] soon be over'.[113] In one of Trump's first actions, his administration issued interim final rules, later finalized, that kept the Coverage Mandate, but enlarged who could object. The Trump Administration exempted not only all religious objectors but also moral objectors, too, taking a page from the archetypal healthcare conscience clause, the Church Amendment.[114] The Church Amendment allowed for the moral exemption because four of the mandated drugs 'prevent implantation', which 'many persons believe are abortifacient'.[115]

Unlike the Non-profit Accommodation, the Trump Administration rule allowed employers to step aside with no provision for women's access to the objected-to drugs, creating a wholesale exemption. In effect, under Trump's approach, every objector can

---

[108] Bean and Wilson (n 88).
[109] The Court did not decide whether the government had a compelling interest. See Wilson (n 105) at 343.
[110] *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, at 1167 (10th Cir. 2015) ('The Little Sisters have always excluded coverage of sterilization, contraception, and abortifacients from their health care plan in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral.'). In Hobby Lobby, Justice Ruth Bader Ginsburg in dissent stressed that decisions 'whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but the covered employees and dependents, in consultation with their health care providers,' implying that the employers' objections were too attenuated to be cognizable. See: *Burwell v Hobby Lobby* at 760–61 (n 98).
[111] Zubik v. Burwell, 136 S. Ct. 1557, at 1560-61 (2016).
[112] Ibid at 1559.
[113] Michael J. O'Loughlin, 'White House Signing Ceremonies Showcase Two Styles of U.S. Catholicism' (*America: The Jesuit Review*, 9 May 2017) <https://bit.ly/2PAFRRv> Accessed 24 June 2022.
[114] Bean and Wilson (n 88).
[115] 'Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act' (2017) 82 Fed. Reg. 47838, at 47840-41.

now elect to be treated like churches, with no duty to anyone. Obviously, whoever an accommodation extends to, it feels very different when the harm to others is muted.

The Trump administration's fix precipitated its own legal challenge, resolved, for now, in the U.S. Supreme Court's 7-2 decision in *Little Sisters of the Poor*.[116] Two states, Pennsylvania and New Jersey, balked at shouldering the financial burden of providing contraceptives to women working for exempted employers.[117] The Court upheld the wholesale exemption, resting its decision on just three words out of the ACA's more than 400,000 words—'as provided for'.[118] Congress, the majority found, had delegated ample discretion to agencies to not only decide what should be covered under the coverage mandate, but who was required to abide by its terms. In other words, the Obama Administration could create the mandate and Trump could punch big holes in it.

Those three little words allowed both presidential administrations to inflame Americans' perennial culture war over abortion. Ironically, the grounding in statutory interpretation ensures that agencies will remain a locus of culture war fights.

President Biden has said he would 'restore the Obama-Biden policy that existed before the *Hobby Lobby* ruling: providing an exemption for houses of worship and an accommodation for non-profit organizations with religious missions.'[119]

It will take a while. The underlying regulation happened too early for Congress to take it back under the Congressional Review Act, which permits Congress to take back regulations for 60 legislative days.[120] Undoing the Trump regulation will require notice and comment. As of this writing, the Biden Administration has not proceeded with regulations.

The balances struck between competing rights may increasingly see-saw from administration to administration.[121] Approaches that follow President Obama's example and take members of our society out of clashing positions are far more likely to endure and be sustainable.

---

[116] Bean and Wilson (n 88).

[117] *Pennsylvania v. President of the U.S.*, 930 F.3d 543 (3d Cir. 2019) at 560–61. The states argued that if employers did not provide needed drugs through the coverage mandate, they would incur additional costs under their state-funded family planning and contraceptives services programs.

[118] The Affordable Care Act § 2713(a)(4); 42 U.S. Code § 300gg-13(a)(4).

[119] Julie Zauzmer Weil and Sarah Pulliam Bailey, 'Trump said Biden 'hurt God'. Biden has spent his life drawing from his Catholic faith.' (*The Washington Post*, 7 August 2020) <https://www.washingtonpost.com/religion/2020/08/07/trump-hurt-god-biden-catholic-faith/.> Accessed 16 December 2021.

[120] Bridget C. E. Dooling, Daniel Pérez, and Steven J. Balla, 'Where are the Congressional Review Act disapprovals?' (*Brookings,* 24 March 2021), <https://www.brookings.edu/research/where-are-the-congressional-review-act-disapprovals/> Accessed 16 December 2021 – 'Our research has shown that Democrats, like Republicans, have a history of introducing disapproval resolutions under the CRA. This unsettles the conventional wisdom that the CRA is a tool for Republicans. Instead, we find that the introduction of CRA disapprovals is an institutionalized aspect of Congress on both sides of the aisle. Whether Democrats choose to undo particular Trump rules using this tool or not, our work suggests that they are likely to turn to the CRA in the future.'; Paige Smith and Courtney Rozen, 'Trump Worker Bias Rule Gets Rare Challenge From Hill Democrats' (*Bloomberg Law,* 23 March 2021), <https://news.bloomberglaw.com/daily-labor-report/democrats-3.> Accessed 16 December 2021.

[121] Bean and Wilson (n 88).

IV. Where We Can, We Should Leave All People the Ability to Be Fully Themselves

Culture war fights are existential. They implicate our deepest commitments and identities. As Dr Adenitire notes, 'different conceptions of a good life are objectively valuable in different ways and [...] the individual is the best judge of what is most valuable for him. The state should stay away from dictating what conception is more valuable'.[122]

In our increasingly pluralistic society, evidence is legion of clashing values. Whether religion is privileged or not, society should strive to allow each of us to be fully, authentically ourselves, in public and private.

How to proceed when an exemption threatens to undercut the norm of inclusion is the hardest question on the table. It helps to recognize there are dignity claims on both sides of the ledger.

In July 2021, the United States Supreme Court declined to review the finding of discrimination against a small mom-and-pop wedding vendor, Barronelle Stutzman, the Washington florist and owner of 'Arlene's Flowers'.[123] Stutzman was sued by a gay couple, as well as by the state.[124] After the U.S. Supreme Court landmark case, *Masterpiece Cakeshop*, the Court vacated the state's judgment finding Stutzman violated Washington's SOGI non-discrimination law and remanded for consideration in light of *Masterpiece Cakeshop*.[125] The state courts again found her liable. With the denial of

---

[122] Adenitire (n 1) at 11.

[123] The Arlene's Flowers lawsuit is a series of merged civil suits brought against Barronelle Stutzman, who refused to prepare flower arrangements for her client Rob Ingersoll and his same-sex partner, based on her religious beliefs. The first set of lawsuits, *Ingersoll v. Arlene's Flowers* (filed by Plaintiffs Robert Ingersoll and Curt Freed) and *State of Washington v. Arlene's Flowers* (a consumer protection suit filed by Washington State Attorney General Bob Ferguson) were merged at the Superior Court of Washington level into one case for discovery purposes. In 2015, in *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. 2015), the judge issued a memorandum decision and order denying motion from defendants for summary judgment based on plaintiffs' lack of standing, granting the State of Washington's motion for partial summary judgment on liability and constitutional defences, and granting plaintiffs Ingersoll and Freed's motion for partial summary judgment. In 2017, In *State v. Arlene's Flowers, Inc.*, 187 Wash.2nd 804 (2017), the Supreme Court of Washington affirmed the Superior Court's decision; In 2018, *Arlene's Flowers, Inc. v. Wash.*, 138 S. Ct. 2671 (2018) was argued in front of the U.S. Supreme Court which granted the petition and vacated the judgement and remanded to the Supreme Court of Washington to be considered in light of *Masterpiece Cakeshop, Ltd. v Colo. Civil Rights Comm'n.* In 2019, in *State v. Arlene's Flowers, Inc.*, 193 Wash.2d 469 (Wash. 2019), the Supreme Court of Washington reaffirmed its previous decision in *State v. Arlene's Flowers, Inc.*, 187 Wash.2nd 804 (2017), saying 'The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding.' The Petition for Certiorari was filed in 2019. *See* P*etition for cert.* (U.S. Sept. 11, 2019) (No. 19-333). In 2021, the U.S. Supreme Court denied petition for writ of certiorari from which Justices Alito, Gorsuch, and Thomas dissented. *Arlene's Flowers, Inc. v. Washington*, No. 19-333, 2021 WL 2742795, (U.S. July 2, 2021).

[124] Wilson, (n123) at 411 ('Barronelle Stutzman . . . [was] asked to make flowers for her long-time client Rob Ingersoll and his husband Curt . . . [This, she feels,] forced her to 'choose between [her] affection for Rob and [her] commitment to Christ. As deeply fond as I am of Rob, my relationship with Jesus is everything to me. Without Christ, I can do nothing.')

[125] Debra Cassens Weiss, 'Supreme Court remands case of Oregon bakers who refused to make same-sex wedding cake' (*American Bar Association Journal*, 17 June 2019), <https://www.abajournal.com/news/article/supreme-court-remands-case-of-oregon-bakers-who-refused-to-make-same-sex-wedding-cake.> Accessed 16 December 2021.

certiorari, this long litigation just petered out, with losses for Stutzman left in place.[126] Stutzman had gladly made flower arrangements for her long-time client Rob Ingersoll and his partner (and later husband) Curt, but when it came to assisting with wedding flowers, felt forced to 'choose between my affection for Rob and my commitment to Christ. As deeply fond as I am of Rob, my relationship with Jesus is everything to me. Without Christ, I can do nothing'.[127]

Stutzman's objection had less to do with Rob and Curt and more to do with Jesus. In this sense the objection may be separated from objections to homosexuality or the couple themselves.[128]

That fact did little to change the experience for Rob and Curt, who felt hurt. Rob explained:

> After Curt and I were turned away from our local flower shop, we cancelled the plans for our dream wedding because we were afraid it would happen again. We had a small ceremony at home instead…We hope this decision sends a message to other LGBTQ people that no one should have to experience the hurt that we did.[129]

Note the striking parallelism. Across much of the country, LGBTQ individuals still feel unsafe and unsupported, or worse, under attack.[130] LGBTQ people report being bullied, fired, denied jobs or promotions, and excluded from housing at higher rates than heterosexual people, and they worry about the fragility of the gains made during their lifetimes.[131] Many religious communities and persons also fear for the future and believe they cannot fully be themselves.[132] Religious people fear they will not be able to, or cannot

---

[126] Tucker Higgins, 'Supreme Court declines to decide whether religious flower shop owner can refuse same-sex weddings' (*CNBC*, 2 July 2021), <https://www.cnbc.com/2021/07/02/supreme-court-declines-to-say-whether-flower-shop-can-reject-same-sex-weddings.html.> Accessed 16 December 2021.

[127] Warren Richey, 'A florist caught between faith and financial ruin' (*The Christian Science Monitor,* 12 July 2016), <https://www.csmonitor.com/USA/Justice/2016/0712/A-florist-caught-between-faith-and-financial-ruin> Accessed 16 December 2021.

[128] Both businesses employ LGBT workers and otherwise serve LGBT people. See *Appellant's Brief, Washington v. Arlene's Flowers, Inc*., No. 91615–2 (Wash. 2015) at 9–10, 13 (noting Stutzman 'has employed and served those who identify as gay, lesbian and bisexual, and their sexual orientation did not affect how she viewed them as employees, customers and friends'). See also, *Elane Photography*, 309 P.3d 53 (N.M. 2013) cert denied, 134 S. Ct. 1787 (2014), Petition for a Writ of Certiorari, No 13–585 (2013) at 7, <https://perma.cc/25YJ-6UHP> ('[T]he Huguenins gladly serve gays and lesbians.'). Accessed 7 July 2022.

[129] Devin Dwyer, 'Gay couple wins case against florist after Supreme Court rejects appeal' (*ABC News,* 2 July 2021) <https://abcnews.go.com/Politics/gay-couple-wins-case-florist-supreme-court-rejects/story?id=78631214> Accessed 16 December 2021.

[130] See generally*:* Robin Fretwell Wilson, 'Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off' (2018) 8 U.C. IRVINE LAW REV. 583.

[131] Ilan H. Meyer, 'Factsheet: Experiences of Discrimination among Lesbian, Gay, and Bisexual People in the United States' (*UCLA School of Law: Williams Institute*, April 2019), <https://williamsinstitute.law.ucla.edu/publications/lgb-discrimination-experiences/> Accessed 16 December 2021; Jaime M. Grant et al., 'Injustice at Every Turn: A Report of the National Transgender Discrimination Survey' (*National Center for Transgender Equality and National Gay and Lesbian Task Force*, 2011) <https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.> Accessed 16 December 2021.

[132] Shirley Hoogstra and Robin Fretwell Wilson, 'Fairness as a Path Forward on LGBTQ Rights and Religious Liberty' in Chris Seiple and Dennis R. Hoover (eds), *The Routledge Handbook of Religious Literacy, Pluralism and Global Engagement* (Routledge, 2022).

currently, 'preserve what they see as religious integrity in their own spaces',[133] without being labelled as bigots. Knowing that a shrinking slice of Americans share their perspectives,[134] religious believers fear a loss of stature, respect, and the ability to live with integrity. Villainizing each other does not help us find ways to respect each other while also being respected.

Now, for the record, it is possible for all people to be served on Main Street without asking small mom-and-pop wedding vendors to violate their religious convictions[135] or visiting the dignitary harm on same-sex couples. State lawmakers in the U.S. are currently working on such approaches. But when the clash is presented as honouring Stutzman or honouring Rob and Curt, the public naturally lines up on one side or another.

Professor Laycock has emphasized that Stutzman risked losing a livelihood, an enduring harm, while the harm to the couple passes. Yet, the harm to the couple occurs on what should be one of the happiest days of their lives. Professor Laycock further observes:

> All of us impose costs on our neighbours with most of what we do, but there must be limits to such costs. We cannot inflict significant secular harm on others, even in the exercise of a constitutional right. Religious liberty with respect to actions can be protected, but it cannot be protected absolutely.[136]

Dr Adenitire would reverse the parties' fortunes. He believes 'there are good reasons for the general right to take a back seat in the context of provision of commercial goods and services'.[137] In particular, 'conscientious exemptions from anti-discrimination norms should not be granted [...] to providers of commercial services because doing so would cause unjustifiable dignitary harms to members of the Lesbian, Gay and Bisexual ('LGB') community as the law would allow them to be classed and treated as second-class citizens'.[138]

Dr Adenitire grounds this outcome in how the claimed interest fits with the larger right. '[D]ignity should prevail over the claim to complicity' because 'the former engages the core of the right to non-discrimination' while 'the latter engages the periphery of freedom of religious and non-religious conscience, which grounds the general right'.[139]

The obvious question confronting us in the U.S. is this: if the political will is there to recognize a new right like same-sex marriage, why should the state accommodate anyone? After all, the whole point of laws is to shift the norm in society and treat all those who live

---

[133] Emma Green, 'America Moved on from Its Gay-Rights Movement—and Left a Legal Mess Behind' (*The Atlantic,* 17 August 2019) <https://www.theatlantic.com/politics/archive/2019/08/lgbtq-rights-america-arent-resolved/596287/> Accessed 16 December 2021.

[134] 'In U.S., Decline of Christianity Continues at Rapid Pace' (*Pew Research Center*, 19 October 2019) <https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/> Accessed 16 December 2021. See also: 'The 2020 Census of American Religion' (*Public Religion Research Institute*, July 8, 2021) <https://www.prri.org/research/2020-census-of-american-religion/> Accessed 24 June 2022.

[135] Robin Fretwell Wilson, 'Bakers and Bathrooms: How Sharing the Public Square is the Key to a Truce in the Culture Wars' in Eskridge and Wilson (n 32).

[136] Douglas Laycock, 'Religious Liberty and the Culture Wars' [2014] U. ILL. L. REV. 839.

[137] Adenitire (n1) at 280.

[138] ibid.

[139] ibid.

in society equally well. In this view we should not be messaging that the LGBTQ community is less than.

These are nonetheless reasons to meld rights for all persons in laws, rights that are both principled and pragmatic.

In principled terms, the same fundamental values of personal liberty that support an individual's right to follow and fulfil his or her essential identity, including sexual identity and same-sex relationships, also support an individual's right to live according to his or her religious convictions. Former member of the U.S. Civil Rights Commissions Chai Feldblum has observed that the 'identity liberty' same-sex couples have in marriage and the 'belief liberty' objectors have in their religion both constitute core values and deserve protection, although these values directly conflict when civil rights laws force one to accommodate the other. [140]

Gay rights activist Jonathan Rauch has said that the smart move is to 'bend toward accommodation', not away from it.[141] With marriage equality now guaranteed, the temptation for many LGBT rights supporters may be to harden against compromise. This would be a mistake. There is far more work to be done for the LGBT community even after securing marriage equality.

Not all observers agree with such principled arguments, however.[142] Practical arguments may have an appeal even when more normative claims do not.

---

[140] Chai R. Feldblum, "Moral Conflict and Conflicting Liberties," in Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., Rowman & Littlefield Publishers, Inc., 2008) 123, at 157. Feldblum concludes that the conduct demanded by civil rights laws 'can burden an individual's belief liberty interest,' but '[a]cknowledging [the burden's impact] does not necessarily mean that … exemptions . . . will always be granted to individuals holding such beliefs.'; see also Thomas C. Berg, 'What Same-Sex Marriage and Religious-Liberty Claims Have in Common' (2010) 5 NW. J.L. & SOC. POL'Y 206, at 219–20 and 230–32 (critiquing Professor Feldblum's argument). Many other scholars also offer principled arguments. See generally: Taylor Flynn, 'Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace' (2010) 5 NW. J.L. & SOC. POL'Y 236 (arguing that religious objections to same-sex marriage do not necessitate additional statutory protections because those objections predate the debate over same-sex marriage); Maggie Gallagher, 'Why Accommodate? Reflections on the Gay Marriage Culture Wars' (2010) 5 NW. J.L. & SOC. POL'Y 260 (discussing four reasons to maintain religious liberty accommodations for those opposed to same-sex marriage); Ira C. Lupu & Robert W. Tuttle, 'Same-Sex Equality and Religious Freedom' (2010) 5 NW. J.L. & SOC. POL'Y 274 (distinguishing between freedom of clergy and claims of 'religiously motivated individuals,' and concluding that although some religious freedoms are sufficiently protected under the U.S. Constitution, others receive less protection, and thus same-sex marriage opponents would be wise to find common ground to secure robust exemptions now rather than wait); Marc D. Stern, 'Liberty v. Equality; Equality v. Liberty,' 5 NW. J.L. & SOC. POL'Y 307 (2010) (advocating qualified religious exemptions as a solution to preserving religious liberty without diminishing the equality of same-sex couples).

[141] Jonathan Rauch, 'Majority Report' (*The Advocate*, December 2010), <https://www.jonathanrauch.com/jrauch_articles/the-emerging-gay-majority/> Accessed 26 December 2021.

[142] Shannon Gilreath, 'Not a Moral Issue: Same-Sex Marriage and Religious Liberty' [2009] U. ILL. L. REV. 205, 221.

Pragmatically, a red-blue fault line runs across America.[143] Same-sex couples may marry everywhere, but in more than half of U.S. states, they can be evicted from their homes or fired by a small employer for no reason other than being gay or transgender.[144]

In the absence of accommodations, public attitudes toward same-sex relationships are likely to become more divided, not less, as Professor Douglas Laycock has noted:

> To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on a religious counselling agency that refuses to provide marriage counselling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch. Every such case will be in the news repeatedly, and every such story will further inflame the opponents of same-sex marriage. Refusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.[145]

By creating religious martyrs, the likely outcome is to delay social acceptance of gay marriage, not to hasten it.

In the United States, our over-decade-long experience with attempts to secure legislation recognizing same-sex marriage suggests that religious accommodations likely pulled same-sex marriage across the finish line.

Eleven jurisdictions—Maine, Connecticut, Maryland, New Hampshire, New York, Vermont, Washington, Minnesota, Illinois, Hawaii, and Delaware—and the District of Columbia have enacted, and retained, laws recognizing same-sex marriage. In three of those states—New York, Maryland, and Washington—proposed legislation offering protection only to the clergy failed to garner enough support to become law only months

---

[143] Robin Fretwell Wilson, 'The Nonsense about Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns' (2017) 20 LEWIS & CLARK L. REV. 1373.

[144] See generally*:* Eskridge and Wilson (n 32).

[145] See*:* Letter from Douglas Laycock to Governor John Baldacci, in Shannon Gilreath, *The End of Straight Supremacy: Realizing Gay Liberation* (CUP, 2011) 260–61 (predicting that '[t]he number of people who assert their right to conscientious objection will be small in the beginning, and it will gradually decline to insignificance if deprived of the chance to rally around a series of martyrs').

before revised bills passed.[146] The fact that same-sex marriage bills with more expansive protections were enacted a short time later suggests that exemptions mattered to the ultimate success of those bills.[147]

V. Where We Can, We Should Bypass Clashes Rather Than Balancing Rights

Dr Adenitire believes that conscience rights should be given but 'should be balanced against important rights, such as non-discrimination on the basis of sexual orientation'.[148]

However, long before lawmakers balance rights, they should try to find creative ways to fulfil the state's duties that do not force win-lose outcomes. Scarcity often leads to chokepoints.[149]

Consider the marriage clerk, Kim Davis,[150] an elected Kentucky official, who shut down marriage to everyone in a part of Kentucky for ten weeks after *Obergefell*.[151] Davis made gay couples wanting a license wait for days before being served because of concerns for her conscience, making a kind of endorsement claim. 'To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to the certificate, would violate my conscience',[152] she said. 'It's not a light issue for me. It's a heaven or hell decision'.[153] Neither Davis nor anyone on her staff would issue the license to a same-sex couple legally entitled to it until Judge David Bunning tossed Davis in jail and broke the impasse.[154] To be clear, Davis is as unsympathetic as a religious objector can possibly be.[155] In the name of religious freedom, she claimed the ability to deny others their rights. She used the choke point position that her office occupied as an occasion to humiliate couples she refused to serve.[156]

Davis quickly became the face of those angry at the Court for 'redefining marriage'. Yet she is a terrible poster child for religious liberty since she claimed the liberty to block others from their rights. No one should be a choke point on the path to services. This turned out to be an expensive mistake. Kentucky paid nearly $225,000 at the end of litigation.[157]

That said, some office workers have been in these jobs for decades and could never have imagined this question of conscience would ever come up. Many were on the cusp of retirement, when forced resignation would be especially harsh.[158]

Three months before *Obergefell*, Utah simply bypassed this collision in its landmark legislation (the "Utah Compromise") protecting the full LGBTQ community from discrimination in housing and hiring.

Before those laws, Utah had never had a duty that someone in clerks' offices be available to solemnize civil marriages. The Utah Compromise placed a duty, for the first time, on the clerk's office to offer solemnization services to all people equally. Each county clerk's office must designate a willing celebrant,[159] who in Utah may be a judge, religious authority, or other elected official.[160] This function could be served by any willing clerk in the office, or this function could be outsourced to persons in the community willing to serve all couples on exactly the same basis.[161]

This expanded choice of options to fulfil a new duty placed on the government to solemnize marriages meant that individual employees of the clerk's office could 'step off'

[146] See Fairness For All Initiative <https://www.fairnessforallinitiative.com/maps-of-laws> Accessed 6 July 2022. On May 12, 2009, the New York Assembly passed legislation containing a clergy-only exemption by a vote of 89–52—only to see it defeated in the New York Senate on December 2, 2009, by a vote of 24–38. See Jeremy W. Peters, Making Gay Marriage Personal and Political, N.Y. Times, May 12, 2009, at A1 <https://www.nytimes.com/2009/12/03/nyregion/03marriage.html> Accessed 7 July, 2022 (paywall); Dwyer Arce, 'New York Senate Rejects Same-Sex Marriage Legislation' (*Jurist*, 2 December 2009), <https://www.jurist.org/news/2009/12/new-york-senate-rejects-same-sex/> Accessed 24 June 2022. See generally Robin F. Wilson, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485 (2014) (with Anthony Kreis) (summarizing the development of the key issues in the same-sex marriage legislation of New York, Maryland, and Washington). Two years later, Governor Andrew M. Cuomo proposed the Marriage Equality Act, a revised bill that included more expansive religious liberty protections. See infra app. A. The New York Assembly approved that bill on June 15, 2011, by a vote of 80–63. Kenneth Lovett, 'New York Assembly Passes Bill to Legalize Gay Marriage 80-63; Legislation Now Heads to Senate', N.Y. Daily News, 15 June 2011 <https://www.nydailynews.com/new-york/new-york-assembly-passes-bill-legalize-gay-marriage-80-63-legislation-heads-senate-article-1.129026> Accessed 7 July 2022 (paywall). The New York Senate then revised the bill to include yet more protections, facilitating the bill's passage on June 24, 2011 by a vote of 33–29. See Nicholas Confessore & Michael Barbaro, New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law, N.Y. Times, June 25, 2011, at A1 <https://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html> Accessed 24 June 2022 (paywall). Although robust protections played an important role in New York, so too did money and political manoeuvring in convincing Senate Majority Leader Dean Skelos to allow the bill to reach the Senate floor in the first place. Strenuous lobbying by Governor Cuomo and New York City mayor Michael Bloomberg persuaded Skelos not to block the vote, and must have also persuaded some Republican members of the Senate to support the final bill. See Michael Barbaro, Behind Gay Marriage, an Unlikely Mix of Forces, N.Y. Times, June 26, 2011 <https://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?ref=todayspaper> Accessed 27 June 2022, at A1; Nicholas Confessore & Michael Barbaro, Donors to G.O.P. Are Backing Gay Marriage Push, N.Y. Times, May 13, 2011, at A15 <https://www.nytimes.com/2011/05/14/nyregion/donors-to-gop-are-backing-gay-marriage-push.html> Accessed 27 June 2022; Thomas Kaplan, After Pushing Gay Marriage, Cuomo Is Thanked with Money, N.Y. Times, Dec. 2, 2011, at A29 < https://www.nytimes.com/2011/12/02/nyregion/cuomo-fund-fills-with-money-from-thankful-gay-donors.html> Accessed 27 June 2022. Efforts to pass same-sex marriage legislation in Maryland followed a similar trajectory. In 2008, Maryland legislators introduced bills containing clergy-only exemptions, but neither House Bill 351 nor Senate Bill 290 was voted upon by either chamber. See generally Wilson (n 146) (summarizing same-sex marriage legislation in Maryland). In 2009, bills containing identical clergy-only exemptions died in their respective committees. In 2011, the Maryland House considered two bills that contained the same clergy-only exemption. The Senate, however, added more expansive protections for religious objectors to the original House bill. The Senate passed the bill by a vote of 25–21 on February 24, 2011, but the bill languished in a House committee, never to be voted upon by the full House. See id. In the next legislative session, the House took up legislation proposed by Governor Martin O'Malley, which contained additional protections. See id. The Maryland House passed that bill on February 17, 2012, by a vote of 72–67, and the Senate approved it on February 23, 2012 by a vote of 25–22. See Sabrina Tavernise, In Maryland, House Passes Bill to Allow Gays to Wed, N.Y. Times, Feb. 17, 2012, at A13 <https://www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html> Accessed 27 June 2022; see also John Wagner Same-sex marriage bill passes Maryland House of Delegates, Washington Post, Feb. 7, 2012, at B1 (reporting that the Maryland Senate preliminarily voted in favor of same-sex marriage by a vote of 25–22) <https://www.washingtonpost.com/same-sex-

marriage-bill-passes-maryland-house-of-delegates/2012/02/17/gIQARk7XKR_story.html> Accessed 27 June 2022. Nevertheless, opponents of the bill collected enough signatures to prevent the Maryland law from taking immediate effect, and it was considered in a referendum in November 2012. See Rebecca Berg, In Maryland, Gay Marriage Seeks a 'Yes' at the Polls, N.Y. Times, Aug. 25, 2012, at A16 < https://www.nytimes.com/2012/08/26/us/in-maryland-gay-marriage-seeks-a-yes-at-the-polls.html> Accessed 27 June 2022 (paywall). In Washington, a bill offering protection only to clergy failed to gain traction in 2011 and was reintroduced in 2012. See generally Wilson (n 146) (discussing the legislative history of Washington's same-sex marriage bill). Legislators then introduced a competing bill containing more robust protections, which was substantially amended and ultimately passed the Senate on February 1, 2012 by seven votes, with a total vote of 28–21. The Washington House passed the Senate's engrossed bill by a vote of 55–43 on February 8, 2012. See id. The bill was signed into law by Governor Christine Gregoire on February 13, 2012. See Joel Connelly, Gregoire Signs Same-Sex Marriage Bill, Seattle Post-Intelligencer (Feb. 13, 2012), <http://www.seattlepi.com/local/connelly/article/Make-History-Gregoire-signs-samesex-marriage-3312315.php> Accessed 27 June 2022; Andrew Garber, 'Gay-Marriage Bill Passes House, Awaits Gregoire's Signature' (*Seattle Times,* 8 February 2021) <https://www.seattletimes.com/seattle-news/gay-marriage-bill-passes-house-awaits-gregoires-signature/> Accessed 27 June 2022. Like Maryland's law, the law legalizing same-sex marriage in Washington was placed on hold in June 2012, when opponents gathered sufficient signatures to block the law from taking immediate effect pending a November 2012 referendum on the legislation. See Laura L. Myers, 'Gay Marriage in Washington Blocked by Proposed Referendum' (*Reuters,* 6 June 2012) <https://www.reuters.com/article/us-usa-gaymarriage-washington-idUSBRE8551JE20120606> Accessed 27 June 2022.

[147] The two exceptions to this pattern are Connecticut and Maine. In 2007, Connecticut considered, and failed to pass, proposed same-sex marriage legislation containing protections only for the clergy. See generally Wilson (n 146) (discussing same-sex marriage in Connecticut). On Oct. 28, 2008, the Connecticut Supreme Court, *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407, held that 'the state's disparate treatment of same sex couples [in excluding them from the institution of marriage] is constitutionally deficient.' 957 A.2d 407, at 412 (Conn. 2008). With the judiciary's thumb on the scales, legislators then introduced a same-sex marriage bill with substantial protections that ultimately passed in 2009. See Chase Matthews, Connecticut Gov. Signs Gay Marriage into Law, ChicagoPride.com (Apr. 23, 2009), <https://chicago.gopride.com/news/article.cfm/articleid/7272400> Accessed 6 July 2022. In Maine, legislation containing a clergy-only exemption attained overwhelming support before being repealed in a popular referendum. See generally Wilson (n 146) (discussing same-sex marriage in Maine). That bill passed in 2009 by votes of 89–57 and 21–13 in the lower and upper chambers, respectively. See id. Although it is impossible, after the fact, to say definitively that more expansive exemptions proved decisive in the success of these same-sex marriage laws, the number of narrowly defeated bills that later succeeded when revised to include more expansive exemptions is suggestive. Also suggestive is Maine's experience: even where a same-sex marriage bill passed both chambers of the legislature by substantial majorities, the new law containing protection only for the clergy was narrowly rejected by voters. See id. It remains to be seen whether new legislation in Maryland and Washington, containing more expansive exemptions, will satisfy voters in a referendum. In these states, opponents have collected sufficient signatures to force a November 2012 referendum on the legislation. See Berg (n 147); Myers (n 147). See generally Wilson (n 146) (summarizing recent developments in same-sex marriage legislation in Maryland and Washington).

[148] Adenitire (n 3).

[149] Robin Fretwell Wilson, 'Common Ground Lawmaking: Lessons of Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise' (2019) 51 CONN. L. REV. 3

[150] ibid.

[151] Adam Beam, 'Judge Jails Kentucky Clerk Who Refuses to Issue Gay Marriage Licenses' (*Toronto Star*, 3 September 2015) <https://www.thestar.com/news/world/2015/09/03/kentucky-clerk-who-refuses-to-issue-gay-marriage-licenses-faces-court.html?rf> Accessed 26 December 2021.

without harm to the public.[162] Same-sex couples and heterosexual couples both receive seamless access to marriage; no one is treated differently.[163]

---

[152] John Mura & Richard Pérez-Peña, 'Marriage Licenses Issued in Kentucky County, but Debates Continue' *N.Y. Times*, 4 September 2015), <http://www.nytimes.com/2015/09/05/us/kim-davissame-sex-marriage.html> Accessed 26 December 2021 ('Kentucky law says that a marriage license must contain 'an authorization statement of the county clerk issuing the license,' which same-sex marriage advocates note is standard language, pre-printed on the form. State law does not require a clerk's signature on the license; to be valid, it must have 'the signature of the county clerk or deputy clerk issuing the license.').

[153] Abby Ohlheiser, 'Kentucky Clerk Kim Davis on Gay Marriage Licenses: 'It is a Heaven or Hell Decision' (*Washington Post,* 1 September 2015) <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/09/01/kentucky-clerk-kim-davis-on-gay-marriage-licenses-it-is-a-heaven-or-hell-decision/> Accessed 26 December 2021.

[154] '57 Kentucky County Clerks Ask for Special Session' (*Associated Press*, 9 July 2015), <https://www.wuky.org/local-regional-news/2015-07-09/57-kentucky-clerks-ask-for-special-session> Accessed 6 July 2022; Ryan Felton, 'Kentucky Clerk Kim Davis Released from Jail After Judge Lifts Contempt Ruling' (*The Guardian,* 8 September 2015) <http://www.theguardian.com/us-news/2015/sep/08/kentucky-clerk-kim-davis-released-from-jail> Accessed 26 December 2021; Eyder Peralta, 'Just Before Big Rally, Kim Davis is Released from Jail' (*NPR,* 8 September 2015) <http://www.npr.org/sections/thetwo-way/2015/09/08/438587612/hours-before-big-rally-judge-orderskim-davis-released.> Accessed 26 December 2021.

[155] Some religious figures fault Davis's approach. Peter Wehner, a Christian commentator who served in the last three Republican presidential administrations, stated 'I think she's wrong on the merits, wrong theologically and her stance is harmful to Christians both in the religious liberty debate and in trying to present Christianity to the watching world.' Travis Loller, 'Many Religious Conservatives Split on How to Feel About Kim Davis' (*Talking Points Memo,* 13 September 2015), <http://talkingpointsmemo.com/news/kim-davis-religious-liberty-groups. > Accessed 6 July 2022.

[156] A male couple was ignored for days as they waited to be served. Bil Browning, 'Watch: Cops Respond to Kentucky Gay Couple Requesting Marriage License', (*Advocate*, 8 July 2015), <https://www.advocate.com/politics/marriage-equality/2015/07/08/watch-cops-respond-kentucky-gay-couple-requesting-marriage-lic> Accessed 26 December 2021. Kentucky officials were ultimately ordered to pay $222,695 in attorneys' fees and $2,008 in costs as a result of Davis's actions. 'Judge: Kentucky Will Pay $224,000 in Fees in Kim Davis Case' (*WKMS*, 21 July 2017), <https://www.wkms.org/government-politics/2017-07-21/judge-kentucky-will-pay-224-000-in-fees-in-kim-davis-case> Accessed 27 June 2022.

[157] '57 Kentucky County Clerks' (n 154).

[158] Robin Fretwell Wilson, 'Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws' (2010) 5 NW. J.L. & SOC. POL'Y 318 (arguing that government employees with religious objections should be granted exemptions when all couples can be treated alike, with dignity).

[159] UTAH CODE ANN. §§ 17-20-4(2), 30-1-6 (West 2015) (requiring that a county clerk or designee be available during business hours to solemnize a legal marriage and adding this to the list of those who may solemnize marriages); 11 FIU L. REV. 163, at 176

[160] ibid.

[161] ibid, s 30-1-6(1).

[162] 'The clerk's office would allow people to step off as long as there was someone to issue the license'. Dennis Romboy, 'New Law Helps Utah Avoid Marriage License Conflict Playing Out in Kentucky' (*Desert News,* 4 September 2015), <https://www.deseret.com/2015/9/3/20571625/new-law-helps-utah-avoid-marriage-license-conflict-playing-out-in-kentucky#:~:text=New%20law%20helps%20Utah%20avoid%20marriage%20license%20conflict,licenses%2C%20but%20it%20doesn%27t%20dictate%20those%20guidelines.%20clock> Accessed 27 June 2022.

[163] More specifically, same-sex couples should never stand in another line or receive the service in a different manner than heterosexual couples. Offices may elect to outsource the function for workload reasons as well. The mechanism chosen to guarantee seamless access must be established ex ante so that no one is surprised by or confronted with an objecting employee.

Utah created a new structure that avoids finitude.[164] In this structure, all people are served, and no one is forced from a job. That win-win is something that only legislatures or the executive branch can do, not courts.

Lawmakers need to do more to take people out of positions of conflict. They need to work harder to structure laws so that the state does not prefer one interest over another.

Moreover, litigation is wasteful when decisions about where one person's rights end and the other person's begins can be worked out *ex ante*. Note the defining features of Utah's civil solemnization process. Same-sex couples were not asked to wait or to stand in another line or receive the service in a different manner than heterosexual couples. Offices could elect to outsource the function for workload reasons as well.

No good can come of allowing government-paid workers to stand loudly on their rights, as Kim Davis did, or to make decisions in the moment about whether to provide a service, without having first made some provision for the public to be served respectfully.[165] With fresh thinking and re-imagination of old statutory schemes, the Utah Legislature found a win-win.

VI. Consciously Muting Harm Allows For the Extension of New Protections

Without room for all, rights for minorities are at a stand-still, sometimes for decades. This is so because some protections require positive law to happen. And legislation is often not forthcoming when it protects one side to the exclusion of others.

True, there are exceptions. Virginia's 2020 LGBTQ non-discrimination law was enacted while Democrats held both houses of the legislature and the governorship.[166] On April 11, 2020, Governor Ralph Northam signed the Senate Bill 868 ("Virginia Values Act"), anti-discrimination legislation that gives protections for the LGBTQ community,[167] while extending religious liberty protections.[168] But a careful look at red-blue America shows

---

[164] Wilson (n 150).

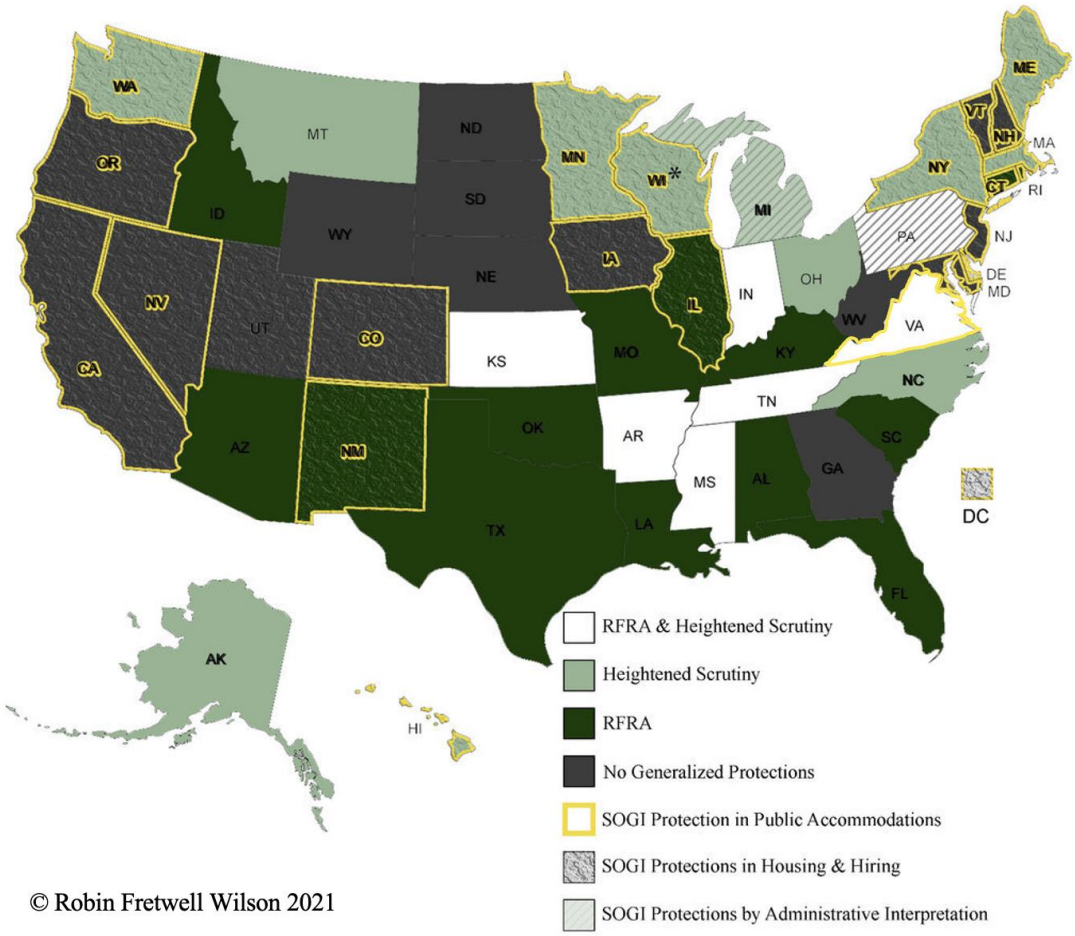
[165] North Carolina's measure allows recusal but does not make it invisible to the public, inviting ugly exchanges and precipitating dignitary harms to the couples who seek services. *See* Alan Blinder, 'North Carolina Governor Vows to Veto a Bill Seen as Targeting Gay Marriage' *N.Y Times* (May 28, 2015), <https://www.nytimes.com/2015/05/29/us/north-carolina-governor-vows-to-veto-a-bill-seen-as-targeting-gay-marriage.html> Accessed 27 June 2022. (noting the proposal allows officials 'to recuse from performing lawful marriages' based on their sincerely held religious beliefs).

[166] Senate Bill 868's language may be found at '2020 Session' (*Virginia's Legislative Information System*) <https://lis.virginia.gov/201/ful/SB432ER.HTM> Accessed 26 December 2021.

[167] 'Governor Northam Signs Virginia Values Act: Virginia is first Southern state to provide sweeping anti-discrimination protections for LGBTQ people' (*Commonwealth of Virginia Website*, 11 April 2020) <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856051-en.html.> Accessed 26 December 2021.

[168] The 2020 Virginia LGBT non-discrimination law includes protections for churches of two kinds: (a) pre-existing and unchanged exemptions by Senate Bill 868, or (b) added as new protections through Senate Bill 868. As an example, places of accommodation owned or operated on behalf of religious corporations fall outside Senate Bill 868 if they are not open to the public (in other words, if they are private clubs or accommodations). Moreover, Senate Bill 868 does not encompass individuals who are less than 18 years old or receiving special benefits from programs assisting those older than 50. Further, it is not considered an unlawful employment practice for parochial schools to hire or employ employees based on their adherence to a particular religion if the curriculum is designed for the propagation of a particular religion.

that Republicans hold one or both houses and the governorship in nearly every state that has yet to enact a law protecting LGBTQ people from discrimination in housing, hiring and public accommodations. The map below shows where all 50 states and the District of Columbia fall on LGBTQ non-discrimination laws:



Protections for LGBTQ persons are also missing from core federal civil rights statutes in the US. Although the United States Supreme Court in *Bostock v. Clayton County, Georgia*, interpreted Title VII's protection against sex discrimination in employment to include sexual orientation and gender identity, millions of Americans remain outside Title VII's protections, which do not extend to small employers.[169] Currently pending before

---

Employees of religious corporations, religious associations, parochial educational bodies, or religious societies are left to the side. Senate Bill 868 enlarged exemptions to allow churches to limit the sale or rental of their properties to those who have a membership in their religion unless religious membership is given based on race, color, national origin, sex, elderliness, familial status, sexual orientation, gender identity, status as a veteran, or disability.

[169] *Bostock v. Clayton County, Georgia*, 590 U.S. 140 S. Ct. 1731 (2020); J. Stuart Adams and Robin Fretwell Wilson, *Human Rights for All: From Culture War to Not a War at All*, vol. 47 no. 3/4 ABA Human Rights (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/human-rights-for-all/ (accessed Sept. 5, 2022).

Congress is the Equality Act,[170] which would protect LGBTQ person from discrimination in six domains. This bill prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system.[171] It has one sponsor and two hundred and twenty-four co-sponsors but is predicted not to clear the Senate.[172] It carves back long-standing protections for religious organizations and educational institutions.[173]

Also introduced into the 115th Congress was the First Amendment Defense Act,[174] which garnered twenty-two co-sponsors. The bill provided that the federal government 'shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognised as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage'.[175] It was not passed and has not been reintroduced.[176]

Both acts, in their own way, award the public square to either conservative religious groups or the LGBTQ community.[177] Such purity models are short sighted and self-defeating.[178]

In December 2019, Representative Chris Stewart introduced the Fairness for All Act ("FFA").[179] The core intuition behind FFA is that reasonable compromise is necessary if we are to live together as one American people despite our divisions on questions of faith, sexuality, and marriage. It locates consensus where many assumed none could be found.[180] FFA represents the first federal approach to common ground law-making at the

---

[170] HR5, Equality Act 117th Cong. (2021-2022) <https://www.congress.gov/117/bills/hr5/BILLS-117hr5pcs.xml.> Accessed 26 December 2021.
[171] ibid.
[172] ibid.
[173] Kelsey Dallas, 'Explainer: Would the Equality Act treat churches the same as restaurants and stores?' (*Deseret News,* 10 June 2021) <https://www.deseret.com/2021/6/10/22465708/would-the-equality-act-treat-churches-the-same-as-stores-and-restaurants-public-accommodations.> Accessed 26 December 2021.
[174] S. 2525, First Amendment Defense Act, 115th Cong. (2017-2018) <https://www.congress.gov/bill/115th-congress/senate-bill/2525/text.> Accessed 6 September 2022.
[175] Mike DeBonis, 'How conservatives are keeping the gay marriage issue alive on Capitol Hill' *(The Washington Post*, 17 July 2015) <https://www.washingtonpost.com/news/post-politics/wp/2015/07/17/how-conservatives-are-keeping-the-gay-marriage-issue-alive-on-capitol-hill/.> Accessed 26 December 2021.
[176] Mary Emily O'Hara, 'First Amendment Defense Act Would Be 'Devastating' for LGBTQ Americans' (*NBC News*, 20 December 2016) <https://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416.> Accessed 26 December 2021.
[177] Chris Stewart & Gene Schaerr, 'Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act' (2020) 46 J. of Legislation 134, 143-47.
[178] 'Why Find Common Ground?' (*Fairness for All Initiative*) <https://www.fairnessforallinitiative.com/why-find-common-ground > Accessed 26 December 2021.
[179] H.R.5331 - Fairness for All Act, 116th Congress (2019-2020) <https://www.congress.gov/bill/116th-congress/house-bill/5331.> Accessed 27 June 2022.
[180] *See generally*: Tanner Bean & Robin Fretwell Wilson, 'Common Sense Case for Common Ground Lawmaking: Three Cheers for Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act' [2020] Journal of Legislation Online 3 <https://bit.ly/3ksjYlj.> Accessed 26 December 2021.

intersection of religious freedom and LGBTQ rights. No one doubts that the FFA bill will see future amendments. But it is a start at brokering peace.

Americans are weary of polarization. Tomorrow's leaders, Millennials and Gen Z, are adept at embracing differences and finding mutually respectful ways to coexist. Younger Americans have grown up in a strikingly diverse and interconnected time. They are the generation most likely to see the advancement of LGBTQ rights as a positive development[181] while also embracing the value of spirituality.[182] They believe that it is time to chart the way forward and bridge divides.

VII. Conclusion

Dr John Adenitire's book, *General Right to Conscientious Exemption - Beyond Religious Privilege*, could not come at a more propitious time. The shape and reach of proposed laws often determine whether those who have long been marginalized receive protections in positive law. Many rankle at the idea that some will be exempted from the obligations required by new protections for groups or persons. This strikes many as a kind of religious privilege and tests our commitments to pluralism. In the end, lawmakers have a tremendous capacity to blend civil rights protections for different persons, and should strive to allow all to fully, authentically be themselves, as far as possible without harming others.

[181] See: Annie E. Casey Foundation, "What Are the Core Characteristics of Generation Z?" Casey Connects (blog), April 14, 2021, <https://www.aecf.org/blog/what-are-the-core-characteristics-of-generation-z/> Accessed 27 June 2022.

[182] 'Millennials are less religious than older Americans, but just as spiritual' (*Pew Research Center*, 23 November 2015) <https://www.pewresearch.org/fact-tank/2015/11/23/millennials-are-less-religious-than-older-americans-but-just-as-spiritual/https://www.pewresearch.org/fact-tank/2015/11/23/millennials-are-less-religious-than-older-americans-but-just-as-spiritual/> Accessed 26 December 2021.