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RFRAs and Reasonableness

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"It is a risky step to interfere with the most intimate details of other people's lives while loudly claiming liberty for yourself." – Douglas Laycock[1]

INTRODUCTION

The organized opponents of legal and social equality for gays and lesbians, particularly the foes of marriage for same-sex couples, have coalesced in recent years around the rallying cry of "religious liberty."[2] In 2015, the conflict between LGBT rights and religious liberty intensified as legislators in seventeen states considered adopting Religious Freedom Restoration Acts (RFRAs).[3] Most of the national attention focused on Indiana, where legislators adopted a RFRA under pressure from religious conservatives, only to later amend it under pressure from business and civic leaders over concerns that the law sent a message endorsing anti-gay discrimination.[4]

RFRAs, which typically require strict scrutiny when a religious adherent claims that a government law or policy imposes a substantial burden on the adherent's exercise of religion,[5] have been around for more than twenty years. But they became a battlefront in the culture wars only recently, as they came to be regarded as a form of backlash against the legal and political advancements of gays and lesbians. RFRAs became a vehicle for dissent by religious conservatives against lower court rulings

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1. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 869.

2. *See, e.g.*, Emily Bazelon, *What Are the Limits of "Religious Liberty"?*, N.Y. TIMES, July 7, 2015, http://www.nytimes.com/2015/07/12/magazine/what-are-the-limits-of-religious-liberty.html [http://perma.cc/D79E-DDNR]; McKay Coppins, *Republicans Take Up Cause of Religious Liberty – And Ditch Family Values*, BUZZFEED (Aug. 1, 2013, 11:19 PM), http://www.buzzfeed.com/mckaycoppins/republicans-take-up-cause-of-religious-liberty-and-ditch-fam#.ta6KXW6r1 [http://perma.cc/95JG-K6XD].

3. *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. ST. LEGISLATURES (Sept. 3, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx [http://perma.cc/K3CB-2XDK].

4. Tony Cook, Tom LoBianco & Brian Eason, *Gov. Mike Pence Signs RFRA Fix*, INDIANAPOLIS STAR (April 2, 2015, 8:06 PM), http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/ [http://perma.cc/9B7M-TCVW].

5. *See, e.g.*, IND. CODE § 34-13-9-10(a) (2015).

that were bringing same-sex civil marriage to states (like Indiana) that had long and tenaciously resisted it. Religious conservative activists said RFRAs were necessary so that store owners, landlords, and employers who oppose legal equality for gays and lesbians could seek religious accommodations from laws that prohibit discrimination based on sexual orientation.[6] Disagreement over whether or when such accommodations are appropriate pretty much sums up the current RFRA debate in a nutshell.

The U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*[7] settled the question of marriage equality in the United States as a matter of constitutional law. But gays and lesbians still face the possibility of discrimination as they go about their daily lives in the spheres of commerce, employment, and housing—as they engage in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[8] With the long struggle for marriage equality now resolved, the new centerpiece of the LGBT rights movement is likely to be a push for the expansion of laws forbidding discrimination on the basis of sexual orientation and gender identity in employment, housing, and public accommodations.[9] Such laws currently exist in twenty-two states and the District of Columbia,[10] as well as dozens of cities and counties.[11] (No federal statute bars discrimination on the basis of sexual orientation or gender identity, though executive orders prohibit employment discrimination by the federal government and federal contractors,[12] and the federal Equal Employment Opportunity Commission in 2015 adopted the position that sexual orientation discrimination is illegal under federal law as a form of sex discrimination.[13]) But these efforts will run into vigorous resistance from

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6. *See, e.g.*, Nick Maled, *Opportunity Knocking for Indiana*, IND. FAMILY INST. (Dec. 26, 2014), http://www.hoosierfamily.org/blog/opportunity-knocking-indiana [http://perma.cc/2ZFW-DHHU]("Indiana does not have their [sic] own Religious Freedom Restoration Act like many other states. The absence of such a State Act has allowed many municipalities [with non-discrimination laws covering sexual orientation] to intrude on individual practice of religion, especially when it comes to businesses.").

7. 135 S. Ct. 2584 (2015).

8. Romer v. Evans, 517 U.S. 620, 631 (1996).

9. *See, e.g.*, Robert P. Jones, *After Same-Sex Marriage, Then What*?, ATLANTIC (June 24, 2015), http://www.theatlantic.com/politics/archive/2015/06/after-same-sex-marriage-then-what/396659/ [http://perma.cc/P9ZA-VMNC]; Evan Wolfson, Op-Ed, *What's Next in the Fight for Gay Equality*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/opinion/evan-wolfson-whats-next-in-the-fight-for-gay-equality.html?_r=0 [http://perma.cc/FR4P-X8AS].

10. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [http://perma.cc/T2JE-CT6L] (last modified Sept. 9, 2015). In nineteen of these states plus the District of Columbia, the laws cover both sexual orientation and gender identity; in three other states, only sexual orientation is covered. *Id.*

11. *Local Employment Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies [http://perma.cc/H8JY-F5SF] (last modified Nov. 12, 2015).

12. *E.g.*, Laura Meckler, *Obama To Sign Order Barring Anti-Gay Discrimination*, WALL ST. J. (July 18, 2014, 6:47 PM), http://www.wsj.com/articles/obama-to-sign-order-barring-anti-gay-discrimination-at-federal-contractors-1405713593 [http://perma.cc/47RX-YUVU].

13. Dale Carpenter, *Anti-gay Discrimination Is Sex Discrimination, Says the EEOC*,

religious conservatives and their allies in the Republican Party. These conservatives scored a surprise victory in late 2015 when they engineered the repeal of an antidiscrimination ordinance in Houston, calling it a "virulent form of political correctness."[14]

Throughout the debate over LGBT rights and religious liberty, prominent scholars and commentators have called for moderation and compromise. A way must be found, they have urged, for these two fundamental American values—the equal rights and dignity of all persons, and the freedom of religious exercise and conscience—to coexist. Douglas Laycock has written that "[i]f we are to preserve liberty for both sides in the culture wars, then we have to preserve some space where each side can live its own values and where its rules control."[15] John Inazu has suggested that the LGBT rights/religious liberty struggle must be tempered by a "confident pluralism" that "seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life."[16] Columnist David Brooks (always the thinking person's tribune of centrism and moderation) has similarly counseled, "It's always easier to take an absolutist position. But, in a clash of values like the one between religious pluralism and equality, that absolutism is neither pragmatic, virtuous nor true."[17]

This Article seeks to contextualize and advance this conversation about coexistence. This is not an article about doctrine. Nor is it a prescription for how one side or the other can "win" this particular culture war. There is, of course, a vast literature on social movement organizations and their relationship to law,[18] but nor is this an article about theory or retrospective assessment of strategies and accomplishments. Rather, my suggestions are forward looking and normative. I simply offer a few observations about what moderation and reasonableness might look like in the context of the struggle between LGBT rights and religious liberty. I identify some of the excesses to which both sides are prone, and I suggest that the ways in which the combatants in this particular culture war conduct themselves—specifically, the decisions they make about how and when to use law to advance their respective causes through litigation—will be the most important

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WASH. POST: VOLOKH CONSPIRACY (July 16, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/16/anti-gay-discrimination-is-sex-discrimination-says-the-eeoc/ [http://perma.cc/3G8H-T3B2].

14. Steven F. Hotze & Jared Woodfill, *Defeating HERO: We Were Defending Our Culture and Protecting Women's Well-being*, HOUSTON CHRON. (Nov. 13, 2015), http://www.chron.com/opinion/outlook/article/Hotze-Woodfill-Defeating-HERO-We-were-6628270.php [http://perma.cc/FV62-8FTF].

15. Laycock, *supra* note 1, at 876.

16. John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 592 (2015).

17. David Brooks, Op-Ed., *Religious Liberty and Equality*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/03/31/opinion/david-brooks-religious-liberty-and-equality.html?_r=0 [http://perma.cc/TKC3-PCRF].

18. *See, e.g.*, JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); Debra C. Minkoff, *Bending with the Wind: Strategic Change and Adaptation by Women's and Racial Minority Organizations*, 104 AMER. J. SOC. 1666 (1999).

factor in determining whether or not it is possible to attain some measure of balance, if not peaceful coexistence, between LGBT rights and religious liberty. The rest of us should judge their conduct accordingly, and if Americans do so, it likely will help determine the long-term fates of both movements.

On the religious-conservative side, reasonable behavior means not misusing RFRAs or other forms of religious accommodation to amplify political dissent from LGBT rights and energize a base of supporters. RFRAs and other forms of religious accommodation are intended to provide space for individual adherents to exercise their religious beliefs where there is not a compelling government interest in enforcing a law (such as an antidiscrimination statute) uniformly against everyone, including the religious adherent. And so, for example, if a hypothetical wedding-cake baker turns away a gay customer out of mere distaste for gay people or political dissent from LGBT rights, rather than genuine religious conscience, and the baker's lawyer seeks to use a RFRA as a defense against a discrimination complaint, the RFRA has been misused: the fact that a claim is capable of being dressed up with a strategic veneer of religious justification does not mean it should be. Moreover, religious accommodations always require careful balancing between individual and government interests. The more that we see claims demanding that the religious adherent's rights be regarded as absolute and take priority over all other interests, the more we will be entitled to conclude that religious liberty advocates are not operating in good faith.

The reciprocal obligation for LGBT rights stakeholders is that, in bringing claims under antidiscrimination laws, they should exercise something akin to prosecutorial discretion. They should recognize that facts and the motivations of persons who have allegedly discriminated can be murky and complicated, and that occasionally the better path to justice and civil peace is to forbear from using all of the weapons that law makes available to complaining parties. In other words, just because a florist, wedding photographer, or cake baker *could* be hauled into court over an alleged civil rights violation does not necessarily mean that he *should* be. The point is not that we should tolerate illegal anti-gay animus. The point is that, before bringing a discrimination complaint, the complaining party should be very sure that true anti-gay animus actually was the cause of the alleged injury.

Of course, it is always easy to prescribe "reasonableness" for other people's conduct. Why should religious conservatives and LGBT stakeholders heed this advice? Because it is in their own best interest to do so. With controversies over LGBT rights and religious liberty being a prominent and ongoing topic in legislative debates, elections, and news and social media, both sides in the conflict should remember: people are watching.

These issues arise out of law, but they are deeply intertwined with our politics and public culture. Both sides have an incentive to cultivate an image of reasonable expectations, common sense, and fair play. Neither side has yet won the culture war. Consider that clear majorities endorse marriage equality,[19] and a poll last year suggested that Americans actually felt more favorably toward gays and lesbians than

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19. *E.g.*, Jones, *supra* note 9 ("In 2015, nearly all public polls have shown solid majority support for same-sex marriage, between 55 percent and 61 percent.").

they did toward evangelical Christians.[20] Yet, another poll in June 2015 found that, by 56 to 40 percent, Americans believe "it's more important for the government to protect religious liberties than the rights of gays and lesbians if the two come into conflict."[21] Most said businesses should not be allowed to refuse service to same-sex couples—unless they're wedding-related businesses, in which case 52 percent thought such refusals were okay.[22]

Americans will continue to register their opinions and attitudes about these issues not only on the perceived worthiness, but also on the perceived reasonableness, of the advocates and arguments on both sides. In response, politics and law will adapt accordingly.[23] Neither side should compromise on their convictions, but my argument is that they should use judgment and discretion about when and how to *act* upon their convictions. To borrow a line from Mario Cuomo's celebrated speech at the University of Notre Dame on the relationship between politics and religion, the activists, litigants, and engaged citizens on both sides must demonstrate that they are committed to "creat[ing] conditions under which all can live with a maximum of dignity and with a reasonable degree of freedom."[24]

Some context is necessary in order to understand the underlying principles, and some of the inherent dilemmas, of both antidiscrimination law and religious liberty protection. Accordingly, in Part I, I sketch the political-philosophical justifications for antidiscrimination laws as exercises of the states' police power. I then consider how even neutral, general exercises of the police power can burden religious liberty, and how RFRAs have emerged as a response to such concerns. I explain how RFRAs and other forms of religious accommodation are most problematic when they burden the rights of other people. In Part II, I discuss how religious conservatives have organized around the issue of religious liberty, and how the lack of meaningful standards for identifying an "exercise of religion" may encourage plaintiffs and their lawyers to bring claims that are more about anti-gay politics than actual conscience. Much of this problem arises because, in the United States today, there really is no daylight between religious and political opposition to LGBT rights—the two have effectively become one and the same. In Part III, I discuss some of the factors LGBT

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20. Nikki Schwab, *Poll: Gay People More Popular Than Evangelicals*, U.S. NEWS & WORLD REP. (Mar. 27, 2014, 4:16 PM), http://www.usnews.com/news/blogs/washington-whispers/2014/03/27/poll-gay-people-more-popular-than-evangelicals [http://perma.cc/UX9J-ZXQF].

21. Emily Swanson, *Public Split on Same-Sex Marriage*, U.S. NEWS & WORLD REP. (June 25, 2015, 3:22 AM), http://www.usnews.com/news/politics/articles/2015/06/25/5-things-same-sex-marriage-case-divides-public-opinion [http://perma.cc/S8P8-AWVG].

22. *Id.*

23. For discussion of the relationship between law and public opinion, see, for example, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379 (2006).

24. Mario Cuomo, Governor of N.Y., Religious Belief and Public Morality: A Catholic Governor's Perspective (Sept. 13, 1984) (transcript available at http://archives.nd.edu/research/texts/cuomo.htm [http://perma.cc/V35J-B2MG]).

rights stakeholders should consider in deciding when it is appropriate to invoke the remedies of antidiscrimination laws.

I. THE "ANTIDISCRIMINATION PROJECT" VS. RELIGIOUS LIBERTY

At the heart of the conflict between LGBT equality and religious liberty is a kind of legal/cultural schizophrenia. On the one hand, in the considered judgment of the people's elected legislators in almost half the states, the District of Columbia, and dozens of local jurisdictions, discrimination on the basis of sexual orientation (and, in most cases, gender identity as well) is against public policy.[25] In other words, it has been categorized as a socially harmful behavior—just like burglary, pollution, or public indecency—to be regulated under the government's police power, consistent with the long and settled American tradition of laws protecting civil rights in the marketplace and private sector. Where they exist, sexual orientation antidiscrimination laws generally have the same scope, and operate in the same manner, as laws prohibiting discrimination on the basis of race, sex, religion, disability, or other commonly protected characteristics. In other words, black-letter law does not recognize among prohibited discriminations any hierarchy of moral superiority, historical pedigree, or lingering social acceptability.

On the other hand, for some substantial number of people, opposition to (or at least moral quandaries about) homosexuality, and same-sex marriage in particular, is a matter of sincere religious conviction. The advocates for moderation and compromise remind us that "[w]hile there are many bigots" represented among the opposition to same-sex marriage, "there are also many wise and deeply humane people whose most deeply held religious beliefs contain heterosexual definitions of marriage."[26] The long history of religious teaching (indeed, until quite recently, social consensus) that homosexuality was a moral evil cannot just be swept aside, these moderates say, by the majority vote of a city council or state legislature. The social consensus may have moved decisively in support of LGBT equality, but matters of religious doctrine and individual conscience sometimes evolve on slower time scales. Antidiscrimination law cannot impose a social consensus that has not yet been achieved. If it does, it risks oppressing those whose consciences still require a different understanding, people who are, in the meantime, "worthy of tolerance, respect and gentle persuasion."[27]

To better appreciate this conflict, it is helpful to have a basic understanding of the political-philosophical underpinnings of antidiscrimination laws, including those that protect sexual orientation, then to consider how such laws interact with constitutional and statutory protections for religion.

Andrew Koppelman, who has provided what I regard as the best and most comprehensive exposition of what he calls the "antidiscrimination project," explains that laws forbidding private individuals from using certain characteristics such as race, gender, or sexual orientation as the basis for treating other individuals badly in the marketplace are intended to "eliminate or marginalize the shared meanings,

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25. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 11.
26. Brooks, *supra* note 17.
27. *Id.*

practices, and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage."[28] The aim of these laws is "to transform culture, not just legal entitlements, and to end those unjust private practices—the most notorious of which is discrimination—that exacerbate the disadvantages of these groups."[29] The antidiscrimination project helps perfect democracy, because "government cannot attain the level of impartiality among citizens that justice and democracy require so long as racism and similarly invidious beliefs remain pervasive in the culture from which governmental decision makers are drawn."[30] The antidiscrimination project attacks "[s]tigmatized social status and the concomitant withholding of respect" because such stigma "is the source of the poison that contaminates, and renders unfair the outcomes of, public and private decision making."[31] Eradicating private practices of stigmatization and dignitary harm is a worthy and important government enterprise because when some social groups are regarded as inferior in the private sphere, they suffer in the public sphere since government decision making may fail to "give due regard to their interests."[32]

In a similar vein, Andrew Sullivan has written that the equality and liberty that government is obligated to guarantee to all its citizens become a "chimera" if they are "overwhelmed by public and private bias."[33] And John Rawls observed that, in order to take part in society "as citizens, much less as equal citizens," people need a certain minimum level not only of material well-being, but also "*social* well-being."[34] Accordingly, courts have long held that government has a compelling interest in the eradication of private discriminatory practices,[35] including those based on sexual orientation.[36] (Of course, there is a robust classical liberal/libertarian critique of the antidiscrimination project which holds, basically, that government regulation of private attitudes and biases is illegitimate and that government should not attempt to enlarge liberty for some by restricting it for others.[37])

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28. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 8 (1996).

29. *Id.*

30. *Id.* at 9.

31. *Id.*

32. *Id.*

33. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 141 (1995).

34. JOHN RAWLS, POLITICAL LIBERALISM 166 (expanded ed. 2005) (emphasis added); *see also* ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 30 (2000) ("[T]he best rationales for a liberal democracy forbid restricting freedom except where it is required to prevent serious harm or to preserve equal basic liberty or equal basic political power."); BRIAN LEITER, WHY TOLERATE RELIGION? 117 (2013) (arguing that "consistent with a principle of toleration, the state may indeed put its imprimatur on values and worldviews" such as antidiscrimination "that are inconsistent with the claims of conscience of some of its citizens," as long as the objective is not to suppress or coercively burden those claims of conscience).

35. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (sex discrimination); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (race discrimination).

36. *See* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 31–38 (D.C. 1987).

37. For a discussion of this critique, see, for example, SULLIVAN, *supra* note 33, at 142–68.

The libertarian critique notwithstanding, let us assume that state and local antidiscrimination laws are justifiable as exercises of the police power intended to improve the quality of democracy and safeguard citizens' welfare and security. Now consider that almost all exercises of the police power hold the potential to impose burdens on some individuals' exercise of their religion. For example, laws requiring full-face photographs on driver's licenses are motivated by legitimate governmental purposes, yet they pose serious problems for some Muslim women or members of the Old Order Amish.[38]

The Supreme Court ruled in 1990 in *Employment Division v. Smith*[39] that under the First Amendment's Free Exercise Clause, neutral, general laws do not require religious accommodations, nor need they be justified by compelling governmental interests.[40] Emphasizing the distinction between belief and conduct, the Court explained, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[41] To do so, the Court said, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[42] This standard is said to reflect a stance of strict formal government neutrality toward religion, "preventing government from using religion as a 'standard for action or inaction,' thus disabling government from using religion 'either to confer a benefit or to impose a burden.'"[43] *Smith* replaced the test provided in *Sherbert v. Verner*,[44] which held that government actions that substantially burdened a religious practice must be justified by a compelling government interest.[45]

It is not obvious to everyone, of course, that a position of formal neutrality toward religion is consistent with America's constitutional history and public culture. As one federal jurist recently wrote in a federal RFRA case:

> From conscientious objector status in the military draft to federal and state tax codes, from compulsory school attendance laws to school lunch menus, from zoning law to employment law and even fish and wildlife rules, our governments at every level have long made room for religious faith by allowing exceptions from generally applicable laws. Through

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38. Patrick T. Currier, Freeman v. State of Florida*: Compelling State Interests and the Free Exercise of Religion in Post-September 11th Courts*, 53 CATH. U. L. REV. 913, 916 (2004).

39. 494 U.S. 872 (1990).

40. *Id.* at 876–90.

41. *Id.* at 878–79. The rule only applies to laws that are neutral and generally applicable, not to laws that appear to intentionally single out religious practices for special disabilities. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

42. *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

43. Bette Novit Evans, *Constitutional Language and Judicial Interpretations of the Free Exercise Clause*, *in* THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES 141, 166 (Derek H. Davis ed., 2010) (quoting PHILIP KURLAND, RELIGION AND THE LAW (1961)).

44. 374 U.S. 398 (1963).

45. *Id.* at 402–03.

> such exceptions and accommodations, we respect diverse faiths, and we govern with reasonable compromises that avoid unnecessary friction between law and faith.[46]

Daniel Conkle has observed that "formal neutrality severely undermines the theoretical foundation of American religious liberty," and renders religion "virtually an irrelevancy."[47] Professor Laycock has argued that the Free Exercise Clause should be understood as "a substantive entitlement, and not merely a pledge of non-discrimination."[48] Richard Garnett argues that "[t]he generous and sympathetic accommodation of religion is a crucial part of, not an obstacle to, the practice and promotion of civil rights."[49] Moreover, as the example of driver's license photos demonstrates, what seems "neutral" to some people may impose serious costs on others. Lack of sympathy toward, or merely unfamiliarity with, less common religious beliefs and practices may make us "unaware, selectively indifferent, or insensitive to the needs of" some religious persons.[50] Considering the current politics of religious liberty, it is easy to forget that *Sherbert*'s robust standard for protecting religion sprang from the pen of the great constitutional liberal William Brennan. It is worth noting, too, that where race is concerned, a powerful critique of the prevailing "color blind" theory of the Equal Protection Clause is that "formal equality can mask enormous substantive inequalities."[51]

RFRAs, which currently are on the books in federal law[52] and in twenty-one states,[53] have been the response to *Smith*'s perceived constitutional underprotection of religion. They essentially provide the same standard as *Sherbert*: where there is a substantial burden on religious exercise, government must show that the challenged law or policy is supported by a compelling interest as applied to the specific individual claimant, and that it is the least restrictive means for realizing that interest.

But not all RFRA claims are alike. Sometimes the claimant seeks to be permitted an exercise of religion that imposes no tangible, direct costs on other persons—for example, a Muslim prison inmate who wants to be allowed to grow a short beard[54]

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46. Univ. of Notre Dame v. Burwell, 786 F.3d 606, 621 (7th Cir. 2015) (Hamilton, J., concurring).

47. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 25 (2000).

48. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 13; *see also* Emp't Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in the judgment) (arguing that under the Free Exercise Clause, "an individual's free exercise of religion is a preferred constitutional activity").

49. Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 509 (2015).

50. Evans, *supra* note 43, at 166; *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1136 (1990) ("Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice.").

51. Evans, *supra* note 43, at 166.

52. *See* 42 U.S.C. §§ 2000bb–2000bb-4 (2015).

53. NAT'L CONF. ST. LEGISLATURES, *supra* note 3.

54. *See* Holt v. Hobbs, 135 S. Ct. 853 (2015).

or the member of a Native American religion who wants to be allowed to ingest peyote as part of a religious ritual (the situation in *Smith*).[55] These appear to be the sorts of claims most legislators and commentators had in mind when the federal RFRA and the early state RFRAs were approved in the wake of *Smith*—claims by "religious minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws" and where "the costs of accommodating [the] claims were minimal and widely shared."[56]

But RFRAs also apply to what Douglas NeJaime and Reva Siegel have labeled "complicity-based" claims—that is, claims that involve "religious objections to being made complicit in the assertedly sinful conduct of others."[57] Objections by florists, bakers, and photographers to providing services for same-sex weddings are complicity-based claims. So was the claim about contraceptive coverage under employer-paid health insurance in the *Hobby Lobby* case.[58] It is the perceived need to address complicity-based claims that has driven the political demand for RFRAs by religious conservatives.

Even if RFRAs in general are a good idea as a matter of public policy (and in this Article I am assuming for the sake of argument that they are), complicity-based claims are problematic because they have "distinctive potential to impose material and dignitary harm on those the claimants condemn."[59] Although singling out some people for exemptions from general laws arguably always carries some social cost, no person is directly, tangibly harmed when, for example, the member of a Native American religion ingests peyote as part of a religious ritual. But a gay couple is indisputably harmed when they are refused service in a place of business. Not only are they denied goods or services that are available to other people, they also suffer stigmatization and an offense to their dignity, the exact sorts of injuries that the antidiscrimination project seeks to discourage.[60] Complicity-based claims "have social meaning and material consequences for the law-abiding persons who the claimants say are sinning."[61] After all, refusals of service have an ignominious place in this country's civil rights history. When Congress adopted the public accommodations antidiscrimination section of the 1964 Civil Rights Act, it sought "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[62]

RFRA skeptics like Marci Hamilton argue that the appropriate limit to religious liberty is "when the religious actor will harm another person."[63] RFRAs, she says,

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55. *See* Employment Division v. Smith, 494 U.S. 872, 874 (1990).

56. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2520 (2015).

57. *Id.* at 2519.

58. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

59. NeJaime & Siegel, *supra* note 56, at 2527.

60. *See supra* notes 28–36 and accompanying text.

61. NeJaime & Siegel, *supra* note 56, at 2520.

62. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16–17 (1964)).

63. MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 16 (2d ed. 2014).

are "evidence of an agenda of one-way accommodation, where the religious believer is the center of the universe and the rest of us are supposed to make way."[64]

Allowing religious adherents to bring complicity-based RFRA claims requires that we compromise on the antidiscrimination project. We must accept that the rights and dignity of persons who transact with religious adherents may suffer some injury. RFRAs privilege religion by granting it more protection from neutral, general laws (such as antidiscrimination laws) than the Constitution requires.[65] And so, if we are to have RFRAs, they must be confined to a proper place for a pluralistic society, especially where their use burdens the rights of other people. We are entitled to expect that religious adherents and their lawyers who bring religious accommodation claims will respect the careful balancing of interests that such accommodations require.

II. OPPOSITION TO LGBT RIGHTS: RELIGION AND POLITICS

For religious conservatives, the enactment of RFRAs and other forms of religious accommodation has become a signature political project and a locus of strategic organizing and messaging. This fact in itself does not make religious accommodations illegitimate. After all, on the other side, the pursuit of antidiscrimination laws has long served the same purpose for LGBT groups.[66] But the credibility of RFRAs will be compromised if calculations arising from politics and messaging inform the *bringing of individual claims*. Given the high level of deference the Supreme Court has said must be given by courts to individuals' assertions about what their religious beliefs require,[67] it will be difficult for courts to separate out claims involving genuine religious exercise from claims that are really about grandstanding and simple political dissent from LGBT rights.

Remember, we could eliminate RFRAs altogether and remain safely within the requirements of the Constitution's Free Exercise Clause. RFRAs privilege religion by giving it more protection from general laws than the Constitution requires. And so we are entitled to specify some reasonable boundaries on RFRA claims in order to help assure the appropriate balance between civil rights and religious liberty. "Reasonableness" for religious liberty stakeholders, then, means refraining from abusing the privilege that religious accommodations provide, and not exploiting the fact courts are likely to accept most claims about religious belief at face value. If RFRA stakeholders cannot exercise reasonable judgment and discretion in the bringing of accommodation claims, then there will be more justification for questioning the whole enterprise of religious accommodations that affect the rights of other people, because the risk will grow unacceptably high that the value of accommodating religious conduct will be overbalanced by the accommodations' "distinctive power to stigmatize and demean third parties."[68]

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64. *Id.* at 1.

65. *See supra* notes 40–45 and accompanying text.

66. JAMES W. BUTTON, BARBARA A. RIENZO & KENNETH D. WALD, PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES 2–10 (1997) (discussing the role of antidiscrimination law in organizing for gay rights).

67. *See infra* notes 105–10 and accompanying text.

68. NeJaime & Siegel, *supra* note 56, at 2566.

It is not hard to see why, on matters of LGBT equality, it has become almost impossible to untangle religion from politics and culture.[69] For as long as gay men and lesbians have been a visible presence in American life, religious conservatives have fought in legislatures, courts, and the public square against their legal rights, even the acknowledgement of their equal citizenship and basic humanity, with asymmetrical and disproportionate fury.[70] Religion was centrally responsible for the social construction of lesbians and gay men as a caste to be stigmatized, as a group whose members were denied respect by their fellow citizens and denied equal treatment—in such areas as marriage, military service, and the criminal law—by their government.[71] Conservative religious activist James Dobson called the fight against marriage equality "our D-day, or Gettysburg or Stalingrad."[72]

In the last decade or two, as secular arguments in opposition to marriage and other LGBT rights have all but vanished, religious conservative activists, lawyers, and public intellectuals have provided virtually all of the energy and arguments against LGBT equality. Religious conservative think tanks and litigators have hammered away at the message that same-sex marriage is an existential threat to religious liberty[73] and presents "a multiplicity of serious risks for religious institutions."[74] In the recently concluded federal marriage litigation, the states' central argument in defense of their marriage laws—that marriage could be reserved to heterosexuals in the interest of "responsible procreation"—had been developed by religious conservative scholars.[75] Meanwhile, the term "religious liberty" has become an overused talisman, its meaning stretched and distorted to encompass almost every form of dissent from marriage equality and LGBT civil rights.[76]

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69. *Cf.* Conkle, *supra* note 47, at 31 (observing that "[r]eligion always has played a role in American politics, but in recent decades, the relationship between religious perspectives and political ideologies has become unusually direct and highly visible" (internal citation omitted)).

70. *See, e.g.*, DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT (1997).

71. *See, e.g.*, *id.* at 25–91.

72. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 98 (2013).

73. *See, e.g.* Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007).

74. *Id.* at 957.

75. Jeffrey Rosen, *The Laughable Argument Against Gay Marriage*, NEW REPUBLIC (Mar. 26, 2013), http://www.newrepublic.com/article/112778/supreme-court-gay-marriage-case-2013-laughable-argument [http://perma.cc/2556-NTQ4] (stating that the "'responsible procreation' argument . . . first surfaced in the 1990s in law review articles and presentations by Lynn Wardle, a law professor at Brigham Young University, and Teresa Collett, a law professor at the University of St. Thomas"). The argument was rooted in natural law conceptions, but it had the attraction of sounding more neutral and secular than the actual reason legislators and voters adopted same-sex marriage bans: "moral disapproval of homosexuality (which is sometimes religiously based)." *Id.*

76. *E.g.*, Bazelon, *supra* note 2 ("Unlike in earlier eras, when religious objections let the faithful separate themselves from institutions they felt they could not support, many conservatives now deploy the phrase as a way of excluding other people.").

With the Supreme Court's ruling in *Obergefell*, the invocation of religious liberty by some prominent religious conservative leaders and politicians became so hyperbolic that it threatened to undermine any reasonable understanding of the term. Former Republican presidential candidate and Louisiana Governor Bobby Jindal said the marriage decision would "pave the way for an all out assault against the religious freedom rights of Christians who disagree with this decision."[77] Tony Perkins, president of the Family Research Council and arguably the most visible and powerful Christian conservative leader, said the ruling would mean Christians would be "dragg[ed] . . . kicking and screaming out of your church" within the next "five years."[78] Perkins insisted there is no middle ground on LGBT rights, and that pastors should tell their congregations "they live all for God or they don't live for him at all" and to "resist unrighteous and unlawful government."[79] In a similar vein, Albert Mohler, president of the flagship seminary of the Southern Baptist Convention, the largest American protestant denomination, insisted last year that "there is no third way. A church will either believe and teach that same-sex behaviors and relationships are sinful, or it will affirm them."[80]

These, obviously, are not the statements of men who are interested in legal balancing tests. Perkins, Mohler, and some substantial share of their millions of followers and coreligionists reject the premise that gays and lesbians *have* civil rights. Yet Perkins and his organization, along with their affiliated groups at the state level, have been in the forefront of the demand for more RFRAs—laws that require judges to carefully determine what actually counts as religious conduct and to thoughtfully balance respect for that conduct against the harms that religious conduct can inflict on other people.[81] This job threatens to become unmanageable if one side refuses to accept any distinctions among the religious, the cultural, and the political.

The principle of religious accommodations will also become unworkable if religious conservative activists continue taking extreme positions that personify Professor Hamilton's "I am the center of the universe and everyone else must make way" critique of RFRAs.[82] Although it was not a RFRA case, the controversy in 2015 over a Kentucky county clerk who refused to issue marriage licenses to same-sex couples, even in defiance of a federal court order, provided good evidence for those who already suspected that religious conservatives were not serious about attempting to balance their claims of liberty against the rights—in this case, the

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77. Jonathan Topaz & Nick Gass, *Republican Presidential Candidates Condemn Gay-Marriage Ruling*, POLITICO (June 26, 2015), http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466.html [http://perma.cc/2FSD-N6TK].

78. Miranda Blue, *Tony Perkins: Gay Rights Encouraging ISIS, Pastors Will Be Dragged 'Kicking and Screaming' out of Church*, RIGHT WING WATCH (May 22, 2015), http://www.rightwingwatch.org/content/tony-perkins-gay-rights-encouraging-isis-pastors-will-be-dragged-kicking-and-screaming-out-c [http://perma.cc/FT4T-V6VZ].

79. *Id.*

80. *There Is No 'Third Way'—Southern Baptists Face a Moment of Decision (And So Will You)*, ALBERTMOHLER.COM (June 2, 2014), http://www.albertmohler.com/2014/06/02/there-is-no-third-way-southern-baptists-face-a-moment-of-decision-and-so-will-you/ [http://perma.cc/U9XX-VJZ5].

81. *See supra* note 6 and accompanying text.

82. HAMILTON, supra note 63; *see also supra* notes 63–64 and accompanying text.

constitutional rights—of other people.[83] The position of the clerk's lawyer from the religious conservative group Liberty Counsel—essentially, that the clerk's religious beliefs must be "accommodated" either by forcing gay and lesbian couples to get their marriage licenses in a different county or by forcing the state legislature to change the state's marriage licensing rules[84]—was an example of the sort of maximalist, one-sided, and unworkable demands that threaten to give the cause of religious liberty a bad name. Such demands send the message that certain religious adherents "are members of a privileged class, who need not cooperate with the rest of society."[85]

To be sure, some religious conservatives view the legalization of civil marriage for same-sex couples as "the state interfering with the sacred, changing a religious institution. They reject the change, and they reject the state's authority to make the change."[86] These opinions are entitled to protection when they are part of public debates about policy or the wisdom of courts. But they cannot be allowed to dictate the litigation strategy of religious liberty advocates. As the Supreme Court has said, government cannot be expected "to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[87] Free exercise involves determining "what the government cannot do to the individual, not . . . what the individual can extact from the government."[88]

Some religious conservative leaders have candidly acknowledged that their campaign for "religious liberty" is not merely about protecting the rights of individual religious persons, it is about evangelization: "spread[ing] the Gospel" and "transform[ing] culture by transforming hearts for Jesus Christ."[89] Professors NeJaime and Siegel document how religious conservative leaders have made messaging about complicity-based claims one of their key political organizing tools.[90]

Indeed, although RFRAs as written can be used to challenge virtually any state or local law or policy that is alleged to substantially burden a plaintiff's free exercise, the politics behind the 2015 RFRAs strongly indicated that they were a backlash against the legal and political advancements being made in favor of marriage

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83. *See* Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=1 [http://perma.cc/JVZ5-38LF].

84. Sean Mandell, *Liberty Counsel's Mat Staver: 'Kim Davis' Religious Freedom Must Be Accommodated,'* TOWLEROAD (Sept. 2, 2015, 8:59 AM), http://www.towleroad.com/2015/09/liberty-counsels-mat-staver-kim-davis-religious-freedom-must-be-accommodated-video/ [http://perma.cc/S2ED-Q8D9].

85. Marci Hamilton, *The Dangers of Accommodation of Religion Based on Religious Status, As Opposed to Religiously Motivated Practice, and the Duty of Religious Individuals To Obey the Law*, FINDLAW (Apr. 5, 2007), http://writ.news.findlaw.com/hamilton/20070405.html [http://perma.cc/4XA2-KV44].

86. Laycock, *supra* note 1, at 848 (internal citations omitted).

87. Bowen v. Roy, 476 U.S. 693, 699 (1986).

88. Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

89. *Bishop: Hobby Lobby Case Shows Need To Fight Secularism*, CATHOLIC NEWS AGENCY (July 15, 2014, 12:02 PM), http://www.catholicnewsagency.com/news/bishop-hobby-lobby-case-shows-need-to-fight-secularism-43480/ [http://perma.cc/3BXT-4KFH].

90. NeJaime & Siegel, *supra* note 56, at 2542–52.

equality.[91] As Ira Lupu put it, "In the current political and cultural climate, proposed RFRAs are a whistle that everyone can hear."[92] Notwithstanding the arguments of some RFRA supporters with a principled and reasoned perspective on why religious accommodations are appropriate,[93] it became clear to many observers that anti-gay, anti-marriage equality activism was the dominant force that was impelling the Indiana RFRA legislation.[94]

And so, the politics of RFRAs and other religious accommodations so far have demonstrated the propensity of religious conservatives to use them as tools of culture war. Will this pattern continue in the litigation of individual RFRA claims?

If we are serious about balancing religious liberty with the rule of law, it seems correct that "[o]nly when the definition of religion is strictly confined within clear boundaries can the state safely excuse citizens and others from obeying the law on the basis of religious beliefs or practices."[95] Otherwise, the effect of accommodations is to "excuse unacceptably large numbers of people from complying with unacceptably large numbers of laws."[96] As one federal appeals court has observed, "[t]he very word 'accommodation' implies a balance of competing interests."[97]

On the other hand, "[t]he scope of religiously motivated behaviors is virtually incalculable,"[98] and courts are supposed to tread carefully in assessing what is or is not a "valid" religious practice.[99] If defining "religion" is a challenging exercise (some scholars have attempted to do so[100] while others have concluded that the enterprise is hopeless[101]), identifying a religious *exercise* proves to be even more difficult. Consider that

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91. *See, e.g.*, Steve Sanders, *Indiana's RIFRA: The Law Is Complicated, but the Anti-Gay Politics Are Not*, AM. CONST. SOC'Y (Mar. 29, 2015), www.acslaw.org/acsblog/indiana's-rifra-the-law-is-complicated-but-the-anti-gay-politics-are-not [http://perma.cc/F3CQ-87C5].

92. Ira C. Lupu, *Moving Targets:* Obergefell*,* Hobby Lobby*, and the Future of LGBT Rights*, 7 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 62 (forthcoming 2015).

93. *E.g.*, Daniel O. Conkle, *Law Professor: Why Indiana Needs 'Religious Freedom' Legislation*, INDIANAPOLIS STAR (Apr. 3, 2015, 11:51 AM), http://www.indystar.com/story/opinion/readers/2015/03/07/indiana-needs-religious-freedom-legislation/24477303/ [http://perma.cc/A9VS-DP6B].

94. *See* Sanders, *supra* note 91. Indiana lawmakers, having endured a stunning amount of negative nationwide attention in both traditional and social media, and under heavy pressure from nervous business and civic leaders, hastily amended the RFRA so that now the one scenario where a religious accommodation is *not* available is in defense to any discrimination charge. Cook et al., *supra* note 4. Indiana's statewide civil rights law does not include sexual orientation or gender identity, but ordinances in most of the state's major cities do so. *See* Stephanie Wang, *Do Local Laws Really Protect Rights of LGBT Hoosiers?*, INDIANAPOLIS STAR (Apr. 6, 2015, 12:20 PM), http://www.indystar.com/story/news/politics/2015/04/04/local-laws-really-protect-rights-lgbt-hoosiers/25274065/ [http://perma.cc/6ZHV-X678].

95. Frederick Mark Gedicks, *Religious Exemptions, Normal Neutrality, and* Laïcité, 13 IND. J. GLOBAL LEGAL STUD. 473, 481 (2006) (emphasis omitted).

96. *Id.*

97. Univ. of Notre Dame v. Burwell, 786 F.3d 606, 618 (7th Cir. 2015).

98. Evans, *supra* note 43, at 153.

99. *See infra* notes 103–07 and accompanying text.

100. *See, e.g.*, LEITER, *supra* note 34, at 26–53.

101. *See, e.g.*, WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS

> [r]eligious mandates cover comportment in the world at large in such areas as social responsibility, education, child rearing, relations between the sexes, medical practices, appropriate employment, financial decisions, and countless other aspects of life. Religious practices include ceremonial activities performed in religious institutions and secular practices motivated by religious faith—both obligatory and optional practices, practices sanctioned by recognized churches and those based upon individual conscience, as well as the folk practices of religious communities.[102]

While acknowledging that there may be claims "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection,"[103] the Supreme Court has said that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others,"[104] but must only be sincerely held and involve "an honest conviction" that one's personal religious belief or understanding prohibits the conduct required by law.[105] The Court has been equally firm that "[c]ourts are not arbiters of scriptural interpretation."[106] In one of those moments of lofty understatement that gloss over its inability to provide lower courts with actual practical guidance, the Court has acknowledged that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task."[107]

RFRAs generally require a "substantial burden" on religious exercise before an accommodation is allowed. But the Supreme Court has indicated that the bar for a "substantial burden" is also low. Essentially, the Court has held, if an adherent suffers any meaningful government penalty for an exercise of religion (and remember, an exercise of religion is essentially whatever the adherent says it is, as long as the adherent has an "honest conviction"), a substantial burden is established.[108] Presumably the threat of a fine or monetary damages under an antidiscrimination law would qualify as such a penalty. In *Hobby Lobby*, a case applying the federal RFRA, the Court's conservative majority rejected the suggestion that determining whether a burden is substantial requires at least some consideration of how attenuated the connection is between the specifics of the religious belief and the government's regulation of the conduct at issue.[109] Such an analysis, the Justices claimed, would take courts into the forbidden territory of assessing the plausibility or reasonableness of a religious claim, as opposed to whether it represents an "honest conviction," the only inquiry courts are supposed to make.[110]

The ease of meeting these undemanding tests can be expected to work in favor of litigants bringing claims for accommodation. Courts do sometimes reject religious accommodation claims when they involve highly unusual or dubious beliefs and

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FREEDOM (2005).

102. Evans, *supra* note 43, at 153.
103. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).
104. *Id.* at 714.
105. *Id.* at 716.
106. *Id.*
107. *Id.* at 714.
108. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–79 (2014).
109. *Id.* at 2777–79.
110. *Id.* at 2779 (quoting *Thomas*, 450 U.S. at 716 (1981)).

practices.[111] But because opposition to homosexuality has been so closely associated with religious conservatism, it seems unlikely that courts would ask very many tough questions of a business owner who asserted that his religious beliefs forbid him to be complicit with a same-sex marriage.

All of this raises the concern that RFRAs could tempt social conservatives to make questionable or outright false claims for religious accommodations from civil rights laws. As Professor Lupu recently observed, "Not so long ago, a claim that opposition to same-sex marriage was religiously sincere would have been met with a completely non-skeptical response. . . ."[112] But at this "moment of great social change and cultural agitation on issues of same sex intimacy . . . we may be entering a period of increased skepticism" about whether particular acts of defiance against civil rights laws are motivated by "sincere religious conviction, or reflexive, homophobic bigotry."[113] Professor Garnett, a proponent of greater protection for religion, also acknowledges that "religious exemptions and accommodations are increasingly seen as departures from the rule of law . . . or as disingenuous ploys by those hostile to . . . legal recognition of same-sex marriage," and that "[t]he distinctions among religion, on the one hand, and culture, tradition, identity, and politics, on the other, are much more contested than clear."[114]

In the end, it may be impossible for anyone but the claimant and her lawyer to know for sure whether an asserted religious belief is truly sincere, and thus whether avoiding compliance with a law is truly necessary to prevent infringing the claimant's exercise of religion. Some scholars have argued that separating the "religious" from the "political" or "cultural" is an impossible task to expect from courts. As Winnifred Sullivan observes, "[w]hen law claims authority over religion, even for the purpose of ensuring its freedom, lines must be drawn";[115] yet, "[o]rdinary religion, that is, the disestablished religion of ordinary people, fits uneasily into the spaces allowed for religion in the public square and in the courtroom."[116] But if "complicity" with sinful behavior is the problem to be avoided, then at least we should expect that the complicity will be apparent, articulable, and serious. We should expect claimants to demonstrate that compliance with a civil rights law would objectively threaten to distort their religious choice or alter their religious belief or action by forcing them to participate *directly* in some activity that conflicts with their own religion.

For example, a wedding photographer who would be required to be present at a same-sex marriage ceremony might have a reasonable claim to accommodation, especially if the ceremony has religious trappings of its own. Although we should not confuse speech with religious exercise, an analogy to the First Amendment's compelled speech doctrine seems appropriate. "Wedding photographers are hired to create images that convey the idea that the wedding is a beautiful, praiseworthy, even

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111. *E.g.*, State v. Cordingley, 302 P.3d 730 (Idaho Ct. App. 2013) (explaining that the defendant's use of marijuana as a member of the "Church of Cognitive Therapy" did not comprise an exercise of religion for purposes of the state's RFRA).

112. Lupu, *supra* note 92, at 15.

113. *Id.*

114. Garnett, *supra* note 49, at 495–96.

115. SULLIVAN, *supra* note 101, at 148.

116. *Id.* at 138.

holy event," and so "[m]andating that someone . . . create photographs that depict as sacred that which she views as profane, jeopardizes the person's 'freedom of mind' at least as much as would mandating that she display [the government's slogan] on her license plate."[117]

On the other hand, the same could not be said of a photographer who is simply asked to shoot a portrait in her studio of a betrothed same-sex couple as they prepare for their wedding day. It is hard to see how this request would make the photographer "complicit" in anything. The photographer's real objection would seem to be that the *people* she is photographing are somehow profane. But a religious accommodation based on that argument would seem to validate exactly the sort of stigmatization and dignitary harm that antidiscrimination law is intended to restrain. The burden on the photographer in this instance should be outweighed by the government's compelling interest in attacking anti-gay discrimination. More to the point for my purposes, an accommodation claim in this case should seem unreasonable to the objective observer.

Similarly, a florist who is asked to custom-design and install flowers at a wedding chapel or reception hall for a same-sex wedding might have a valid claim of complicity. But the same should not be true of a florist who is merely asked to ring up a few bouquets of flowers that a customer has chosen off the rack, even if it is made clear the flowers are destined for a same-sex wedding. The florist is not complicit in anything more than a quotidian business transaction. It would require an absurdly attenuated trail of but-for reasoning to imagine that, simply by being asked to hand some baby's breath over the counter, she is somehow being forced to participate in someone else's sinful undertaking.

Even if religious conservatives disagree with the way I have parsed these hypotheticals, they should see that reasonableness is in their own interest. If we have arrived at a point where, as Professor Garnett puts it, many people regard "religious liberty claims and claimants [as] difficulties to be managed, obstacles to be negotiated, or even enemies to be defeated,"[118] it is because the politicians and spokespersons associated with religious conservatism have overplayed their hand. Americans' identification with Christianity is on the decline, even among evangelicals and especially among rising generations,[119] and "[i]ncreasingly, people identify and link organized religion with anti-gay attitudes, sexual conservatism, [and] a whole range of those kind of social cultural values."[120] Southern Baptist theologian R. Albert

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117. Brief of Amici Curiae The Cato Institute et al., Elane Photography, LLC v. Willock, 309 P.3d 53 (2012) (No. 33,687), 2012 WL 5990629.

118. Garnett, *supra* note 49, at 499.

119. *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ [http://perma.cc/SF48-7HTX] (reporting that "[t]he Christian share of the U.S. population is declining, while the number of U.S. adults who do not identify with any organized religion is growing" and that "the drop in Christian affiliation is particularly pronounced among young adults").

120. Katherine Bindley, *Religion Among Americans Hits Low Point, as More People Say They Have No Religious Affiliation: Report*, HUFFINGTON POST: RELIGION (last updated Mar. 14, 2013, 11:52 AM), http://www.huffingtonpost.com/2013/03/13/religion-america-decline-low-no-affiliation-report_n_2867626.html [http://perma.cc/BW9H-T9GL] (quoting Claude Fischer, a sociologist of religion at the University of California Berkeley).

Mohler Jr. has acknowledged that "'[t]he so-called Judeo-Christian consensus of the last millennium has given way to. . . . a new narrative, a post-Christian narrative, that is animating large portions of this society.'"[121]

Religious conservative activists have responded to this new reality by "shift[ing] from speaking as a majority seeking to enforce traditional morality to speaking as a minority seeking exemptions from laws that offend traditional morality."[122] But the American public has largely made up its mind in favor of gay rights,[123] at least in principle, and at the same time there are few indications that the Christian right's narrative of minority persecution gets much traction outside that group's own friendly media and political fora.[124] If religious conservatives do not exercise more restraint and discretion—that is, more *reasonableness*—then the term "religious liberty" may suffer the same fate as the term "family values": a once-potent rallying cry that became so overused and misused that it eventually degenerated into little more than a cliché and a synonym for anti-gay animus and intolerance.

III. WHEN TO USE ANTI-DISCRIMINATION LAW

LGBT rights activists have been accused of hostility toward religion and of their own forms of overzealousness in seeking to enforce their legal rights.[125] To be clear, I am not suggesting a false equivalency: I believe that to the extent some LGBT rights supporters have demonstrated negative or even hostile attitudes toward religion or religious accommodations, it is largely a reaction to many years of religiously driven attempts to restrict marriage equality and, in too many cases, to demonize LGBT people. But the hegemony of Christian religious preferences in politics and law seems to be on the decline, and the cultural tectonic plates have shifted rapidly. LGBT rights are on the ascendant in courts, politics, and public opinion, while religious conservatism finds itself increasingly on the ropes. And so, LGBT rights stakeholders can afford to exercise reasonable judgment and discretion as they use the tools of antidiscrimination law in their own pursuit of greater liberty and equality. And while the long-term trend in favor of LGBT equality seems clear, the American public can be fickle and easily distracted, and so reasonableness is good strategy and politics as well.

Recall that the justification for antidiscrimination laws is to eliminate the socially and democratically corrosive effects of animus that is aimed at a personal characteristic like race, gender, or sexual orientation.[126] But "[d]iscrimination is a

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121. Jon Meacham, *The End of Christian America*, NEWSWEEK (Apr. 3, 2009, 8:00 PM), http://www.newsweek.com/meacham-end-christian-america-77125 [http://perma.cc/M834-HUAQ].

122. NeJaime & Siegel, *supra* note 56, at 2553 (emphasis omitted).

123. *See, e.g.*, Jones, *supra* note 9 (discussing data on public opinion about same-sex marriage).

124. *See* Laycock, *supra* note 1, at 869 (observing that "the conflict over sexual morality is making a large part of the population deeply suspicious of claims to religious liberty," and that "[t]he consequence of fighting the Sexual Revolution so hard and so long may be to permanently turn much of the country against religious liberty" (emphasis omitted)).

125. *See, e.g.*, *id.* at 869–75.

126. *See supra* notes 28–37 and accompanying text.

powerful charge," and "the broad label 'discrimination' makes no distinctions."[127] Yet distinctions are the lawyer's stock-in-trade, and well-reasoned distinctions are necessary if we are to have coexistence. Just as insubstantial burdens or nonreligious speech or conduct should not necessarily give rise to religious accommodations, the justification for antidiscrimination laws suggests that a refusal of service that is not based on true anti-gay animus should not necessarily give rise to a civil rights complaint.

Consider that members of many professions and trades are accorded a large measure of autonomy and freedom for self-direction. Lawyers are not allowed to discriminate on the basis of a protected characteristic like race or religion, but they are not obligated to take on clients whom they believe they cannot effectively represent. Similarly, no one would think that a Republican or Democratic political consultant should be required to take on all comers—not necessarily because he has animus toward the other party, but because he does not share the same base of experience or speak the same political language. A Republican political consultant might reasonably conclude he does not have the knowledge, vocabulary, and contacts to do the best job possible for a Democrat, and vice versa.

When it comes to the needs of gays and lesbians, we should at least entertain the idea that similar considerations of professional competency and self-definition might inform the decisions of some businesspersons and certain types of service providers. Does it really make sense, for example, to sue a marriage counselor who primarily serves conservative Christians if he refuses his services to a gay or lesbian couple?[128] Under a very formalistic (and, I think, myopic) view of the antidiscrimination project, the answer might be yes. But I think the more reasonable answer would be no.

Imagine a professional wedding planner who is approached by a lesbian couple to orchestrate their big day. After a short chat, it becomes clear that the planner and the prospective clients inhabit different worlds, whether it's about esthetics, music, or gastronomy. The women want their ceremony in a Unitarian church. The planner mentions that she's never done a same-sex wedding and has only ever worked in Christian churches. After a full discussion, the planner tells the women she's sorry, she cannot do their wedding.

Has the lesbian couple been illegally discriminated against? Assuming that the planner made her decision based on the totality of the circumstances and not merely the potential clients' sexual orientation, the answer should be no. Even if the planner is a traditional Christian who would personally prefer not to have truck with Unitarian lesbians who want to play Sia Furler and serve vegan imitation calamari at their weddings, the planner *on these facts* has made an acceptable—and probably wise for all concerned—professional judgment. Like Karl Rove attempting to run a campaign for Bernie Sanders, she lacks the necessary competencies, and it is foreseeable that everyone would end up unhappy. Perhaps the couple perceives the

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127. Laycock, *supra* note 1, at 869.

128. "No same-sex couple in its right mind would want to be counseled by a counselor who believes that the couple's relationship is fundamentally wrong. But supporters of gay rights insist that every counselor be available to same-sex couples." *Id.* at 872. Laycock suggests that "[t]he purpose of such arguments is not to obtain counseling, but to drive conservative believers out of the profession." *Id.*

matter differently, and perhaps they could even persuade a state judge or sympathetic city human relations commission to decide in their favor. But if so, I believe it would be a misuse of antidiscrimination law. On these facts—again, I am positing that the planner genuinely thinks she cannot meet the couple's needs and desires, not that she is turning them away out of animus—no civil rights complaint should be brought.

Or, imagine a florist who has cheerfully done business for many years with a customer whom she knows to be gay. Despite their cordial and longstanding relationship, the florist declines to arrange a special order of flowers for the customer's wedding, explaining that to do so would be incompatible with her "relationship with Jesus." Has the florist actually discriminated on the basis of sexual orientation? (Remember that she has long done business with the customer knowing he is gay.) Is she manifesting the kind of socially and democratically corrosive animus and stigmatization that the antidiscrimination project I discussed in Part I seeks to eradicate?

On something very close to this set of facts, a Washington state court in 2015 held a florist, Barronelle Stutzman, in violation of the state's antidiscrimination law, and she was required to pay a fine.[129] The grandmotherly Stutzman has now become a heroine among religious conservatives, and the case has become a rallying point for religious conservative activists who have used it to loudly and bitterly complain about government "intimidat[ing] citizens into acting contrary to their faith and conscience."[130]

Barronelle Stutzman presents an easy case for professional activists and political fundamentalists on both sides. For religious conservatives, she is a martyr; for some LGBT and progressive bloggers, she is a symbol of the other side's assertions of religious supremacy and skill at demagoguery.[131] I think Stutzman presents a hard case, and to borrow from an old saying, we should at least be open to the possibility that hard cases can make bad law. Can we really say she is a homophobe who needs to be made an example of? Did her actions truly "single out" her customer for "stigma and disadvantage" based on his sexual orientation?[132]

I recognize that LGBT rights stakeholders will argue that the florist's refusal to serve her gay customer's needs inflicted a dignitary harm, and that the law is the law: she refused to help with his wedding because it was a *gay* wedding, and therefore she discriminated on the basis of sexual orientation. A Colorado intermediate appellate court adopted this sort of reasoning in rejecting a bakery's argument that

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129. Washington v. Arlene's Flowers, No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015). For a case presenting some similar issues, see Elane Photography, LLC, v. Willock, 309 P.3d 53, 61 (N.M. 2013) (discussing plaintiffs' explanations that they would serve gay and lesbian customers in many ways but would not photograph anyone, gay or straight, in ways that depicted same-sex marriage in a favorable light).

130. *Wash. Grandmother's Home, Livelihood, Freedom at Stake*, ALLIANCE DEFENDING FREEDOM (June 1, 2015), http://www.adfmedia.org/News/PRDetail/8608 [http://perma.cc/LE8E-VWEZ].

131. *See, e.g.*, Jeremy Hooper, *Baronelle Stutzman's Misapplication of 'Say It With Flowers' Slogan Says So Much About Her Bad Case*, GOOD AS YOU (May 12, 2015), http://www.goodasyou.org/good_as_you/2015/05/baronelle-stuzmans-misapplication-of-say-it-with-flowers-slogan-says-so-much-about-her-bad-case.html [http://perma.cc/SP5P-WMWZ].

132. KOPPELMAN, *supra* note 28, at 8.

its refusal to provide a cake for a same-sex wedding was not discrimination on the basis of sexual orientation.[133] The bakery argued "that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured [plaintiffs] that it would design and create any other bakery product for them, just not a wedding cake."[134] The court was unimpressed. "But for their sexual orientation," the complaining gay couple "would not have sought to enter into a same-sex marriage, and but for their intent to do so," the bakery "would not have denied them its services."[135] Citing the U.S. Supreme Court's observation that "[a] tax on wearing yarmulkes is a tax on Jews,"[136] the Colorado court thought it clear that "discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation."[137] Moreover, LGBT rights stakeholders would argue, we should not make exceptions to the enforcement of civil rights laws that gays and lesbians fought—and are still fighting—so hard to win, because any sign of weakness or "victory blindness" will cause "anti-LGBT forces . . . to regroup and advance."[138]

I would not argue that the Washington and Colorado cases were wrong as a matter of law. Nor do I wish to deny understandably aggrieved gay plaintiffs their day in court. I am simply questioning whether they were wise cases to bring as a matter of long-run strategy. While Barronelle Stutzman's action may have violated the *letter* of antidiscrimination law, "reasonableness" means that a complaining party in such a case should also consider whether the action violates the *spirit and purpose* of anti-discrimination law. While the plaintiffs in the Stutzman and Colorado bakery cases may feel they have achieved vindication, these cases are energizing the opponents of LGBT equality, stoking their persecution complex, and creating opportunities to persuade people in the undecided middle that LGBT rights advocates are giving everyone else only two choices: "withdraw or conform."[139] As libertarian commentator Julian Sanchez observes, "the urge to either fine or compel the services of these misguided homophobes comes across as having less to do with avoiding dire practical consequences for the denied couple than it does with symbolically punishing a few retrograde yokels for their reprehensible views."[140]

The LGBT movement has enjoyed great political and legal success, and a great deal of this success is attributable to the fact that the movement's leaders and

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133. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453, at *5 (Colo. App. Aug. 13, 2015) (petition for certiorari pending in Colorado Supreme Court).

134. *Id.*

135. *Id.* at *6.

136. *Id.* at *7 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

137. *Id.*

138. Michelangelo Signorile, *Why Indiana Wasn't a Turning Point on LGBT Rights -- and Why You Should Be Mad About It*, HUFFINGTON POST: GAY VOICES (June 16, 2015), http://www.huffingtonpost.com/michelangelo-signorile/why-indiana-wasnt-a-turni_b_7584856.html [http://perma.cc/R6LA-BNTU].

139. Laycock, *supra* note 1, at 871.

140. *Discriminating Between Discriminations*, JULIAN SANCHEZ (Feb. 27, 2014), http://www.juliansanchez.com/2014/02/27/discriminating-between-discriminations/ [http://perma.cc/B955-R4C8].

strategists avoided overreaching and instead focused on persuading Americans of both the justness and the reasonableness of their cause. After defeats in several critical states in the late 2000s, the campaign for marriage equality "redoubled its efforts to push not just a legal argument but a *moral* one, a case for marriage equality that every American, not just judges, could understand."[141] Moreover, "[a]t the heart of this push was one thing: conversation. Marriage supporters, gay and straight, were encouraged to talk to their friends, family, and co-workers about who gay people really are and why marriage matters so much to them."[142] Indeed, the pursuit of marriage equality was, in many ways, a deeply traditionalist undertaking. As Michael Klarman has written, "[g]ay couples getting married . . . upended traditional stereotypes of homosexuals by presenting an image of stable couples in search of lifetime commitments."[143] In the case involving the Kentucky county clerk who refused to issue marriage licenses in defiance of a court order, the gay plaintiffs asked the judge to impose fines for contempt of court, but not jail—apparently well aware that jailing the clerk would only make her a martyr, appear vindictive, and spark backlash.[144] (The judge sent the clerk to jail anyway.[145])

The point is not that the LGBT movement needs to lower its sights or apologize for its expectation of equal treatment and dignity. The point is that the movement cannot afford to assume that it can consolidate and extend its political and legal successes without bothering to *continue* persuading people of the justness and reasonableness of its cause, especially as that cause now transitions to new priorities and strategies. One way a group demonstrates justness and reasonableness is in which battles it decides to pick.

Finally, there is one more practical argument for the exercise of reasoned judgment. If religious conservative advocates succeed in persuading legislators and opinion leaders that LGBT antidiscrimination laws are being used as a tool of oppression against religious conservatives, legislators in some states may go beyond RFRAs and write religious exemptions directly into their civil rights laws. Unless they are carefully and narrowly drawn, such direct exemptions could be far more harmful to the antidiscrimination project because they do not allow for the sort of interest balancing that RFRAs require.

CONCLUSION

My premise in this Article has been that legislative compromises or judicial decisions, no matter how wise or well crafted, cannot deliver coexistence between LGBT rights and religious liberty. Coexistence is more a matter of politics and culture than of law. Law enters the picture when it is invoked by one side or the other. My argument has been that coexistence can be significantly advanced by the

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141. Mark Joseph Stern, *The Marriage Mastermind: How Evan Wolfson Transformed American Society*, SLATE (Apr. 26, 2015, 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/evan_wolfson_freedom_to_marry_he_invented_the_gay_marriage_liberty_and_morality.single.html [http://perma.cc/8GU7-9QWQ].

142. *Id*.

143. KLARMAN, *supra* note 72, at 210 (internal quotation marks omitted).

144. Blinder & Lewin, *supra* note 83.

145. *Id.*

application of good faith, discretion, and reasoned judgment in deciding when and how to use the tools that law makes available to protect both LGBT equality and religious freedom.