# EXIT RIGHTS, PLURALISM, AND EQUAL CITIZENSHIP: WHY RELIGIOUS EXEMPTIONS ARE STILL BE WORTH IT.

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***Abstract**: Critics of religious exemptions view them as "exit rights" or euphemisms for discrimination, undermining our shared social commitment to civil rights and our aspiration to secure equal citizenship for everyone. This paper responds by arguing that so-called "exit rights" are, in fact, an elegant and necessary application of pluralism — itself one of our society's shared aspirational commitments. America's commitment to pluralism requires us to respect the dignity within each enclave of religious society. Our policymakers undermine that respect if they adopt an inferior view of pluralism, which attempts to replicate the composition of society writ large within each religious enclave. This paper connects these competing visions of pluralism to recent controversial applications of Religious Freedom Restoration Acts, and uses the competing visions as a lens to analyze high-profile state religious liberty bills in Georgia and Mississippi. Such debates inevitably raise questions about how states would respond to racial discrimination posed as religious belief, but racial slippery slopes are inapposite to modern religious liberty claims. Finally, well-crafted, pluralistic religious liberties laws can respect the autonomy of religious exercise while properly securing equal citizenship for all communities.*

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## INTRODUCTION

Religious liberty is a triumph of Western liberalism. For most of American history, freedom of religion as a concept evoked pride rather than controversy.[2] In the years since the Supreme Court shifted the culture wars' balance of power with *United States v. Windsor*[3] and *Obergefell v. Hodges*,[4] however, the phrase evolved into a hot-button political issue.[5] To some, religious liberty is now little more than a euphemism for discrimination.[6] Exemptions from general laws to protect religious liberty now appear to clash against society's shared commitments to nondiscrimination and equal citizenship.

Critiques of modern religious liberty claims come principally in two forms. First, critics like Professor Robin West decry the loss of social unity.[7] Specifically, she argues that religious exemptions amount to exit rights that undermine our shared social commitment to civil rights, thus imposing a

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[2] *See generally* Mary Ann Glendon, *First of Freedoms? How Religious Liberty Could Become a Second-Class Right*, AMERICA MAG. (March 5, 2012), http://americamagazine.org/issue/5131/article/first-freedoms ("Until recently the status of religious liberty as one of the most fundamental rights of Americans has seldom been seriously challenged.").

[3] 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act).

[4] 125 S. Ct. 2584 (2015) (striking down state law that precluded same-sex marriage).

[5] *See*, *e.g.*, Jonathan Merritt, *Religious-Liberty Laws That Have No Meaning*, THE ATLANTIC (Apr. 28, 2016), http://www.theatlantic.com/politics/archive/2016/04/religious-liberty-laws-that-have-no-meaning/480297/.

[6] *See generally Using Religion To Discriminate*, AM. CIVIL LIBERTIES UNION (last visited May 6, 2016), https://www.aclu.org/feature/using-religion-discriminate.

[7] Robin West, *Freedom of Church and Our Endangered Civil Rights: Exiting the Social Contract*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY, (Zoe Robinson, Chad Flanders and Micah Schwartzman, eds., Oxford University Press forthcoming 2015), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2489&context=facpub.

brutal cost on society.[8] Second, scholars like Professors James Fleming and Linda McClain argue that, at least in some circumstances, religious exemptions could threaten our constitutional culture's guarantee of equal citizenship to all people.[9]

This paper responds to the first group of critics by arguing that so-called "exit rights" are, in fact, an elegant and necessary application of pluralism — itself one of our society's shared aspirational commitments. In response to the concerns of the second group, this paper sketches out specific ways to craft religious exemptions to generally applicable laws to minimize the cost of liberty against equality. These suggestions are humble, fully acknowledging that difficult tradeoffs will always remain, so no compromise can satisfy every concern. But in a world where religious exemptions do indeed exist, exemptions are not all created equally.[10] Even the harshest critic can acknowledge that some formulations pose less risk to our shared civil rights commitment than others.

Past commentators, especially Professor Robin Fretwell Wilson, proposed exemption regimes framed as compromises.[11] In fact, Utah largely

[8] *Id*.
[9] James E. Fleming & Linda C. McClain, ORDERED LIBERTY, 146 (2013).
[10] Traditional RFRA laws are far more restrained than more recent state legislation, and specific provisions differ greatly state-by-state. See sections below for more extensive analysis on new state legislation.
[11] Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417, 1418 (2012).

adopted her vision as state law.[12] Such "compromises" warrant fresh examination in light of recent controversy over state religious liberty bills, including the heated debates in Mississippi and Georgia. This paper will specifically examine these state proposals, highlighting what religious exercise they properly protected, where they went astray, and how other states should approach similar conflicts. As with any discussion of religious exemptions, we must acknowledge the looming counter-example of race. Ultimately, that means considering how states would respond to a request for religious exemptions to racial nondiscrimination laws. Finally, this paper concludes on a more satisfying note by considering a potential solution for states that want to protect religious liberties while expressing some commitment to civil rights and equal citizenship.

## RELIGIOUS EXEMPTIONS: PLURALISM OR SOCIETAL FRACTURE

### The Societal Critique

Professor Robin West presents her critique of religious liberty exemptions in a societal context. Religious organizations make internal decisions about their own composition and behavior, but these decisions do not exist in a vacuum. All participants in civil society feel the repercussions

[12] *Robin Fretwell Wilson*, ILL. COLL. LAW (last visited May 4, 2016), https://www.law.illinois.edu/faculty/profile/robinfretwellwilson.

of religious practices, and some people suffer at the hands of religiously-motivated behavior that receives state protection. She posits:

> "The core of my objection that freedom, then, is just this: we should remember that what is jettisoned when we enshrine the "Freedom of the Church" in the constitutional canon is not . . . just the occasional right of employees in ministerial positions in church-affiliated places of employment to a remedy for their wrongful discharge. What is jettisoned, rather, is the aspiration of a civil rights society in a much larger sense. It is the aspiration for an understanding of rights as being rights *to enter* rather than rights to exit—rights to be included, and to participate in all aspects of our social, civic, and constitutional identity. When we set aside our civil rights to enter in order to make room for a Church's freedom to exit, we are setting aside not only a particular litigant's right to relief for a wrongful discharge, but also a particular conception of our rights tradition. We are setting aside an understanding of rights and a history of rights that seeks to secure, on behalf of every one of us, entry into the socially and legally constructed civic worlds of work, school, commerce, family, the public square, the courthouse, and neighborhood."[13]

Professor West couches her social goals in policy language with a presupposition that the state is the proper actor to secure entry into these civic worlds. Her language allows virtually no room for religious practice independent of some government supervision if their practice chooses to deny access to some people. But our rights history does not place the state at the entry point of every socially constructed world. In dealing with a sphere of private actors assembling for religious purposes (as in *Hosanna-Tabor*, Professor West's foil for her argument). To do so would be essentially statist.

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[13] Robin West, *Freedom of Church and Our Endangered Civil Rights: Exiting the Social Contract*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY, (Zoe Robinson, Chad Flanders and Micah Schwartzman, eds., Oxford University Press forthcoming 2015), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2489&context=facpub.

Rights function as "trump cards" to preserve individual interests.[14] The individual thus thwarts collective interest, preventing further engagement even when collective welfare could be advanced. The church whose rights Professor West disparages did not step outside of its sphere, it did not enter a commercial enterprise. Churches are not public transportation buses. Religious charities are not public corporations. The state may validly respect the autonomy of religious organizations, and doing so entails protecting their societal sphere from some external controls and coercion.

Ultimately, Professor West advances a normative goal about social order. By using the power of government to foist particular hiring practices upon a congregation, or dictate any other practice of any other religious organization, the government could indeed ensure equal rights to enter. It would also ensure the loss of vibrant pluralism. Our civil society functions with diverse religious enclaves, from horseback transportation in Amish Country to Islamic schools in Dearborn, Michigan. To preserve that legacy, policymakers must not reflexively use the power of government to establish a preferred social order within religious organizations.

Because of our longstanding respect for the autonomy of worshippers to observe their own practices and religious behavior, we do not seek to impose certain criteria for entry or practice unless it violates the rights of others. If a religious cult demanded ritual abduction as part of its religious practice, the state would not defer to the cult's autonomy, prioritizing instead

[14] *See generally* Ronald Dworkin, TAKING RIGHTS SERIOUSLY (1977).

the state's responsibility to protect rights. In Professor West's conception, the same rule holds for protecting the right of equal access. All decisions by a religious organization, or by a religious family with a business, inevitably affect other people. No religious practice is therefore truly private. Social conservatives made similar arguments about morality, suggesting that private moral acts undermine a shared moral ecosystem such that no moral acts are truly private.[15] Here, no religious exercise is truly private, because they affect our ecosystem of shared civic aspirations.[16]

But any religious organization must have more autonomy in determining entry into its own assembly. Simply because someone is part of the same society, and thus enjoys some societal benefits, does not grant the state a right of micromanagement. In an analogy sometimes attributed to Professor Richard Epstein, using a public highway does not give the state the right to force you to pick up hitchhikers. A pastor declining to officiate a same sex marriage or a church denying access to its multipurpose outdoor facility for the same marriage must be treated differently than if the church blocked access to another facility they do not own. Our aspiration to pluralism demands that much respect.

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[15] *See generally* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17 (2000).
[16] *See* West, *supra* note 13, at 3 ("To discriminate in employment in violation of those laws, then, is not simply an act that may give rise to a cause of action for reinstatement or damages, as per Justice Roberts's suggestion. It is also to break faith with and to undermine the shared national project of creating a world of equal opportunity and full participation that is free of racism and sexism and their related effects, and it is to perform an individual moral wrong in one's personal contractual relations with one's employees or with those who seek one's employment.").

**The Equal Citizenship Critique**

When religious groups seek exemptions from civil rights laws, their accommodations often "collide[] not only with general public policies . . . but also clash[] with antidiscrimination norms that are as normatively supported as religious freedom."[17] Churches and religious institutions are among the nongovernmental associations that offer "seedbeds of virtue" that "guard against governmental orthodoxy by generating their own distinctive virtues and values."[18] Professors James Fleming and Linda McClain explain that these associations are sometimes congruent with the goals of public policy, but other times they stand athwart the values promoted by civil government.[19] Fleming and McClain draw a common distinction between commercial and noncommercial activity.[20]

Religiously-motivated individuals thus forfeit at least some of their free association rights when they choose to enter a commercial market with its embedded nondiscrimination rules.[21] This framework follows a stated goal of avoiding absolutism "of one liberty to the exclusion of other constitutional commitments."[22] Toward that end, it protects some religious practices of individual clergy and church teachings, but in other contexts, a "head-on clash of civil rights — between freedom of religion and freedom from

[17] Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 786 (2007).
[18] James E. Fleming & Linda C. McClain, ORDERED LIBERTY, 146 (2013).
[19] *Id*.
[20] *Id*. at 173 – 174.
[21] *Id*.
[22] *Id*. at 148.

discrimination" must come down in favor of nondiscrimination to "secur[e] the status of equal citizenship for everyone."[23] With this priority in mind, religious exemptions are best characterized as a "prudential mutual adjustment" or "interim remedy" rather than an intrinsically valuable protection of individual liberty in its own right.[24]

Some aspects of equal citizenship will always lie in a tradeoff with liberty of conscience. If a minister declines to officiate a same-sex ceremony, the wedding couple is thereby denied equal treatment. But few people would be despotic enough to force the minister to officiate the wedding, so we are left with a line-drawing problem on the spectrum of conscience. Professors Fleming and McClain urge a mutual adjustment of values by which both sides yield. The question still turns, however, on what point someone's liberty of conscience must yield. Because that question lacks an easy answer, statutory liberty of conscience protections typically rely on the least restrictive means requirement. As a general rule, requiring the government to use least restrictive means imposes a burden on the correct party. If the state must interfere with religious practice, it should bear some obligation to use that power reluctantly out of respect for our shared constitutional commitment to liberty of conscience and pluralism.

The commercial/non-commercial distinction offers help in many situations, but sometimes it does not answer questions of culpability. A

[23] *Id*. at 173 (internal quotations omitted).
[24] *Id*. at 174.

wedding photographer is a member of the commercial market, and enjoys benefits of the legal system given to companies. Nonetheless, incorporation documents do not shield the photographer from moral culpability for every decision he or she makes. A photographer does not share decision-making power with a board of directors or managers. If the government requires him or her to participate in someone else's religious ceremony by serving a marriage, that may involve compelled practice against his or her religion while still being commercial.

Professor John Inazu, himself a supporter of religious exemptions, suggests that the commercial/non commercial distinction is purely pragmatic.[25] To a large degree, it probably is just that. However, it also reflects the unique role that churches and religious institutions play as seedbeds of virtue in American culture and history. They could rationally receive more deference, or at least, demand a closer review of state action when it encroaches on their religious exercise. Companies, by contrast, lack that historic purpose and institutional role as seedbeds of virtue, so corporations could warrant more scrutiny in a religious claim, with a policy basis deeper than simple pragmatism.

The least restrictive means requirement may be instructive here too. Professor Robin Fretwell Wilson makes the case for protecting the religious practice of wedding cake bakers and photographers when the victims of such practices — the couples denied equal citizenship — have readily available

[25] John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015).

alternatives.[26] If the burden on religious exercise is not necessary, then the government should not force the issue. Why sue the one photographer who opposes same-sex marriage, compelling him or her to facilitate a wedding, when many others would happily accept the business? Of course, critics could pose a similar question the other way, highlighting the burden on a couple seeking marriage: Why must an LGBT couple suffer the embarrassment, stigma, and hassle of finding another provider simply to placate someone else's religion?[27] An important difference remains, however, between harm and aggression.[28] Someone suffers a dignitary harm in both instances, but only the harm against liberty of conscience is compelled by the government.

If no one else is available to fill the religious objector's role, then the state might compel the photographer's participation to ensure the couple's equal citizenship. Professor Wilson also applies this logic to public officials providing marriage licenses.[29] She would protect the conscience of a county clerk to avoid participation as long as someone in the office was available to sign a same-sex marriage license. This exercise of religious expression, however, cannot fall under the same justification as religious individuals and organizations. No live-and-let-live solution is available when a public official

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[26] Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417 (2012).

[27] The other obvious counterexample is that we would never permit racial discrimination on the basis that other businesses would want the business. Race is addressed separately in this paper.

[28] *See generally* Stephanie Slade, *Why the Best Arguments Against Religious Liberty Should Still Be Rejected*, REASON (Nov. 13, 2015, 8:00 AM), http://reason.com/blog/2015/11/13/the-best-arguments-about-religious-liber.

[29] Wilson, *supra* note 26.

refuses to follow public policy. Unlike a minister or wedding photographer, county clerks and similar officials choose to inject themselves into the administration of public laws, and thus lose the right to evaluate the administration of each law against their personal religious convictions. We apply this logic, for example, when we extend conscientious objection to those drafted by the military, but not to a services member who cannot volunteers to join the special forces, then decline a mission because of their moral qualms.

In short, someone will assume a dignitary burden. But only one party seeks to coerce the other into submission. The photographer is willing to embrace a live-and-let-live arrangement, in Professor Doug Laycock's parlance.[30] In an era of legalized gay marriage and rapidly solidifying popular support for LGBT rights, the indignities a photographer can inflict upon a wedding he or she does not attend are limited. If the state forces action by the photographer, however, the live-and-let-live arrangement is upended, ignoring all dignitary interests of someone's religious expression, as well as the pluralistic respect for their own practice. Live-and-let-live is little more than a euphemism for liberty. To understand this liberty in context, it's worth asking whether religious exemptions comport with the spirit of free exercise claims at all.

[30] *See generally* Douglas Laycock, *Religious Liberty as Liberty,* J. CONTEMP. LEGAL ISSUES (2013).

**MODERN RELIGIOUS EXEMPTIONS VERSUS FREE EXERCISE OF RELIGION**

Do modern religious liberty debates bear any relationship to the historic roots of religious liberty? At first glance, questioning whether religious organizations should be bound by nondiscrimination laws may not seem analogous to citizens' right to practice the religion of their choice. In at least one sense, however, they share a common moral basis of pluralism. Just as exit rights today undermine the social unity of our aspirational values, exit rights for religious minorities in confessional states diluted the shared national commitment to which those nations aspired. That shared national commitment was misplaced, no doubt, but it was a shared social project weakened by religious exit rights.

In the eighteenth century, the American constitutional project sought to replace the social unity of a confessional state with a republican society that respected liberty of conscience.[31] Their predecessors in Europe still compelled their subjects to embrace particular religious confessions in order to be a citizen in good standing of a nation. These confessional states begat the *Book of Common Prayer*, compulsory church attendance, and publicly-financed churches.[32] More important than any particular religious practice,

[31] *See* John Witte Jr., *Essential Rights and Liberties of Religion*, 71 NOTRE DAME L. REV. 371 (1996).

[32] *See generally* Philip Gorski, *Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, CA. 1300 to 1700*, 65 AM. SOCIOLOGICAL REV. 138, 157 ("During the Confessional Age, the lines between temporal and religious authority became increasingly blurred, both in principle and in fact.").

these societal expectations demonstrated a shared social commitment to certain ideas.[33]

Dissenters — be they Muslim, Jewish, atheist, Roman Catholic, or protestant — needed exit rights from the existing social contract.[34] The aspirations of civic identity in Elizabethan England simply did not comport with the individual religious identity of Roman Catholics, nor was the French constitutional identity under Louis XIV compatible with the personal religious identity of Anabaptists.[35] Religious minorities sought, in a sense, an exit right. They wanted to freely exercise their religion, to freely assemble with fellow believers, to secure a liberty of conscience that undercut their society's shared social commitments. The First Amendment provides just such a space.[36]

The American constitutional project expresses a commitment to religious exercise, facilitated by liberty of conscience.[37] Historically, the

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[33] *See generally* Brent F. Nelsen & James L. Guth, RELIGION AND THE STRUGGLE FOR EUROPEAN UNION: CONFESSIONAL CULTURE AND THE LIMITS OF INTEGRATION (2015).
[34] *See generally* Gorski, *supra* note 32, at 158 ("Thus, in the Confessional Age, one's access to the public sphere, and even one's membership in the community, were largely dependent upon one's (professed) religious views—a de-differentiation of the religious and the secular.").
[35] *Id.* at 158-159 ("The sixteenth and seventeenth centuries witnessed mass movements of religious refugees, a sort of confessionally driven Volkerwanderung in which Protestants drove out Catholics, Catholics drove out Protestants, and everybody drove out the Baptists and other 'sectarians.'").
[36] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").
[37] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1427 (1990) (arguing that American history demonstrates a longstanding commitment to religious exemptions). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (countering McConnell's historical evidence to argue that most eighteenth century Americans recognized no right to religious exemption from generally applicable laws).

United States emerged from a European civic culture that preferred social unity in the form of a confessional state over personal liberty of conscience. The First Amendment inverts that hierarchy, explicitly protecting religious exercise without regard to potential societal value of social unity.[38] By opting for liberty of conscience over social unity, the framers expressed a values preference that is transferable to modern contexts. In today's debates, religious liberties are not pitted against state religion. Instead, they increasingly stand athwart nondiscrimination ordinances that reflect our shared social commitment to civil rights and equal citizenship. Depending on the social norms and shared societal commitments of any generation, liberty of conscience may entail the right of believers to exit those shared commitments.

Following the American model, governments across the world shifted their religious paradigms. Hundreds of statutes and constitutional measures across the world enacted in recent decades afford new protections to religious rights, including "generous protections for liberty of conscience and freedom of religion," along with "guarantees of religious pluralism" and "special protections and entitlements for religious individuals and religious groups."[39]

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[38] U.S. CONST. amend. I.

[39] *See* John Witte Jr., *A Dickensian Era of Religious Rights*, 42 WM. M. L. REV. 707, 709 (2001) ("In the past two decades, more than 150 major new statutes and constitutional provisions on religious rights have been promulgated-many replete with generous protections for liberty of conscience and freedom of religious exercise, guarantees of religious pluralism, equality, and nondiscrimination, and several other special protections and entitlements for religious individuals and religious groups. These national guarantees have been matched with a growing body of regional and international norms. . . .").

Protecting religious exercise incongruent with the government's preferred social orthodoxy thus comports with our First Amendment constitutional culture. Dissenting in *Dennis v. United States*, Justice Hugo Black argued that the First Amendment is a keystone of our government because it protects all viewpoints, not merely those consistent with Congressional majorities.[40] Such an approach would "not likely to protect any but those 'safe' or orthodox views which rarely need [First Amendment] protection."[41]

Today, our shared national commitment to civil rights is noble and accepted, while confessional states are mostly confined to a few pockets in the Middle East. But the impulse for societal unity and shared commitments transcends generations, and the value of vibrant religious pluralism stands the test of time.

## COMPETING VISIONS OF PLURALISM

Does our shared social commitment to civil rights require bludgeoning down dissenters? For those who embrace a total win approach on both the left or the right, a confident pluralism that embraces intellectual diversity falls

[40] *Dennis v. United States*, 341 U.S. 494, 580 (1951) ("I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those 'safe' or orthodox views which rarely need its protection.").
[41] *Id*.

flat. Prominent Harvard Law School Professor Mark Tushnet embodies the "they lost, we won" approach.[42] In dealing with "losers," Professor Tushnet rejects any accommodations for cultural conservatives, a group whose perspective he judges to lack any "normative pull."[43]

Rather than carving out a space in pluralistic society for religious minorities to exercise their own autonomy within limited contexts, Professor Tushnet's call to suppress minority religious views stems from a moral imperative to thwart opinions that he deems not only unsavory, but akin to historically epic evil, suggesting that "taking a hard line seemed to work reasonably well in Germany and Japan after 1945."[44] The rapid emergence of such a hard line attitude among some progressives is drawing a sharp rebuke from more pragmatic liberals. Fifty-two gay marriage supporters recently wrote an open letter chiding gay marriage advocates who refuse to provide space for dissenting thinkers.[45]

The highest vision of pluralism opts for protecting the liberty of each individual over the social value of protected equality in equal citizenship, or in the words of Professor West, our shared commitment to civil rights. Nobel

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[42] Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html ("The culture wars are over; they lost, we won.").
[43] *Id*. ("For liberals, the question now is how to deal with the losers in the culture wars. That's mostly a question of tactics. My own judgment is that taking a hard line ('You lost, live with it') is better than trying to accommodate the losers, who – remember – defended, and are defending, positions that liberals regard as having no normative pull at all.").
[44] *Id*.
[45] John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015) (citing *Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POL. (Apr. 22, 2014), http://www.realclearpolitics.com/articles/2014/04/22/freedom_to-marryfreedomto_dissentwhywemusthaveboth_1 22376.html).

laureate economist Milton Friedman famously summed up his preference for liberty by suggesting that societies valuing freedom over equality would achieve both, while those valuing equality over freedom would achieve neither.[46]

In the context of religious organizations and their clash with our shared commitment to civil rights, Justice Samuel Alito articulated this robust vision of pluralism as protecting individual liberty in his *Christian Legal Society v. Martinez* dissenting opinion.[47] The Christian Legal Society (CLS) chapter at Hastings College of Law required its leaders to be Christians themselves, and espouse the organization's statement of faith. CLS also espoused a religious view that human sexuality is created for and properly limited to conjugal marriage between a man and woman, thus precluding a large number of sexually active students from leadership, including all LGBT students.

Nothing in the trial or appellate records claim any particular student complained about the policy. The case presented no plaintiff who felt harassed or discriminated against, nor even a student who bothered to seek leadership in a religious group for a religion to which he or she did not belong. Nonetheless, Hastings Law maintained an "all-comers" policy requiring student groups to allow any student to pursue leadership positions, regardless of whether their own beliefs comport with the organization's

[46] Milton Friedman, FREE TO CHOOSE, 148 (1980).
[47] *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 706 (2010).

beliefs. The law school thus denied registration to a CLS chapter on campus, consequently withholding resources available to student organization. These resources included the ability to book campus facilities, receive institutional support, and request student fee money for events. The Ninth Circuit, and later the Supreme Court, upheld the law school's decision as viewpoint-neutral and reasonable.[48]

Justice Alito highlighted past inconsistencies in Hastings's application of its "accept all-comers" policy, shedding light on the school's potentially pretextual motives for citing the policy to deny CLS registration.[49] But more importantly, he also painted a moral vision of pluralism as an alternative to the accept-all-comers approach. Justice Alito cited the record to argue that intellectual diversity should thrive organically among student organizations, not diversity within student organizations, artificially foisted upon them.[50] Justice Alito supported the "creation of a forum within which Hastings students are free to form and obtain registration of essentially the same broad range of private groups that nonstudents may form off campus."[51] In essence, Justice Alito believed that the diverse collection of campus groups

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[48] *Christian Legal Soc. Chapter of Univ. of California v. Wu*, 626 F.3d 483 (9th Cir. 2010); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010).

[49] *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 713 (2010) (Alito, J., dissenting) (observing that the Hastings Democratic Caucus, Association of Trial Lawyers of America at Hastings, La Raza, and Vietnamese American Law Society all maintained viewpoint-discriminatory rules for leadership, only being subjected to enforcement after litigation began against the CLS).

[50] *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 732-735 (2010) (Alito, J., dissenting).

[51] *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law*, 562 U.S. at 729 (Alito, J., dissenting).

best reflected society's diversity, rather than forcing each group to be a microcosm of societal diversity reflected within each group.

His live-and-let-live view of pluralism acknowledges that people naturally seek association with those who share their moral and religious beliefs, and rather than fighting such voluntary associations, pluralism protects the rights of each one to operate freely. Christian, Jewish, and Islamic organizations should then exist alongside LGBTQ organizations, each enjoying the freedom to select leaders holding certain religious or moral values. The live-and-let-live view also holds the unique advantage of being the non-coercive conception of pluralism, as discussed later in this paper.

Professor John Inazu labels this thriving intellectual ecosystem as "confident pluralism."[52] Building on John Rawls's "fact of pluralism," Inazu believes we must "embrace a right to differ from state and majoritarian norms."[53] He roots this argument in two premises. First, confident pluralism reflects suspicion of state power, or what I previously called the non-coercive value.[54] These independent communities should be able to, in the words of William Eskridge, "flourish and wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all

[52] John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015).
[53] *Id*. at 591, 592.
[54] In framing my preference for non-state power over state power in terms of coercion, I draw heavily from F.A. Hayek and somewhat from Jon Stuart Mill. *See generally* F.A. Hayek, THE CONSTITUTION OF LIBERTY (1960); Jon Stuart Mill, ON LIBERTY (Dover Thrift Ed. 2002).

others."[55] Second, Professor Inazu suggests that confident pluralism advances the aspiration of tolerance, humility, and patience better than government-mandated orthodoxy.[56] By supporting tolerance, humility, and patience, confident pluralism fosters "fruits of persuasion" between individuals on a personal level.[57] In the case of LGBT rights, public opinion shifts the terms of debate away from discrimination, even with the widespread presence of RFRA laws.[58] This confidant pluralism maintains the authenticity of each autonomous community within the diverse society. Accordingly, it is the only vision of pluralism that respects the full dignitary interests of each group's members, and the only vision that avoids using coercion to meet majoritarian norms.

## THE BACKGROUND OF MODERN RELIGIOUS EXEMPTION CLAIMS

Scholars attribute the spectrum of religious exemptions to modern social movements more than a unified legal theory.[59] Those movements explain why religious organizations historically receive historically generous exemptions for sexual orientation but virtually no slack on racial

[55] John D. Inazu, *supra* note 52, at 590 (quoting William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997)).
[56] John D. Inazu, *supra* note 52 at 592.
[57] *Id*.
[58] *See generally Gay and Lesbian Rights*, GALLUP (last visited May 14, 2016), http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx
[59] *See generally* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 782 (2007).

nondiscrimination requirements.[60] They also receive more exemptions than secular nonprofits.[61]

Religious convictions are not constitutionally entitled to exemptions from generally applicable laws.[62] Instead, the Religious Freedom Restoration Act of 1993 (RFRA) provides a federal statutory remedy to religious adherents.[63] Under RFRA, the federal government[64] may only substantially burden a person's exercise of religion if it can demonstrate 1) a compelling governmental interest, and 2) that it used the least restrictive means of furthering that interest.[65] Twenty-one states followed Congress by enacting their own RFRA laws to protect religious exercise from state law.[66]

The 1993 federal law passed the Senate by a 97-3 vote majority[67] with the support of the American Civil Liberties Union at the time.[68] In the

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[60] *See generally Id.*
[61] *See generally Id.* at 785 (citing Martha Minow, *Partners, Not Rivals? Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1084 (2000)).
[62] *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).
[63] 42 U.S.C. § 2000 (2012) [hereinafter Federal RFRA].
[64] RFRA originally applied to state and local governments as well, but the Supreme Court struck down its application against them on federalism grounds. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (reversing the trial court's application of RFRA against a local zoning ordinance because it exceeded Congress's enforcement power under the Fourteenth Amendment).
[65] *Id.* ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").
[66] *State Religious Freedom Acts*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.
[67] *H.R. 1308 (103rd): Religious Freedom Restoration Act of 1993*, GOVTRACK (last visited May 1, 2016) https://www.govtrack.us/congress/votes/103-1993/s331.
[68] In the aftermath of *Hobby Lobby* decision, the ACLU withdrew its support for RFRA legislation, concluding that its policy implications were no longer palatable for the organization's political and ideological goals. *See* Louise Melling, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (Jun. 25, 2015),

following decades, most litigation invoking RFRA flew under the radar of public opinion. The statute cropped up, for example, to protect a Sikh woman's right to carry religious objects in federal buildings[69] and to ensure a Muslim prisoner could maintain a beard for religious reasons.[70] But in the midst of these low-profile legal skirmishes, one case catapulted RFRA claims into a national debate about religious liberty — *Burwell v. Hobby Lobby Stores, Inc*.[71]

In *Hobby Lobby*, the Supreme Court considered claims by two families, the Greens and the Hahns,[72] each of whom owned large family businesses that functioned as closely-held corporations.[73] The decision's critics balk at such personalized language — can a retail chain with over $1 billion in revenue be fairly considered a "family business"? I argue explicitly what Justice Alito implies in the majority opinion, namely, that a family's moral duties do not bear an inverse relationship to profitability. Their culpability cannot rationally dissipate at any particular profit margin or workforce size. Instead, the dispositive factors as to RFRA's applicability should be corporate structure and decision making. The Greens and Hahns

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http://wpo.st/SSa_1 ("It's time for Congress to amend the RFRA so that it cannot be used as a defense for discrimination.").

[69] *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) (remanding the case for RFRA analysis on an IRS employee's claim that security personnel discriminated against her by denying her the right to carry a symbolic ceremonial blade).

[70] *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

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

[72] *Hobby Lobby*, 134 S. Ct. at 2765, 2756.

[73] For a sample of popular outrage at the challengers' corporate status, *see, e.g.*, Micah Schwartzman et al., *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html.

had full power to set corporate policy and moral guidelines themselves, which would simply not be true in a publicly-held company of comparable size. In a public company, moral culpability is distributed among public shareholders, each of whom lack the power to personally set policy. Here the decision's critics counter that even closely-held corporations receive tangible government benefits (tax incentives, access to marketplace protections, insulation from liability), and these benefits must only come in exchange for adherence to social responsibilities as expressed in generally applicable laws. That argument is a recurring narrative in religious exemption debates, but is not itself related to the size of any party in a RFRA claim.

Although popular press coverage continues to portray their claim as seeking to deny access to contraceptives,[74] the Greens in fact provided health care coverage to their employees at Hobby Lobby stores, including sixteen different methods of FDA-approved birth control.[75] The Greens declined, however, to provide four types of birth control, such as ulipristal, that they believed could take effect after fertilization, thus violating their religious beliefs.[76] The government did not challenge the validity of the Greens' understanding of the drugs or their operation.[77] Justice Alito's opinion

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[74] *See*, *e.g.*, Glenn Thrush, *Hillary Would Beat Him From Jail*, POLITICO (Apr. 11, 2016, 5:21 AM), http://www.politico.com/story/2016/04/off-message-tim-miller-never-trump-221785#ixzz48nNeF1JL ("Jeb and I were talking about *Hobby Lobby*," Miller said — referring to the Supreme Court case that raised constitutional questions about the employer's rights to deny contraception to employees.").
[75] *Hobby Lobby*, 134 S. Ct. at 2756.
[76] *Hobby Lobby*, 134 S. Ct. at 2756.
[77] Brief for the Petitioners at 9 n.4, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at *9; *see also* Jonathan Adler, *No, the Supreme*

acknowledged that providing birth control was a compelling government interest, but faulted the government for failing to exercise the least restrictive means of furthering that interest.[78]

Hobby Lobby generated extensive media coverage, and with it, passionate public debate about RFRA laws generally. Their steady proliferation on the state level could no longer escape notice in the press. When Indiana introduced RFRA legislation modeled after the federal law, expanding it to provide a defense against private suits, the blowback was swift.[79] Businesses condemned the bill and revoked tens of millions of dollars from corporate investment in Indiana.[80] Republican Governor Mike Pence even signed a subsequent clarification that the law did not protect businesses to deny services on the basis of sexual orientation.[81] In the following weeks, Arkansas Governor Asa Hutchinson faced a similar dilemma. He ultimately signed the state's RFRA law with a similar clarification.[82]

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*Court's Hobby Lobby Decision is Not Based Upon a Scientific Mistake*, WASH. POST (Jul. 6, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/06/no-the-supreme-courts-hobby-lobby-decision-is-not-based-upon-a-scientific-mistake/ (rejecting arguments that the opinion was based on "bunk science.").

[78] *Hobby Lobby*, 134 S. Ct. at 2780 – 2783.

[79] *See generally* Amanda Terkel, *Mike Pence Signs Revised Indiana 'Religious Freedom' Law*, HUFFINGTON POST (Apr. 3, 2015), http://www.huffingtonpost.com/2015/04/02/mike-pence-religious-freedom_n_6996144.html.

[80] *Id*.

[81] *See generally* Tony Cook, et al., *Gov. Mike Pence Signs RFRA Fix*, INDYSTAR (Apr. 2, 2015, 8:08 P.M.), http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/.

[82] *See generally* Eric Bradner, *Arkansas Governor Signs Amended 'Religious Freedom' Measure*, CNN (Apr. 2, 2015), http://www.cnn.com/2015/03/31/politics/arkansas-religious-freedom-anti-lgbt-bill/.

Two recent state laws offer an opportunity to contrast post-*Hobby Lobby* approaches to religious liberties legislation. [83] Georgia and Mississippi both passed religious liberties protections. Governor Nathan Deal vetoed the Georgia bill, while Governor Phil Bryant signed the Mississippi measure into law. Rather than simply accepting or rejecting religious exemptions writ large, these state examples offer an opportunity to contrast approaches. Their contrast underscores how drastically the scope of religious liberties legislation can vary state-by-state.

## PLURALISM IN STATE RELIGIOUS LIBERTY LAW

### Georgia

In Georgia, social conservatives passed legislation to strengthen the religious exit rights of ministers, religious organizations, and private individuals.[84] Critics quickly labeled it a license to discriminate, going beyond innocuous religious liberties protection and permitting businesses to deny

[83] While North Carolina also earned media attention alongside Georgia and Mississippi, its legislation actually approached different issues with a different scope. While the other states addressed a varieties of religious liberty claims, North Carolina focused exclusively on the transgender movement, thus falling outside the purview of this paper. *See* H.B. 2, Second Extra Sess. 2016 (N.C. 2016).

[84] *See* H.B. 757, 2015 – 2016 Reg. Sess. (Ga. 2016) [hereinafter Georgia Bill] (To protect religious freedoms . . . to provide that religious officials shall not be required to perform marriage ceremonies, perform rites, or administer sacraments in violation of their legal right to free exercise of religion . . . to protect property owners which are faith based organizations against infringement of religious freedom; to protect certain providers of services against infringement of religious freedom. . . .").

service to LGBT customers.[85] As purported compromises, supporters removed explicit protection for businesses and clarified that the bill would "not allow discrimination banned by federal or state law."[86]

These attempts at conciliation, however, did little to stem the growing tide of criticism directed at the bill.[87] Local institutions ranging from professional sports franchises to the Atlanta Chamber of Commerce balked, major companies threatened to divert investment away from Georgia, and the state's business-friendly Republican governor grew nervous.[88] Eventually, Governor Nathan Deal vetoed the bill, thus triggering threats from the legislature to introduce a similar measure again the following year.[89]

Amid all the controversy, how much did the Georgia bill actually differ from longstanding federal law? As discussed above, the federal RFRA law simply established a two-prong process for reviewing religious liberty challenges: compelling governmental interest and least restrictive means.[90] The Georgia bill, by contrast, waded deeper into specific hot-button issues.

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[85] Greg Bluestein, *Breaking: Nathan Deal Vetoes Georgia's 'Religious Liberties' Bill*, ATL. J.-CONST. (Apr. 19, 2016), http://politics.blog.ajc.com/2016/03/28/breaking-nathan-deal-will-veto-georgias-religious-liberty-bill/ ("[Corporate executives] joined with gay rights groups who warned that the measure amounts to legalized discrimination and pointed to the corporate outrage that rocked Indiana after a similar measure was signed into law there.").
[86] *Id*.
[87] *See Id*.
[88] *Id*.
[89] *Id*.
[90] 42 U.S.C. § 2000 (2012).

It first provides religious ministers with an unencumbered right to decline participation in any marriage ceremony for religious reasons.[91] This provision is hardly novel, and exists in other states without such heated controversy.[92]

Second, the bill pivoted to the commercial sector to insulate business and industry from any legal requirement to work on religious days of rest, specifically the Judeo-Christian Saturday or Sunday.[93] It seems at least plausible that the bill would be vulnerable to challenge on the grounds that it favors Christianity and Judaism over other religions by singling out Saturday and Sunday as days of rest. Such a claim is, however, outside the scope of this paper.[94]

Third, the bill reinforced the autonomy of churches and faith-based organizations to exercise discretionary control of their facilities without liability for denying access because of religious convictions.[95] Religious conservatives are concerned that growing acceptance of gay marriage will lead to civil pressure to use the facilities of faith-based organizations, if not

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[91] Georgia Bill, *supra* note 39 ("All individuals who are ministers of the gospel or clerics or religious practitioners . . . shall be free to solemnize any marriage . . . or to decline to do the same, in their discretion, in the exercise of their rights to free exercise of religion. . . .").
[92] *See*, *e.g.*, Fleming & McClain, *supra* note 8 at 174 ("Religious clergy [in New York] continue to enjoy constitutional freedom not to perform marriages that offend their religious beliefs.").
[93] Georgia Bill, *supra* note 39 ("No business or industry shall be required by ordinance or resolution of any county, municipality, or consolidated government to operate on either of the two rest days (Saturday or Sunday).").
[94] *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (explaining that "government should not prefer one religion to another, or religion to irreligion.").
[95] Georgia Bill, *supra* note 39 ("No faith based organization shall be required to rent, lease, or otherwise grant permission for property to be used by another person for an event which is objectionable to such faith based organization.").

churches themselves, in ceremonies they find morally objectionable on religious grounds.[96]

Fourth, the Georgia bill introduced general RFRA language requiring a compelling governmental interest and least restrictive means in order to substantially burden a person's exercise of religion.

The bill did not extend any protection to public employees, such as county clerks or other local magistrates to deny marriage licenses on a religious basis.[97]

On the whole, the Georgia bill text itself did not amount to "legalized discrimination" about which the critics and alarmists warned.[98] The Georgia legislature confined the bill's scope to focus on religious organizations and individuals, not public officials or corporations.[99] One exception is the weekend holiday provision, which seems to be the most disjointed of the bill's sections. Aside from that requirement, the bill protects the sovereignty of religious individuals and organizations within their own spheres. Can

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[96] *See Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 1999), http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf ("In New Jersey, after the establishment of a quasi-marital "civil unions" scheme, a Methodist institution was stripped of its tax exempt status when it declined, as a matter of religious conscience, to permit a facility it owned and operated to be used for ceremonies blessing homosexual unions.").

[97] Georgia Bill, *supra* note 39 ("Nothing in this chapter shall be construed to . . . Afford any protection or relief to a public officer or employee who fails or refuses to perform his or her official duties. . . .").

[98] *See* Bluestein, *supra* note 35.

[99] Critics could argue that, because *Hobby Lobby* applied RFRA to a company, state RFRA laws always grant license to companies, and that comes at the risk of new discrimination. However, *Hobby Lobby* only considered a closely-held firm, not a public corporation, and the Court only ruled in light of a particularly onerous mandate. It strains credulity to say this means that any state law applying the RFRA test to religious claims opens the door legalized discrimination. The unique case of racial discrimination is considered separately below.

religious liberty have *any* meaningful application if it does not include permitting religious groups to associate among themselves freely by hiring under their own criteria, or have facilities that may be used according to their religious beliefs?

These are exit rights, to be sure. But they exit from majoritarian social norms to preserve their distinct religious expression. Far from undermining our social fabric, they foster authentic religious communities. Freed from state coercion in hiring decisions and imposition of majoritarian rules about which religious ceremonies they must officiate, they can instead contribute to a diverse tapestry of religious communities. This pluralism of diverse groups allows each to thrive, as opposed to top-down imposition of pluralism *within* each group.

**Mississippi.**

Mississippi upped the ante, enacting H.B. 1523, titled the "Protecting Freedom of Conscience from Government Discrimination Act."[100] The law protects not religious views writ large, but rather those religious or moral views specifically related to sexuality and marriage.[101] Inclusion of *moral* rather than strictly *religious* views is significant, because the First

[100] H.B. 1523, 2016 Reg. Sess. (Miss. 2016) [hereinafter Mississippi Bill] ("The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.").
[101] *Id*.

Amendment may protect religious liberty more strongly than other moral convictions.[102]

Moving past the standard RFRA language of compelling governmental interests and least restrictive means (which Mississippi adopted in 2014), the new law reframed debate by prohibiting the government from "tak[ing] any discriminatory action against a religious organization" in a variety of ways.[103] By focusing on religious organizations as sympathetic characters, thus casting them as victims rather than perpetrators of discrimination, the legislature mirrors the rhetorical strategy of social conservatives in the gay marriage debates.[104] Governor Phil Bryant signed the bill into law under that justification. Critics, by contrast, lambasted state lawmakers for enabling "open discrimination" against gay people.[105]

As for specific provisions, the law first builds on its marriage focus by specifically protecting those who provide "services, accommodations, facilities, goods or privileges" related to marriage against

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[102] *See generally* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 782 (2007) ("The special treatment of religious groups is striking especially given the denial of comparable exemptions to secular nonprofit organizations, although
the constitutional roots of religious free exercise offer a rationale
for this different treatment.").

[103] Mississippi Bill, *supra* note 53 (The state government shall not take any discriminatory action against a religious organization wholly or partially on the basis that such organization. . . ."

[104] *See*, *e.g.*, Manhattan Declaration, *supra* note 51 ("We see it in the use of anti-discrimination statutes to force religious institutions, businesses, and service providers of various sorts to comply with activities they judge to be deeply immoral or go out of business.").

[105] Camila Domonoske, *Here's Why Mississippi's 'Religious Freedom' Bill Is So Controversial*, NAT'L PUB. RADIO (Apr. 1, 2016, 2:12 PM), http://n.pr/1SFgubE.

government action for declining involvement in that marriage.[106] It later grants specific legal protection for goods and services such as wedding florists, photographers, and bakers — ancillary marriage services in the battleground of current litigation.[107]

Second, the law provides a liability shield for a religious organization in its hiring decisions.[108] Religious organizations already enjoy a First Amendment ministerial protection against employment litigation, but the exception is limited to ministers — not necessarily all employees of a religious organization.[109] Nor does a blanket protection for moral convictions necessarily equate to RFRA's requirement of religious exercise. In *Hosanna-Tabor*, Chief Justice John Roberts rooted part of the majority opinion in the relationship of ministers to their congregation, a distinctly religious structure.[110]

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[106] *Id*.

[107] *See*, *e.g.*, Christine Mai-Duc, *Florist Who Rejected Same-Sex Wedding Job Broke Washington Law, Judge Rules*, L.A. TIMES (Feb. 18, 2015, 7:26 PM), http://www.latimes.com/nation/nationnow/la-na-nn-florist-same-sex-wedding-20150218-story.html.

[108] Mississippi Bill, *supra* note 53 ("Makes any employment-related decision including, but not limited to, the decision whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organization, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 2 of this act. . . .").

[109] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 708 (2012) (evaluating a minister's formal title given by a church, the substance reflected in that title, the minister's own use of that title, and the important religious functions she performed to conclude the ministerial exception covered the plaintiff).

[110] *Hosanna-Tabor*, 123 S. Ct. at 706 ("The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.").

Third, the law explicitly protects the rights of adoptive parents to teach their children consistent with the parents' sincerely held religious or moral beliefs, presumably even if some people find those beliefs discriminatory.[111]

Fourth, the law prohibits state action against adoptive and foster parents on the basis that they refuse on a religious or moral basis to facilitate their child's gender transition or sex reassignment.[112]

Fifth, the law codifies the rights of individuals to reject access of transgender individuals to locker rooms and bathrooms of the non-birth gender with which they identify.[113]

Sixth, the law sides with state employees who engage in "expressive conduct" based on their religious beliefs, with some time, place, and manner restriction allowed.[114] The full scope of what "expressive conduct" encompasses remains unclear.

Seventh, the law allows for recusal by public officials with religious or moral convictions against issuing a marriage license.[115] While the law attempts to avoid a Kim Davis-style conflict by requiring public offices to

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[111] Mississippi Bill, *supra* note 53 ("The state government shall not take any discriminatory action against a person who the state grants custody . . . wholly or partially on the basis that the person guides, instructs or raises a child . . . in a manner consistent with a sincerely held religious belief or moral conviction. . . .").
[112] *Id.*
[113] *Id.* (The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person establishes sex-specific standards or policies concerning . . . access to restrooms . . . or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction. . . .").
[114] *Id.*
[115] *Id.*

"take all necessary steps" to ensure the marriage is solemnized without delay, it remains unclear which side would win in a head-on conflict.[116] If all clerks in an office refuse to sign a marriage license for a gay couple, can the entire office claim an exemption, or does the "all necessary steps" provision require one of them to set aside their religious objection?

The swiping provisions of H.B. 1523 stand in marked contrast to Georiga, and bear almost no resemblance to RFRA laws in Arkansas and Indiana. Conceivably, we have lost sensitivity to the nuances of each bill because the critics are just as loud every time, and the supporters' justifications sound exactly the same every time. The protestors and sensationalists in Indiana and Arkansas may have inoculated the press and the public against their warnings. By labeling fairly tepid bills as "legalized discrimination" — even measures formerly supported by the ACLU — critics who truly understood the Mississippi bill's ramifications could no longer ability to turn the volume up any higher. They lacked rhetorical space to escalate their warnings for bills that actually did pose a greater threat to their interests.

Mississippi exceeded the scope of Georgia, Indiana, and Arkansas by providing explicit protection to government workers who refuse to perform their duties if they conflict with religious beliefs. This alters the relationship of religious exemptions to the state, and exceeds the bounds of any potential

[116] *Id*. ("The Administrative Office 199 of Courts shall take all necessary steps to ensure that the 200 performance or solemnization of any legally valid marriage is not 201 impeded or delayed as a result of any recusal.").

live-and-let-live compromise. The open-ended protection of religious "expressive conduct" by state employees is even more concerning. We have no reference point to understand what that means. Time, place, and manner restrictions are malleable concepts, open to recurring litigation, and state court judges in Mississippi may not be prone to rule against the time, place, and manner of religious expression. Consequently, this provision alone could open the most far-reaching Pandora's box of dignitary harms to LGBT residents, sanctioning state employees in an undefined set of actions that could deny equal citizenship to the very taxpayers they are commissioned to serve.

Further, the state created another potentially broad cause of action by adoptive parents. By barring state action against adoptive parents on the basis of the parents' beliefs about gender, the state could invite lawsuits if it declines to place a child with gender dysphoria in a family whose parents reject the existence of such a condition. Parents could then potentially sue to have a child placed in their home, and the state could not legally consider the family's attitude toward gender when determining the suitability of their home.

The bill's provisions underscore that each state's approach to religious exemptions can be wholly different. Critics should carefully weigh their language to evaluate whether their dire warnings are overstated. Supporters should resist the urge to go for a "total win" in conservative states like

Mississippi, and instead recognize that they do not want Professor Tushnut adopting the opposite posture against them.

## THE PROBLEM OF RACE

Any discussion of religious liberties exemptions arrives at the same sticky wicket: what would the exemption advocate say to a white supremacist group that seeks a religious exemption from the Civil Rights Act? How can the advocate of religious liberties reconcile the Supreme Court's opinion in *Bob Jones* with its decision in *Hobby Lobby*? In *Bob Jones*, the Supreme Court ruled that the IRS did not violate the religious liberty of an ostensibly conservative Christian college when it denied tax exempt status because the school maintained racially discriminatory policies, including a policy against interracial dating.[117] By the time *Bob Jones* reached the Supreme Court, it focused on favorable tax treatment as a subsidy rather than behavior compelled by threat of punishment.[118]

All Americans analyzing the law must wrestle carefully with race. As Professor Inazu points out, race is unique as an institution in American history.[119] Its unparalleled influence in America, along with its interplay with

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[117] *Bob Jones Univ. v. United States*, 461 U.S. 574, 574 (1983).
[118] *See generally* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 795 (2007) ("As presented to the Supreme Court, the clash between religious exercise and protection against racial discrimination concerned entirely the availability of favorable tax treatment.").
[119] *See generally* John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015).

centuries of systematic and open discrimination in the Jim Crow South, warrant its own category of analysis. Without a doubt, LGBT Americans have suffered at the hand of discrimination since the earliest days of the republic. Despite the legacy of that injustice, it cannot be compared to methodical abduction, sale, and trafficking of millions of people across continents. Lack of social respect and workplace discrimination influence opportunities and underscore the need for equal citizenship. They do not, however, constitute an analog to centuries of open violence, a Constitutionally-established inferiority for over 50 years, and open, unmistakable identification with a marginalized group. That is certainly different from any "new majority" today, against whom religious claimants often seek relief.

These factors make the LGBT movement distinct from other discreet and insular minorities. They do not, under any circumstance, mitigate or denigrate the real struggle facing LGBT communities in a post-*Obergefell* world. Particularly for LGBT youth, who suffer from social ostracizing and higher suicide rates than other students.[120] As a result, simply saying "race is different" may be an emotionally unfulfilling answer. But it is inescapably consistent with our institutional history and constitutional culture. This a reason similar to why courts evaluate racial equal protection claims differently than other equal protection claims, not even applying the same standard of review.

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[120] *See generally Lesbian, Gay, Bisexual, and Transgender Health*, CTR. FOR DISEASE CONTROL & PREVENTION (last updated Nov. 12, 2014), http://www.cdc.gov/lgbthealth/youth.htm.

The special need for racial nondiscrimination protections is also corroborated by even the arch-libertarian himself, Professor Richard Epstein, who emphasizes the Civil Rights Act confronted an unprecedented system of private discrimination matched with violence, asystematically unfair legal systems, state-sanctioned discrimination and cronyism, along with a host of other threats not analogous to any factor other than race.[121]

The other potential answer appeals to the nature of religious beliefs. Christianity, Judaism, and Islam, among other religious traditions propagate sexual morality in some fashion. Under most traditional Christian creeds, churches interpreted the Bible to restrict sexual conduct to marriage. They also taught marriage as a conjugal institution between men and women. These teachings received, at various times, widespread support among clergy, theologians, and practicing Christians. Racial discrimination received a safe harbor in some southern churches, but may not have been a globally dominant religious tenant akin to sexual morality. The absolute lack of racist organizations currently seeking religious exemptions may offer some evidence of this position.

This second answer seems plausible, but legally weak as a distinguishing factor between race and gender identity. Courts consistently avoid ruling on the validity of religious beliefs, and for good reason — it's hard to embrace pluralism and preach religious liberty if the state effectively

[121] Richard A. Epstein, *Rand Paul's Wrong Answer*, FORBES (May 24, 2010, 12:48 PM),http://www.forbes.com/2010/05/24/rand-paul-rachel-maddow-opinions-columnists-richard-a-epstein.html.

exercises veto power over what is and what is not a valid or sincerely held religious belief.[122] Trial courts might be able to find evidence of pretext to say that racist beliefs are not sincerely held, but in a close case, a court might struggle to articulate why it's an inferior religious belief.

In general, such line-drawing problems rarely arise because most people without a religious exemption don't seek one. In the event they did, the entirely one-of-a-kind nature of racial discrimination sets it apart as entailing separate nondiscrimination policies with independent justifications for their measures. The compelling governmental interest is so strong and unique that there is no way to sufficiently tailor means around objections, religious or otherwise.

## THE WAY FORWARD

In the spirit of mutual adjustment, the live-and-let-live solution is the only one that adopts a robust view of vibrant pluralism and properly embraces mutual adjustment. One promising example of such a compromise originated in Utah, where socially conservative Mormon leaders coalesced around a bill to ban discrimination against LGBT citizens.[123] The law added sexual orientation and gender identity to protected classes such as race and

[122] *See United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Heresy trials are foreign to our Constitution.").
[123] Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, NY TIMES (March 5, 2015), http://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?_r=0.

gender.[124] In exchange, the bill exempted religious organizations and their auxiliary bodies.[125]

Even so, not everyone is happy. Religious leaders fear the protections are insufficiently strong because the law does not protect the wedding photographers and cake bakers protected by Mississippi and Georgia.[126] Russell Moore, a prominent social conservative who heads the Southern Baptist Convention's Ethics and Religious Liberties Commission, warns that antidiscrimination ordinances are "not the right tactic" for Christians.[127] Nor does the law placate ardent progressive advocates, who see such compromise ordinances as a Trojan horse for religious conservative values.[128] Crucially, the bill's final version omitted public accommodations protections. LGBT citizens are therefore protected in employment and other settings, but not interactions with businesses, restaurants, and other public accommodations. Many states currently have no protections against public accommodation discrimination on the basis of sexual orientation, and contra warnings about state RFRA laws ushering in a new era of Jim Crow, public accommodations

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[124] *Id*. ("The bill would ban employers and landlords or property owners from discriminating against people on the basis of sexual orientation and gender identity, adding those categories to Utah's laws that already protect against discrimination on the basis of race, sex and age.").
[125] *Id*. ("Religious organizations and their affiliates, such as colleges and charities, would be exempted.").
[126] *Id*. ("The bill, however, does not address what has become one of the most divisive questions on gay rights nationwide: whether individual business owners, based on their religious beliefs, can refuse service to gay people or gay couples — for example, a baker who refuses to make a cake for a gay wedding.").
[127] *Id*.
[128] *See generally* Zack Ford, *The 'Utah Compromise' Is A Dangerous LGBT Trojan Horse*, THINKPROGRESS (Jan. 29, 2016, 8:00 AM), http://thinkprogress.org/lgbt/2016/01/29/3743944/utah-compromise-lgbt-nondiscrimination-protections/ ("[Bill supporter Robin Fretwell] Wilson's past advocacy reinforces the notion that her latest support for LGBT protections are actually a Trojan-horse tactic.").

are not generally the hotbed of LGBT discrimination. The cases center on narrow and discrete jobs that participate in same-sex weddings, like bakers and photographers, not restaurants or hotels refusing to serve LGBT customers. Naturally this does not disprove the need for nondiscrimination legislation, and certainly does not support a claim that it is unwise policy. The consideration is only relevant to consider that equality advocates should consider Utah incremental progress, and recognize that the civil rights threat may be overstated.

Sometimes the best compromises fail to satisfy everyone. If we could set the clock back ten years, it's difficult to envisage a world where LGBT advocates would not be thrilled to learn that the Mormon church in 2016 would embrace nondiscrimination protections in a state where gay marriage is legal. We should not, however, let the good serve as the enemy of the best, so it is important to understand that this framework (if not every aspect of the Utah compromise negotiation) has intrinsic value. Live-and-let-live solutions can follow the Utah model to embrace three key elements: 1) general nondiscrimination protections for LGBT citizens; 2) adequate protections for religious individuals and organizations in the form of a RFRA analysis; and 3) protection for equal citizenship that only uses governmental coercion as a last resort.

## CONCLUSION

Religious liberty claims enjoy a rich history that extends far beyond political compromises and pragmatism. America's shared commitment to pluralism requires us to respect the dignity within each enclave of religious society. Our policymakers cannot offer that respect if they adopt the alternative view of pluralism, which tries to replicate the composition of society writ large within each religious enclave. Nor can they respect a vibrant pluralism if the government's interest in protecting a shared social commitment to entry rights overrides liberty of conscience for each religious group. Instead, they should acknowledge the dignitary interests undermined by state intervention. Governments must respect the autonomy of religious practice for individuals and religious organizations.

Such a vibrant pluralism allows for a live-and-let-live provision for equal citizenship as well. Before coercing religious believers to participate in something against their religious convictions, the government should be obligated to explore less restrictive means. Harassing the lone photographer whose religion objects to same-sex marriage may advance goals of a shared social commitment to equal rights — or not, it might only provoke blowback. Either way, it certainly does not advance vibrant pluralism. Nor does it acknowledge that both parties have dignitary interests, but only one seeks to enforce theirs with the power of government force.

Keeping with these commitments, states can learn from the dangers of Mississippi and the strengths of Utah to craft new live-and-let-live solutions. These solutions need not implicate concerns about racial discrimination or adjudicating sincere religious beliefs. Instead, they can boldly assert a moral high ground of liberty. It may not be a universally popular solution, but from the earliest Madisonian experiments, liberty of conscience has proven to be a durable brand. When liberty of conscience comes in a form that can protect equal citizenship as well it reminds us what a triumph of liberalism it remains.