

RELIGIOUS LIBERTY AND THE CULTURE WARS

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Religious liberty has become much more controversial in recent years. A principal reason is deep disagreements over sexual morality. On abortion, contraception, gay rights, and same-sex marriage, conservative religious leaders condemn as grave evils what many other Americans view as fundamental human rights. Somewhat hidden in the battles over permitting abortion and recognizing same-sex marriage lie religious liberty issues about exempting conscientious objectors from facilitating abortions or same-sex marriages. Banning contraception is no longer a live issue; there, religious liberty is the principal issue. These culture-war issues are turning many Americans toward a very narrow understanding of religious liberty, and generating arguments that threaten religious liberty more generally. Persistent Catholic opposition to the French Revolution permanently turned France to a very narrow view of religious liberty; persistent religious opposition to the Sexual Revolution may be having similar consequences here.

The Article argues that we can and should protect the liberty of both sides in the culture wars; that conservative churches would do well to concede the liberty of the other side, including on same-sex marriage, and concentrate on defending their own liberty as conscientious objectors; and similarly, that supporters of rights to abortion, contraception, gay rights, and same-sex marriage would do well to concentrate on securing their own rights and to concede that conscientious objectors should rarely be required to support or facilitate practices they view as evil.

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The Article offers a detailed analysis of the Final Rules that attempt to insulate objecting religious institutions from having to “contract, arrange, pay, or refer for” contraception. These rules offer very substantial protection to religious institutions, but they have not ended the litigation. Litigation on behalf of religious not-for-profit organizations remains at an early stage. Test cases on for-profit employers are now pending in the Supreme Court. Those cases present different issues, but this Article argues that it is at least clear that Congress understood the Religious Freedom Restoration Act to apply to for-profit businesses.

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I begin with a proposition that may be more controversial than it sounds: I believe that human liberty is a good thing, and especially so with respect to matters that are deeply personal. And, therefore, I believe that the free exercise of religion is a good thing, that control of our own sex lives is a good thing, and that legal and social equality for those who exercise these liberties is a good thing. But I do not intend to defend these propositions more than incidentally. My purpose here is to examine the political conflict between them.

The conflict between these liberties is generating mutual hostility, attitudinal shifts, and legal arguments that endanger religious liberty more generally. The rise of one set of liberties threatens the decline of another, older set of liberties. I believe that we can protect liberty and equality for both sides of this conflict if we have the will to do so. But neither side seems to want that. Lest there be any doubt, the tone of frustration in parts of this Article is equally directed at both sides in the culture wars.

I. THE AMERICAN TRADITION OF RELIGIOUS LIBERTY

Religious liberty is one of America’s great contributions to the world. Religious liberty has largely ended religious warfare and persecution in the West. It has enabled people with fundamentally different

views on fundamental matters to live in peace and equality in the same society. It has enabled each of us to live, for the most part, by our own deepest values.

Religious liberty includes the right to believe whatever you choose about religion, or whatever you find believable, or to dismiss all religious claims as *not* believable. According to the Supreme Court, the right to believe is absolute.¹

Religious liberty also includes the right to *speak* about religion. That right is essential to religious liberty, but it has mostly been protected by the Free Speech Clause.²

More controversially, religious liberty includes the right to practice a religion, to engage in religiously motivated actions—in the language of the Constitution, to *exercise* a religion. A right to believe a religion, but no right to act on its teachings, would be a hollow right indeed. Belief without practice was the conception of religious liberty that the dictator Oliver Cromwell offered to the Catholics of Ireland.³ Even when Justice Scalia shrank the Free Exercise Clause in *Employment Division v. Smith*,⁴ he explicitly agreed that religiously motivated actions are part of the exercise of religion.⁵

But actions are necessarily subject to regulation. All of us impose costs on our neighbors with most of what we do, but there must be limits to such costs. We cannot inflict significant secular harm on others, even in the exercise of a constitutional right. Religious liberty with respect to actions can be protected, but it cannot be protected absolutely.⁶

Sometimes religious actions are protected by simply not regulating. The practices of politically dominant religions have never been unlawful. Some actions are generally unlawful, but when the same actions are done for religious reasons, they are protected by exemption from regulation. Sometimes this is entirely uncontroversial. It is unlawful to give alcohol to children, but no one thinks that rule should apply to communion wine or Seder wine.

This kind of regulatory exemption has been part of the American experience of religious liberty since the seventeenth century. The Caro-

1. *Bowen v. Roy*, 476 U.S. 693, 699 (1986); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 218 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

2. *See, e.g., Watchtower Bible & Tract Soc’y v. Vill. of Stratton*, 536 U.S. 150 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (protecting the right not to speak).

3. CHRISTOPHER HILL, *GOD’S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION* 121 (1970) (quoting Cromwell’s statement that he would “meddle not with any man’s conscience,” but that no one would be permitted to say the mass in any place “where the Parliament of England have power”).

4. 494 U.S. 872 (1990).

5. *Id.* at 877 (“But the ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts . . .”).

6. *See* cases cited *supra* note 1.

lina colony exempted Quakers from swearing oaths in 1669,⁷ and Rhode Island exempted them from serving in the militia in 1673.⁸ Conscientious objectors to military service have been exempted from the draft in all of America's wars.⁹

In colonial Massachusetts, Quakers were first executed, later flogged and escorted out of the colony, eventually tolerated—and then, very quickly in the wake of toleration, given regulatory exemptions.¹⁰ Even the colony with the worst history of intolerance quickly realized, once it undertook to protect religious liberty, that religious liberty must extend to religious actions.

Protecting religious liberty reduces human suffering; people do not have to choose between incurring legal penalties and surrendering core parts of their identity. And religious liberty reduces social conflict; there is much less reason to *fight* about religion if everyone is guaranteed the right to *practice* his religion.¹¹

II. REGULATORY EXEMPTIONS TODAY

There were only a few conflicts between law and religious practice in the founding era. Governments were small and the nation was overwhelmingly Protestant. But as regulation grew more pervasive, and as the population grew more religiously diverse, the number of conflicts grew. So did the number of religious exemptions.

Today, these religious exemptions are the subject of a fundamental disagreement about legal doctrine and policy. Does/should religious liberty require special justification for all laws that substantially burden the free exercise of religion, including laws that are in some sense neutral and generally applicable? Or, is special justification required only for laws that in some way treat religious conduct differently from similar secular conduct? Courts and legislatures are deeply divided.

The most visible Supreme Court case, *Employment Division v. Smith*, held that the Free Exercise Clause creates no right to exemption from neutral and generally applicable laws.¹² But what is a generally ap-

7. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1804–05 (2006) (collecting primary sources for this and other early exemptions).

8. See *id.* at 1806–07.

9. See PETER BROCK, *LIBERTY AND CONSCIENCE: A DOCUMENTARY HISTORY OF THE EXPERIENCES OF CONSCIENTIOUS OBJECTORS IN AMERICA THROUGH THE CIVIL WAR* 3–7, 47–50, 77–80, 113–19 (2002) (summarizing exemptions from colonial times to the end of Civil War); GEORGE Q. FLYNN, *CONSCRIPTION AND DEMOCRACY: THE DRAFT IN FRANCE, GREAT BRITAIN, AND THE UNITED STATES 189–93* (2002) (summarizing exemptions from World War I and later); Laycock, *supra* note 7, at 1806–25 (documenting exemptions in colonial times and the Revolutionary War).

10. Laycock, *supra* note 7, at 1805 n.54.

11. For more complete statements of the reasons for regulatory exemptions for the exercise of religion, see, for example, Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J. L. & RELIGION 139 (2009); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U.L. REV. 241 (1995).

12. 494 U.S. 872, 876–90 (1990).

plicable law? *Smith* offered a new rationale for what had been the leading case, *Sherbert v. Verner*.¹³ *Sherbert* held that a worker who lost her job for refusing to work on her Sabbath was constitutionally entitled to unemployment compensation.¹⁴ The state required her to be available for work or lose eligibility, but that rule contained “at least some” secular exceptions.¹⁵ And therefore, the Court said in *Smith*, the Constitution requires a religious exception as well.¹⁶ The implication is that even rather narrow secular exceptions make a law less than generally applicable.

The only subsequent Supreme Court case interpreting “generally applicable law” is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁷ where local ordinances singled out a religious practice for regulation that applied to no one else. The Court said that those ordinances were not generally applicable—and that they did not come close.¹⁸

For judges who carefully parse the two opinions, the result has been an unusually protective form of equality rule. A law that burdens the exercise of religion cannot have any exceptions, or any gaps in coverage, that allow secular conduct to cause the same alleged harm as the regulated religious conduct. That would be to treat religious conduct unequally as compared to the unregulated secular conduct. And that inequality must be justified by a compelling interest.¹⁹

Judges guided more by the tone of the *Smith* opinion assume that most laws are neutral and generally applicable.²⁰ All of the Court’s statements suggesting otherwise are simply ignored. The effect of these decisions is to remove most religiously motivated actions from the realm of the Free Exercise Clause.

13. 374 U.S. 398 (1963).

14. *Id.* at 402–09.

15. *Smith*, 494 U.S. at 884. The quotation, “at least some,” is the *Smith* court’s characterization of the South Carolina law at issue in *Sherbert*.

16. *Id.*

17. 508 U.S. 520 (1993).

18. *Id.* at 543 (“[T]hese ordinances fall well below the minimum standard necessary to protect First Amendment rights.”).

19. See *Ward v. Polite*, 667 F.3d 727, 738–40 (6th Cir. 2012) (holding that where a rule, prohibiting counseling students from referring assigned counselees to another counselor, had exceptions for some values conflicts between counselor and counselee, plaintiff had stated a claim to an exception for religious objections to same-sex relationships); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) (holding that a zoning law excluding not-for-profit organizations, with exception for lodges and clubs, must have exception for religious organizations); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297–99 (10th Cir. 2004) (holding that a history of occasional and individualized exceptions, from requirement that acting students accept any role assigned, raised triable issue of fact on plaintiff’s claim to a religious exception); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364–66 (3d Cir. 1999) (holding that a rule requiring police officers to be clean shaven, with exception for medical conditions, must have exception for religious objection); *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 15–16 (Iowa 2012) (holding that a ban on buggies with steel protuberances on wheels was not generally applicable where county failed to ban other devices that also damaged roads).

20. See, e.g., *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134–37 (9th Cir. 2009) (holding preliminarily that a law with numerous exceptions, enforced only against conscientious objectors, was generally applicable because there appeared to be plausible reasons for the exceptions); *Big Sky Colony, Inc. v. Mont. Dep’t of Labor and Indus.*, 291 P.3d 1231, 1236–37 (Mont. 2012), *cert. denied*, 134 S. Ct. 59 (2013) (holding that workers’ compensation act with twenty-six categorical exemptions, and an amendment drafted to extend coverage to only one religious group, were generally applicable, because amendment was not motivated by desire to “shackle” the religion).

A separate branch of constitutional doctrine protects the right of religious organizations to govern their own internal affairs. This right is protected by both the Free Exercise Clause and the Establishment Clause. It was unanimously reaffirmed two years ago, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.²¹

Every state constitution also protects religious liberty. Fourteen states have interpreted their state constitutions to protect religiously motivated conduct even from generally applicable laws.²² Only six or seven states have interpreted their state constitutions to mean something like the rule of *Employment Division v. Smith*.²³

There is also a vast body of statutory law protecting religious liberty. Twenty years ago, James Ryan estimated that there were about two thousand religious exemptions in state and federal statutes.²⁴ That is a

21. 132 S. Ct. 694 (2012).

22. See *Larson v. Cooper*, 90 P.3d 125, 131–32 & n.31 (Alaska 2004) (requiring “substantial threat to public safety, peace or order or . . . competing governmental interests that are of the highest order . . .”) (internal quotations and citations omitted); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 445–51 (Ind. 2001) (protecting religious conduct against material burdens, but not formulating a standard for justifying such burdens); *State v. Evans*, 796 P.2d 178, 179–80 (Kan. Ct. App. 1990) (requiring compelling interest and least restrictive means); *Foltin v. Roman Catholic Bishop*, 871 A.2d 1208, 1227–30 (Me. 2005) (requiring compelling interest); *Rasheed v. Comm’r of Corr.*, 845 N.E.2d 296, 302–03, 308 (Mass. 2006) (requiring state “interest sufficiently compelling to justify” burden on religious exercise and proof that a religious exception would “unduly burden that interest”); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998) (requiring compelling interest), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999); *State v. Hershberger*, 462 N.W.2d 393, 396–99 (Minn. 1990) (requiring compelling interest and least restrictive means); *In re Brown*, 478 So. 2d 1033, 1037–39, 1039 n.5 (Miss. 1985) (requiring compelling interest); *St. John’s Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1276–77 (Mont. 1992) (requiring interest of the highest order and not otherwise served); *Catholic Charities v. Serio*, 859 N.E.2d 459, 465–68 (N.Y. 2006) (protecting religious practice against unreasonable interference); *In re Browning*, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996) (requiring compelling interest); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043–45 (Ohio 2000) (requiring compelling interest and least restrictive means); *City of Woodlinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009) (requiring “a narrow means for achieving a compelling goal”); *Coulee Catholic Schs. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 884–87 (Wis. 2009) (requiring compelling interest and least restrictive alternative, except that with respect to hiring and firing employees with ministerial functions, the constitutional protection is absolute); see also *Lower v. Bd. of Dirs. of the Haskell Cnty. Cemetery Dist.*, 56 P.3d 235, 244–46 (Kan. 2002) (quoting the *Smith* standard but applying pre-*Smith* standard). Kansas and Mississippi have since adopted Religious Freedom Restoration Acts. See *infra* note 26.

23. *State v. Fluewelling*, 249 P.3d 375, 378–79 (Idaho 2011) (applying *Smith* standard as matter of state law); *Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012) (adopting *Smith* standard as matter of state law); *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 123 (Md. 2001) (quoting *Smith* and *Lukumi* for meaning of state free exercise clause); *In re Interest of Anaya*, 758 N.W.2d 10, 19 (Neb. 2008) (reaffirming state’s adoption of *Smith* standard); *Appeal of Trotzer*, 719 A.2d 584, 589 (N.H. 1998) (applying state’s adoption of the *Smith* standard); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 359–62 (Or. 1995) (reaffirming state’s adoption of *Smith* standard); *State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761–62 (Tenn. Ct. App. 2001) (concluding, without analyzing state precedent, that state free exercise clause provides no more protection than federal Free Exercise Clause); but see *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107 (Tenn. 1975) (applying compelling interest standard and stating that Tennessee Constitution provides “substantially stronger” protection than federal Constitution, which in 1975 also applied the compelling interest test). Two of these states—Kentucky and Tennessee—have since enacted Religious Freedom Restoration Acts. See *infra* note 26.

24. James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

ballpark number, based on sampling techniques, but it indicates the longstanding legislative response to the need for exemptions.

Ryan's search was motivated by a new kind of exemption statute, the Religious Freedom Restoration Act (RFRA).²⁵ There is now a federal RFRA for federal law, and nineteen state RFRA's for state laws.²⁶ These statutes say that government may burden the exercise of religion only if necessary to serve a compelling interest. Absent a compelling interest, the burdened religious claimant is entitled to an exemption.

All in all, this is a substantial body of law providing regulatory exemptions for religiously motivated actions. It is also a confusing and rather ragtag body of law. Twenty-four years after *Employment Division v. Smith*, there are still fundamental questions about what *Smith* means. Whatever *Smith* means, Congress and thirty-one states have adopted more protective rules, either by statute or judicial decision. On the other hand, this body of state law has been little used and little tested.²⁷ About much of this law, there is an air of under enforcement.

III. NEW LEVELS OF CONTROVERSY

All of this law has become far more controversial than it used to be. When Congress passed the federal RFRA in 1993, it acted unanimously in the House and 97-3 in the Senate.²⁸

Four years later, in *City of Boerne v. Flores*,²⁹ the Supreme Court held the federal RFRA unconstitutional as applied to the states.³⁰ Congress immediately set out to enact replacement legislation under other constitutional powers. But that proposed legislation was soon mired in partisan deadlock, principally due to energetic demands to carve out all civil rights claims.³¹

By 2000, Congress abandoned the effort to enact a broad replacement for RFRA. It enacted what it could agree on, the Religious Land

25. 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

26. ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. §§ 41-1493-41-1493.04 (2011); CONN. GEN. STAT. § 52-571b (2013); FLA. STAT. §§ 761.01-761.05 (2012); IDAHO CODE ANN. §§ 73.401-73.404 (2013); 775 ILL. COMP. STAT. 35/1-99 (2012); KAN. STAT. ANN. §§ 60-5301-60-5305 (West 2013); KY. REV. STAT. ANN. § 446.350 (West 2013); LA. REV. STAT. ANN. §§ 13:5231-13:5242 (2012); 2014 Miss. Laws WL No. 196; MO. REV. STAT. §§ 1.302-1.307 (West 2013); N.M. STAT. ANN. §§ 28-22-1-28-22-5 (West 2013); OKLA. STAT. tit. 51, §§ 251-258 (2013); 71 PA. STAT. ANN. §§ 2401-2407 (West 2013); R.I. GEN. LAWS §§ 42-80.1-1-42.80.1-4 (2006); S.C. CODE ANN. §§ 1-32-10-1-32-60 (2013); TENN. CODE ANN. § 4-1-407 (West 2013); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-110.012 (West 2013); VA. CODE ANN. § 57-2.02 (West 2013).

27. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 479-89 (2010) (surveying litigation under state RFRA's and finding them little used and sometimes misunderstood).

28. See 139 CONG. REC. 26,416 (cumulative ed. Oct. 27, 1993) (Senate vote); Linda Feldmann, *Congress to Boost Freedom of Religion*, CHRISTIAN SCI. MONITOR, (May 17, 1993), <http://www.csmonitor.com/1993/0517/17013.html> (reporting the House vote).

29. 521 U.S. 507 (1997).

30. *Id.* at 529-36.

31. See Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 412-13 & nn.34-35, 38 (2011) (reviewing this debate).

Use and Institutionalized Persons Act (RLUIPA).³² RLUIPA protects the religious liberty of prisoners and mental health patients, and it protects religious organizations in the zoning process.

The larger question is suggested by the failure of the broader bill. We had gone from 97-3 to partisan gridlock in just five years. And disagreement over religious liberty has gotten progressively worse since.

Large social and political developments, of course, have multiple causes. But the biggest problem for religious liberty in our time is deep disagreements over sexual morality. Under this heading, I will cluster disagreements about abortion, contraception, emergency contraception, sterilization, gay rights, and same-sex marriage.

The items on that list raise very different issues, and principally affect different groups of people. With respect to abortion and same-sex marriage, most of the attention is on the primary dispute: should abortion or same-sex marriage be permitted at all? But each of these issues has also given rise to a secondary dispute about the religious liberty of conscientious objectors. With respect to contraception, religious liberty *is* the primary dispute. Of course the contending sides are concerned about more than just sex. But it is disagreements about moral issues related to sex that link these issues together and drive most of the legal, social, and political conflict.

A. Abortion

After the Supreme Court announced a constitutional right to abortion, the pro-choice movement tried to force all hospitals to perform them—including religious hospitals. The pro-choice side had some occasional successes in the lower courts,³³ but Congress responded with legislation to protect the rights of conscience.³⁴ No medical provider can be required to perform or assist an abortion—no hospital or other organization, and no doctor, nurse, or other individual. The pro-choice movement does not like these rules, and they are sometimes underenforced.³⁵

32. 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

33. See *St. Agnes Hosp., Inc. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990) (upholding withdrawal of accreditation from residency program in obstetrics and gynecology at Catholic hospital that refused to perform abortions or teach how to perform them); cf. *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948, 949–51 (D. Mont. 1973) (vacating a preliminary injunction that had ordered Catholic hospital to perform sterilizations); *id.* at 950 n.1 (describing the preliminary injunction and the congressional response).

34. See 42 U.S.C. § 300a-7 (2006) (responding principally to the *St. Vincent's* case, this provision is known as the Church Amendment); 42 U.S.C. § 238n(a)(1) (2006) (responding principally to the *St. Agnes* case, this provision is known as the Danforth Amendment). The Weldon Amendment, written into appropriations beginning in 2004, provides for a cutoff of federal funds as an enforcement mechanism. See, e.g., Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786, 1111–12 (2011). For further analysis of these provisions, see Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 81–86 (Douglas Laycock et al. eds., 2008) [hereinafter SAME-SEX MARRIAGE].

35. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010) (holding that there is no private right of action to enforce the provision of the Church Amendment that protects employees from discrimination by employers).

But the exemptions have persisted, and Congress seems to treat the issue as settled. Nearly all states have similar legislation.³⁶

This longstanding status quo is now under litigation attack at the edges. The ACLU has sued the Catholic bishops and their health-care leadership in a case arising out of egregious alleged facts: a woman whose water broke in the eighteenth week of pregnancy was told at a Catholic hospital that no treatment was possible, misled about her condition and about the prognosis for her and the baby, and not referred elsewhere. The baby had almost no chance of surviving, and the usual treatment would have been to induce labor or otherwise terminate the pregnancy. The woman had no car, and the hospital was the only one in the county. Of course, she lost the baby; she also suffered painful and dangerous complications caused by the futile effort to prolong the pregnancy. All this is according to the complaint.³⁷

The complaint alleges only state-law negligence claims.³⁸ The Michigan conscience legislation says that any hospital and any “person connected therewith, may refuse to perform, participate in, or allow to be performed on its premises an abortion,” and shall have “immunity from any civil or criminal liability.”³⁹ The complaint does not mention this statute, but it is hard to see how plaintiff’s claim can proceed without asking the court either to invalidate this statute as applied, hold it preempted by the federal duty to provide emergency care,⁴⁰ or do major interpretive surgery on it.⁴¹ The ACLU has not tipped its hand on what its theory will be. Invalidation of conscience legislation as applied to these alleged facts would, of course, not invalidate conscience legislation as applied to more routine abortions in which no one is misled about what medical treatment is and is not available. But, no doubt, the ACLU hopes to build on any success it may have in this case.

36. See Wilson, *supra* note 34, at 299–310 (collecting state legislation as of 2008).

37. Complaint ¶¶ 12–52, Means v. U.S. Conference of Catholic Bishops, No. 2:13-cv-14916-DPH-PJK (E.D. Mich. Nov. 29, 2013), ECF No. 1.

38. *Id.* ¶¶ 96–109. The complaint was filed in federal court in the diversity jurisdiction; the defendants are the national Catholic leadership and not the local hospital. *Id.* ¶¶ 5–10.

39. MICH. COMP. LAWS § 333.20181 (2008).

40. See 42 U.S.C. § 1395dd (2006 & Supp. V 2011). Of course this statute must presumably be read in light of the federal conscience legislation cited *supra* note 34.

41. The complaint alleges that the bishops and their health officials are in position to give binding orders to the hospital. Complaint ¶¶ 61–63, 87–91, Means v. U.S. Conference of Catholic Bishops, No. 2:13-cv-14916-DPH-PJK (E.D. Mich. Nov. 29, 2013), ECF No. 1. This makes it hard to also argue that they are not “connected” with the hospital within the meaning of the conscience legislation and therefore protected for refusing to permit an abortion. Another section of the Michigan conscience legislation says that physicians may refuse to give advice with respect to abortions. MICH. COMP. LAWS § 333.20183 (2008). One subsection of this provision can be read to require that the physician inform the patient that he refuses to give advice about abortions; the other subsection can arguably be read to grant immunity without requiring such disclosure. Perhaps the ACLU hopes to resolve this ambiguity in favor of required disclosure, and then argue for reading this policy into the separate section protecting hospitals, which plainly contains no such requirement. On this view, the refusal to perform an abortion would be protected but the failure to disclose that some treatments were being excluded on religious grounds would not be. A federal court presented with such questions may well certify them to the Michigan Supreme Court. See MICH. R. 7.305(B)(1).

I do not offer this case as an example of an unjustified attack on religious liberty. If the facts are as alleged—local monopoly, deliberate deception of an unsophisticated patient, known and substantial risk of harm to that patient—there are multiple grounds for rejecting any claim of right for the hospital to do what it allegedly did. The case is relevant to my thesis not because of its merits, but because of its timing. Why was this suit filed now and not ten, twenty, or forty years ago? This cannot be the first case with egregious facts; the complaint alleges that this is at least the fifth such case at this one hospital.⁴² Of course, I am not privy to the ACLU's strategy discussions. I can only speculate that this lawsuit looks viable to the ACLU today, and did not look viable in the past, and that what has changed is not any controlling or even suggestive precedent, but a climate of opinion that is more skeptical of claims to religious liberty. One complaint is a straw in the wind, but in this case, the straw is highly suggestive.

B. *Same-Sex Marriage*

The more recent conflict over same-sex marriage has not reached any kind of equilibrium, even one challenged around the edges. Both supporters and opponents agree that same-sex marriage poses serious religious liberty issues.⁴³ Same-sex relationships that are in any way like marriage often pose similar issues.

The disagreement over marriage equality begins with a disagreement over the nature of marriage.⁴⁴ Marriage is a personal relationship, a legal relationship, and a religious relationship. The secular side sees the legal relationship, or the committed personal relationship between the spouses, as primary.⁴⁵ Committed religious believers see the religious relationship as primary.⁴⁶ They see same-sex marriage legislation as the state interfering with the sacred, changing a religious institution.⁴⁷ They reject the change, and they reject the state's authority to make the change.⁴⁸ We need to much more cleanly separate legal marriage from religious marriage.⁴⁹ But that is not easily done; legally and especially culturally, the legal and religious relationships are deeply entangled.

42. Complaint ¶ 54, *Means v. U.S. Conference of Catholic Bishops*, No. 2:13-cv-14916-DPH-PJK (E.D. Mich. Nov. 29, 2013), ECF No. 1.

43. See Douglas Laycock, *Afterword, in SAME-SEX MARRIAGE*, *supra* note 34, at 189 (“All six contributors—religious and secular, left, center, and right—agree that same-sex marriage is a threat to religious liberty. Yet little of that threat is inherent in the concepts of religious liberty, gay rights, or same-sex marriage.”)

44. See *id.* at 201–07.

45. See *id.* at 205.

46. See *id.* This view is elaborated from the perspective of Catholic theology in Helen M. Alvaré, *A “Bare . . . Purpose to Harm”? Marriage and Catholic Conscience Post-Windsor*, <http://ssrn.com/abstract=2433741>.

47. See Laycock, *supra* note 43, at 203.

48. See *id.*

49. See *id.* at 201–07 (arguing for separation of legal and religious marriage).

Both as organizations and as individuals, religious conservatives focused on the religious relationship refuse to participate in same-sex weddings or commitment ceremonies. Some churches will not make their space available,⁵⁰ many clergy will not perform the ceremony,⁵¹ and some individuals in the wedding business will not assist with the ceremony or the reception.⁵² Conservative Christian counselors will not counsel same-sex couples.⁵³ Catholic adoption agencies will not place children with same-sex couples.⁵⁴ To avoid treating same-sex marriages as valid, Catholic Charities in the District of Columbia quit providing health insurance to any employee spouses not already covered.⁵⁵

The refusal of some small businesses to assist with same-sex weddings does not entail any claim of a right to refuse to serve gays and lesbians as individuals.⁵⁶ Their religious-liberty claim rests on the view that marriage is inherently religious. They refuse to facilitate, validate, or recognize a relationship that, in their view, falsely mimics a religious relationship but is religiously prohibited. Frank Bruni reported some recent examples of openly gay employees in Catholic schools and churches being fired when they married.⁵⁷ Bruni and gay rights groups are, of course, outraged. But the point for these Catholic employers is that they were not discriminating against gay employees as such—not even openly gay and sexually active employees. They drew the line at same-sex marriage, perhaps because it so openly defied church teaching but also because spousal employment benefits would force the church to treat that same-sex marriage as a valid marriage.

50. See *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, 339 Fed. Appx. 232, 235 (3d Cir. 2009) (summarizing facts of religious organization's refusal to make its outdoor facility available for a civil union ceremony, and resulting civil rights investigation by state agency).

51. See, e.g., UNITED METHODIST CHURCH, BOOK OF DISCIPLINE ¶341.6, available at <http://www.umc.org/what-we-believe/para-341-unauthorized-conduct> ("Ceremonies that celebrate homosexual unions shall not be conducted by our ministers and shall not be conducted in our churches."); Joseph Berger, *Among Conservative Rabbis, a Wide Disagreement Over Same-Sex Marriage*, N.Y. TIMES (Aug. 1, 2011), http://www.nytimes.com/2011/08/02/nyregion/conservative-rabbis-disagree-on-same-sex-marriage.html?pagewanted=all&_r=0.

52. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (refusing exemption for wedding photographer who refused on religious grounds to photograph a same-sex commitment ceremony).

53. See, e.g., *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (reversing summary judgment against religious counseling student expelled from graduate school for refusing to provide counseling with respect to problems in a same-sex relationship).

54. Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES (Dec. 28, 2011), <http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html> (reporting that Catholic Charities has closed adoption agencies in Illinois, Massachusetts, and the District of Columbia over this issue).

55. William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, WASH. POST (Mar. 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html?sid=ST2010030103363>.

56. See, e.g., *Elane Photography, LLC, v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (quoting 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).

57. Frank Bruni, *The Catholics Still in Exile*, N.Y. TIMES (Dec. 14, 2013), <http://www.nytimes.com/2013/12/15/opinion/sunday/bruni-the-catholics-still-in-exile.html>.

Where conservative Christians see a protected exercise of conscience, gays and lesbians see discrimination that is or should be illegal. They mostly concede, either genuinely or tactically, that the clergy should not be required to perform the wedding ceremony.⁵⁸ They sometimes acquiesce in bills that protect religious *organizations* in contexts *beyond* the ceremony. But they have kept those exemptions narrow,⁵⁹ and they have fiercely and successfully opposed any kind of exemption for religious *individuals* in the wedding business.⁶⁰ As the momentum has built in favor of same-sex marriage, the religious exemptions have tended to get narrower. They are likely to get broader again when the movement for same-sex marriage moves into red states.

Most of these battles have been fought in state legislatures; only a few scattered cases have squarely presented claims to religious exemption. A graduate student in social work was disciplined for refusing to sign a letter to the legislature in support of a bill to permit adoptions by gay or lesbian parents; that case settled on terms highly favorable to the student.⁶¹ A counseling student was expelled for refusing to counsel gays about their relationship difficulties;⁶² she settled for a cash payment without being readmitted to the program.⁶³ The students in these cases insisted only on a right to refrain from endorsing gay rights and a right to refer same-sex couples to another counselor⁶⁴—a referral that clearly benefits the client and not just the referring counselor. Students and employees in the helping professions have appropriately lost cases when they insist-

58. Every statute legalizing same-sex marriage exempts clergy from performing the ceremony. DEL. CODE ANN. tit. 13, § 106(e) (West 2013); D.C. CODE § 46-406(c), (d) (2012); HAW. REV. STAT. §§ 572-D, 572B-9.4; 750 ILL. COMP. STAT. 5/209 (a-5) (West 2013); ME. REV. STAT. tit. 19-A, § 655.3 (2012); MD. CODE ANN., FAM. LAW § 2-202 note § 2 (West 2012); MINN. STAT. § 517.09 (2013); N.H. REV. STAT. ANN. § 457:37.I (LexisNexis 2012); N.Y. DOM. REL. LAW §§ 10(b)(1), 11 (Consol. 2012); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); VT. STAT. ANN. tit. 18, § 5144(b) (2012); WASH. REV. CODE § 26.04.010(4) (2012). This exemption is always part of the bill when it is first introduced.

59. DEL. CODE ANN. tit. 13, § 106 note (West 2013); D.C. CODE § 46-406(e) (2012); HAW. REV. STAT. §§ 572-E, 572B-9.5; 750 ILL. COMP. STAT. 5/209 (a-10), 80/15 (West 2013); MD. CODE ANN., FAM. LAW § 2-202 note §§ 3, 4 (West 2012); MINN. STAT. § 517.201(1) (2013); N.H. REV. STAT. ANN. § 457:37.II, III, IV (LexisNexis 2012); N.Y. DOM. REL. LAW §§ 10-b(2) (Consol. 2012); R.I. GEN. LAWS § 15-3-6.1(a), (c)(2), (d), (e) (2013); VT. STAT. ANN. tit. 8, § 4501(b), tit. 9, § 4502(l) (2012); WASH. REV. CODE §§ 26.04.010(5), (6), (7), 26.04.900 (2012). The Maine law has an exemption only for the wedding ceremony, because it was passed by referendum and thus without legislative negotiation and amendment. For a detailed comparison of these provisions, see Robin Fretwell Wilson, *A Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE. W. RES. L. REV. (forthcoming 2014).

60. None of the statutes cited in notes 58 and 59 has any exemption for any for-profit business, no matter how small. Delaware exempts judges as well as clergy from performing the ceremony. DEL. CODE ANN. tit. 13, § 106(e) (West 2013).

61. See *Missouri State U. Settles Lawsuit Filed by Student*, ST. LOUIS POST-DISPATCH, Nov. 9, 2006, at D4 (describing settlement).

62. *Ward v. Polite*, 667 F.3d 727, 731, 730–32 (6th Cir. 2012) (reversing summary judgment for the university).

63. Press Release, Walter Kraft, Resolution of Julea Ward Case Leaves Programs, Policies Intact at Eastern Michigan University (Dec. 10, 2012), available at <http://www.emich.edu/univcomm/releases/release.php?id=1355161741> (announcing settlement for \$75,000 in cash).

64. *Ward*, 667 F.3d at 731, 741.

ed on a right to meet with gay clients and try to convert them to heterosexuality or to evangelical Christianity.⁶⁵

A wedding photographer who refused to photograph a same-sex commitment ceremony lost her claims for constitutional or statutory exemptions in the Supreme Court of New Mexico,⁶⁶ and a baker who refused to make a wedding cake has been ordered to cease and desist by an administrative law judge in Colorado.⁶⁷ The press has reported a handful of other cases, filed or threatened, that so far have not produced reported opinions.⁶⁸ There may well be others that have not come to my attention. Marc Stern has collected reported cases on conflicts between gay rights and religious liberty from 2008 and before, conflicts that mostly do not involve marriage.⁶⁹

C. Contraception

The Patient Protection and Affordable Care Act⁷⁰ reopened a long dormant battle over contraception. The Catholic Church has long taught that artificial contraception is immoral. Most Americans, and indeed most Catholics, have rejected the Church's teaching as incomprehensible and wrongheaded.⁷¹

In the middle of the twentieth century, the Church's view was enforced or supported by law in some states.⁷² But in 1965, in *Griswold v. Connecticut*,⁷³ the Supreme Court held that legal bans on contraception are unconstitutional. And the Church acquiesced. There was no rear-

65. See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868–69 (11th Cir. 2011); *Knight v. State Dep't of Health*, No. 3:97CV2114(DJS), 2000 WL 306447 (D. Conn. 2000).

66. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

67. *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Office of Admin. Cts. Dec. 6, 2013), <http://aclu-co.org/sites/default/files/Signed%20Initial%20Decision%20Cake%20Case%20No%20%20CR%202013-0008.pdf>.

68. See Katie Zezima, *Couple Sues Vermont Inn for Rejecting Gay Reception*, N.Y. TIMES (July 19, 2011), http://www.nytimes.com/2011/07/20/us/20vermont.html?_r=0; Everton Bailey Jr., *Gresham Bakery Finding Buyers, Backers Amid Wedding Cake Controversy*, OREGONIAN, http://www.oregonlive.com/gresham/index.ssf/2013/02/gresham_bakery_finding_buyers.html (last updated Jan. 20, 2014, 10:09 AM); *Gay Couple Sues Illinois Bed and Breakfast for Refusing to Host Civil Union Ceremony*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois_n_827115.html (last updated May 25, 2011, 7:35 PM); Steve Nelson, *Washington State Sues Florist Who Refused Flowers for Same-Sex Wedding*, U.S. NEWS (April 10, 2013), <http://www.usnews.com/news/newsgram/articles/2013/04/10/washington-state-sues-florist-who-refused-flowers-for-gay-marriage>.

69. Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE, *supra* note 34, at 2–19.

70. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of Titles 26 and 42).

71. See, e.g., Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, GALLUP (May 22, 2012), <http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx> (reporting Gallup Poll data: eighty-nine percent of Americans, including eighty-two percent of Catholics, think that “birth control” is morally permissible; only eight percent of Americans and fifteen percent of Catholics disagree).

72. A reputable journalist reports, without citations, that thirty states had laws restricting the sale or advertising of contraceptives. GAIL COLLINS, *WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF AMERICAN WOMEN FROM 1960 TO THE PRESENT* 159 (2009). This helps to explain why condoms in that era were sold from vending machines in the men's rooms of gas stations, and why the machines bore the prominent but fictional message, “Sold Only for Prevention of Disease.”

73. 381 U.S. 479, 481–86 (1965).

guard resistance to *Griswold* of the sort that faced the Court's decisions on abortion, or school prayer, or government religious displays, or many other controversial issues.

From 1965 to 2011, the situation with respect to contraception nicely illustrated the live-and-let-live solution to such a deep moral disagreement. The great majority thought that contraception is morally permissible, and used it themselves as needed, but they made no effort to force that view on the minority that disagreed. The minority thought that contraception is immoral, and refrained from using it, but they made no effort to force that view on the majority. Each side allowed the other to live by its own values.

The Affordable Care Act disturbed that equilibrium. The Act includes preventive reproductive care in the minimum standards for all health insurance plans.⁷⁴ The implementing guidelines require coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."⁷⁵ These guidelines meant that Catholic institutions would be required to arrange for, contract for, and pay for insurance coverage that would include sterilizations, and contraceptive drugs and devices, prohibited by Catholic teaching. The bishops responded that Catholic institutions could not in conscience provide that coverage.⁷⁶

The minimum required coverage also includes *emergency* contraception.⁷⁷ To most Americans, emergency contraception is simply another form of contraception.⁷⁸ But to much of the pro-life movement, both Catholic and evangelical, emergency contraception is sometimes a way of

74. 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011) provides:

(a) A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— . . .

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

75. Health Resources and Services Administration, *Women's Preventive Services Guidelines*, www.hrsa.gov/womensguidelines/ (last visited Mar. 1, 2014).

76. See Press Release, U.S. Conference of Catholic Bishops, USCCB: HHS Mandate for Contraceptive and Abortifacient Drugs Violates Conscience Rights (Aug. 1, 2011), available at <http://www.usccb.org/news/2011/11-154.cfm>.

77. The FDA-approved label for Plan B, the "morning-after pill," says that the drug was first approved in 1982. Federal Drug Administration, *Plan B One-Step (levonorgestrel) Tablet, 1.5 mg, For Oral Use*, http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (last visited Mar. 1, 2014) [hereinafter "Plan B Label"]. The FDA-approved label for Ella, which can work up to five days after intercourse, says that the drug was first approved in 2010. Federal Drug Administration, *Ella (ulipristal acetate) Tablet*, http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf (last visited Mar. 1, 2014) [hereinafter "Ella Label"].

78. See, e.g., *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 164–67 (E.D.N.Y. 2013) (describing Plan B One-Step, the current version, as a safe and effective contraceptive); Deborah Nucatola, Opinion, *All Women Should Have Quick, Confidential Access to Emergency Contraception*, U.S. NEWS (May 3, 2013), <http://www.usnews.com/debate-club/should-the-plan-b-morning-after-pill-be-available-to-15-year-olds/all-women-should-have-quick-confidential-access-to-emergency-contraception> ("Emergency contraception is a safe and effective form of birth control . . .").

inducing abortions.⁷⁹ This belief cannot be dismissed as a product of the religious right's fevered imagination. The FDA-approved labels for these drugs say that they act by preventing ovulation—that's just contraception—and that they may sometimes also act by preventing implantation of a fertilized egg into the wall of the uterus.⁸⁰

For those who believe that a new human life is created at the moment of fertilization, preventing implantation is a form of abortion. It does not matter that these drugs work that way only sometimes, or that the FDA says only that they “may” work that way sometimes, or that some critics say the FDA labels are wrong and that the drugs do not prevent implantation.⁸¹ If I hand you a gun and say that it might be loaded, but not to worry, it probably is not—or even if I say it almost certainly is not—not one of my readers would take the chance and fire that gun at another human being. And for just the same reason, if you really believe that life begins at conception, you will not take the chance. Catholic and evangelical institutions, and devout owners of otherwise secular businesses, will not pay to make available a drug that “may” act in a way that, in their view, destroys an innocent human life.

There are now dozens of pending cases around the country seeking an exemption from the obligation to provide contraception (the Catholic cases) or emergency contraception (both the Catholic and evangelical cases). The plaintiffs are religious institutions⁸² and, in a more difficult

79. See, e.g., Helen M. Alvaré, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 394–95 (2013) (arguing that these drugs cause abortions by preventing implantation of fertilized eggs); Pam Belluck, *Abortion Qualms on Morning-After Pill May Be Unfounded*, N.Y. TIMES (June 5, 2012), http://nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html?_r=0 (“Based on the belief that a fertilized egg is a person, some religious groups and conservative politicians say disrupting a fertilized egg’s ability to attach to the uterus is abortion . . .”).

80. Plan B Label, *supra* note 77; Ella Label, *supra* note 77.

81. See *Tummino*, 936 F. Supp. 2d at 165 (quoting multiple sources to effect that Plan B acts pre-fertilization, but concluding that label is unchanged because post-fertilization effects cannot be ruled out); Belluck, *supra* note 79. Belluck’s article has received much attention, and is cited in the *Tummino* opinion, but she stated her conclusions much more strongly than did the studies on which she relied. See Alvaré, *supra* note 79, at 395 (2013) (summarizing those studies, which I have also reviewed myself). A study not mentioned by Belluck, which surveyed studies of the effectiveness of emergency contraception, found effectiveness rates that cannot not be explained by prevention of ovulation alone. Rafael T. Mikolajczyk & Joseph B. Stanford, *Levonorgestrel Emergency Contraception: A Joint Analysis of Effectiveness and Mechanism of Action*, 88 FERTILITY & STERILITY 565, 569 (2007). The science is, of course complex, but the basic insight is not: if emergency contraception worked only by preventing ovulation, it would never work when taken after ovulation has already occurred. And if all that matters is whether the pill is taken before or after ovulation, it is not apparent why the number of days after intercourse matters—why Plan B is said to work only one day after intercourse but Ella is said to work five days after intercourse. There appears to be some genuine scientific uncertainty and disagreement here, and some politically motivated choosing of sides. But serious studies support the view that these drugs may prevent implantation, and that is more than enough for those who will take no chances on whether these drugs sometimes act as abortifacients.

82. See, e.g., *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (holding appeals on the docket pending revision of the rules); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013), *appeal pending*, No. 13-2814 (3d Cir.) (preliminarily enjoining enforcement); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012) (dismissing claim on ripeness grounds because of pending revision of rules), *aff’d on other grounds*, 743 F.3d 547 (7th Cir. 2014) (dismissing on the merits). Dismissal on ripeness grounds was the most common result while the rule revisions were pending; now that the rules are final, courts are proceed-

set of cases, closely held corporations controlled by religious individuals.⁸³ Some of these corporations are engaged in an explicitly religious business, such as Christian publishing;⁸⁴ others, probably most, are engaged in businesses generally understood as secular. The government argues that for-profit corporations are not “persons” within the meaning of the Religious Freedom Restoration Act.⁸⁵ This is mistaken; corporations are clearly persons protected by the statutory text,⁸⁶ and Congress understood RFRA to protect persons engaged in for-profit activities.⁸⁷

ing to the merits, which now present quite different issues than before the rules were revised. For continuing information on all the pending cases, see BECKET FUND FOR RELIGIOUS LIBERTY, *HHS Mandate Information Central*, <http://www.becketfund.org/hhsinformationcentral> (last visited Mar. 2, 2014) [hereinafter “Becket Fund”].

83. See, e.g., *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), cert. filed, No. 13-937 (Feb. 6, 2014) (finding likelihood of success on the merits and directing entry of a preliminary injunction); *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), cert. filed, No. 13-567 (Nov. 5, 2013) (finding that shareholders of closely held corporation, but not the corporation, showed likelihood of success on the merits); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), cert. filed, No. 13-482 (Oct. 15, 2013) (rejecting claim on merits and directing district court to dismiss); *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), cert. granted, 134 S. Ct. 678 (Nov. 26, 2013) (finding no likelihood of success on the merits); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), (en banc) cert. granted, 134 S. Ct. 678 (Nov. 26, 2013) (holding that plaintiff had shown irreparable injury and likelihood of success on the merits). For continuing information on all the pending cases, see BECKET FUND, *supra* note 82 (noting substantially more wins than losses for plaintiffs at the preliminary relief stage).

84. See *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 111–12 (D.D.C. 2012), appeal dismissed on appellants’ motion, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013). Tyndale is a for-profit corporation engaged in the publication of Christian books; 96.5% of the shares are owned by a not-for-profit foundation. *Id.* The government apparently dismissed its appeal from a preliminary injunction in *Tyndale* to avoid focusing the court’s attention on the facts of that case as it decided *Gilardi*, 733 F.3d 1208. The government continues to vigorously litigate *Tyndale* in the district court. See Defendants’ Cross-Motion for Summary Judgment and Opposition to Plaintiffs’ Motion for Summary Judgment, *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-cv-01635-RBW (D.D.C. June 17, 2013), ECF No. 41. One of the plaintiffs in *Hobby Lobby* is Mardel, Inc., which operates a chain of Christian bookstores. *Hobby Lobby*, 723 F.3d at 1120.

85. See *Korte*, 735 F.3d at 673–82 (rejecting this argument); *Gilardi*, 733 F.3d at 1211–16 (accepting this argument but concluding that the individual owners of the corporation are persons who may have a RFRA claim); *Autocam*, 730 F.3d at 625–28 (accepting this argument); *Conestoga Wood*, 724 F.3d at 382–88 (accepting this argument); *Hobby Lobby*, 723 F.3d at 1128–37 (rejecting this argument). For academic analysis of whether corporations or corporate shareholders in that capacity may have free exercise or RFRA rights, see Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235 (2013) (yes, sometimes); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59 (2013) (yes, sometimes); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, AM. U. J. GENDER SOC. POL’Y & L. (forthcoming), available at <http://ssrn.com/abstract=2289383> (no, never); Robert K. Vischer, *Do For-Profit Businesses Have Free-Exercise Rights?*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2013), available at <http://papers.ssrn.com/abstract=2254128> (yes, sometimes); Caroline Mala Corbin, *Corporate Religious Liberty*, <http://ssrn.com/abstract=2327919> (no, never); Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, <http://ssrn.com/abstract=2360309> (no, generally).

86. 42 U.S.C. § 2000bb-1(a) (2006) (emphasis added) (“Government shall not substantially burden a person’s exercise of religion . . .”). “In determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .” 1 U.S.C. § 1 (2012). The context does not indicate otherwise. If corporations were not persons under RFRA, then most churches and religious associations would not be protected.

87. See Brief of Christian Legal Society et al. as Amici Curiae, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354, 2014 WL 411294; Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 364–72 (2013). This brief, and Ms. Chaganti’s note, review the debate over the effort to remove civil rights claims against corporate de-

But as the size and number of the businesses seeking exemption expands, the government's compelling-interest argument becomes stronger, and as the number of shareholders expands, the claim of personal moral responsibility for the acts of the corporation becomes more attenuated.⁸⁸ The Supreme Court has agreed to decide two of these cases, each involving a closely held for-profit corporation whose owners object to medications and devices that might cause abortions, but do not object to other forms of contraception. These cases will probably be resolved shortly after this lecture is published.⁸⁹

On July 2, 2013, after much debate over earlier proposals, the Departments of the Treasury, Labor, and Health and Human Services published *Final Rules* that attempt to sever the connection between the religious institutions and the mandatory coverage for contraception.⁹⁰ Churches, associations of churches, and their integrated auxiliaries are entirely exempt; they need do nothing with respect to contraception.⁹¹ The "exclusively religious activities of any religious order" are entirely exempt.⁹² These exemptions incorporate by reference a long-established exemption from filing informational tax returns.⁹³ At the other end of the continuum, there is no exemption or accommodation for any for-profit business covered by the Act.⁹⁴

Not-for-profit organizations that are not wholly exempt, but that hold themselves out as religious and that object to one or more contraceptive drugs, devices, or procedures, are entitled to self-certify themselves as conscientious objectors.⁹⁵ A religious institution with an insured plan is to send this self-certification to the insurer that issued its group

defendants from the proposed Religious Liberty Protection Act (RLPA). Both sides in that debate believed that if enacted, RLPA would protect for-profit corporations from civil rights claims that substantially burdened the owner's free exercise of religion. RLPA was *in pari materia* with RFRA, and its operative language was identical to the language of RFRA. The supporters of a civil-rights exception to RLPA were seeking an amendment that they knew they needed, and that had not been part of RFRA.

88. See Bainbridge, *supra* note 85, at 246–47 (requiring that corporation be closely held and noting other indicators of shareholders infusing corporation with their religious faith).

89. *Conestoga Wood*, 134 S. Ct. 678 (Nov. 26, 2013) (granting cert); *Hobby Lobby*, 134 S. Ct. 678 (Nov. 26, 2013) (granting cert).

90. Final Rules, Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, and 45 C.F.R. pts. 147, 156 [hereinafter Final Rules]). These separate codifications contain the parallel Rules of the three Departments. The version of this document in the *Federal Register* includes substantial explanation of the rules and of the Departments' reasoning and their response to public comments. The history leading to these rules is reviewed in Final Rules, 78 Fed. Reg. at 39,870–72.

91. Final Rules, *supra* note 90, at 39,874.

92. *Id.*

93. See 26 U.S.C. § 6033(a)(3)(A) (2006).

94. See Final Rules, *supra* note 90, at 39,874–75 (explaining this omission on the ground that religious exemptions in federal law have not heretofore extended to the for-profit sector).

95. *Id.* at 39,896 (to be codified at 45 C.F.R. § 147.131(b)). Insurers may not require any documentation in support of this self-certification. *Id.* (to be codified at 45 C.F.R. § 147.131(c)). But it appears that the government could, and that insurers have a duty to object to facially implausible certifications. See *id.* at 39,897 (to be codified at 45 C.F.R. § 147.131(e)(1)) (providing that an insurer who "relies reasonably and in good faith" on a self-certification is protected if the self-certification "is later determined to be incorrect"). Government scrutiny of self-certifications is likely to be reserved for extreme cases.

policy.⁹⁶ Upon receiving this notice, the insurer is required to expressly exclude contraceptive coverage from the institution's group policy, and to make separate payments for contraceptive services, with its own funds, to everyone insured under the plan.⁹⁷ The insurer is to offer these payments without requiring a separate application, without deductibles or co-pays, and without charge either to the religious institution or to the persons insured under the plan.⁹⁸ Premium revenue collected from the religious institution's group plan must be segregated from the money used to pay for contraception.⁹⁹ The Departments' explanation of the *Final Rules* says, twice, that the insurer "must be able to account for this segregation of funds, subject to applicable, generally accepted accounting and auditing standards."¹⁰⁰ But the text of the *Final Rules* does not expressly say anything about audits or accounting standards.

The insurer must notify the persons insured, in a mailing separate from other materials about the plan, that payment for contraception is available and that the religious institution does not administer or fund these benefits.¹⁰¹ Model language for this notice, suggested but not required, would say that the religious institution "will not contract, arrange, pay, or refer for contraceptive coverage. . . . [It] will not administer or fund these payments. If you have any questions about this notice, contact" the insurer.¹⁰²

For self-insured plans, the religious institution is to send the self-certification to the plan administrator,¹⁰³ which is typically an affiliate of an insurance company. The plan administrator must then either pay for contraception, or contract with a third party to pay for contraception, under the rules applicable to insurers.¹⁰⁴ The same rules apply to college and university plans covering students, with a tweak required by details of state insurance law.¹⁰⁵

With respect to religious institutions, this is a serious effort. A key phrase in the suggested model language for the notice to plan participants—that the religious institution will not "contract, arrange, pay, or refer for" contraception—is the goal of these rules and a recurring mantra in the explanation of these rules.¹⁰⁶ But this solution is not yet acceptable to many conservative religious groups.¹⁰⁷

96. *Id.* at 39,896 (to be codified at 45 C.F.R. § 147.131(c)(1)).

97. *Id.* (to be codified at 45 C.F.R. § 147.131(c)(2)).

98. *Id.* (to be codified at 45 C.F.R. § 147.131(c)(2)(B)(ii)).

99. *Id.*

100. *Id.* at 39,877, 39,878.

101. *Id.* at 39,896–97 (to be codified at 45 C.F.R. § 147.131(d)).

102. *Id.* at 39,897 (to be codified at 45 C.F.R. § 147.131(d)).

103. *Id.* at 39,894–95 (to be codified at 29 C.F.R. § 2590.715-2713A(b)(1)(ii)).

104. *Id.* at 39,895 (to be codified at 29 C.F.R. § 2590.715-2713A(b)(2)).

105. *Id.* at 39,897 (to be codified at 45 C.F.R. § 147.131(f)).

106. The phrase appears *id.* at 39,871, 39,872, 39,873, 39,874, 39,876 (twice), 39,878, 39,883, 39,884, 39,887, 39,888, 39,889, 39,893, 39,895, and in the actual rule at 39,897.

107. See Press Release, U.S. Conference of Catholic Bishops, HHS Final Rule Still Requires Action in Congress, by Courts, Says Cardinal Dolan (July 3, 2013), available at <http://www.usccb.org/news/2013/13-137.cfm>; Press Release, Becket Fund for Religious Liberty, Final HHS Rule Fails to Protect Constitutional Rights of Millions of Americans (June 28, 2013), available at <http://www.becket>

The *Final Rules* abandon an earlier version of the model language, which said that payments for contraception were not “connected in any way to” the group policy provided by the religious institution.¹⁰⁸ The Departments did not explain this change, but the simplest explanation is that the earlier language was obviously untrue. Payments for contraception are available to all those people, and only those people, who are also covered by the group policy.¹⁰⁹ The insurer or plan administrator who insures or manages the group plan is responsible for making these payments or contracting with someone else who will make them.¹¹⁰

The self-certification of religious objections might have been a simple statement that the religious institution refuses to supply certain drugs and devices. In fact, the government-promulgated form contains additional language about the resulting legal obligations of insurers and plan administrators.¹¹¹ This language arguably makes explicit what could easily have been left implicit. But either way, with or without explicit language, the self-certification is a legally binding command to pay for contraception separately from the other benefits under the insurance plan. That is, sending the self-certification triggers a legal obligation on the insurer or plan administrator to pay for contraception (an obligation that would otherwise have existed within the scope of the insurance plan), and to do so outside the plan and without charge to the religious institution.

In all these ways, these off-plan contraception benefits are “connected” to the plan. The mantra of the *Final Rules* is more accurate. I think it entirely fair to say that under these *Final Rules*, religious institutions do not contract, arrange, or refer for contraception.

Can it also be said that the religious institution does not *pay* for contraception? That may depend on what the meaning of “pay for” is. The *Final Rules* have elaborate provisions to ensure that religious institutions do not pay for contraception. At a formal level, these are clearly sufficient. Considered in terms of the religious institution’s intent, they seem clearly sufficient. No dollar from any religious institution can be traced to any payment for contraception.

Where the economic benefits and burdens of contraceptive coverage ultimately fall in a competitive insurance market is harder to say. When health insurers or plan administrators bid for the business of an evangelical or Catholic institution, they know with a high degree of certainty that this customer is going to self-certify its religious objection to some or all forms of contraception. They know that whoever wins the

fund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate/. The Becket Fund was able to comment on June 28 because the *Final Rules* were first issued on that date, four days before publication in the *Federal Register*.

108. Proposed Rules, Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8475 (proposed Feb. 6, 2013) (for codification at 45 C.F.R. § 147.131(d)).

109. *Final Rules*, *supra* note 90, at 39,896 (to be codified at 45 C.F.R. § 147.131(c)(2)(i)(B)).

110. *Id.* at 39,896 (to be codified at 45 C.F.R. § 147.131(c)(2)(i)).

111. The form, denominated “EBSA Form 700—Certification,” is available at <http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf>.

account will be required to provide those drugs at no additional charge. It is hard to believe that the insurers and plan administrators will not take account of that cost when they bid the plan. Premiums paid must be great enough to cover the insurer's projected costs, including the cost of contraception, even though those premiums must be segregated from the funds used to pay for contraception.

Under the *Final Rules*, administrators of self-insured plans will be allowed to credit the cost of contraception against the fees they pay the federally facilitated insurance exchanges under the Affordable Care Act.¹¹² This credit is available whether the plan administrator pays for contraception itself or contracts with another company to make the payments.¹¹³ This provision appears to ensure that a plan administrator can contract to have contraception paid for by a company that can use the credits. Federally facilitated exchanges will exist only in states that fail or refuse to create their own exchanges,¹¹⁴ but so far, there are plenty of those. This provision appears to effectively insulate plan administrators from bearing the cost of contraception.

There is no comparable provision for insurers of insured plans. Instead, the *Final Rules* rely on the view that contraception coverage more than pays for itself, saving the insurer the much greater cost of pregnancy, pre-natal care, and birth.¹¹⁵ This is not nearly so obvious as it sounds on first impression, and it appears not to have been the view of many insurers. If these savings accrued to the insurer or self-insured employer, then we might have expected insurers and employers to cover contraception voluntarily. Many of them did not.¹¹⁶

Maybe they were just acting irrationally. Maybe they were betting that most women would get some means of contraception on their own, so that the insurance plan would not have to pay for pregnancies *or* contraception. They may well have been right about that.¹¹⁷ A greatly disproportionate share of unintended pregnancies occur among low-income women and especially low-income teenagers, but employer-sponsored insurance protects only women who are employed full time or the dependent of someone who is employed full time.¹¹⁸ And cost turns out to

112. Final Rules, *supra* note 90, at 39,897 (to be codified at 45 C.F.R. § 156.50(d)).

113. *Id.*

114. 42 U.S.C. § 18041(c)(1) (Supp. V 2011).

115. See Final Rules, *supra* note 90, at 39,872–73 nn.15–18 (collecting studies).

116. As of 1993, fewer than half of employer-sponsored health insurance plans covered most means of contraception. By 2002, coverage had increased to the ninety percent range for plans insured by an insurance company. Adam Sonfield et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 2002*, 36 PERSP. ON SEXUAL AND REPROD. HEALTH 72, 75 tbl. 1 (2004). Self-insured plans were not studied because of low response rates. *Id.* at 74. Growing state regulation played a large part in this change, but this regulation did not apply to self-insured plans. *Id.* at 73.

117. See Alvaré, *supra* note 79, at 396–431 (reviewing many reasons why it is difficult to conclude that employer-funded contraception will produce net savings for the insured group).

118. *Id.* at 399, 402, 424.

rank rather low among the reasons women give for not using contraception.¹¹⁹

Maybe insurers feared that even if there are savings, most of those savings come nine months later, and that the employer might have switched insurers in the interim. That is, any savings from contraception do not necessarily match up with the costs of contraception.

Whatever the reasons, many insurers and employers refused to cover contraception voluntarily.¹²⁰ Legal requirements that they do so are a recent and scattered development, beginning in the late 1990s in the states¹²¹ and a little later under federal discrimination law.¹²² State coverage is spotty for multiple reasons,¹²³ and those demanding contraception under federal law had very limited success prior to the Affordable Care Act.¹²⁴

The *Final Rules* address a different way in which the costs saved by paying for contraception might not accrue to the insurers who pay for it. The Departments do not report that insurers challenged the studies showing cost savings from contraceptive coverage—whatever the industry’s earlier views might have been. Instead, the Departments report that some commenters on the *Proposed Rules*, presumably insurers, argued that “the cost savings due to lower pregnancy-related costs and improvements in women’s health would flow to employers through reduced premiums, thereby leaving issuers uncompensated for the cost of provid-

119. *Id.* at 424–28.

120. See Sonfeld et al., *supra* note 116, at 78.

121. The National Conference of State Legislatures has collected twenty-eight states with statutes, administrative regulations, or attorney general opinions requiring insurance plans that cover prescription drugs to cover contraception. *Insurance Coverage for Contraception Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx> (last visited Mar. 2, 2014).

122. See *In re Union Pac. R.R. Emp’t Practices Litig.*, 479 F.3d 936, 939–45 (8th Cir. 2007) (holding that excluding contraception from employer-sponsored health insurance is neither sex discrimination nor pregnancy discrimination); *id.* at 940 n.1 (collecting seven conflicting district court decisions on the issue, none earlier than 2001); *EEOC Commission Decision on Coverage of Contraception*, EEOC, <http://www.eeoc.gov/policy/docs/decision-contraception.html> (finding reasonable cause to believe that such an exclusion was pregnancy discrimination) (Dec. 14, 2000).

123. None of these state laws apply to self-insured plans, because of ERISA preemption. ERISA (the Employee Retirement Income Security Act) preempts “any and all State laws” that “relate to” an employee-benefit plan covered by ERISA, 29 U.S.C. § 1144(a) (2006), except that it does not preempt “any law of any State which regulates insurance . . .” § 1144(b)(2)(A), but no ERISA-covered benefit plan “shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . .” § 1144(b)(2)(B). The bottom line is that states can regulate insurance companies, including their employer-sponsored group plans, but states cannot regulate self-insured plans.

Twenty-one of the state laws have exemptions, usually for religious objectors. NAT’L CONF. OF ST. LEGISLATURES, *supra* note 121. But some of these religious exemptions are narrow, largely confined to the church itself. The failure to exempt other religious organizations was upheld against constitutional attack in California and New York. *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities v. Serio*, 859 N.E.2d 459 (N.Y. 2006). RFRA, which figures prominently in challenges to federal regulation, was not available in these challenges to state law. See generally Chad Brooker, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 169, 178–83 (2012) (reviewing both the state and federal law prior to the Affordable Care Act).

124. See sources cited *supra* note 122.

ing contraceptive coverage.”¹²⁵ The Departments responded that insurers “have various options for achieving cost neutrality.”¹²⁶

For large groups plans that are experience rated and bid individually, insurers could set the premium “as if no payments for contraceptive services had been provided.”¹²⁷ This cryptic sentence appears to mean that the insurer could somehow estimate the cost of covering all the pregnancies that would have resulted if it had not paid for contraception—and charge a premium based on those costs. This but-for-contraception premium would be higher than the religious institution’s actual health care costs, and higher than its health care costs plus the cost of contraception.¹²⁸ The religious institution would be paying extra, and this extra would more than cover the cost of contraception. But the amount of the extra charge would not be measured by the cost of contraception, and because of the segregation requirement, the institution’s dollars would not be used to pay for contraception. One might say that the religious institution would be demonstrating its sincerity, paying for the cost of pregnancies that would have happened if the government and the insurer had acted on the institution’s moral views. Or an institution might say that this extra payment was just a disguised way of paying for contraception.

Probably, no religious institution will have to decide what it thinks of this solution. Any insurer that added a significant phantom cost to its bid calculation for a large-group plan would almost certainly lose the contract to another insurer that bid more realistically. Charging for non-existent pregnancies is a theoretical model, not a real-world solution in a market with even modest competition.

Alternatively, the Departments suggest that insurers could treat the cost of contraception as an administrative expense and spread it across their entire risk pool for small groups, or their entire book of business for individually rated large groups—but in either case, not including the objecting religious institutions.¹²⁹ The Departments believe that spreading the cost in this way “would result in an imperceptible increase in administrative load.”¹³⁰ But in the Departments’ view, even that imperceptible amount could not be charged to objecting religious institutions, because insurers are “prohibited from charging any premium, fee, or other charge” to objecting religious institutions.¹³¹

This, too, is somewhat cryptic. For large-group plans, the bidding process would presumably swallow this “imperceptible” adjustment to cost calculations. But the Affordable Care Act requires that small-group

125. Final Rules, *supra* note 90, at 39,877.

126. *Id.*

127. *Id.*

128. This relationship between the costs of contraception and the hypothetical costs of prevented pregnancies is inferred from the studies mentioned *supra* note 115.

129. Final Rules, *supra* note 90, at 39,878.

130. *Id.*

131. *Id.*

plans within a rating area be combined into a single risk pool and all charged at the same rate.¹³² This rate can take account of age and tobacco use among the members of the group, and it can distinguish individual from family coverage, but no other variables are permitted.¹³³ Insurers will apparently set rates for individuals and families and for smokers and nonsmokers within each age band, and apply those rates to the individuals within each small group as part of the process of setting a rate for the group. The Departments apparently envision that each insurer might also calculate its cost of paying for contraception at objecting religious institutions, divided by the total number of individuals in all the small groups it covers. Call that number ϵ , for an arbitrarily small amount. Then for each rating category based on age, smoking, and family coverage, the rate quoted to small-group plans at objecting religious institutions would be the standard rate, and the rate for everybody else would be the standard rate plus ϵ . It is not clear how visible these rates for each category of group member would be, but this procedure might very well make the imperceptible increase in administrative load perceptible.

This dual rate structure is merely suggested as a possibility.¹³⁴ It is not explicitly required. It is not even explicitly suggested; it is the apparent implication of what is suggested. Here, too, it may be that no insurer would do this. However small ϵ might be, a visibly dual rate structure, adopted for the express purpose of making clear that everyone else is paying for contraception for the religious institutions' employees, would be a potential irritant to secular customers.

Recall that the point of these regulatory suggestions is not to ensure that religious institutions are not paying for contraception. Rather, these approaches to rate setting are offered as ways by which the insurers might capture the cost savings created by paying for contraception. The Departments' fundamental position is that contraception more than pays for itself, so insurers need not be reimbursed.

The ultimate economic impact of both the costs and any savings will be distributed by market forces. An insurer's cost curve will be one important determinant, but not the only determinant, of its bids for large-group business and its rate quotes for small-group business. Both the costs of contraception, in the form of direct payments, and any savings from contraception, in the form of fewer claims for medical expenses related to pregnancy, will accrue in the first instance to an insurer—but not always the same insurer. The insurers' fear that the savings will accrue to employers is a fear that any savings will be redistributed by market forces, as they may well be.

The same is true of the costs. When an insurer bids a plan or quotes a rate, both the costs and the savings from contraception are in there somewhere. They are in the cost curve, but bids and rates are also influ-

132. 42 U.S.C. § 300gg (Supp. V 2011).

133. *Id.*

134. See Final Rules, *supra* note 90, at 39,878.

enced by the demand curve, by what competitors are doing or expected to do, by the state of the insurer's reserves, by current corporate strategy, and probably by other factors that I might think of if I knew more about insurance. Who ultimately bears any net cost or accrues any net savings in economic terms is impossible to say. What we are left with is that premiums from objecting religious organizations must be segregated, that insurers cannot make any calculation that assigns any part of the cost of contraception to those religious organizations, and that the savings may well exceed the costs. That is probably the best that can be done.

The *Final Rules* are complicated. They have a jury-rigged quality about them. But they spare religious institutions from contracting, arranging, or referring for contraception, and they protect those institutions from paying for contraception in any way that is visible or detectible. These *Final Rules* offer a serious plan to protect religious liberty without depriving women of contraception.

These *Final Rules* are utterly inconsistent with the common charge that the Obama Administration is engaged in a "war on religion."¹³⁵ They are in some tension with the thesis of this paper: even though many Americans are becoming hostile to religious liberty, and even though that hostility is disproportionately on the left, a Democratic administration still feels obliged to offer substantial protections for religious liberty in the implementation of its principal legislative achievement. The Catholic Health Association, which represents most Catholic hospitals and nursing homes, has said that these *Final Rules* are satisfactory.¹³⁶ But other religious organizations, including the Catholic bishops, remain bitterly opposed, demanding a total exemption.¹³⁷

It has seemed to me that few courts are likely to find a substantial burden on the free exercise of religion in the residual uncertainty about how the market distributes the cost of contraception or in the religious institution's residual connections to the insurer's provision of contraception. This judgment has so far been mostly mistaken. Judges reaching the merits have overwhelmingly issued preliminary injunctions protecting the religious institutions, mostly on the ground that sending the self-certification form is in itself a substantial burden on the exercise of reli-

135. See, e.g., PHYLLIS SCHLAFLY & GEORGE NEUMAYR, NO HIGHER POWER: OBAMA'S WAR ON RELIGIOUS FREEDOM (2012) (title says it all); Barbara Bradley Hagerty, *Has Obama Waged a War on Religion?*, NPR (Jan. 8, 2012, 6:10 AM), <http://www.npr.org/2012/01/08/144835720/has-obama-waged-a-war-on-religion> (quoting both sides and me in the middle); Rachel Weiner, *Romney Ad: Obama Waging 'War on Religion'*, WASH. POST (Aug. 9, 2012, 8:04 AM), http://www.washingtonpost.com/blogs/the-fix/post/romney-obama-waging-war-on-religion/2012/08/09/192c4e02-e213-11e1-a25e-15067bb31849_blog.html (quoting Romney ad as saying "President Obama used his health care plan to declare war on religion").

136. *Women's Preventive Health Services Final Rule*, CATHOLIC HEALTH ASS'N U.S., <http://www.chausa.org/newsroom/women%27s-preventive-health-services-final-rule> (last visited Mar. 2, 2014) ("We are pleased that our members now have an accommodation that will not require them to contract, provide, pay or refer for contraceptive coverage.").

137. See U.S. Conference of Catholic Bishops, *supra* note 107; Becket Fund, *supra* note 107.

gion.¹³⁸ The Supreme Court granted a stay to the Little Sisters of the Poor, while disclaiming any position on the merits.¹³⁹ But in the *Notre Dame* case, in an opinion by Judge Posner, the Seventh Circuit incredulously rejected the claim of substantial burden, arguing that no conscientious objector could get an exemption without asking for it and that federal law requires insurers and plan administrators to pay for contraception in any event, either inside the plan or outside the plan, and whether or not Notre Dame sends the self-certification form.¹⁴⁰ This reaction is closer to what I expected; it remains to be seen whether other federal judges, or ultimately the Supreme Court, find this opinion persuasive.

IV. REVOLUTIONS AND RELIGIOUS LIBERTY

At this point, I will digress. A few years ago, I was asked to compare the French and American law of religious liberty.¹⁴¹ I learned that the fundamental French provision on religious liberty guarantees free exercise of religion,¹⁴² abolishes all establishments of religion,¹⁴³ and is captioned “Separation of the Churches and the State.”¹⁴⁴

138. See *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 564 n.1 (7th Cir. 2014) (Flaum, J. dissenting) (collecting cases).

139. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014).

140. *Notre Dame*, 743 F.3d at 554–58.

141. See Douglas Laycock, *Conference Introduction: American Religious Liberty, French Laïcité, and the Veil*, 49 J. CATHOLIC LEGAL STUD. 21 (2010).

142. “La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l’intérêt de l’ordre public.” Loi du 9 décembre 1905 concernant la séparation des Eglises et de l’Etat [Law of December 9, 1905, Concerning the Separation of Churches and the State], Dec. 9, 1905, art. 1 (Fr.) [hereinafter Law of 1905], available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749>. Or in English: “The Republic guarantees freedom of conscience. It guarantees the free exercise of religion subject only to the restrictions enacted hereafter in the interest of public order.” All translations in this section are with the generous assistance of Professor Rebecca Scott, who has done research in French-language sources for many years. She denies that she is a professional French-to-English translator.

143. “Les établissements publics du culte sont supprimés, sous réserve des dispositions énoncées à l’article 3.” Law of 1905, *supra* note 142, art. 2. Or in English: “State institutions of worship are abolished, subject to the provisions of Article 3.” “Les établissements” may also be translated with its cognate, establishments, and it sometimes is. For example: “The public establishments of religion are abolished, subject to the conditions stipulated in Article 3.” Muriel Fraser trans., *Law Separating Church and State (1905): Excerpts*, CONCORDAT WATCH, http://www.concordatwatch.eu/showkb.php?org_id=867&kh_header_id=849&kb+id=1525 (last visited Mar. 2, 2014). Concordat Watch is an organization committed to separation of church and state. Professor Scott does not say that translating “établissements” as “establishments” is necessarily wrong, but she thinks that “institutions” probably better captures the sense in French.

“Religion” (“*religion*”) is also a cognate in French and English, but these French statutes all use “*culte*” (or “*cultes*”), not “*religion*.” “*Le culte*” is sometimes translated as “organized religion.” JOHN R. BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 16 (2007). “You know, the word ‘religion’ (*religion*) has no place in French law. Religion has to do with the relationship of the individual to God. *Le culte* is the outward expression of that relationship.” *Id.* at 17 (quoting the Chef du Bureau Central des Cultes (Chief of the Central Office of Organized Religions)).

144. Law of 1905, *supra* note 142. Or in English: “The Law of 9 December 1905 Concerning the Separation of Churches and the State.”

From those common beginnings, France and the United States have come to opposing answers to almost every important question about religious liberty. Many of the French answers are outside the range of the American debate. There is no right to religious exemptions in French law, and few if any legislated exemptions.¹⁴⁵ France can, and sometimes does, single out religion for discriminatory regulation. French school girls can wear a head scarf for fashion reasons, or medical reasons, or any other secular reason, but not for religious reasons; the law expressly singles out religious motivation for prohibition.¹⁴⁶ The more recent law aimed at burkas says that no one in the public space may wear clothing that hides his face,¹⁴⁷ but then exempts nearly everyone except Muslims and bank robbers.¹⁴⁸

Religious organizations in France must obtain licenses from the state, and, on occasion, these licenses are denied.¹⁴⁹ There are restrictions on religious speech, and especially on evangelism.¹⁵⁰ The state

145. See BOWEN, *supra* note 143, at 17 (“*Le culte* involves three elements: the celebration of the *culte*, as in the mass; its buildings; and the teaching of its principles. That’s all! Freedom of *culte* is limited to those three domains.”) (quoting the Chief of the Central Office of Organized Religions); Alain Garay et al., *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France*, 19 EMORY INT’L L. REV. 785 (2005) (discussing various hypotheticals, and the many reasons for which religion can be regulated, and revealing no concept of religious exemptions).

146. “Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.” Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 pursuant to the principle of secularism, restricting the wearing of symbols or clothing denoting religious affiliation in schools, colleges and public schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190, available at www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L. Or in English: “In public elementary schools, middle schools, and high schools, the wearing of symbols or clothing by which the pupils conspicuously manifest a religious affiliation is prohibited.”

147. “Nul ne peut, dans l’espace public, porter une tenue destinée à dissimuler son visage.” Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law No. 2010-1192 of October 11, 2010 prohibiting the concealment of the face in public space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&categorieLien=id>. Or in English: “No person may, in public areas, wear clothing intended to conceal his or her face.”

148.

L’interdiction prévue à l’article 1er ne s’applique pas si la tenue est prescrite ou autorisée par des dispositions législatives ou réglementaires, si elle est justifiée par des raisons de santé ou des motifs professionnels, ou si elle s’inscrit dans le cadre de pratiques sportives, de fêtes ou de manifestations artistiques ou traditionnelles.

Id. art. 2.II. Or in English: “The prohibition in Article I shall not apply if the dress is required or authorized by law or regulation, if it is warranted for reasons of health or for professional reasons, or if it is part of sporting activities, festivities, or artistic or traditional events.”

149. See BOWEN, *supra* note 143, at 18–19, 26 (summarizing the system and noting the refusal, eventually reversed, to recognize the Jehovah’s Witnesses); Garay et al., *supra* note 145, at 800–03 (briefly reviewing the theory of the system for recognizing religions); T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation, and State Intervention*, 57 DRAKE L. REV. 949, 961 (2009) (noting that the Jehovah’s Witnesses paid fines and “millions of dollars in taxes” for the period in which they were denied recognition).

150. See Garay et al., *supra* note 145, at 826–27 (reviewing a variety of grounds for restriction or prohibition, and places where distribution of religious literature is prohibited); Gunn, *supra* note 149, at 961 (noting that Jehovah’s Witnesses were fined for publishing religious tracts without a license); see also BOWEN, *supra* note 143, at 20 (explaining that selling tracts or ringing doorbells is outside the traditional role of organized religion in France, and therefore outside of constitutional protection).

owns most of the churches, and pays for their maintenance, and it pays for religious schools.¹⁵¹ There is a Central Office of Organized Religions that negotiates the church-state relationship with officially designated representatives of various religious traditions.¹⁵² The whole body of law seems designed to keep the religious groups dependent on the state and on a short leash.¹⁵³

What accounts for these radically different outcomes? However disappointing to textualists, history and culture matter to constitutional interpretation. The biggest difference is that in France, the Church was on the wrong side of the Revolution.¹⁵⁴ The Catholic Church opposed not just the Revolution's excess, but the Revolution itself.¹⁵⁵ It supported repeated cycles of counter-revolution through most of the nineteenth century.¹⁵⁶ The Church was seen as opposed to the liberties of the people; it made itself the subject of enmity, suspicion, and hostile regulation. The result has been a very narrow view of religious liberty in French law and in French public opinion.

In the United States, the churches overwhelmingly supported the Revolution.¹⁵⁷ There was no one dominant religion, and religion was not associated with the monarchy or with an *ancien régime*.¹⁵⁸ In the United States, religion and liberty were perceived as natural allies; in France, religion and liberty were perceived as natural enemies.¹⁵⁹ These contrasting

151. See Law of 1905, *supra* note 142, Part III, art. 12–17 (“Buildings for Religion”); BOWEN, *supra* note 143, at 26–28, 36–43 (explaining the system and the attempts to fit Islam within it); T. Jeremy Gunn, *French Secularism as Utopia and Myth*, 42 HOUS. L. REV. 81, 89 (2005) (noting that the government owns all churches constructed before 1905, and that it directly financed construction of the Paris Mosque); Gunn, *supra* note 149, at 956–57 (summarizing the system).

152. See BOWEN, *supra* note 143, at 16, 48–62 (noting the *Bureau Central des Cultes*, reviewing its attempts to deal with Islam, and translating its title as I have it in text); Gunn, *supra* note 149, at 960–61 (noting the office and its functions, and translating its title more loosely as Bureau of Religious Affairs).

153. See Michel Troper, *Sovereignty and Laïcité*, 30 CARDOZO L. REV. 2561, 2569 (2009) (“[T]he famous act of 1905 . . . does not really depart from the idea that it is the State that organizes religion.”).

154. See BOWEN, *supra* note 143, at 22–24 (briefly summarizing this conflict); Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 347–48 (2006) (“[A] great part of the Catholic Church, which suddenly had been deprived of its grip over the State and the society at large, had frozen into a reactionary attitude.”).

155. See BOWEN, *supra* note 143, at 23.

156. See *id.* at 23–25; AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY 136–53 (2009) (reviewing this history); Custos, *supra* note 154, at 345–51 (reviewing “the War between the Two Frances”—Catholic and secular—from the Revolution through the end of the nineteenth century).

157. See SIDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 361–77 (2d ed. 2004); THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION 75–95 (2010); ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 274–85 (1950).

158. See KURU, *supra* note 156, at 74–84 (emphasizing these two points).

159. Tocqueville famously observed this difference: “In France, I knew, the spirit of religion and the spirit of liberty almost always pulled in opposite directions. In the United States I found them intimately intertwined: together they ruled the same territory.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 341 (Arthur Goldhammer trans. 2004). His brief discussion attributed the difference simply to the separation of church and state, which is certainly part of the explanation, and probably the most apparent part to his American informants in the 1830s. That the churches had not brought the ire of the people down upon themselves by opposing the Revolution was a non-event that was probably taken for granted.

perceptions have had very different consequences for religion, and for religious liberty.

So what if we had a new revolution in our time? The Sexual Revolution that began in earnest in the 1960s continues to make important gains, most dramatically with respect to same-sex relationships. And conservative churches in this country have persistently been on the losing side of this Revolution. They have opposed not just the Sexual Revolution's excesses; they have opposed its core. Each of the remaining sexual issues—abortion, same-sex marriage, contraception, sterilization, emergency contraception—has the same fundamental structure: what one side views as a grave evil, the other side views as a fundamental human right. For tens of millions of Americans, conservative churches have made themselves the enemy of liberty.

In the view of the pro-life and traditional marriage movements, abortion and same-sex marriage are so evil that they must be prohibited for everybody. And that means, in the view of pro-choice women, same-sex couples, and many who support their causes, that religious conservatives are attempting to interfere with the most intimate and personal of human decisions, and to impose their controversial views of morality on the entire population.

Most Americans are understandably ambivalent about abortion, and polling data depends on how the question is phrased. But it appears that a majority do not want women trapped in unwanted pregnancies with no way out.¹⁶⁰

Support for gay rights in contexts other than marriage is becoming lopsided, although polling results sometimes seem to depend on who sponsored the poll.¹⁶¹ Support for same-sex marriage is growing with extraordinary rapidity.¹⁶² And there is a strong age-skew in the data; the

160. See Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP POLITICS (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx> (reporting that sixty-one percent of Americans think that “abortion should generally be legal” in the first three months of pregnancy). But asked to classify themselves as “pro-choice” or “pro-life”, forty-eight percent said pro-choice and forty-four percent said pro-life. *Id.* And asked “Would you like to see the Supreme Court overturn” *Roe v. Wade*, fifty-three percent said no, twenty-nine percent said yes, and eighteen percent had no opinion. *Id.*

161. See, e.g., Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AM. PROGRESS (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections/> (reporting that seventy-three percent of Americans support legal prohibitions on workplace discrimination against gays and lesbians); Gary Langer, *Poll Finds Majority Acceptance of Gays from the B-ball Court to the Boy Scouts*, ABC NEWS (May 9, 2013, 12:01 AM), <http://abcnews.go.com/blogs/politics/2013/05/poll-finds-majority-acceptance-of-gays-from-the-b-ball-court-to-the-boy-scouts> (reporting that Americans support Boy Scouts' decision to admit gay scouts by sixty-three percent to thirty-two percent); Emily Swanson, *Workplace Discrimination Poll Finds Most Favor Law Protecting Gays, Lesbians*, HUFFINGTON POST (June 22, 2013, 1:26 PM), http://www.huffingtonpost.com/2013/06/22/workplace-discrimination-poll_n_3480243.html (reporting that Americans support legal prohibitions on workplace discrimination against gays and lesbians by fifty-two percent to thirty-five percent).

162. See Jon Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, WASH. POST, (Mar. 18, 2013, 2:00 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/> (reporting that fifty-eight percent of Americans say same-sex marriage should be legal, and thirty-six percent say it should be illegal, almost exactly reversing the results from

opponents of marriage equality tend to be older, and the supporters tend to be younger.¹⁶³ That clearly indicates the future direction of public opinion. For a time, religious conservatives dismissed the polls because they had won all the referendums.¹⁶⁴ But in November 2012, they lost four referendums out of four.¹⁶⁵ Nate Silver, the sophisticated analyst of opinion polls and election data, projects that the supporters of same-sex marriage could win referendums in 44 states by 2020.¹⁶⁶

The contraception issue is different in important ways. Nearly all Americans think they are entitled to use contraception and that it is no one else's business.¹⁶⁷ It is unimaginable that any American state would now attempt to ban contraception, and the bishops gave up that battle long ago.¹⁶⁸ Here the source of friction is not a direct attempt to regulate other people's sex lives; here the friction flows from the religious liberty claim itself. Do religious institutions have to provide contraception for their students and employees?

The churches, correctly in my view, see any requirement that they buy insurance that covers contraception coverage as imposing secular morality inside religious institutions.¹⁶⁹ The churches are not telling anyone what they can do with their own money—not even with the wages paid by the religious institution. These institutions are refusing to provide contraception coverage themselves. With respect to contraception, they would do nothing—neither provide it nor interfere with it.

the same question in 2003); *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CENTER FOR PEOPLE & PRESS (Mar. 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/> (reporting that forty-nine percent of Americans say that same-sex couples should be allowed to marry legally, and forty-four percent say no); Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP POLITICS (May 8, 2012), <http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx> (reporting results of Gallup polls from 1996, when Americans opposed legalization of same-sex marriage by sixty-eight percent to twenty-seven percent, to 2012, when they supported it by fifty percent to forty-eight percent). The Washington *Post*-ABC News question, which offers a choice of legal or illegal, consistently shows higher support for same-sex marriage than the Pew Center question, which mentions only making such marriages legal. PEW RES. CENTER, *supra*. Gallup asks whether same-sex marriages “should or should not be recognized by the law as valid, with the same rights as traditional marriages.” Newport, *supra*.

163. See, e.g., PEW RES. CENTER, *supra* note 162 (reporting that seventy percent of those born after 1980, but only thirty-one percent of those born before 1946, support legalization of same-sex marriage).

164. See Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer ‘Milestone Year’*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/same-sex-marriage-gains-cheer-gay-rights-advocates.html> (noting that, up until November of 2012, “opponents of same-sex marriage had consistently repeated that the issue had lost every time the voters had a voice in the matter”).

165. *Id.*

166. Nate Silver, *Assessing the Shift in Public Opinion*, N.Y. TIMES (Mar. 27, 2013), <http://query.nytimes.com/gst/fullpage.html?res=9C07E2DC1E3AF934A15750C0A9659D8B63>.

167. See Newport, *supra* note 71 (reporting that eighty-nine percent of all Americans think birth control is morally acceptable).

168. See, e.g., Admin. Comm. of the U.S. Conference of Catholic Bishops, *United for Religious Freedom 2* (Mar. 14, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/upload/Admin-Religious-Freedom.pdf> (“This is *not* about the Bishops’ somehow ‘banning contraception,’ when the U.S. Supreme Court took that issue off the table two generations ago.”).

169. See, e.g., *id.* at 3 (complaining that Catholic leaders “will be forced by government to violate their own teachings within their very own institutions”).

But, of course, the other side does not see it that way. American law and policy have bizarrely made health care an employer responsibility,¹⁷⁰ and religious institutions are refusing to perform. Never mind that the employees signed on to do the work of the church and to further its mission. Those demanding contraception do not see themselves as imposing secular rules on the church; they see the church as imposing religious rules on them.¹⁷¹ Once you reframe the conflict that way, then once again, the church is seen as interfering with other people's sex lives, and with their health care too.

Most of these issues can also be put in the frame of discrimination. Churches and believers discriminate on the basis of sexual orientation by not recognizing or facilitating same-sex marriages.¹⁷² They discriminate on the basis of sex by refusing to provide items essential to women's health care.¹⁷³ They discriminate on the basis of religion by limiting membership in religious organizations to those who actually believe the religion. Imagine that! A religion that cannot make distinctions on the basis of religion is not likely to survive as a religion. But never mind; a

170. Reliance on employers arose largely by accident, in response to tax incentives, wartime wage controls, and the administrative efficiencies of group coverage. RASHI FEIN, *MEDICAL CARE, MEDICAL COSTS: THE SEARCH FOR A HEALTH INSURANCE POLICY* 22–26 (1986); David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 *YALE J. HEALTH POL'Y, L. & ETHICS* 23, 25–26 (2001). In time, the great bulk of health insurance was provided through employers. FEIN at 153; Hyman & Hall at 26 (sixty-five percent of population under age 65). This system worked well for many, but it omitted the unemployed, the self-employed, the irregularly employed, and those whose employers were unable or unwilling to provide reasonable coverage. See FEIN at 26, 153. It locked many people into jobs for fear of losing health insurance if they resigned. Hyman & Hall at 28–29. The Affordable Care Act now requires employers with more than fifty employees to provide health insurance plans. 26 U.S.C. § 4980H(a), (c)(2) (Supp. V 2011).

171. See, e.g., FREDERICK MARK GEDICKS, *WITH RELIGIOUS LIBERTY FOR ALL: A DEFENSE OF THE AFFORDABLE CARE ACT'S CONTRACEPTION COVERAGE MANDATE* 1 (2012), available at http://www.acslaw.org/sites/default/files/Gedicks_-_With_Religious_Liberty_for_All_1.pdf (arguing that religious exemption “would violate the liberty of others by imposing on them the consequences of religious beliefs and practices that they do not share and which interfere with their own religious and other fundamental liberties”); Caroline Mala Corbin, *The Contraception Mandate*, 107 *NW. U. L. REV.* 1469, 1481 (2013) (“Excluding contraception . . . imposes the employer's religious values onto” female employees).

172. See, e.g., JAY MICHAELSON, *REDEFINING RELIGIOUS LIBERTY: THE COVERT CAMPAIGN AGAINST CIVIL RIGHTS* 27 (2013), http://www.politicalresearch.org/wp-content/uploads/downloads/2013/04/PRA_Redefining-Religious-Liberty_March2013_PUBLISH.pdf (“In fact, there is not a single ‘religious liberty’ claim that does not involve abridging someone else's rights.”). This document is a research report of Political Research Associates, which describes itself as “a progressive think tank devoted to supporting movements that are building a more just and inclusive democratic society.” *Id.* at 2.

173. See Corbin, *supra* note 171, at 1481 (“Excluding contraception . . . discriminates against female employees”); Marci Hamilton, *New Proposed HHS Contraception Rules*, *CONLAWPROF* (Feb. 1, 2013, 1:44 PM), <http://lists.ucla.edu/pipermail/conlawprof/2013-February/041962.html> (“The employer's objection is also gender discrimination as these rules were passed for women's health purposes and carving out women's health is gender discrimination plain and simple.”); Louise Melling, Letter to the Editor, *Birth Control and Religious Freedom*, *N.Y. TIMES* (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/opinion/birth-control-and-religious-freedom.html> (letter to editor by Louise Melling, Director, Center for Liberty, American Civil Liberties Union, arguing that “[r]eal religious freedom . . . doesn't give them the right to impose their beliefs on others or to use religion as an excuse to discriminate by closing the door—of their office, emergency room or bakery—because they disagree with the person seeking services.”).

student religious group's statement of faith is religious discrimination in the view of many student affairs officers.¹⁷⁴

Discrimination is a powerful charge. It still retains some of the moral imperative associated with the civil rights movement of the 1960s, when the discrimination at issue was utterly indefensible by any measure. The issues involved in these religious liberty disputes are very different from Jim Crow, but the broad label "discrimination" makes no distinctions.

The stakes are high. Many disputes over the free exercise of religion involve unusual practices of small religions, unusual laws of little importance, or both.¹⁷⁵ But these disputes over same-sex marriage, contraception, emergency contraception, and abortion involve core teachings of large and mainstream religious organizations on one side, and important government programs backed by powerful interest groups on the other. They present claims of fundamental right on both sides—the right to exercise one's religion and not to violate God's will as one understands it, and the right to control one's own sex life, one's own body, and one's own health care. Both religion and sex are intensely personal. Both religion and sex are spheres that we normally try to protect from government interference.

It is a risky step to interfere with the most intimate details of other people's lives while loudly claiming liberty for yourself. If you stand in the way of a revolution and lose, there will be consequences. The bishops have won an important victory—if they will recognize it and accept it—by firmly insisting on their right not to provide contraception themselves. Continued intransigence is likely to be perceived as an untenable claim of right to deprive their students and employees of contraception even when someone else is paying for it.

I do not offer a prediction; I identify a very large risk. The consequence of fighting the Sexual Revolution so hard and so long *may* be to permanently turn much of the country against religious liberty—or at least to turn public opinion towards a very narrow, more French-like understanding of religious liberty. Certainly in the short run, the conflict over sexual morality is making a large part of the population deeply suspicious of claims to religious liberty.

V. GROWING HOSTILITY

The pro-choice and gay-rights movements see their constituents, correctly in my view, as the targets, or victims, of religiously driven attempts to restrict abortion and same-sex marriage. They respond with

174. See, e.g., *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

175. See, e.g., Steinberg, *supra* note 11, at 253–54.

very negative views of their religious opponents.¹⁷⁶ They see conservative believers as extreme and unreasonable.¹⁷⁷ They see conservative believers as bigoted, a word they mostly use with respect to gay rights and same-sex marriage.¹⁷⁸ Beyond that, many of them believe, and occasionally say explicitly, that the religious side is evil.¹⁷⁹ There is every reason to fear that the conflict over contraception is generating similar hostile attitudes.¹⁸⁰

For too many on the pro-choice, gay rights, and women's health care side of these issues, the free exercise of religion begins to look like a bad idea. It is a bad idea because it empowers their enemies. It should be interpreted extremely narrowly, confined to a bare right to believe whatever crazy and bigoted things you like. But it cannot mean a right to act on those beliefs, a right to actually *exercise* a religion.

Often these views have been implicit, but they are becoming explicit. One somewhat scholarly researcher and activist puts "religious liberty" in scare quotes every time he mentions it¹⁸¹ and urges an organized campaign to oppose a wide range of religious liberty claims.¹⁸² He believes, for example, that the existence of a religious liberty clinic at Stanford Law School "should be seen as an enormous victory for the conservative 'religious liberty' movement and a catastrophe for protecting civil rights."¹⁸³

Another example comes from a columnist in the Toronto *Globe and Mail*: "It's time to speak out *against* religious freedom. . . . For the ardent religious believer and the organized, hierarchical religious organization, 'religious freedom' often refers to the right to restrict the freedoms of others, or to impose one's religion on the larger world."¹⁸⁴

176. See, e.g., TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 125 (2008) (describing the "anger," "outrage," and "vitriol" with which each side responds to the other).

177. See, e.g., Michaelson, *supra* note 172, at 11 (charging that the "endgame" of those arguing for religious liberty "is a 'Christian nation' defined in exclusively conservative terms").

178. See, e.g., FETNER, *supra* note 176, at 121 ("We were blessed to have the hateful, bigoted opponents we have had" (quoting Steve Endean, executive director of the National Gay Rights Lobby)); *Religion-Based Bigotry*, FAITH IN AMERICA, <http://www.faithinamerica.org/bigotry/> (last visited Mar. 3, 2014) ("Religion-based bigotry is not synonymous with bigotry. It is a uniquely vile form of bigotry as the prejudice, hostility and discrimination behind the words are given a moral stamp of approval.").

179. *Mormon Image Suffers After Gay Marriage Fight*, WASH. TIMES (Aug. 16, 2009), <http://www.washingtontimes.com/news/2009/aug/16/mormon-image-suffers-after-gay-marriage-fight/> (quoting lesbian leader as saying that her community sees the Mormons "as a force for evil").

180. See, e.g., Anthony M. Stevens-Arroyo, *The Catholic Health Association v. the Bishops v. Obama*, FAITH STREET (July 11, 2013), <http://www.faithstreet.com/onfaith/2013/07/11/the-catholic-health-association-v-the-bishops-v-obama/> (commenting on the bishops' rejection of the religious accommodation in the *Final Rules*: "Like the tea party faction in Congress, anything Obama is for, these prelates are against. They refuse to accept victory in order to keep fighting with President Obama.").

181. Michaelson, *supra* note 172, *passim*. For the "researcher and activist" description, see *id.* at 4 (a Preface by Malika Redmond).

182. See *id.* at 38–39.

183. *Id.* at 38.

184. Doug Saunders, '*Religious Freedom*' Sends the Wrong Message to the Wrong People, GLOBE AND MAIL (updated Nov. 23, 2012 8:22 AM), <http://www.theglobeandmail.com/globe-debate/doug-saunders-religious-freedom-sends-the-wrong-message-to-the-wrong-people/article4591927/> (emphasis added).

Closer to home, the Colorado Senate passed a civil-union bill with no meaningful exemption for religious liberty.¹⁸⁵ The bill's sponsor, Senator Pat Steadman explained why:

So, what to say to those who say religion requires them to discriminate. I'll tell you what I'd say. Get thee to a nunnery and live there then. Go live a monastic life away from modern society, away from people you can't see as equal to yourself, away from the stream of commerce where you may have to serve them.¹⁸⁶

No living in peace and equality in the same society for him. Religious minorities must withdraw or conform. And this is from an elected official who apparently did not fear retaliation at the polls.

In the winter and spring of 2014, Religious Freedom Restoration Acts became politically toxic. Resentment of the federal RFRA because of the contraception litigation, an overreaching bill in Kansas that was not a RFRA at all, and proposed amendments to clarify that the Arizona RFRA applies to business people, combined with anti-gay statements from the Arizona bill's sponsor, enabled opponents to create an overwhelming public reaction that took down the Kansas and Arizona bills and proposed state RFRAs in Georgia and Ohio.¹⁸⁷ These various bills were very different, but the avalanche of publicity generally failed to distinguish among them, and thus inevitably mischaracterized them.

For many people, this hostility to religious liberty is a growing intuitive reaction. They are tired of hearing from the Catholic bishops and the evangelical preachers—tired of hearing about their religion, tired of hearing their claims to religious liberty, tired of them trying to restrict other people's sex lives. "Increasingly, people identify and link organized religion with anti-gay attitudes, sexual conservatism, a whole range of those kind of social cultural values."¹⁸⁸

For others, it is a more thought out position. The academic arguments against religious liberty grow more elaborated in the law reviews, more hostile in the list serves. Arguments created to win a particular battle about contraception or marriage are rarely *limited* to those issues.

185. Colorado Civil Union Act, COLO. REV. STAT. §§ 14-15-101–14-15-119 (2013).

186. Vincent Carroll, *Civil Unions or a Nunnery? Please*, DENVER POST (Feb. 13, 2013, 12:01 AM), http://www.denverpost.com/ci_22575306/civil-unions-or-nunnery-please (quoting Sen. Steadman). For Steadman's sponsorship of the bill, see John Andrews, *Zealots Endanger Freedom*, DENVER POST (Mar. 24, 2013, 12:01 AM), http://www.denverpost.com/ci_22843893/zealots-endanger-freedom.

187. See, e.g., Adam Nagourney, *Arizona Bill Allowing Refusal of Service to Gays Stirred Alarm in the G.O.P.*, N.Y. TIMES (Feb. 27, 2014), <http://www.nytimes.com/2014/02/28/us/arizona-bill-allowing-refusal-of-service-to-gays-stirred-alarm-in-the-gop.html>; Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html>. The characterization of the bills in the two headlines indicates the tenor of most coverage, in the *Times* and elsewhere. For an analysis of what the Kansas and Arizona bills actually said, see Letter from Law Professors to Governor Jan Brewer, Ariz., on the Ariz. RFRA Amendments, <http://mirrorofjustice.blogs.com/files/arizona-gov-brewer-letter.pdf>.

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

These arguments have obvious implications for other religious liberty claims, and if accepted by courts, the precedents apply to all religious liberty claims.

I cannot offer a full analysis of the legal issues in these cases. But I do want to highlight the sweep of the arguments that are being made against claims to religious liberty.

The interest groups now arrayed against religious liberty tend to assume that any interest they care about is compelling, and to state those interests at the grandest level of generality. There is a compelling interest in women's health, or even more broadly, in public health;¹⁸⁹ there is a compelling interest in nondiscrimination.¹⁹⁰ Such sweeping claims avoid the proper inquiry, which is whether enforcement of the government's interest *as applied* to the particular religious claimant—and to all others whose similar claims cannot be fairly distinguished—is necessary to serve a compelling government interest.¹⁹¹

Not that that matters, because the opponents of religious liberty also insist that every individual application of their interests is compelling.¹⁹² They say there is a compelling interest in avoiding any inconvenience or affront; no potential customer should ever be referred elsewhere.¹⁹³ They say that they are entitled to have personal services available even when the services are entirely unwanted. 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.¹⁹⁴ The purpose of such arguments is not to obtain counseling, but to drive conservative believers out of the profession.

The same logic is applied to every other occupation or profession in any way connected to one of these disputes. If you don't want to do abortions, do not work in obstetrics and gynecology.¹⁹⁵ You should not be permitted to *deliver* babies unless you are also willing to *kill* babies on

189. See Final Rules, *supra* note 90, at 39,872 (claiming “compelling government interests in safeguarding public health”); GEDICKS, *supra* note 171, at 15 (finding many compelling interests, including “improvement of the health of pregnant women and newborn children”).

190. See Final Rules, *supra* note 90, at 39,872 (claiming “compelling government interests in . . . ensuring that women have equal access to health care.”).

191. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (attributing this standard to both the Religious Freedom Restoration Act and the Free Exercise Clause).

192. See, e.g., *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 282–83 (Alaska 1994) (finding a “transactional” compelling interest in preventing each individual act of housing discrimination, distinct from “derivative” interest in insuring that all persons had access to housing).

193. See, e.g., Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE, *supra* note 34, at 123, 153.

194. See cases cited *supra* notes 61–64; Todd A. DeMitchell et al. *The University Curriculum and the Constitution: Personal Beliefs and Professional Ethics in Graduate School Counseling Programs*, 39 J.C. & U.L. 303, 337–44 (2013) (defending university decisions to exclude counseling students who refer gay clients to other counselors).

195. See Julie D. Cantor, *Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009) (“[P]hysicians and other health care providers have an obligation to choose specialties that are not moral minefields for them. Qualms about abortion, sterilization, and birth control? Do not practice women's health.”).

request. If you don't want to do same-sex weddings, don't be a wedding planner or a caterer or the owner of a bridal shop, however small.¹⁹⁶ And even: if religious nonprofits don't want to provide contraception, they don't have to run "a hospital, school, or charity."¹⁹⁷ Never mind that churches for centuries have treated education, and care of the sick and the destitute, as part of their missions.

In Washington State, Planned Parenthood and the governor's office spent years trying to find even one woman who was unable to promptly obtain emergency contraception when she needed it, or when she went as a test shopper and *claimed* to need it. They never found a single example that stood up in court.¹⁹⁸ But they are still litigating fiercely to require a handful of small pharmacies and individual pharmacists to stock and deliver emergency contraception.¹⁹⁹ This litigation is not to solve a problem; it is to drive those pharmacies out of the profession or force them to conform to the plaintiffs' view of the matter.

These interests are said to be compelling, and the law is said to be generally applicable, even if vast numbers of cases are exempt for secular reasons. To note just the biggest and most obvious exemption, the employers' obligation to provide health insurance to employees does not apply to employers with fewer than fifty employees.²⁰⁰ That exempts more than twenty-five million employees, or about twenty-eight percent of all private-sector employment.²⁰¹ Some of these small employers provide health insurance voluntarily, and those that do so must include coverage for contraception.²⁰² For the rest, the government asserts no interest at all in employer-provided contraception. But it allegedly has a *compelling* interest in refusing a much smaller exemption for the employees of conscientious objectors.

Just as all government interests are compelling in this view, no burdens on religion are substantial. Driving religious minorities out of their chosen occupation or profession is said not to be a burden on religion, because their religions do not require them to be a wedding planner, or a marriage counselor, or an obstetrician.²⁰³ Never mind that excluding

196. Service providers in the wedding industry appear to have been the principal target of Sen. Steadman's remarks, quoted in text, *supra* note 186.

197. Corbin, *supra* note 171, at 1482.

198. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 946–51 (W.D. Wash. 2012) (making detailed findings of fact on this issue), *appeal pending*, No. 12-35221 (9th Cir. 2013).

199. See generally Appellants' Opening Brief, *Stormans, Inc. v. Selecky*, No. 12-35221 (9th Cir. 2012), ECF No. 31; Opening Brief of Intervenors-Appellants, *Stormans, Inc. v. Selecky*, No. 12-35221 (9th Cir. 2012), ECF No. 20.

200. See 26 U.S.C. § 4980H(a) (Supp. V 2011) (imposing the obligation on "any applicable large employer"); 26 U.S.C. § 4980H(c)(2) (Supp. V 2011) (defining "applicable large employer").

201. John Mullins & Mike McCall, *Analytical Highlights of CES Firm Size Employment Data* at 2137 chart 1, 2141 chart 5 (Oct. 2012), <http://www.bls.gov/osmr/pdf/st120070.pdf>. "CES" refers to the Current Employment Statistics from the Bureau of Labor Statistics.

202. 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011).

203. See, e.g., *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 926 (Cal. 1996) ("[T]he landlord in this case does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples. No religious exercise is burdened if she

Catholics from professions was a time-honored means of persecution, well-known to the Founders.²⁰⁴

All the Catholic bishops say it violates their religious obligations to arrange for insurance that covers contraception,²⁰⁵ but their critics say the bishops are mistaken. They may think that they are so closely connected to the sin as to be morally responsible, but really, and even if they pay, the connection is pretty loose. They should not think of themselves as buying insurance that covers contraception; they should think of themselves as paying their employees, some of whom will then choose to spend their pay on contraception.²⁰⁶ This assumption—that the employer’s transaction in buying the insurance is morally irrelevant, and that only the employee’s later transactions with the health-care system count—seems to pervade the arguments against exemptions in this context.

But from the bishops’ perspective, it is the Catholic employer’s transaction that matters. Unlike wages, which pass beyond the employer’s control and can be spent on anything the employee chooses to spend them on, contraception coverage in an insurance policy is an earmarked benefit that can be spent only on contraception. It is not even the case that the employee can spend the benefit *either* on contraception or some other medical benefit. Because the Affordable Care Act eliminates coverage limits, spending on contraception in no way reduces the other medical benefits available under the policy.²⁰⁷ So the bishops quite plausibly understand employers as buying a contraception benefit.

If the bishops’ moral views were widely shared, instead of being so highly idiosyncratic, then the employer’s moral responsibility would also be uncontested. Suppose an employer offered its employees an entertainment benefit, which could be spent at movies, live theaters, night clubs, strip clubs, S&M dungeons, or legal brothels in Nevada or abroad. When the inevitable public criticism came—and it would come from the women’s movement as well as from social conservatives—the critics would not be assuaged by the employer’s response that this benefit was just another form of compensation, and that the employees chose where to spend it. The critics would see the employer as providing a morally dubious benefit, encouraging the inappropriate treatment of women, and

follows the alternative course of placing her capital in another investment.”); Cantor, *supra* note 195 (arguing that pro-life medical personnel should not work in women’s health).

204. See Laycock, *supra* note 43, at 201 (summarizing this history and collecting statutory examples).

205. See Catholic Bishops, *supra* note 76; Catholic Bishops, *supra* note 107.

206. See, e.g., Corbin, *supra* note 171, at 1477–78 (analogizing employer’s purchase of insurance that covers contraception to government voucher plan that supports wide range of educational choices); Gedicks, *supra* note 171, at 144–45 (arguing that insuring contraception for employees is just like paying wages or taxes, which employees and governments are free to spend as they choose); Jonathan Mallamud, *New Proposed HHS Contraception Rules*, CONLAWPROF (Feb. 2, 2013, 2:24 PM), <http://lists.ucla.edu/pipermail/conlawprof/2013-February/041977.html> (“The payment by an employer for health insurance is equivalent to the payment of wages, and an employee purchasing goods or services considered immoral by the employer should not implicate the employer’s moral responsibility.”); Sepper, *supra* note 85, at 118–19 (analogizing contraception benefits to wages); see also Michaelson, *supra* note 172, at 27 (making a similar argument that lay people misunderstand their religion).

207. 42 U.S.C. § 300gg-11(a)(1) (Supp. V 2011).

tempting the employees toward immoral behavior. That is just how the bishops see contraception, except that they would say it is morally forbidden, not merely dubious.

An argument that sweeps even more broadly is that religious institutions should not feel morally responsible because the government made them do it.²⁰⁸ This argument applies to every law that requires a violation of conscience; accepting it generally would be a wholesale repealer of the Free Exercise Clause and of all Religious Freedom Restoration Acts.

We are told that Catholic teaching on contraception does not matter because most Catholics reject that teaching.²⁰⁹ Some of the deepest disagreements in Christianity have been over forms of church governance,²¹⁰ and it is absolutely clear that Catholic institutions are not run as democracies. But never mind; we will take Catholic teaching from the people and overrule the bishops. As long as we agree with the people.

These arguments are made with no sense of any difference between omission and commission. Failing to provide a service is seen as doing affirmative harm, even if the service is readily available elsewhere.²¹¹

208. See Corbin, *supra* note 171, at 1478 (“The mandatory nature of the coverage also weakens the ‘forced to condone contraception’ argument.”); Marty Lederman, *New Proposed HHS Contraception Rules*, CONLAWPROF (Feb. 2, 2013, 1:14 PM), <http://lists.ucla.edu/pipermail/conlawprof/2013-February/041973.html> (“But where, as here, *all* plans must by law cover all manner of drugs, it *would* *be a surprise that an employer would feel morally responsible”); Mallamud, *supra* note 206 (“[I]t is not the employer’s decision, but the government’s.”). Professor Lederman emphatically disavows any intention to suggest “that ‘the government made me do it’ is sufficient to eliminate religious burdens in all cases.” Marty Lederman, *New Proposed HHS Contraception Rules*, CONLAWPROF (Feb. 2, 2013, 3:02 PM), <http://lists.ucla.edu/pipermail/conlawprof/2013-February/041981.html>. His explanation appears to me to resolve the argument in this footnote—the government made me do it—into the argument *supra* note 206—that the only relevant act is the employee’s purchase of contraceptives and not the religious institution’s purchase of insurance that covers contraceptives.

209. See, e.g., Corbin, *supra* note 171, at 1471, 1475–76 (“To start, most American Catholics do not consider the ban on contraception central to their faith, as a vast majority of Catholic women have used birth control.”); *The Truth About Religious Freedom*, CATHOLICS FOR CHOICE, <http://www.catholicsforchoice.org/topics/politics/TheTruthAboutReligiousFreedom.asp> (last visited Mar. 3, 2014) (supporting the requirement that religious institutions provide contraception on many grounds, including that the bishops represent only themselves and that most Catholics approve of contraception). A *New York Times* editorial implied something similar: “[T]he First Amendment is not a license for religious entities to impose their dogma on society through the law. The vast majority of Americans do not agree with the Roman Catholic Church’s anti-contraception stance, including most American Catholic women.” Editorial, *The Politics of Religion*, N.Y. TIMES (May 27, 2012), <http://www.nytimes.com/2012/05/28/opinion/the-politics-of-religion.html>.

210. See Douglas Laycock et al., *Letter to Sen. Andrew McDonald and Rep. Michael Lawlor*, in DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 302, 302–06 (John Witte, Jr. ed., 2011) (briefly summarizing this history).

211. See MICHAELSON, *supra* note 172, at 27 (comparing conscientious refusal to serve customers with defrauding customers, because there are rules against both, and businesses must comply with the rules); Corbin, *supra* note 171, at 1480 (“[D]enying free access to contraception results in serious and direct harms to women’s autonomy, equality, and equal access to health care.”); Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming April 2014), available at <http://ssrn.com/abstract=2328516> (arguing that wholly exempting religious not-for-profits, other than churches and their integrated auxiliaries, would violate the Establishment Clause by depriving employees of free contraception); Marci Hamilton, *New Proposed HHS Contraception Rules*, CONLAWPROF (Feb. 3, 2013, 6:48 AM), <http://lists.ucla.edu/pipermail/conlawprof/2013-February/>

These arguments are made with a completely one-sided sense of each side's turf. If 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. Inside a Catholic institution has to be a Catholic space—but not in the view of the church's opponents. If your Catholic institution does not generally refuse to employ non-Catholics, or if your Catholic college does not generally refuse to educate non-Catholics, or if it teaches any secular subjects, some critics think it has forfeited its right to live by Catholic rules.²¹² If an individual provides any goods or services, on however personal a basis, on however small a scale, he has crossed over to the other side's turf in the same-sex marriage debate and forfeited his right to exercise his religion.²¹³

Arguments like this will not easily be confined to the bitter debates over sexual morality. Once formulated, once widely adopted in political debates, once accepted by at least some judges, they will be ready at hand for any other religious liberty dispute that may arise.

These developments are mutually reinforcing with another that is beyond the scope of this Article. Academics have begun to argue that special protection for religious liberty cannot be justified in a society with many nonbelievers.²¹⁴ I fully agree that nonbelievers must be integrated into the system of religious liberty, and that this task is only partially completed. The rise of a new set of beliefs about religion, and a new axis of religious conflict, is a new problem for the law of religious liberty to address; this has been a recurring theme of my work.²¹⁵ The emergence of a new and more fundamental disagreement about religion makes religious liberty more important, not less.

But this Article's point is more descriptive. Those who are opposed to religious liberty because churches interfere with other people's sex lives are likely to be attracted to this argument about nonbelievers. It

041997.html (“And there is a compelling interest in insuring that employers do not use their position to coerce women to choose not to follow their own religious precepts related to reproductive health.”).

212. See GEDICKS, *supra* note 171 (defending these terms of the 2011 version of the rules).

213. See MICHAELSON, *supra* note 172, at 27 (“In fact, there is not a single ‘religious liberty’ claim that does not involve abridging someone else’s rights.”); Hagerty, *supra* note 135 (quoting Rob Boston of Americans United for Separation of Church and State: “If you don’t want to serve the public, don’t open a business saying you will serve the public.”); Jonathan Mallamud, *New Proposed HHS Contraception Rules*, CONLAWPROF (Feb. 2, 2013, 2:29 PM), <http://lists.ucla.edu/pipermail/conlawprof/2013-February/041978.html> (“[W]hen one takes up a place in medical school and goes on to become a doctor that person should have an obligation to provide services in accord with the patients’ needs and beliefs.”).

214. See Laycock, *supra* note 31, at 422–24 (collecting and summarizing examples).

215. See Douglas Laycock, *Reviews of a Lifetime*, 89 TEX. L. REV. 949, 957 (2011) (arguing against government-sponsored religious observances, and noting that “[t]he emergence of a substantial nonbelieving minority in a society of believers will destabilize long-held assumptions”); Laycock, *supra* note 31, at 419–29 (documenting the rise of nonbelief and exploring its implications for religious liberty); Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 511–13 (2006) (identifying religious-secular conflict as the third historic alignment of religious conflict in the United States, replacing Protestant-Catholic and Protestant-Protestant conflicts of earlier eras); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326–37 (1996) (arguing for protection of nontheistic conscience); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990) (arguing for protection of nontheistic conscience).

has the potential to get rid of religious liberty once and for all. And those arguing that there is no justification for religious liberty will likely be attracted to arguments designed to minimize religious liberty so long as it survives. These developments are mutually reinforcing. And they are deeply threatening to the American tradition of religious liberty.

VI. POINTING TOWARD A SOLUTION

Most religious liberty issues actually have nothing to do with sex, or abortion, or nonbelievers. They have nothing to do with the culture wars except as the culture wars are eroding support for religious liberty.

The United States is probably the most religiously diverse nation on the planet, and it is pervasively regulated by multiple layers and branches of government. Issues about the free exercise of religion arise whenever one of these diverse religious practices comes into conflict with one of these equally diverse laws or administrative practices. Very often, the problem is not some conflict with a competing interest group, but bureaucratic rigidity and indifference. Bureaucratic rigidity is sometimes stiffened by a more generalized hostility to religion and to religious liberty, and that hostility is becoming more widespread because of the culture-war issues.

Even on the hot-button culture-war issues, religious liberty provides a model for resolving or ameliorating social conflict. We could still create a society in which both sides can live their own values, if we care enough about liberty to protect it for both sides.

One of the ironies of the culture wars is that religious minorities and gays and lesbians make essentially parallel demands on the larger society.²¹⁶ I cannot fundamentally change who I am, they each say. You cannot interfere with those things constitutive of my identity; on the most fundamental things, you must let me live my life according to my own values. We can honor both sides' version of that claim if we will try.

And in all but a tiny fraction of these cases, the issue is not whether any other individual can obtain contraception, or whether a same-sex couple can have a wedding with the full panoply of catering, clothes, photographs, flowers, and all the rest. All those things are readily available in the market place in most of the country. The issue is whether the religious conscientious objector must be the one who provides these things.

If it is thought to be essential to provide contraception to all for free, or very inexpensively, there are other ways to do it. The *Final Rules* seem likely to work for religious institutions. Or government could provide it directly. Or we could require the pharmaceutical companies to sell contraceptives to individuals at the same prices they charge to group

216. See Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 212–27 (2010); 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, 2416–30 (1997); Laycock, *supra* note 43, at 189–90.

plans. Any proposed solution will pose political issues of its own, but the First Amendment does not say that government may interfere with the free exercise of religion whenever churches have less political clout than some other interest group. The Free Exercise Clause exists precisely because religious minorities often do not have the clout to protect their liberty politically.

As always, abortion is different. Hostile regulation has made abortions difficult to obtain in much of the country.²¹⁷ But apart from the occasional emergency cases like the one now in litigation against the bishops,²¹⁸ the statutory conscience protections for medical providers are not a significant part of that problem.²¹⁹ Most abortions are provided in clinics, and the pro-choice movement wants it that way, because moving abortions to hospitals would be vastly more expensive.²²⁰ Doctors and nurses with conscientious objections to abortion do not work in abortion clinics.

Abortion is also a special case with respect to any possibility of a live-and-let-live solution. The pro-life side sees it as killing innocent human beings,²²¹ and you cannot expect them to be live-and-let-live about that. The moral imperatives on the pro-choice side are equally strong; no one will submit to an unwanted other invading her body and her life.²²² But access to abortions for women who need them does not require compelling pro-life doctors and nurses to perform them.

For the rest of these issues, live-and-let-live solutions would be quite possible if either side would accept them. I obviously cannot tell believers what their religion requires of them. But I can sketch out steps that might help divert us from the path to a French view of religious liberty.

The first step for the religious side would be to focus on protecting its own liberty, and to give up on regulating other people's liberty. That is, the religious side would have to stop seeking legal restrictions on other people's sex lives and other people's relationships. In practical terms, that would mean giving up the fight against same-sex marriage *now*, instead of waiting until the fight becomes hopeless.

Every other form of noncommercial consensual sexual behavior has been deregulated, either de facto or de jure, and religious conservatives have mostly acquiesced. There is no significant lobbying to enforce or

217. See, e.g., Laura Tillman & John Schwartz, *Texas Clinics Stop Abortions After Court Ruling*, N.Y. TIMES (Nov. 1, 2013), <http://www.nytimes.com/2013/11/02/us/texas-abortion-clinics-say-courts-ruling-is-forcing-them-to-stop-the-procedures.html> (describing recent Texas legislation that is forcing many abortion clinics to close).

218. *Means v. U.S. Conference of Catholic Bishops*, more fully described *supra* notes 37–42.

219. Conscience protections are occasionally a problem in emergencies, but this problem affects few cases. Conscience protections in four states have an exception for emergencies. Wilson, *supra* note 34, app. at 310. If carefully drafted and confined to true emergencies, this is the appropriate solution to the problem.

220. See *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 431–39 (1983) (invalidating requirement that second- and third-trimester abortions be performed in hospital).

221. Laycock, *supra* note 31, at 418.

222. *Id.*

re-enact fornication laws, adultery laws, sodomy laws, or laws against gay and lesbian sex. No-fault divorce is much lamented, but there is no significant effort to roll it back.²²³ Even the effort to restrict pornography has largely collapsed, with its energies redirected to child pornography.²²⁴ On all these issues, churches teach what people morally *should* do, but they no longer seek to control by law what people *may* do.

With respect to contraception, the bishops would be well advised to accept a compromise that gives them reasonable insulation from the provision of contraceptives, even if that insulation is not air tight. They might have separated out the issues of abortion and emergency contraception, where people who disagree can at least understand their argument, and seek more stringent protections there. It may be too late for that now, but probably it is not. If they let the perfect be the enemy of the good, they may get the perfect—but they run a great risk of winding up with the very bad.

On the other side, the advocates of sexual liberty and marriage equality would have to agree to the same basic proposition: that it is far more important to protect their own liberty than to restrict the liberty of religious conservatives. They would agree not to demand that religious individuals or institutions assist or facilitate practices they consider immoral, except—and this is an important exception—where the goods or services requested are not available from another reasonably convenient provider. Of course same-sex couples should have a right to marry, and to as big a wedding as they choose, and women should have a right to contraception, but apart from local monopolies, they have no real need to obtain those things from religious believers with deep moral objections. A corollary of this solution is that Catholic hospitals should not seek, and should not be permitted, to acquire local monopolies over women's health care. Those who seek to live by their own values should avoid acquiring monopolies that block that same possibility for others.

Of course this proposed solution is just a thought experiment. There is no apparent prospect of either side agreeing to live and let live. Each side respects the liberties of the other *only* when it lacks the votes to impose its own views. Each side is intolerant of the other; each side wants a total win.

This mutual insistence on total wins is very bad for religious liberty. The religious side persists in trying to regulate other people's sex lives and relationships so long as it thinks it has any chance of success. That motivates much of the other side's hostility to religious liberty. And those on the other side persist in demanding not only the right to live

223. See, e.g., Frederick Cusick, *Divorce Bill Is Backed By Bishops*, PHILA. INQUIRER (June 6, 1987), http://articles.philly.com/1987-06-06/news/26181717_1_unilateral-divorce-frivolous-divorces-divorce-law (“The church still opposes divorce, and we opposed the no-fault law, but we recognize that the law is here.”).

224. See, e.g., Tim Wu, *American Lawbreaking*, SLATE (Oct. 15, 2007, 7:29 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/how_laws_die.html (reviewing decline and effective end of prosecutions for adult pornography).

their own lives by their own values, but also the right to force religious objectors to assist them in doing so. And to that end, they are making arguments calculated to destroy religious liberty.

Maybe this too will pass. Maybe the courts will do their job and protect the liberty of both sides. Maybe the sexual issues will eventually be resolved, passions will cool, and a strong core of religious liberty will survive for application to other, less emotional issues. Or maybe not.

Religious liberty is at risk. And that would be a loss for America, whichever side of the culture wars you are on.