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WHY “LIVE-AND-LET-LIVE” IS NOT A VIABLE SOLUTION TO THE DIFFICULT PROBLEMS OF RELIGIOUS ACCOMMODATION IN THE AGE OF SEXUAL CIVIL RIGHTS

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For the better part of a decade, a number of well-intentioned scholars of religious liberty have insisted that, as Douglas Laycock put it, “conflicts . . . between religious conservatives and the gay rights movement[] have live-and-let-live solutions in the tradition of American liberty.”¹ More recently, some have tried to concretize this general claim in

* Arnold I. Shure Professor of Law, University of Chicago Law School. This essay was developed as part of my contribution to the 2014 Harvard Law School/Williams Institute/ACLU/USC Conference on Religious Accommodation in the Age of Civil Rights; to a 2009 conference convened by UCLA’s Williams Institute and Princeton’s James Madison Program; to a 2014 conference on Religion, Rights and Institutions at Princeton; and, to a lesser extent, as part of my 2013 participation in Stanford Law School’s Marriage Equality conference and the Politics of Religious Freedom Capstone Workshop at Northwestern University, in a 2015 University of Chicago Law School workshop, and at the 2015 Petrie-Flom Conference on Law, Religion, and Health in America. I am grateful to the organizers and participants in those events, many of whom are individually thanked below. Particular thanks are due for comments on drafts by Rick Garnett, Todd Henderson, Doug NeJaime, Alan Patten, Winni Sullivan and Laura Weinrib; the help of Will Baude, David Dunn Bauer, Tom Berg, Jennifer Drobac, Chai Feldblum, Ben Finkelstein, Mary Anne Franks, Fred Gedicks, Robby George, Nicole Goldstein, Josh Guttoff, Dick Helmholz, Nan Hunter, Cathleen Kaveny, Andy Koppelman, Doug Laycock, Saul Levmore, Rachel Leiser Levy, Chris Lund, Chip Lupu, Linda McClain, Sara McDougall, Louise Melling, Michael Moreland, Cliff Rosky, Kim Lane Scheppele, Robin Fretwell Wilson, and Kenji Yoshino; for the research assistance of Rachel Bukberg, Lyo Louis-Jacques, Marlow Svatek, Tara Tavernia, and Kira Wilpone-Jordan; and for the support of the Kanter fund.

1. Douglas Laycock, *McElroy Lecture: Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 429–30 (2011) [hereinafter Laycock, *Free Exercise*]. In addition to the Spring 2014 Harvard Law School/UCLA Williams Institute/USC conference on Religious Accommodation in the Age of Civil Rights to which this Essay is my contribution, at least two other

more-or-less specific proposals for accommodation of religious objectors in the context of state laws recognizing same-sex marriage.² In no small part because of continuing religious conscientious objection to abortion and newly vigorous religious objection to contraception,³ including but not

conferences of which I am aware tackled the question of what such solutions might look like. The first, organized in 2005 under the auspices of the Becket Fund for Religious Liberty, produced an influential conference volume, *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008). The second, co-sponsored by Princeton's James Madison Program in American Ideals and Institutions and the Williams Institute in late 2009, was convened to discuss the question presented in a 2008 draft proposal, Andrew Koppelman & George W. Dent, *Must Gay Rights Conflict With Religious Liberty?* (unpublished manuscript) (on file with author), a question the authors sought to persuade participants could be answered in the negative. Each of these conferences dampened to some extent their chief proponents' optimism. In his Afterword to the 2008 volume, Laycock conceded that the essays in it "ma[d]e clear, to an extent that I had not appreciated, that some of this conflict is unavoidable." Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra*, at 189, 192. And the critique of Koppelman and Dent's 2008 proposal was sufficient to cause them to abandon it. But Koppelman arrived at the 2014 Harvard conference with a retooled proposal, see Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015), while Laycock continues to "believe that we can protect liberty and equality for both sides of this conflict" despite acknowledging increasing frustration at what he sees as the apparent lack of willingness on the part of either side to cooperate in a solution. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 840 [hereinafter Laycock, *Culture Wars*]. That much of my critique in this Essay centers on Laycock and, to a lesser extent, on Koppelman, derives in part from their prominence and influence, but also from the fortuity that I was charged at the 2009 Princeton conference with responding to Koppelman's proposal and was on a panel at the 2014 Harvard conference with Laycock, who there presented an abbreviated version of what shortly thereafter was published as *Culture Wars*.

2. See, e.g., Letter from Robin Fretwell Wilson, Thomas C. Berg, Richard W. Garnett, Carl H. Esbeck & Edward McGlynn Gaffney, Jr., *Religious Liberty Implications of Legalizing Same-Sex Marriage*, House Bill No. 75 [Delaware] (May 1, 2013) [hereinafter Letter from Wilson et al.], available at <http://mirrorofjustice.blogspot.com/files/delaware-letter.pdf> (presenting and urging passage of draft accommodation legislation); Letter from Douglas Laycock et al., *SB 0010 Religious Liberty Implications of Same-Sex Marriage [Illinois]* (Mar. 12, 2013) [hereinafter Letter from Laycock et al.], available at <http://mirrorofjustice.blogspot.com/files/illinois-republicans-2013.pdf> (urging adoption of proposals for religious exemption made in a letter earlier submitted by "a group of scholars led by Professor Robin Fretwell Wilson"). Mirror of Justice collects all the letters the group, including Wilson and Berg, has sent proposing state legislation to a variety of states and all the letters a group headed by Laycock has sent to the same states urging passage of the draft legislation, see Thomas Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR JUST. (Aug. 2, 2009), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>.

3. I describe these objections to the provision of contraception as newly vigorous because, until the contraception mandate in the Patient Protection and Affordable Care Act ("ACA") publicized and crystallized the issue for them, many religious employers who now demand exemptions had quietly been providing to their employees exactly the contraception to which these employers now object, either through alleged inadvertence or under state law and prior court order. Thus, Hobby Lobby claimed to be unaware it had been making available to its employees prescriptions for Plan B and ella, two drugs to which it claimed a religious objection before the United States Supreme Court, until this was drawn to its attention in a review of its insurance policies incident to a Becket Fund inquiry into the possibility of the company's participating in a challenge to the ACA. See, e.g., Katie Sanders, *Did*

limited to demands for exemptions from the contraception mandate of the Patient Protection and Affordable Care Act (“ACA”)⁴ such as those recently considered by the Supreme Court in cases like *Burwell v. Hobby Lobby*,⁵ some of these scholars have now expanded the reach of their proposals for religious accommodation from the narrow issue of same-sex marriage⁶ to more broad “disagreements over sexual morality.”⁷ In this broader context, they renew their claims, first, that to arrive at a live-and-

Hobby Lobby Once Provide the Birth Control Coverage it Sued the Obama Administration Over?, POLITIFACT (July 1, 2014, 1:02 PM), <http://www.politifact.com/punditfact/statements/2014/jul/01/sally-kohn/did-hobby-lobby-once-provide-birth-control-coverage/>. And Catholic Charities had litigated and lost cases under New York and California law, which denied it a religious exemption from an employer mandate to provide prescription contraception as a matter of sex equality. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73 (Cal. 2004) (denying “church-affiliated employer’s constitutional challenges to [California’s] Women’s Contraception Equity Act . . . , under which certain health and disability insurance contracts must cover prescription contraceptives”); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006) (denying constitutional challenge to legislative decision to allow certain church-affiliated employers and not others an exemption from those provisions of New York’s Women’s Health and Wellness Act “requiring that an employer health insurance contract which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices” (internal quotation marks omitted)). Some Catholic institutions in New York continued to provide employees prescription contraceptives even though the N.Y. Court of Appeals had observed that the law offered another option, “surely not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.” *Id.* at 468. See, e.g., Joseph Berger & Thomas Kaplan, *N.Y. Law on Contraceptives Already in Place, and Catholic Institutions Comply*, N.Y. TIMES (Feb. 10, 2012), <http://www.nytimes.com/2012/02/11/nyregion/catholic-institutions-reluctantly-comply-with-ny-contraceptives-law.html> (noting that while “[s]ome New York Catholic institutions—including the Archdiocese of New York . . . chose to self-insure rather than pay for contraception after New York State adopted a requirement in 2002 that any insurance policy with a prescription drug benefit provide coverage for birth control. . . . [other] Catholic institutions now offer health insurance plans that include contraceptive drugs among the services they cover for employees and students, though with caveats.” such as the exclusion of “drugs that induce abortion, sterilization or services relating to the restoration of fertility”).

4. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

5. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that plaintiff closely held for-profit corporations were entitled to an exemption under the Religious Freedom Restoration Act of 1993 (“RFRA”) from the contraception mandate of the ACA). See also, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 1022 (2014) (mem.) (enjoining government from requiring a religious non-profit requesting an ACA exemption to “use the form prescribed by the Government and . . . send copies to third-party administrators”); *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (similar).

6. Others, such as Wilson, began by proposing religious accommodation in the context of reproductive rights before turning attention to same-sex marriage. See generally, Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 1, at 77 (arguing that legislative accommodation models developed for religious objection to abortion should be adapted by religious objectors to same-sex marriage).

7. Laycock, *Culture Wars*, *supra* note 1, at 846. Laycock cites specifically disagreements about “abortion, contraception, emergency contraception, sterilization, gay rights, and same-sex marriage.” *Id.*

let-live solution⁸ is not only desirable but possible “if we have the will to do so,”⁹ and second, that to do otherwise than accommodate would be untrue to this nation’s tradition of religious liberty.¹⁰

This Essay will sharply contest both of these claims with respect not so much to their normative desirability as to their descriptive accuracy. Even when the claim for a win-win, live-and-let-live solution is limited to same-sex marriage or to gay rights more generally, ever since I first seriously engaged with this claim more than five years ago,¹¹ I have been profoundly skeptical as a descriptive matter that such a solution could be concretely constructed, let alone successfully implemented. In part, this is because, as I shall discuss below, proponents of accommodations they claimed were designed to live-and-let-live initially tended to

isolate issues of gay rights without ever even
acknowledging that they are far from the only issues as

8. In a field as rife with acronyms as is religious accommodation law, among them the unpronounceable RFRA (Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq.) and RLUIPA (Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq.), I thought seriously about referring throughout this Essay to proposals to live-and-let-live as “LALL” but decided that repeated verbal clarity as to what was being claimed trumped saving a few syllables.

9. Laycock, *Culture Wars*, *supra* note 1, at 840.

10. Just as space limitations foreclose me from setting out below any of my own arguments in the detail they would require to be fully convincing, they also force me to lump together under the umbrella of “live-and-let-live” a number of scholars, each of whom has his or her own nuanced view of what religious accommodations are possible and desirable and why. To the extent I am aware of differences that matter to my arguments herein, and to the extent space permits, I do my best to note them.

11. I have, of course, been thinking and writing about religious reaction to same-sex marriage claims for far longer than five years. *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1792–97 (2005) (analyzing the effect of the conflation of religious and civil marriage in the United States on the stakes for Protestants in the same-sex marriage debates). In 2009, however, I was asked to prepare a comment for the Princeton symposium, *see supra* note 1, on Koppelman and Dent’s draft, “Must Gay Rights Conflict With Religious Liberty?” and, like most of the others asked to comment, was so critical of the proposal that my announced aim of having Koppelman withdraw it succeeded. At about that same time, I was also publishing the first fruits of my feminist fundamentalism project, discussed further *infra*, *see* Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93 (Susan H. Williams ed., 2009); Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 107 (Linda C. McClain & Joanna L. Grossman eds., 2009) [hereinafter *Feminist Fundamentalism and Constitutional Citizenship*]; Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, each of which gave some attention to the relationship between claims for religious exemption and claims for sex equality and sexual and reproductive rights. I was also, while drafting what became Mary Anne Case, *A Lot To Ask: Review Essay of Martha Nussbaum’s From Disgust to Humanity: Sexual Orientation and Constitutional Law*, 19 COLUM. J. GENDER & L. 89 (2010) [hereinafter *Case, A Lot to Ask*], engaging with my colleague Martha Nussbaum’s somewhat different approach to the competing claims of religion and gay rights.

to which there is strong religiously motivated objection, let alone discussing the extent to which [their] proposed framework should be or the reasons why it should not be applied to any of these other issues.¹²

One of the fears I announced in 2009¹³ has indeed come to pass—the insistent claim for religious accommodation has in the intervening years extended far beyond gay rights to other sexual rights, other reproductive and family recognition rights, and women’s rights.¹⁴ I have a strong personal normative stake in fighting this expansion,¹⁵ committed as I am to what I have called feminist fundamentalism,¹⁶ defined in my case as an uncompromising commitment to the equality of the sexes and to the abolition of fixed sex roles. But my principal focus in this Essay will remain on the practical and legal, not the ideological problems with this expansion.¹⁷ In particular, as I shall discuss, this expansion of claims for accommodation does not solve, but rather compounds, the problem of selective attention to only a subset of the laws and regulations to which religiously motivated actors might have a conscientious objection.

12. Memorandum from Mary Anne Case to Andrew Koppelman and George Dent at 1 (Dec. 4, 2009) [hereinafter Memo to Koppelman and Dent] (on file with author) (circulated in preparation for the Princeton Conference described *supra* note 1 to discuss Koppelman and Dent’s proposal for religious accommodation in the context of gay rights).

13. *See id.* at 10 (“Whether under the Equal Pay Act or Title VII, numerous employers have litigated and lost their claim that their religious views justified them in refusing to hire or promote women or to pay them equally with men. Would your proposal not only upset this settled law but expand the range of employers who could use religious exemptions to discriminate against women?” (footnote omitted)).

14. *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

15. I readily concede my strong personal stake in these issues, but find it equally worthy of note that neither Koppelman nor Laycock has a similarly strong stake—they are neither devout nor gay nor female. It is a lot easier to endorse compromise when you have no dog of your own in the fight, nor ox to be gored. By contrast, even with respect to same-sex marriage, I am not merely an ally of lesbians and gay men; as a feminist fundamentalist, I have a direct personal stake in “genderless marriage.”

16. For my definition of feminist fundamentalism and an exploration of its many analogies to religious commitments, *see generally* Mary Anne Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER SOC. POL’Y & L. 549, 550 (2011) (defining feminist fundamentalism as “an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles”).

17. I also do not take on the normative question of live-and-let-live as a guiding principle. While, at an abstract level, this principle is endorsed even by Pope Francis, who listed it as number one in his “top 10 secrets to happiness,” my point is that the devil remains in the details. *See* Carol Glatz, *In Latest Interview, Pope Francis Reveals Top 10 Secrets to Happiness*, CATHOLIC NEWS SERV. (July 29, 2014), <http://www.catholicnews.com/data/stories/cns/1403144.htm> (“‘Live and let live.’ Everyone should be guided by this principle, he said, which has a similar expression in Rome with the saying, ‘Move forward and let others do the same.’”).

As Laycock acknowledges, “[m]ost religious liberty issues actually have nothing to do with sex, or abortion, or nonbelievers.”¹⁸ His point in acknowledging this fact is to highlight what he sees as a serious risk that the insistent demands by conservative religiously motivated actors for accommodation in the culture wars may “erod[e] support for religious liberty” among Americans more generally in the future.¹⁹ As I shall explain, among my central concerns are two different ones: first, there are serious problems under both the Establishment Clause and the Equal Protection Clause if only a certain subset of religious claims for exemption—those propounded largely by conservative Christians in conflict with laws guaranteeing liberty and equality in matters of sex, gender, and sexuality—are favorably received; and second, there would be even more serious problems with administrability, of the sort Justice Antonin Scalia warned of in his opinion for the Court in *Employment Division v. Smith*,²⁰ if an even broader set of religious accommodation

18. Laycock, *Culture Wars*, *supra* note 1, at 877.

19. *Id.* As he did in response to my remarks at the 2014 Harvard conference, *see supra* note 1, Laycock often vehemently asserts that those who oppose accommodations targeted to favor the religiously motivated opponents of sexual rights favor abolishing religious liberty. *See, e.g.* Harvard Law School, *Religious Accommodation Conference: Complexifying Accommodation in Anti-Discrimination Law* (Apr. 30, 2014), <https://www.youtube.com/watch?v=tfaOp0lZinU> (59:20–1:00:45). This is a profoundly misguided accusation. Few, if any, sane persons are categorically in favor of either religious or sexual liberty. Speaking for myself, whether I support liberty under law for either religious or sexual practices depends profoundly on the nature of the practice—I oppose rape and suttee; I support adults who wish to engage in consensual sex and those who, for religious reasons, decline remarriage after the death of a spouse. It should also be clear that the deeply religious are now and have always been on *both* sides of the sexual culture wars. The Women's Division of the Board of Global Ministries of the United Methodist Church was among the plaintiffs in *Harris v. McRae*, 448 U.S. 297 (1980), seeking to enjoin enforcement of the Hyde Amendment and have the government pay for the medically necessary abortions of poor women. And numerous churches not only support same-sex marriage, but have gone into court to vindicate their right to have the same-sex marriages recognized by their faith tradition also recognized by secular law. *See, e.g.*, Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriage*, in *AFTER SECULAR LAW* 302, 311 (Winnifred Fallers Sullivan et al. eds., 2011) (describing arguments made in pro-same-sex marriage amicus briefs by, *inter alia*, the United Church of Christ). It is worth considering, however, how few persons and organizations *not* motivated by religious conviction are now fighting the sexual culture wars on the side of opposition to LGBT, women's, and reproductive rights. Moreover, it would be a mistake to characterize the legal aspect of the sexual culture wars as lining up religious history and tradition unequivocally on one side and newfangled egalitarian women's and gay liberationists on the other. After all, it was the Puritans who gave us civil marriage. They prohibited ministers from even attending, let alone performing the ceremony. For further discussion, *see Case, Marriage Licenses, supra* note 11, at 1796–97.

20. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888–89 (1990) (“The rule respondents favor [mandating an exemption from generally applicable criminal laws, such as those prohibiting use of controlled substances, for those with a religious reason for engaging in the prohibited conduct] would open the prospect of . . . required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health

claims is given traction.

This Essay thus rests on the normative view that *Smith* was correctly decided and that the Religious Freedom Restoration Act (“RFRA”)²¹ was a mistake, even if for no other reason, then because of the descriptive impracticability of an approach to religious exemptions from generally applicable law contrary to that of the U.S. Supreme Court in *Smith*, as the Court explained when it first squarely confronted the issue in *Reynolds v. United States*:²²

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . [To permit] a man [to] excuse his practices to the contrary because of his religious belief . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.²³

Not only in (in)famous cases like *Reynolds* and *Smith*, but also in somewhat less notorious ones like *Estate of Thornton v. Caldor*²⁴ and *United States v. Lee*,²⁵ and in regrettably nearly forgotten ones like *Hamilton v. Regents of the University of California*,²⁶ which this Essay will review, the Supreme Court repeatedly set forth convincing arguments why the sorts of religious exemptions from generally applicable laws typically

and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.” (citations omitted)

21. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq (2012).

22. *Reynolds v. United States*, 98 U.S. 145 (1878).

23. *Id.* at 166–67.

24. *Estate of Thornton v. Caldor*, 472 U.S. 703, 709–11 (1985) (striking down as a violation of the Establishment Clause a state statute giving employees an “absolute and unqualified right not to work on their Sabbath,” because, among other defects, “the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath”). *See also* *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) (“Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.”), *aff’d in relevant part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968).

25. *United States v. Lee*, 455 U.S. 252 (1982) (rejecting free exercise claim by Amish employer seeking exemption from Social Security tax laws).

26. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (upholding a requirement that students at a state school take a course in military science and tactics, despite students’ religious objections).

proposed by proponents of a live-and-let-live solution to the sexual culture wars are neither workable nor “in the tradition of American liberty.”²⁷

It is noteworthy that not even with respect to the concrete proposals for religious exemption they have actually endorsed, let alone with respect to the host of comparable claims for accommodation foreseeably waiting in the wings, have the proponents of live-and-let-live set forth in any detail how the proposed religious accommodations they urge legislatures and courts to adopt would actually work in practice.²⁸

This lack of detail is not the only respect in which, as a descriptive

27. Laycock, *Free Exercise*, *supra* note 1, at 429–30.

28. If there is a fully detailed proposal out there I have missed, I would welcome access to it. As things stand, I have personally asked for details from many of the more prominent advocates of live-and-let-live solutions and received to date either no response or a frank acknowledgement that many of the details remain to be worked out. Nothing I have seen walks through the elements of an exemption case, including who has the burden of production and of proof of what, especially if the law provides an accommodation only if there is an alternative provider reasonably available. These sorts of details should matter to the conscientious objector, since, for example, small businesses would want to know what sort of risk they are assuming when they decline service. For example, is it incumbent on the provider to inquire up front, before taking an order, whether the service might be objectionable? If no upfront inquiry is made, but the provider learns before performance that, for example, the flowers are for a same-sex wedding, is breach then permissible? Does the provider have the burden of specifying the reasonable alternative? If so, when—at the time of refusal or only in court? If the provider does bear the burden of identifying an alternative at the time of refusal of service, this in itself may pose a problem for the provider’s conscience. If the provider does not have the obligation to offer an alternative, what is the burden on the customer? How many other providers does s/he have to locate and try to do business with and how fungible does their service have to be in terms of either price or quality or accessibility? Is having to run through a dozen refusals before finding a willing provider enough to meet the exemptions requirement of no readily available substitute? If the customer has no car does it matter that there’s no other provider in walking distance? If the customer has no Internet access, does it matter that there’s no other provider in the local phone book? If the service is a custom service, will an off-the-rack alternative do? How much does it matter if the service is a luxury good like a wedding cake or a necessity like emergency medical care? (There certainly are cases in the abortion context where women refused by one hospital suffered grave health consequences on their way to another one; similarly, with respect to the morning-after pill, every hour that goes by after intercourse and before access to it decreases its effectiveness.)

In the case of a general exemption which by its terms depends on there being an adequate substitute provider, one cannot simply assume there will be a thick market for services. One first has to define, in each very particular case, what constitutes a sufficiently thick market and then establish that such a market does exist in that particular case. Were I a lawyer advising a would-be conscientious objector who was only prepared to refuse service if s/he would be legally protected in doing so, I honestly would not know what exactly the conditions on the ground would have to be to ensure a safe harbor. I am not claiming these sorts of practical questions are unanswerable; I am merely suggesting that the fact that every proponent of exemptions I have talked to acknowledges s/he has not developed an answer for them should give one serious pause before adopting an exemption proposal.

For some additional sense of the potential problems with working out the details, see generally Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions For Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012).

matter, it can fairly be said that no viable live-and-let-live solution is currently on the table. Although the claim of the proponents of living-and-letting-live is that “we can and should protect the liberty of both sides in the culture wars,”²⁹ every proposal I have seen provides far more protection to the religious objectors than to the proponents of sexual liberty and equality, among which latter group I unequivocally count myself. In particular, while it is clearly correct to say, as Laycock does, that, “[i]f we are to preserve liberty for both sides in the culture wars, then we have to preserve some space where each side can live its own values and where its rules control,”³⁰ no proposal I yet have seen offers my side in the culture wars anything like the “space . . . [to] live its own values and where its rules control”³¹ such proposals insist our conservative religious opponents are entitled to. As a strong supporter of rights to sexual liberty and equality, I instead observe that many religiously motivated opponents of such rights seem to want to have their cake, eat it too, and shove it down my throat; and that most, if not all, religious liberty scholars who claim their goal is a live-and-let-live solution seem to support my religious opponents in their ongoing efforts to realize these desires at my expense.

Here are some of the descriptive claims I am seeking to encapsulate with this admittedly tendentiously formulated imagery:

First, as proponents of living-and-letting-live themselves have to admit,³² few conservative participants in the sexual culture wars showed any interest in settling for accommodation so long as there was any chance of complete victory for their side.³³ Most religious objectors to, for example, same-sex marriage, began with (and many still retain) a

29. Laycock, *Culture Wars*, *supra* note 1, at 839.

30. *Id.* at 876. *See also* Koppelman, *supra* note 1, at 626 (“Both gay people and religious conservatives seek space in society wherein they can live out their beliefs, values, and identities.”).

31. Laycock, *Culture Wars*, *supra* note 1, at 876.

32. *See, e.g.*, Laycock, *Culture Wars*, *supra* note 1, at 879 (“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.”).

33. One exception may be Douglas Kmiec, who, as early as 2009, in the immediate aftermath of the passage of Proposition 8, co-wrote an editorial urging California to abolish state-sponsored marriage entirely and substitute a civil union status open to couples of any sex. *See* Douglas W. Kmiec & Shelley Ross Sager, *Equality in Substance and in Name*, S.F. GATE, Mar. 2, 2009, at A13, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/03/02/EDFU166H0A.DTL>. Even this offer of a live-and-let-live compromise, however, sought to create an advantageous monopoly for religion by taking the use of the word “marriage” away from the public sphere (and hence from the proponents of sexual liberty and equality, who include not only same-sex marriage proponents but also opponents of the notion that it was a wife’s duty “graciously to submit to her husband’s . . . leadership”). *Cf.* Case, *supra* note 19, at 318 (discussing privatization and formalization by the Southern Baptists of marital doctrines of female subordination they could previously use state law to enforce, but which had been taken constitutionally out of bounds for the state by the late twentieth century).

perfectionist impulse to enshrine as secular law and enforce against their opponents their own religious views;³⁴ they only began to retreat from perfectionism into claims of uncompromising conscientious objection³⁵ once they saw themselves on the losing end of the culture war.³⁶

Second, religious objectors in the U.S. have been increasingly successful in recent years at obtaining unprecedentedly robust constitutional and statutory protection for enclaves in which they can “live [their] own values and [have their] rules control”³⁷ despite the contrary commands of secular laws specifically designed to protect the liberty and equality of their opponents in the culture wars. Among these enclaves, as discussed below, are not only (A) churches themselves and institutions sponsored by or affiliated with them, but (B) for-profit corporations and perhaps also (C) units of local government.

(A) The first Supreme Court case ever to hold that religious institutions were constitutionally entitled to an exemption from civil rights laws was *Hosanna-Tabor Evangelical Lutheran Church and School v.*

34. Consider, for example, the Defense of Marriage Act (“DOMA”), the many state mini-DOMAs both statutory and constitutional; the failed federal marriage amendment; the Proposition 8 campaign, which evidence at trial in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 955 (N.D. Cal. 2010), indicated was largely financed, staffed and passed by religious opponents of same-sex marriage; and the unusually direct demands by religious leaders that their faithful vote against same-sex relationship recognition, such as the DVD with a message stressing the need for a constitutional amendment to ban same-sex marriage in Minnesota mailed by Minneapolis archbishop John Nienstedt to the homes of more than 400,000 Minnesota Catholics just before the November elections in 2010. See, e.g. Case, *supra* note 19, at 309. Many of the state mini-DOMAs prohibited not only marriage, but also any other form of state relationship recognition for same-sex couples, whose sexual activities many conservative religious groups wanted to see remain criminalized in the half-century leading up to *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down state law criminalizing homosexual sex).

35. I am invoking here a distinction between perfectionism (defined as a willingness to impose on others) and fundamentalism (defined as an unwillingness to compromise oneself) I developed in the course of my project on feminist fundamentalism. For a discussion of this distinction, see, for instance, Case, *supra* note 16, at 550–53; for an application of it to religious opponents of same-sex and of egalitarian marriage, see, for instance Case, *supra* note 19, at 317. As I explained in *Feminist Fundamentalism*, *supra* note 16, with respect to any given commitment or set of commitments, one can be either a perfectionist, a fundamentalist, both or neither. One can decide one will not compromise without wishing to impose or that one wishes to impose and, in the interests of that imposition, compromise. I am well aware of the danger of using a term with many meanings like “fundamentalist” or even “perfectionist” in this context, but I must insist that I am carefully using these terms only as I have defined them herein.

36. I would say to them what I said to clients in my years as a corporate litigator: you can’t expect to get, after a trial in which you lost, the same settlement you might have been offered before trial. Now that the Supreme Court will squarely face the constitutional question of same-sex marriage in *Obergefell v. Hodges*, the religious right has lost much of its chance to propose compromise on recognition of same-sex marriage.

37. Laycock, *Culture Wars*, *supra* note 1, at 876.

Equal Employment Opportunity Commission,³⁸ a case Laycock briefed and argued in the Supreme Court on behalf of the prevailing religious entity, part of the Lutheran Church—Missouri Synod, a strong conservative voice in the sexual culture wars.³⁹ Although the law at issue in the case was the Americans with Disabilities Act (“ADA”),⁴⁰ the sexual culture wars nevertheless played a central role at oral argument, with Justices from both the left and the right of the Court and even the advocate for the Equal Employment Opportunity Commission (“EEOC”), taking it as a central and legitimate premise in support of the “ministerial exception” to the employment discrimination laws that “[t]he government’s general interest in eradicating discrimination in the workplace is simply not sufficient to justify changing the way that the Catholic Church chooses its priests [or other authority figures], based on gender roles that are rooted in religious doctrine.”⁴¹ More broadly, Chief Justice Roberts’s opinion for a unanimous court in *Hosanna-Tabor* has the potential to become what I have called

38. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 699 (2012) (holding that “the Establishment and Free Exercise Clauses of the First Amendment bar” employment discrimination lawsuits “when the employer is a religious group and the employee is one of the group’s ministers,” with the result being what had come to be known as the “ministerial exception”).

39. See *Family, Marriage and Human Sexuality FAQs*, LUTHERAN CHURCH—MISSOURI SYNOD, <http://www.lcms.org/faqs/lcmsviews#family> (last visited Feb. 5, 2015). The Lutheran Church—Missouri Synod has filed a number of amicus briefs in sexual culture wars cases before the Court. See, e.g., Brief of *Amici Curiae* Nat’l Ass’n of Evangelicals et al. in Support of Petitioners at 4, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2012 WL 3864341, at *4 (opposing the Ninth Circuit’s decision to strike down Proposition 8—“a state constitutional amendment providing that “[o]nly marriage between a man and a woman is valid or recognized in California””); Brief for Focus on the Family et al. as *Amici Curiae* in Support of Respondents and Cross-Petitioners, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006412 at *6 (supporting Pennsylvania’s spousal notice provision for certain abortions).

40. Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (2012).

41. Transcript of Oral Argument at 32, *Hosanna-Tabor*, 132 S. Ct. at 694 (No. 10-553), 2011 WL 4593953, at *32. The language quoted in text was the response of Justice Department attorney Leondra R. Kruger to Justice Breyer’s statement: “So the fact if they want to choose to the priest, you could go to the Catholic Church and say they have to be women. I mean, you couldn’t say that. That’s obvious. So how are you distinguishing this?” See *id.* at 31–32. See also, e.g., *id.* at 43–44 (colloquy between Justice Alito and Ms. Kruger on the need for deference to the Catholic Church were it to claim that a female professor should not be tenured in canon law). It is worthy of note that, in a disproportionate number of the prominent lower court cases holding that there was a ministerial exemption to the laws guaranteeing equal employment opportunity, the plaintiff whose claim was excluded by the ministerial exception was a woman or a gay man suing a religious organization that openly objected to full equality on grounds of sex or sexual orientation. Thus, Justice Alito’s example of a “nun . . . [who] wanted a tenured position teaching canon law at Catholic University and . . . claimed that she was denied tenure . . . because of her gender” was, as he said, “a real case,” *id.* at 43. See *Equal Emp’t Opportunity Comm’n v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (holding that the ministerial exception applied to a tenured professorship in canon law and dismissing the Title VII claim of Sister Elizabeth McDonough).

“Citizens of the City of God United,”⁴² eviscerating the holding in *Smith* and ceding to religious institutions a constitutionally protected sphere of liberty they have never before enjoyed under U.S. law.⁴³

(B) While the Justices in *Hosanna-Tabor* took discrimination in employment on grounds of sex as the paradigm case of what churches must be protected in doing if they so choose, the majority in *Hobby Lobby* and its progeny took government protection of women’s reproductive freedom and equality, another centerpiece of the sexual culture wars, as the paradigm case of what might be trumped by religious objectors claiming a right to accommodation under RFRA.⁴⁴

(C) There remains comparatively little discussion today among supporters of a live-and-let-live solution to the sexual culture wars of having the spaces in which the respective sides can “live [their] own values and [have their] rules control” truly public spaces,⁴⁵ that is to say, units of government from the level of the county or city all the way up to the state into which people would be encouraged to self-sort.⁴⁶ Nevertheless, the Supreme Court’s recent decisions have not only declared church space to

42. The reference is, of course, to *Citizens United v. FEC*, 558 U.S. 310 (2010), the controversial case in which the Supreme Court overruled previously upheld limitations on the speech and political expenditures of corporations. For further discussion, see Mary Anne Case, *Citizens of the City of God United? The Confused Premises and Radical Implications of Hosanna Tabor* (unpublished manuscript) (on file with the author). In my view, the Roberts opinion in *Hosanna-Tabor* is another major example of the corporatist turn in Supreme Court jurisprudence, and of Chief Justice Roberts’s tendency to plant a seed in an opinion fully cognizant, as his colleagues may not be, of the great oak of legal change he expects to spring from it. In addition to explicating this view, my manuscript analyzes the problems from the perspectives both of religious and of secular law with Roberts’s unprecedented innovative alternate history of the Religion Clauses and the alternative vision it represents.

43. For evidence that religious institutions were under much tighter control under secular law in earlier times in the U.S., see generally Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307 (2014) (providing examples of the limits state law placed on religious organizations in the eighteenth and nineteenth centuries).

44. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (“[O]ur decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.”)

45. See Laycock, *Culture Wars*, *supra* note 1, at 876.

46. There are, of course, religiously-motivated opponents of same-sex marriage still arguing for a federalism-based solution in which states could choose whether or not to recognize same-sex marriage. But the October 2014 actions by the Supreme Court denying certiorari, dissolving stays, and thereby clearing the way for same-sex marriages in at least an additional sixteen states as a matter of federal constitutional right on top of the nineteen states in which same-sex marriage had already been made available under state law, makes this an almost certainly lost cause. See Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html>.

be newly inviolable and private corporate space to be newly protected for the religious, but they have also vastly increased the ability of the religious to exert control over public governmental space⁴⁷ and resources.⁴⁸

While conservative religious individuals and institutions insist on the freedom to exclude and discriminate against their opponents in the sexual culture wars (including, but not limited to, openly lesbian, gay, bisexual, and transgender persons, and heterosexuals to whose sexual, marital, or reproductive choices they claim to have religious objections), they, and the proponents of live-and-let-live solutions who support them in their

47. See *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (sustaining, against an Establishment Clause challenge, a municipality’s practice of opening town board meetings with prayer, frequently including sectarian Christian prayer). Although Laycock represented the losing side in this case pro bono, his objection was limited to the sectarian character of the prayer. See Transcript of Oral Argument at 31, *Id.* (No. 12-696), 2013 WL 5939896, at *31 (response by Laycock in oral argument stating that “[w]e’re saying you cannot have sectarian prayer”). Shortly after the Supreme Court decision in its favor, and contrary to representations relied on by the Court, the town of Greece announced it would be limiting eligibility to deliver prayers at town meetings to “individuals who represent ‘assemblies with an established presence in the town of Greece that regularly meet for the primary purpose of sharing a religious perspective’” and “‘leader[s]’ or ‘appointed representative[s]’ of religious assemblies from outside the town of Greece,” at least one of whose members resides in Greece and “specifically asks in writing.” Dahlia Lithwick, *Checking In on the Town of Greece*, SLATE (Aug. 27 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/the_town_of_greece_s_new_prayer_policy_atheists_need_not_apply.html.

48. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592–93 (2008) (denying taxpayer standing under the Establishment Clause to challenge use by George W. Bush’s White House Office of Faith-Based and Community Initiatives of funds appropriated for the general discretionary use of the Executive Branch for conferences promoting “the efficacy of faith-based programs in delivering social services”); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (denying taxpayer standing under the Establishment Clause to challenge tax credits offered by a state to those who contributed to scholarship funds for sectarian schools that discriminated in admission on the basis of religion). Laycock filed an amicus brief in *Arizona Christian* on behalf of religious organizations, including the United States Conference of Catholic Bishops, opposing the challenge to tax credits for contributions to sectarian schools. Brief *Amici Curiae* of United States Conference of Catholic Bishops et al. in Support of Petitioners, *Ariz. Christian*, 131 S. Ct. at 1436 (Nos. 09-987, 09-991), 2010 WL 3535061. Indeed, if Laycock and other prominent proponents of live-and-let-live solutions to the sexual culture wars had had their way, religious institutions and individuals would have, as a matter of constitutional right, an even greater claim on governmental resources. For example, although the Supreme Court ultimately ruled in *Locke v. Davey*, 540 U.S. 712 (2004), that the state of Washington was permitted to exclude from an otherwise open college scholarship program otherwise qualified applicants who were pursuing a degree in devotional theology, Thomas C. Berg and Laycock had filed an amicus brief in the case on behalf of several consortia of religiously-affiliated colleges and several active conservative religious participants in the sexual culture wars (including the Family Research Council, Focus on the Family, and the Christian Legal Society) arguing that Washington’s exclusion of devotional theology alone from its list of majors qualified for scholarship support was “flagrant and facial discrimination against religious activity and religious viewpoints violat[ive of] both the Free Exercise Clause and the Free Speech Clause.” Brief *Amici Curiae* of the Council for Christian Colls. & Univs. et al. in Support of Respondent at 1, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22176102, at *1.

demands to exclude, simultaneously insist that individuals and institutions committed to sexual equality and liberty should not be permitted to exclude or discriminate against, and indeed should be forced to accommodate and subsidize religious applicants who do not share and wish to be exempted from facilitating an institution's commitments to, for example, LGBT equality, the equality of the sexes or reproductive rights. As the examples discussed below will demonstrate, the proposal to live-and-let-live is radically asymmetrical, with religious opponents of sexual rights demanding both legal protection for their own space and the legal right to invade the space of their opponents.

Moreover, this insistence on nondiscrimination against and nonexclusion of religious opponents of sexual rights extends to an insistence that their access to government recognition and government funding be unimpeded, even when the reason government gives for declining recognition and funding is the religious organization's or individual's discriminatory policies with respect to sex, gender, or sexuality. For example, the draft accommodation proposal that Wilson, Berg, and others, with the support of Laycock and others, have sent to states considering legislative exemptions for those who claim a religious objection to providing goods and services for or recognition to a same-sex marriage, would not only protect the objecting service providers from suit by individuals to whom they refuse service or recognition, but would also legally guarantee that the refusal will not

result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of [the] State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.⁴⁹

This not only seeks to make discrimination as costless as possible for the religious, but would also deny to those states and their subdivisions committed to guaranteeing liberty and equality with respect to sex, gender, and sexuality the ability to vindicate these commitments, even in their

49. See, e.g. Letter from Wilson et al, *supra* note 2, at 5. A similar provision designed to allow continued unfettered access to government subsidies and contracts on the part of religious employers who chose to discriminate against LGBT employees was inserted at the last minute into the version of the Employment Non-Discrimination Act ("ENDA") referred by the Senate to the House in 2013. See S. 815, 113th Cong. § 6(b) (2013). See also Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1375-77 (2014) (discussing legislative proposals to broaden ENDA's already-broad religious exemptions).

choice of contracting partners and subsidy recipients. What then remains of the promise of letting not only religious conservatives, but also those with liberal egalitarian commitments in matters of sexuality and gender “live their own values”? What remains of a space in which they, too, can have their “rules control”?

Most of the proponents of live-and-let-live seem to treat any refusal to recognize, include, or subsidize religious opponents of sexual liberty and equality as unjustifiable discrimination against these religious opponents, rather than as merely an attempt by proponents of sexual equality and liberty to maintain a space in which to live their own values. In the name of living-and-letting-live, for example, many express indignation rather than support for the result in *Christian Legal Society v. Martinez*,⁵⁰ even though all Hastings College of the Law sought to withhold in that case from a campus group that excluded some students on the basis of religion and sexual orientation was official recognition and subsidies, not categorically the ability to meet or advertise on campus.⁵¹ In the name of living-and-letting-live, many similarly complain of and would seek to reverse, through legislatively mandated accommodations and exemptions, the results in cases such as those involving Ocean Grove Camp Meeting in New Jersey,⁵² Catholic Charities in Illinois,⁵³ and the Boy Scouts in Connecticut,⁵⁴ although, in each of these cases, the harm suffered by the religious organization in question was simply its inability to benefit from certain

50. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (upholding policy of a state-sponsored law school of only giving official recognition to student groups that agreed to admit “all comers” and not exclude students based on forbidden grounds including religion and sexual orientation).

51. *Id.* at 671–73. For an example of the hostile reaction of live-and-let-live proponents to the result in *Christian Legal Society*, see, for example Laycock, *Free Exercise*, *supra* note 1, at 428–29 (arguing that the Court should have held there was a “free speech problem” with the rules applied in *Christian Legal Society*); Laycock, *Culture Wars*, *supra* note 1, at 868–69 (mocking the notion that “a student religious group’s statement of faith is religious discrimination”).

52. See Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007, at B2, available at <http://www.nytimes.com/2007/09/18/nyregion/18grove.html> (reporting that a beachfront pavilion associated with the Methodist Church, which had been granted a tax exemption on condition that it be open to the public, violated this condition and forfeited the exemption when it declined to allow a same-sex couple to hold a commitment ceremony on the premises).

53. See Summary Judgment Order at 2, 3, *Catholic Charities of the Diocese of Springfield v. State*, No. 2011-MR-254 (Sangamon Cnty., Ill. Cir. Ct. Aug 18, 2011), 2011 WL 3655016 (“The fact that [Catholic Charities] has contracted with the State to provide care and adoption services for over forty years does not vest [Catholic Charities] with a protected property interest. . . . No citizen has a recognized legal right to a contract with the government.”)

54. See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 84 (2d Cir. 2003) (rejecting Boy Scouts’ First Amendment challenge to its exclusion from Connecticut’s employee charitable contributions campaign on account of its discriminatory policies against gays).

government subsidies or government contracts so long as it refused to abide by the nondiscrimination conditions placed on the contracts and subsidies by the government entities paying for them, which were themselves committed to a policy of nondiscrimination.

Finally, the accommodations and exemptions now being sought by religious conservatives in the sexual culture wars are vastly more expansive than the paradigm cases of religious accommodation in U.S. law to which proponents of granting such exemptions under the banner of live-and-let-live seek to assimilate them, notably the exemption of pacifist Quakers from the draft and of Catholic hospitals from performing nontherapeutic abortions.

Perhaps the best way of illustrating just how far from “honor[ing] America’s . . . long and rich tradition of religious freedom”⁵⁵ granting these expansive new claims for exemption would be is to examine these new claims in light of Justice Benjamin Cardozo’s concurring opinion in a case that should be far more prominent than it is in discussions of religious accommodation. In *Hamilton v. Regents of the University of California*,⁵⁶ the Supreme Court unanimously declined to grant a religious exemption from a required course in military science and tactics to pacifist Methodist students at a state-sponsored school. Justice Cardozo began his analysis of why the case involves no “obstruction by the state to ‘the free exercise’ of religion as the phrase was understood by the founders of the nation, and by the generations that have followed” by observing:

55. Letter from Wilson et al., *supra* note 2, at 1. In this and their other letters urging legislative exemptions for religious opponents of same-sex marriage, Wilson et al. claim that it is part of the American tradition of religious liberty that accommodations should “serve the purpose of insulating conscientious objectors from penalties at the hands of the government.” They then treat as the sort of penalty from which conscientious objectors ought to be insulated any refusal by government to exempt the objector from generally applicable conditions on government subsidies or contracts. *Id.* at 13. Do they therefore see the result and the reasoning in *Hamilton v. Regents of the University of California*, *see infra* notes 56–60 and accompanying text, as contrary to the American tradition of religious liberty?

56. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934); *id.* at 265–68 (Cardozo, J., concurring). The Cardozo concurrence in *Hamilton* is not the only opinion by a highly-regarded Justice concerning religious freedom that I wish had not fallen so far out of the canon. *See also* Douglas v. City of Jeannette, 319 U.S. 157, 180, 181–82 (1943) (Jackson, J. concurring in part and dissenting in part) (“Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hardheaded fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures. . . . This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty.”).

The petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required in any absolute or preemptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher education maintained with the state’s moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare. This may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical. More must be shown to set the ordinance at naught.⁵⁷

Justice Cardozo went on to note that, while “[f]rom the beginnings of our history, Quakers and other conscientious objectors have been exempted . . . from military service,” this was not only a mere “act of grace,” but also “the exemption, when granted, ha[d] been coupled with a condition, at least in many instances, that they supply the army with a substitute or with the money necessary to hire one.”⁵⁸

These specific points are illuminating enough when translated to the present situation. As Justice Cardozo makes clear, the history of free exercise in America demonstrates that a religious accommodation, even when granted, need not be costless to those who receive it, and that conditioning state subsidies on compliance with state policies does not violate the religious liberty of those who choose to avail themselves of the subsidy. He goes on to speak more generally:

Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. . . .

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a

57. *Hamilton*, 293 U.S. at 265–66 (Cardozo, J. concurring). Justice Cardozo’s concurrence was joined by Justices Brandeis and Stone. *Id.* at 268.

58. *Id.* at 266. See generally Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014) (describing the consensus in the World War I era among policymakers and advocates that those excused from the military draft because of conscientious objection to fighting in war would nevertheless be obligated to perform alternative noncombatant or civil service).

principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.⁵⁹

As I see it, every point Cardozo makes about the claims of the plaintiffs in *Hamilton* is true *a fortiori* of the new proposals for religious exemption now championed in the context of the sexual culture wars. Having set forth in general terms my concerns about the viability a live-and-let-live approach to religious accommodation in the sexual culture wars, I will now examine a few of the many serious problems in more detail. One overarching theme of the problems I shall discuss is that of an asymmetry I'm tempted to call "live-and-let-die."⁶⁰ The proponents of living-and-letting-live disregard (or in some instance actively embrace) extremely troubling asymmetries: (1) in the accommodation sought to be granted to religious opponents of sexual civil rights as compared with that offered to religious opponents of almost anything else that secular law requires or protects; (2) in the space sought to be granted to religious opponents of sexual civil rights and those they would offer to proponents of those rights; and (3) in the harms suffered by religious objectors seeking accommodation and the harms suffered by those whom they would be excused from serving, including, or treating equally.

As I have previously observed, what helped the Free Exercise and Establishment Clauses work so well together to maintain religious peace and freedom for so long was that, fortunately, as concerns free exercise, "most of the deepest disagreements between major religious groups in the United States in prior centuries happened to be about what to believe and how to worship rather than how to live in society."⁶¹ One major exception,

59. *Hamilton*, 293 U.S. at 267–68.

60. Cf. Paul McCartney & Wings, *Live and Let Die*, on LIVE AND LET DIE (United Artists Records 1973) ("You used to say live and let live / (you know you did . . .) / But if this ever-changing world in which we're living / Makes you give in and cry / Say live and let die . . . / What does it matter to ya / When you got a job to do / You gotta do it well / You gotta give the other fellow hell."). Literally to "give the other fellow hell," at least if s/he does not repent, remains the expectation of many conservative religious combatants in the "ever-changing world" of the sexual culture wars.

61. Case, *A Lot To Ask*, *supra* note 11, at 108. Similarly, the vast majority of the disputes involving the scope of the Free Exercise Clause brought before the Supreme Court in the past hundred years have, been directly or indirectly about how to worship. These include: (1) the Sunday closing laws cases, *see Braunfeld v. Brown*, 366 U.S. 599 (1961) (upholding Sunday closing laws against challenge by observant Jewish shopkeepers); *Sherbert v. Verner*, 374 U.S. 398 (1963) (mandating unemployment benefits for employee fired for refusing to work on her Sabbath when the law accommodated those for whom Sunday was the religiously mandated day of rest); (2) cases about the sacramental use of controlled substances, *see Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (rejecting Native Americans' free exercise claim for an exemption from a state law that withheld unemployment benefits from persons fired for misconduct, when the misconduct alleged was related to the sacramental use of the drug peyote); *Gonzales v. O Centro Espirita Beneficente Uniao do*

the Mormon practice of polygamy, was not in fact accommodated, but promptly and harshly quashed, as Justice Scalia noted in his *Romer v. Evans* dissent.⁶² As the outcomes in *Reynolds* and *Smith* demonstrate, accommodating religiously motivated differences in how to live has always been much more difficult and less readily attainable than accommodating differences about what to believe. The problems of accommodating religious differences about how to live in society, such as those at issue in the sexual culture wars, are compounded in present-day America, not only by the increasing diversity of religious views about how to live, but also by the increasingly interconnected way groups and individuals do in fact live. Moreover, in contradistinction to most of the exemption claims put forward in the context of sexual rights, earlier free exercise claims such as those in *Reynolds* and *Smith* involved efforts on the part of believers to engage in

Vegetal, 546 U.S. 418 (2006) (after Congress’s enactment of RFRA in response to *Smith*, see *supra* note 21 and accompanying text, granting legislative exemption from drug laws to religiously motivated users of hoasca, an hallucinogenic tea); (3) cases involving impediments to worship faced by prisoners, see *O’Lone v. Shabbaz*, 482 U.S. 342 (1987) (rejecting Muslim inmates’ free exercise challenge to state prison policies they claimed prevented them from attending religious services), Native Americans, see *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (holding that the Free Exercise Clause does not prohibit the Government from granting timber harvesting rights on land central to Native American religious practices), and Santeria, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down portion of municipal ordinance prohibiting ritual animal sacrifice as practiced by Santerians); and (4) even the RFRA case *City of Boerne v. Flores*, 521 U.S. 507 (1997) (concerning a zoning dispute about the architecture of a church). The two major cases in which a religious liberty claim clearly extending beyond worship was vindicated are *Thomas v. Review Board*, 450 U.S. 707 (1981) (extending unemployment benefits to an employee who lost his job because of a religiously motivated refusal to work on the production of armaments), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (providing an exemption from a compulsory school attendance law for Amish children), which are also seen by most scholars as outliers and by many as problematic.

To make this descriptive observation is not at all to claim that religion should be or is confined to belief and worship. Of course, many devout believers incorporate their faith into every aspect of their lives, but, let me repeat what I said previously: in my view, the *Reynolds* Court had it right that this cannot make the religious laws unto themselves. See *supra* notes 22–23 and accompanying text.

62. *Romer v. Evans*, 517 U.S. 620, 648–51 (1996) (Scalia J. dissenting) (drawing analogies between condemnation of polygamy in the nineteenth century and condemnation of homosexuality in the twentieth and observing the numerous respects in which the Supreme Court had found it to be constitutional to make criminal and otherwise legally disadvantage the religiously motivated conduct of polygamists). A more minor exception, the use of controlled mind-altering drugs in religious ritual, was held by the Supreme Court not to require a religious exemption from a general law making use of such drugs illegal. See *Smith*, 494 U.S. at 878–82, 890. As noted *supra* note 61, because it involved the sacramental use of controlled substances, *Smith* is also a dispute about how to worship, but the particular form of worship also quite directly involves a contested way of living in society, as would, to an even greater degree, claims for freedom of worship involving human sacrifice. This is a familiar issue in free speech cases—all speech is also noise; all press, at least before the computer age, is also litter. Just as government is not categorically barred from regulating noise because it takes the form of words, it is not categorically barred from regulating actions because believers invest them with religious significance. For further discussion see Case, *supra* note 42.

primary religiously mandated conduct, rather than efforts to avoid being complicit with, tainted by or implicated in the religiously condemned conduct of others.⁶³ In these and many other respects, claims for exemption made in the context of the current “national conversation on political and cultural issues related to sexuality”⁶⁴ extend well beyond what was even claimed by, let alone granted to, earlier religious conscientious objectors to secular law.⁶⁵

Proponents of live-and-let-live have also yet to come to terms with the fact that issues of sexual rights are far from the only issues about how to live in society as to which there is strong religiously motivated objection by some to the lives and actions of others.⁶⁶ They need to clarify the extent to which their proposed framework should be, or the reasons why it should not be, applied to any of these other issues. As Justice Ruth Bader Ginsburg pointed out in her *Hobby Lobby* dissent, even if one limits the field of inquiry only to the very narrow question of religiously motivated objections to aspects of the provision of health care coverage, there are “religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others),” each of which must either be accorded the same deference granted to religiously motivated objections to the contraceptive

63. A discussion of the implications and limits of this distinction is far beyond the scope of this Essay. In raising it here, I do not mean to suggest that avoiding contamination by or cooperation, however remote, with what one’s faith sees as evil cannot be equally important to believers as themselves refraining from the relevant evil acts. I am simply highlighting once again the extent to which claims for accommodation in the sexual rights context are, if not entirely unprecedented, importantly different from most earlier claims for religious accommodation.

64. Letter from Dr. Joel C. Hunter et al., Senior Pastor, Northland, A Church Distributed, to President Barack Obama I (July 1, 2014), http://www.scribd.com/doc/232327567/Religious-Exemption_Letter_to_President_Obama#scribd.

65. I do not deny that many of the claims made by proponents of sexual rights are similarly unprecedented and that questions about their generalizability remain as yet unanswered. *See, e.g.*, Case, *A Lot To Ask*, *supra* note 11, at 108 (asking, in the context of Justice Scalia’s discussion of special rights in his *Romer* dissent and Martha Nussbaum’s defense of gay rights, “If it is permissible for people to lose jobs on account of their sexual promiscuity or celibacy, let alone their vegetarianism or libertarianism, why not for their homosexual practices?”); Mary Anne Case, *Of “This” and “That” in Lawrence v Texas*, 2003 SUP. CT. REV. 75, 112–14 (comparing employment discrimination against gays and lesbians with employment discrimination against those engaged in other disfavored sexual practices).

66. As Justice Ginsburg put it in her *Hobby Lobby* dissent, “Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804 (Ginsburg, J. dissenting).

mandate or adequately distinguished.⁶⁷ Broadening the horizon, Justice Ginsburg also enumerated just a few of the many “commercial enterprises [in addition to Hobby Lobby] seeking exemptions from generally applicable laws on the basis of their religious beliefs,” citing already litigated cases in which enterprises objected to dealing with blacks, unmarried heterosexual cohabitants, “young, single wom[e]n working without [their] father’s consent,” “married wom[e]n working without [their] husband’s consent,” and any person “antagonistic to the Bible,” including “fornicators and homosexuals.”⁶⁸ She asked, “Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn’t the Court disarmed from making such a judgment . . . ?”⁶⁹

Similarly, I warned in 2009 that even if, *arguendo*, the proponents of live-and-let-live are right going forward about the small number of likely exemption claims arising from same-sex marriage and related gay rights issues (an assumption about which I will raise questions below) “[t]here is every reason to think that” a multiplicity of other analogous “religious exemptions will . . . often be sought. A glance at the docket of a single federal judge, my colleague Frank Easterbrook, gives some sense of the range of already litigated cases on such issues.”⁷⁰ Religious opposition to gay people was involved in some of Judge Easterbrook’s public employment cases; for example, the case of a cosmetology instructor who persisted in proselytizing students in her clinic,⁷¹ but he also was faced with the complaints of a Roman Catholic FBI agent who refused on religious grounds to investigate peaceful anti-war protestors,⁷² a Baptist police officer who refused on religious grounds to accept an assignment at a casino,⁷³ a Black Muslim prisoner who refused on religious grounds, while on kitchen duty, to clean pork off food trays,⁷⁴ and a Christian prisoner who objected on religious grounds to being exposed to observation

67. *Id.* at 2805

68. *Id.* at 2804–05 (citations omitted) (internal quotation marks omitted).

69. *Id.* at 2805.

70. Memo to Koppelman and Dent, *supra* note 12, at 5 (alterations in original). The ensuing discussion builds on the 2009 response to Koppelman and Dent.

71. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668–69 (7th Cir. 2006) (opinion of Wood, J.) From *Piggee*’s student evaluations it appears that not only gay students, but also other students whose “religion is inferior to hers” were likely to be told in class that “she was going to get that devil out of” them. *Id.* at 672.

72. *Ryan v. DOJ*, 950 F.2d 458 (7th Cir. 1991).

73. *Endres v. Ind. State Police*, 349 F.3d 922 (7th Cir. 2003).

74. *Chapman v. Pickett*, 801 F.2d 912 (7th Cir. 1986).

by female guards.⁷⁵

Holding that the Baptist policeman, just like the Catholic FBI Agent, was not entitled to the requested religious accommodation and could be fired, Easterbrook observed:

Many officers have religious scruples about particular activities If [plaintiff] is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does § 701(j) [mandating religious accommodation] require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets mis-weigh bacon and shellfish? Must prostitutes be left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?

. . . .

Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical.⁷⁶

Looking beyond one judge's cases, to the newspaper headlines, would multiply the potential claims for exemption a thousandfold. For example, when it first hit the headlines that Muslim cab drivers at the Minneapolis-St. Paul Airport would not serve passengers carrying duty-free liquor, "officials of the Metropolitan Airports Commission proposed color-coded lights on cab roofs to indicate whether the driver would accept a passenger carrying alcohol."⁷⁷ After more than 5,000 documented taxi refusals at the airport and countless more passengers involuntarily dropped off somewhere between the airport and their destination as soon it became clear to their driver that they were carrying alcohol, authorities dropped all talk of a religious exemption and instead upped the penalty for refusal from being sent to the end of the cab line to a thirty-day taxi license suspension for a first offense and a two-year taxi license revocation for a second offense.⁷⁸ Twin Cities Muslim cab drivers also repeatedly refused to carry passengers with dogs, including seeing-eye dogs.⁷⁹ The overwhelming majority of cabbies in the airport area are Somali Muslims and there is

75. *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995).

76. *Endres*, 349 F.3d at 925, 927.

77. Katherine Kersten, *A Two-Tiered Airport Taxi System Could Lead to 'Chapter Two'*, MINNEAPOLIS STAR TRIB. (Oct. 16, 2006), <http://www.startribune.com/local/11585696.html> (discussing new penalties in Minnesota for cab drivers who refuse to transport certain passengers).

78. *See Minnesota's Muslim Cab Drivers Face Crackdown*, REUTERS, (Apr. 17, 2007) <http://www.reuters.com/article/2007/04/17/us-muslims-taxis-idUSN1633289220070417>.

79. Also, "Muslim taxi drivers have repeatedly refused to transport Paula Hare, who is transgendered, [according to] KMSP-TV, Channel 9." Kersten, *supra* note 77.

every reason to think offering a religious exemption to such drivers would serve to increase the number who insist on one, because failure to insist on one will mark the driver in the eyes of the community as a bad Muslim.⁸⁰ (Compare, here, the argument that civil rights laws mandating that blacks be served by businesses in the South solved the collective action problem faced by business owners pressured by their white racist customers to remain segregated.) Advocates of exemptions from public accommodation laws for service providers who refuse to provide flowers or cake for same-sex wedding celebrations have yet to explain whether and why the claims of these Christian bakers and florists are more worthy of accommodation than those of Minneapolis's Muslim cab drivers, who also wish to avoid "cooperating in sin."⁸¹

Some proponents of religious exemptions in the context of the sexual culture wars have also suggested that the state should be foreclosed from requiring public employees to participate in diversity training classes⁸² or from telling students of social work that it is "simply not acceptable for social workers to view homosexual people as perverse."⁸³ This too, opens up the possibility of a host of analogous religious accommodation claims going far beyond gay rights. Would the same analysis apply to a school

80. See, e.g., Katherine Kersten, *Shariah in Minnesota?*, WALL STREET J. (Mar. 24, 2007), <http://www.wsj.com/articles/SB117470053320547681> ("Islam prohibits the consumption of alcohol but not its transportation, say Somalis who reject the taxi drivers' stance. Yet in June 2006, the Muslim American Society's . . . Minnesota chapter issued a 'fatwa' forbidding drivers here from carrying alcohol to avoid 'cooperating in sin.' Hassan Mohamud, one of the fatwa signers, praised the two top-light proposal as a national model for accommodating Islam in areas ranging from housing to the workplace. But according to Omar Jamal of the Somali Justice Advocacy Center in St. Paul, [the group] is 'trying to hijack and radicalize the Somali community for their Middle East agenda.'").

81. *Id.*

82. See George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 585 (2006–2007) (citing and discussing *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199 (8th Cir. 2001)). Note that the draft legislation proposed by Wilson et al. and endorsed by Laycock et al., would exempt any "individual" from "provid[ing] counseling or other services that directly facilitate the perpetuation of any marriage" or from being liable to any "civil cause of action or other penalties" on account of such refusal. Letter from Wilson et al., *supra* note 2, at 4; Letter from Laycock et al., *supra* note 2. As will be discussed *infra*, it remains unclear whether the effect of this legislation, if enacted, would be to prevent a public (or even a private) employer, from firing or refusing to hire a counselor who refused, out of religious objections to same-sex relationships, to counsel some of the employer's patients. Certainly the proponents of the draft legislation intend it to protect counseling students from educational disadvantage and counseling professionals from licensing difficulties. Laycock, for example, seems to endorse the settlement in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), under which, as he puts it, a "counseling student . . . expelled for refusing to counsel gays about their relationship difficulties . . . settled for a cash payment without being readmitted to the program." Laycock, *Culture Wars*, *supra* note 1, at 850.

83. Dent, *supra* note 82, at 596 (citing Maura Lerner, *St. Cloud State's Department Statement on Gays Causes Backlash*, MINNEAPOLIS STAR TRIB., June 1, 1993, at 9A).

telling students it was training in clinical psychology that it was not acceptable for them to view mentally ill people as possessed by demons, especially considering that exorcism is still practiced by many traditional religions?⁸⁴ If not, why not?

Although the first inclination of those arguing for live-and-let-live solutions to the sexual culture wars may be to say that addressing any other religious exemption questions is beyond the scope of their project, a law reform proposal that cannot be generalized to other similar issues is at best of limited usefulness, at worst dangerous and unconstitutional. Justice Ginsburg is clearly correct to warn, in her *Hobby Lobby* dissent, of the risk of “havoc”⁸⁵ and the absence of a “stopping point”⁸⁶ if exemptions are granted to all those with claims analogous to those put forth by religious opponents of sexual rights. On the other hand, granting exemptions only to religious objectors to sexual rights, and not to other similarly situated conscientious objectors on other issues could itself raise constitutional problems under the federal Establishment and Equal Protection Clauses as well as state constitutional provisions such as California’s No Preference Clause.⁸⁷ As Justice Ginsburg also warned in her *Hobby Lobby* dissent, “approving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause was designed to preclude.’”⁸⁸

It is important to look at the risk of potentially unconstitutional favoritism implicit in proposals for special religious accommodations in the sexual culture wars from two distinct angles, considering the risk of problematic discrimination in both (A) which religious groups and viewpoints are deemed worthy of special accommodation and (B) which societal groups will be singled out for diminished protection and thus for harm by the proposed accommodation. Establishment Clause problems arise when a certain group of believers (notably the conservative

84. Consider that, in 2003, the Bush Justice Department investigated a complaint of religious discrimination against a Texas Tech biology professor who declined to write letters of recommendation for any student who could not “truthfully and forthrightly affirm a scientific answer” to the question “How do you think the human species originated?” Karen Brulliard, *In Texas, a Darwinian Debate*, WASH. POST, Feb. 16, 2003, at A07.

85. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (Ginsburg, J., dissenting).

86. *Id.* at 2802.

87. Article I, Section 4 of the California Constitution guarantees the “[f]ree exercise and enjoyment of religion without discrimination or preference,” and has been interpreted “as being broader than the Establishment Clause of the First Amendment.” CAL. CONST. art. I, § 4; *Vernon v. City of L.A.*, 27 F.3d 1385, 1395 (9th Cir. 1994).

88. *Hobby Lobby*, 134 S. Ct. at 2805 (quoting *United States v. Lee*, 455 U.S., 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment)).

evangelical Protestants and Catholics who would be the principal beneficiaries of religious accommodations in the context of the sexual culture wars) is extended accommodation not granted to others with analogous claims for accommodation, especially when those denied analogous accommodations come from faiths less numerically or culturally dominant. The constitutional concerns are compounded when one considers not only that the views of certain dominant religious groups are favored for accommodation by proponents of live-and-let-live, creating establishment clause problems, but also that the brunt of the proposed exemptions will fall almost exclusively on individual members of historically disadvantaged groups, notably gay men, lesbians and other women, creating equal protection problems. The problem here is precisely that which caused the Supreme Court to strike down the Defense of Marriage Act (“DOMA”) as unconstitutional.⁸⁹

In addition to potentially opening up the floodgates to a host of new potential claims for religious exemption by a host of different kinds of service providers who seek to avoid serving a host of different clients for a host of different religious reasons, proposals to live-and-let-live, if taken seriously, risk upsetting settled law denying religious accommodation to those who claim a religious objection to associating with blacks or Jews or women on terms of equality. Though few today would seek an exemption from dealing with blacks, there is every reason to believe that had such an exemption been made available earlier, it not only would have been asserted, it might have become entrenched. As William Eskridge has documented, the interaction of traditional religions with the black civil rights movement in the United States has been dynamic—denied an accommodation for the exclusion of blacks, traditional religious groups gradually accommodated themselves to their inclusion.⁹⁰

Unfortunately, traditional religions have not yet internalized United States constitutional norms of sex equality to even a significant fraction of the same extent as they have internalized such norms on racial integration

89. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (striking down DOMA as a “[d]iscrimination[] of an unusual character,” targeting for disadvantage and stigma a group the state had specifically chosen to protect but which was condemned by the “traditional (especially Judeo-Christian) morality” legislators wished to reinforce (first alteration in original)). Similar difficulties led Judge Vaughn Walker to strike down California’s Proposition 8, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), and the Supreme Court to strike down Colorado’s Amendment 2, *Romer v. Evans*, 517 U.S. 620 (1996).

90. See William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665–85 (2011) (analyzing the dynamic relationship of American religious groups to African-American civil rights).

in the course of the last half century. Nor, unfortunately, is it likely as a matter of fact that judges and legislators would view religious exemptions from constitutional and statutory sex equality norms to be quite as far out of bounds as exemptions from norms on race,⁹¹ as the carefully phrased dicta in Justice Samuel Alito's *Hobby Lobby* majority opinion confirm.⁹² Whether or not there have been or will continue to be few cases in which "a right is asserted to discriminate against gay people precisely as such,"⁹³ there have been an abundance of cases in which on religious grounds, "a right is asserted to discriminate against [women] precisely as such." Whether under the Equal Pay Act or Title VII, numerous employers have litigated and lost their claim that their religious views justified them in refusing to hire or promote women or to pay them equally with men.⁹⁴ I am even more afraid than I was when I first squarely confronted the issue in 2009 that live-and-let-live proposals risk not only upsetting this settled law but also expanding the range of employers who could use religious exemptions to discriminate against women. This worries me profoundly

91. *But see generally* Case, *supra* note 16 (arguing that, as a matter of law, an uncompromising commitment to the equality of the sexes is incumbent on state actors in the United States, including judges and legislators, whenever they act or speak).

92. *See Hobby Lobby*, 134 S. Ct. at 2783 (majority opinion). Very carefully mentioning only race, and not, for example, sex, let alone sexual orientation, Alito insists:

The principal dissent raises the possibility that discrimination in hiring, *for example on the basis of race*, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to *race*, and prohibitions on *racial* discrimination are precisely tailored to achieve that critical goal.

Id. (emphasis added) (citation omitted).

Note how the words "for example," central to Ginsburg's challenge, drop out of Alito's reassurances, such that only race, but not other forbidden grounds for employment discrimination, are announced by the majority to be immune from interference through RFRA. This is just one of many ways in which Alito's opinion in *Hobby Lobby* is slippery, and calls for careful textual scrutiny to see exactly how little he has actually done to answer the dissent's objections, or indeed, to resolve the issues presented by the case. While further discussion is beyond the scope of this Essay, I am of the view that the text of Justice Alito's *Hobby Lobby* opinion shows that he has not yet understood or grown into his role as a Supreme Court Justice. The opinion is that of a clever lawyer seeking not to get trapped, not that of a judge whose job, beyond resolving the case before him, is to provide guidance to lower court judges, rather than loopholes to advocates, as they deal with the next generation of related cases.

93. Koppelman & Dent, *supra* note 1 at 5..

94. *See, e.g.,* Equal Emp't Opportunity Comm'n v. Fremont Christian Sch., 781 F.2d 1362, 1365 (9th Cir. 1986) (rejecting religious exemption from Title VII claimed by a christian school that wished to use "doctrinal beliefs held by the Church . . . that, while the sexes are equal in dignity before God, they are differentiated in role. . . [and] that in any marriage, the husband is the head of the household," to give lesser pay and benefits to female teachers). As previously noted, and as discussed in greater detail in Case, *supra* note 42, the constitutionalization of the ministerial exemption in *Hosanna-Tabor* already vastly expands the protected scope for religiously justified discrimination against women, notwithstanding the protections civil rights laws have sought to extend to them. Legislatively granted accommodations and exemptions will compound the problem.

both as a feminist and as a constitutional lawyer.

Nor am I reassured by the insistence of proponents of live-and-let-live that while religious liberty may be in great peril, women’s rights are secure, that there is of course no danger of retrogression on aspects of our current law crucial to women’s legal and social equality.⁹⁵ I am also a comparativist and a student of history.⁹⁶ I look at the women of Afghanistan, in modern dress and in the labor force in the mid-twentieth century, in burkas and confined to the home as a matter of law by that century’s end; and similarly at the women of Iran, Iraq, and Israel,⁹⁷ to name just a few of the other countries in which increasing religious demands for sex segregation, for the exclusion of women from the public sphere, even for outright female subordination, have gained rather than lost traction in law as the result of religious demands in the course of my lifetime,⁹⁸ and I am anything but reassured. I also note that, as members of the *Hobby Lobby* majority have very recently acknowledged, demands for religious accommodation are infinitely expandable: in many religions, as a matter of religious principle, a believer strives asymptotically to approach perfect observance, demanding ever more of him or herself, and correspondingly of the state by way of accommodation or exemption from laws that stand in the way of more perfect observance.⁹⁹ This is yet another

95. Of course, not all the danger comes from claims made in the name of religion. Constitutional originalism, as articulated by Justice Scalia, for example, also poses risks, as I discuss in Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431 (2014).

96. Indeed, the job talk that got me my first job in legal academia analyzed exactly such an example of retrogression in women’s rights—the fact that French women, who had been voting for the Estates General since the time of Philip the Fair in the Middle Ages, and who voted in 1789 on terms nearly identical to those of men, lost the franchise entirely in the French Revolution and did not regain it until 1946. See generally Mary Anne Case, “La Révolution n’a rien fait pour les pauvres femmes”: The Rhetoric and Reality of Political Rights for Women in the French Revolution (unpublished manuscript) (on file with the author) (discussing the retrogression in women’s political rights after 1789).

97. See, e.g., ISRAEL RELIGIOUS ACTION CTR., EXCLUDED, FOR GOD’S SAKE: GENDER SEGREGATION IN PUBLIC SPACE IN ISRAEL (2010), available at <http://www.irac.org/userfiles/Excluded,%20For%20God%27s%20Sake%20-%20Report%20on%20Gender%20Segregation%20in%20the%20Public%20Sphere%20in%20Israel%2081%29.pdf> (describing increasing demands by haredim for segregation of the sexes in Israeli public life).

98. Retrogression has also happened here in the United States. Again, recall that even the Catholic Church itself, in California, was providing contraception and same-sex partner benefits to its own employees for decades before the ACA, although it now refuses to do so and the Court seems to be backing it up.

99. During the oral argument of *Holt v. Hobbs*, in which Laycock represented a Muslim prisoner who successfully sought the accommodation of growing a half-inch beard despite prison rules requiring that he shave, Laycock was berated in turn by Justice Scalia and Chief Justice John Roberts. Roberts

sense in which there is, as Justice Ginsburg says, no “stopping point.” In her *Hobby Lobby* dissent, Justice Ginsburg asked about the majority’s proposed less restrictive alternative of having the government pay directly for contraception, “where is the stopping point to the ‘let the government pay’ alternative?”¹⁰⁰ There is similarly no stopping point with analogous claims and no stopping point down the slippery slope to demands to be exempt from ever more remote connection with the religiously impermissible act.¹⁰¹ Consider the ever expanding reach of persons who seek accommodation or exemption due to their conscientious objection to participating in abortions—the range of individuals raising such claims has expanded from physicians actually performing abortions, to ambulance drivers and IV nurses, to pharmacists objecting to dispensing not only the morning after pill, but also condoms.¹⁰²

accused Laycock of

“really just making your case too easy. I mean, one of the difficult issues in a case like this is where to draw the line. And you just say, well, we want to draw the line at half inch because that lets us win. And the next day someone's going to be here with one inch. And maybe it'll be you. And then, you know, two inches. It seems to me you can't avoid the legal difficulty just by saying, all we want is half an inch.

...
 [W]e have to decide this case pursuant to a generally applicable legal principle, and that legal principle is one, it seems to me, that demands some sort of a limit. And if you're unwilling to articulate a limit to the principle itself, it becomes a little bit difficult to apply it, say, well, we don't know what the limit is because you're only asking a half inch.

Transcript of Oral Argument at 6–7, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 5398229, at *6–7.

Then, Justice Scalia (who, earlier in the argument had insisted that “religious beliefs aren't reasonable. I mean, religious beliefs are categorical. You know, it's God tells you. It's not a matter of being reasonable. God be reasonable? He's supposed to have a full beard.”) suggested that Laycock’s reasonable client’s case be dismissed as improvidently granted and the Court wait for a prisoner who claimed the right to a full beard because the Court didn’t “want to do these cases half inch by half inch.” *Id.* at 5, 7, 2014 WL at *5, *7.

100. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting). She continued: “Suppose an employer's sincerely held religious belief is offended by . . . paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money . . . to which the employer has a religion-based objection? . . . [T]he Court cannot easily answer that question . . .” *Id.* (citations omitted).

101. As I shall be discussing in a forthcoming project, *Kol Nidre/All Vows*, the problems are multiplied yet again when individuals are able fully and freely to specify the precise boundaries of the religious obligations they choose to undertake (as did the Greens of *Hobby Lobby* and as do those whose claim for religious exemption is based on a vow) and to have their obligations under secular law modified accordingly.

102. *Cf.* OFFICIAL OPINION FROM THE OFFICE OF RICHARD C. TURNER, ATTORNEY GEN. OF IOWA 9066–67 (Mar. 1, 1976) (answering the question whether language in a proposed law “covering participation or refusal to participate in abortion procedures [is] so broad as to cover refusal of the hospital pharmacists to make up the saline solution used in abortions; . . . the nurse who refuses to attend to the physical comfort and care of the patient in the ward after she has had an abortion[;] . . . [or] personnel [who] refuse to serve food to the room of a patient who is in a hospital room for ‘aftercare’

This ever expanding circle of conscientious objectors to the provision of various aspects of women’s reproductive health care has had among its powerful legal weapons the Church Amendment, which provides:

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.¹⁰³

One way to probe the extent to which proponents of live-and-let-live are serious about the symmetry of their assertion that “[i]f we are to preserve liberty for both sides in the culture wars, then we have to preserve some space where *each side* can live its own values and where its rules control,”¹⁰⁴ is to consider what support they would offer to someone who sought to mobilize the Church Amendment as a conscientious objector *against* the values of traditional conservative religion in the sexual culture wars. Note that the Church Amendment on its face protects persons motivated not only by “religious beliefs” but also by “moral convictions.” I myself have a profound moral conviction that no child, but especially not a girl child, should be born into a family in which women are systematically subordinated to men and forced into traditional sex-roles.¹⁰⁵ As noted above, I have previously called this moral conviction feminist fundamentalism, defined as an uncompromising commitment to the equality of the sexes and the abolition of fixed sex roles.¹⁰⁶ If I were an obstetrician-gynecologist, would I be fully accommodated in a refusal to provide services that would facilitate the reproduction of a Quiverful family or an FLDS family or a woman who came to my office in a burka with a husband who did all the talking for her? Would the supporters of live-and-let-live be as eager to defend me as they are to defend religiously motivated conscientious objectors to the provision of contraceptives?

I could ask similar questions with respect to any of the proposals for

following an abortion” as follows: “In construing language of this sort, a rational, reasonable and sensible approach has to be taken. If it were otherwise, one could eventually get to the point where the man who mines the iron ore that goes to make the steel, which is used by a factory to make instruments used in abortions could refuse to work on conscientious grounds. *Reductio ad absurdum.*”).

103. 42 U.S.C. § 300a-7(d) (2012).

104. Laycock, *Culture Wars*, supra note 1, at 839 (emphasis added).

105. For further discussion, see generally *Feminist Fundamentalism and Constitutional Citizenship*, supra note 11 (describing an uncompromising commitment to sex equality and the abolition of fixed sex roles).

106. I have set forth some of the ways in which I am prepared, if necessary, to be a martyr to this moral conviction in *Feminist Fundamentalism and Constitutional Citizenship*, supra note 11.

accommodation and exemption proponents of live-and-let-live urge be passed in connection with state recognition of same-sex marriages. First, let me observe that the legislation proposed by Wilson et al. and endorsed by Laycock et al. speaks very generally, extending exemptions to individuals and institutions whose “sincerely held religious beliefs” would be “violate[d]” by their “provid[ing] services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of *any* marriage” or by “treat[ing] as valid *any* marriage” or by “provid[ing] counseling or other services that directly facilitate the perpetuation of *any* marriage.”¹⁰⁷ This would on its face extend exemptions to those (and there are many) with a sincere religious objection to facilitating or recognizing interfaith marriages, the remarriage of the divorced,¹⁰⁸ even interracial marriages.¹⁰⁹ When one adds in the objections those with a faith in egalitarian marriage may have to marriages in which wives are subordinate to their husbands, very few couples could remain secure that their marriage will be recognized as necessary by all those from whom they may require services in the course of their married lives.

Far from promoting the social peace proponents of “live-and-let-live” solutions to the sexual culture wars claim to offer, such a broad license to disrespect the validity of such a broad array of potentially disfavored marriages seems to encourage insecurity on the part of those in need of services and hostility on the part of providers. It moves us farther along the road to what I call the new feudalism,¹¹⁰ rather than promoting the liberty and equality of all.

107. Letter from Wilson et al., *supra* note 2, at 3–4 (emphasis added).

108. Officially, the Roman Catholic faith also has a sincere religious objection to the marriage of those physiologically incapable of vaginal intercourse, including those rendered impotent through, for example quadriplegia, *see* 1983 CODE c.1084, § 1, *available at* http://www.vatican.va/archive/ENG1104/_P3Y.HTM. (“Antecedent and perpetual impotence to have intercourse, whether on the part of the man or the woman, whether absolute or relative, nullifies marriage by its very nature.”).

109. *See e.g.*, Melinda Deslatte, *Resignation of Justice Who Refused to Marry Interracial Couple 'Long 'Overdue,' Jindal Says*, *Associated Press* (Nov. 04, 2009), http://www.nola.com/crime/index.ssf/2009/11/resignation_of_tangipahoa_just.html (describing resignation of elected justice of the peace who had refused to marry interracial couples out of concern that their children might suffer lack of acceptance).

110. *See* Mary Anne Case, *The New Feudalism*, Keynote Address at the Tulane Law School Forum on Law and Inequality (Nov. 7, 2014) (discussing the extent to which our rights risk becoming more and more, rather than less and less, a function of our hierarchical attachments, whether to state, church, employer, or family).