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Walls or Bridges: Law's Role in Conflicts over Religion and Equal Treatment

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> *"[D]o you see religion as a club or do you see religion as a path? Do you see it as a wall that separates you or do you see it as a bridge that connects you to God and other people?*
> *— Keith Ellison*[1]

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I give thanks to Dean D. Gordon Smith for the invitation to come here to give this lecture, to Judge Thomas Griffith—my pen-pal over years, for helping to make this possible. It is a particular honor to salute to Bruce Hafen whose scholarship has played a prominent role in my teaching and writing—even when

*300th Anniversary University Professor, Harvard University. Thanks to Gene Chang for crucial assistance and to Joe Singer, Mira Singer, Nell Minow, Newton Minow, David Apatoff, Richard Parker, Andrew Koppelman, Avi Soifer, and Isaac Weiner for invaluable suggestions.

1. Keith Ellison is the Attorney General of Minnesota and former Congressman from Minnesota, who was raised as a Catholic and became a Muslim.

we have not agreed. That example of constructive disagreement guides my remarks here.

Americans are deeply divided. I wish it were not the case. The belief that we are divided is perhaps one of the few things that Americans currently have in common.[2] Half of Americans report they prefer this country to be composed primarily of people with roots in Western Europe with another half disagreeing with that view.[3] Some politicians amplify white grievances while a majority of African-American parents perceive persistent racism and police violence as "big problems."[4] Rather than bringing us together, the pandemic has increased divisions—over masks, vaccines, and whom to trust. Eighty-one percent of Americans believe we are more divided now than we were before Covid-19.[5] Many fear that their ways of life, their beliefs, or their very existence is at stake. American Jews perceive heightened anti-Semitism and risks of violence.[6] American Muslims face religious discrimination and

2. *See* Martha Minow, *Can Americans Forgive One Another?*, PROJECT SYNDICATE (Dec. 21, 2020), https://www.project-syndicate.org/commentary/what-a-politically-divided-america-should-prioritize-by-martha-minow-2020-12.

3. *Competing Visions of America: An Evolving Identity or a Culture Under Attack? Findings from the 2021 American Values Survey*, PPRI (Nov. 1, 2021), https://www.prri.org/research/competing-visions-of-america-an-evolving-identity-or-a-culture-under-attack/. Over half of polled African-Americans perceive structural racism as a bigger problem than racism of individuals compared with eighteen percent of whites, twenty-five percent of Hispanics, and twenty-three percent of Asian-Americans. Katherine Schaeffer & Khadijah Edwards, *Black Americans Differ from Other U.S. Adults over Whether Individual or Structural Racism is a Bigger Problem*, PEW RSCH. CTR. (Nov. 15, 2022), https://www.pewresearch.org/fact-tank/2022/11/15/black-americans-differ-from-other-u-s-adults-over-whether-individual-or-structural-racism-is-a-bigger-problem/.

4. Daniel Kreiss, Alice Marwick & Francesca Bolla Tripodi, *The Anti-Critical Race Theory Movement Will Profoundly Affect Public Education*, SCI. AM. (Nov. 10, 2021), https://www.scientificamerican.com/article/the-anti-critical-race-theory-movement-will-profoundly-affect-public-education/; Kiana Cox & Khadijah Edwards, *Black Americans Have a Clear Vision for Reducing Racism but Little Hope It Will Happen*, PEW RSCH. CTR. (Aug. 30, 2022), https://www.pewresearch.org/race-ethnicity/2022/08/30/black-americans-have-a-clear-vision-for-reducing-racism-but-little-hope-it-will-happen/.

5. Richard Wike, *Across Advanced Economics, Most Say the Pandemic Has Increased Social Divisions*, F. NETWORK (Aug. 12, 2022), https://www.oecd-forum.org/posts/across-advanced-economies-most-say-the-pandemic-has-increased-social-divisions.

6. Isaac Arnsdorf & Michelle Bornstein, *Overt U.S. Antisemitism Returns with Trump, Kayne West: "Something Is Different"*, WASH. POST (Oct. 27, 2022, 8:13 AM), https://www.washingtonpost.com/religion/2022/10/27/antisemitism-kanye-trump-adidas-jews/.

increased rates of suicide attempts.[7] Law enforcement officials disagree over what should count as a hate crime and how to assess whether the number of such incidents is increasing.[8]

The place of religion in public life, including exemptions from legal rules sought by religious individuals and institutions, has become a lightning rod for contemporary American conflicts. There has always been a tension between religious freedom and the demands of public order, just as there is enduring difficulty in preserving pluralism where individuals and groups have diverging views founded in religious and conscientious beliefs. Respect for individuals' consciences and for the free exercise of religion is pivotal within the American constitutional tradition—yet unbounded deference and resulting exemptions granted even to sincerely-held religious claims could destroy vital public policies and laws.[9] And the core American commitment to equal treatment of individuals and combatting discrimination and exclusions based on individuals' immutable characteristics also is paramount in American law and ethos.

These tensions are manifest in concrete situations. What can and what should happen when an employee posts a gay-affirming poster and an employer responds by posting Bible verses, or when

7. Farah Pandith, *Farah Pandith on the Success and Sorrows of American Muslims*, ECONOMIST (Sept. 10, 2021), https://www.economist.com/by-invitation/2021/09/10/farah-pandith-on-the-success-and-sorrow-of-american-muslims ("American Muslims suffer. Reported hate incidents increased after 9/11 and remain high. Recent research in *JAMA Psychiatry* outlines how their mental health has deteriorated over the years, with high rates of suicide attempts. They feel under surveillance at work, mosques and in daily life. Dozens of charities exist to help Muslims get support for mental health, discrimination and hate, and knowledge of their legal rights. These new efforts came about because of the growing need to support American Muslims. The emotional and psychological experience of living as a Muslim in America is difficult. Living with the feeling that you don't belong to the country that you call home and that you love is painful.").

8. NPR, *Researchers Say the FBI's Statistics on Hate Crimes Across the Country Are Flawed*, HOUS. PUB. MEDIA (Jan. 2, 2023, 11:11 AM), https://www.houstonpublicmedia.org/articles/news/criminal-justice/2023/01/02/440144/researchers-say-the-fbis-statistics-on-hate-crimes-across-the-country-are-flawed/.

9. Allegedly sincere beliefs may also be feigned or covers for abusive or false positions, jeopardizing the interests of others. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1292 (2022) (Thomas, J., dissenting) (arguing that religious claims by death-row inmate seeking physical touch from praying clergy neglects third-party harms and shows risks of litigation abuse). Sometimes, the secular legal authorities need to make a judgment, and they can do so when presented with discrete factual questions. *See* Kitzmiller v. Dover Area School District, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (rejecting teaching of "intelligent design" in public school science classes as unfounded in science and advancing particular religious views).

a consumer is turned away from a retailer who cites religious convictions, or when an employer asserts religious objections to covering health care benefits for services contrary to the employer's sincerely held beliefs?[10] What should happen when commitments to religious liberty and to equal treatment conflict?[11]

Sharp disagreements now arise even over how different sides of issues are framed or called. Is it, for example, constitutional free exercise of religion or forbidden discrimination? Equal treatment or discrimination against religious social services? Coerced speech or public accommodation? These disagreements span constitutional, statutory, and administrative laws in national, state, and local settings; they permeate private as well as public spaces—from schools and hospitals to the internet.

Polarizing framings of the disputes and politicized judicial appointments can upend decades of judicial precedents and prompt even more social division. Flash points include treatments of gender, sexual orientation, or gender identity.[12] A recent poll shows white Evangelical Christians reporting greater fears than any other group about what they perceive as threats to American culture.[13]

10. Peterson v. Hewlett-Packard, 358 F.3d 599 (9th Cir. 2004) (ruling against the employer). See *infra* Part III.C.2 for discussions of *303 Creative LLC* and the San Francisco ordinance governing contracting partners.

11. Thoughtful efforts to navigate these conflicting commitments include: Andrew Koppelman, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT (2020); Chai Feldblum, *Moral Conflicts and Conflicts of Liberty*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (2008); Andrew Koppelman, *Response to the Symposium on Gay Rights vs. Religious Liberty*, BALKINIZATION (July 25, 2020), https://balkin.blogspot.com/2020/07/response-to-symposium-on-gay-rights-vs.html; Nomi Stolzenberg, *Can We All Get Along? A Tribute and a Question*, BALKINIZATION (Aug. 4, 2022) https://balkin.blogspot.com/2022/08/can-we-all-get-along-tribute-and.html.

12. For some of my prior work on these issues, see Martha Minow, *Not in the Room Where It Happened: Adversariness, Politicization, and Little Sisters of the Poor*, 2020 SUP. CT. REV. 35, (2020), https://www.journals.uchicago.edu/doi/abs/10.1086/714431 [hereinafter Minow, *Not in the Room*]; Martha Minow, *Religious Exemptions, Stating Culture: Forward to Religious Accommodation in the Age of Civil Rights*, 88 S. CAL. L. REV. 453 (2015); Martha Minow, *Is Pluralism an Ideal or a Compromise: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287 (2008), updated and reprinted as *Principles or Compromises: Accommodating Gender Equality and Religious Freedom in Multicultural Societies in* GENDER, RELIGION & FAMILY LAW: THEORIZING CONFLICTS BETWEEN WOMEN'S RIGHTS AND RELIGIOUS LAWS 3 (Lisa Fishbayne & Sylvia Neil eds., 2013) [hereinafter Minow, *Is Pluralism an Ideal or a Compromise*]; Martha Minow, *Should Religious Groups Ever Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007) [hereinafter Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*].

13. *Understanding the Causes and Consequences of White Evangelical Fear*, NPR (Nov. 19, 2021, 10:00 AM), https://www.wesa.fm/2021-11-19/understanding-the-causes-and-consequences-of-white-evangelical-fear.

Because opponents often find ample legal resources, these clashes occupy courts in cases involving the scope of public accommodation laws, civil rights in employment and education, status of families, and health care policies. Disagreements over framing appear in competing news outlets, as one may describe the constitutional freedom "to think freely and speak freely" while another calls it a "new faith-based right to discriminate."[14]

Such issues arise in other countries, of course.[15] But the distinctively American reliance on litigation exacerbates conflicts by treating them as winner-take-all disputes.[16] Adversarial adjudication frames complex tensions around religion and equality obscures alternatives. All-or-nothing framing puts accommodation out of sight. When coupled with politicized divides, the escalating use of courts to resolve differences over issues of religious freedom and equal treatment intensifies social division and can render actual solutions remote. With recent changes in membership, the U.S. Supreme Court has been dismantling earlier doctrines separating religion and state and changing treatment of free exercise claims of minority groups.[17]

These developments signal a green light for litigation, with traffic powered by competing interest groups. A majority of Americans want to separate the government from religion, but many seek integration of "church and state." These contrasting views often line up with differences in political party affiliation and in views about race and gender.[18]

14. *Compare* Kristen K. Waggoner, *Kristen Waggoner on 303 Creative v. Elenis, Americans Defending Freedom*, ALL. DEF. FREEDOM (Nov. 17, 2022), https://adflegal.org/article/kristen-waggoner-303-creative-v-elenis, *with* Louise Melling, *The New Faith-Based Discrimination*, BOS. REV. (Dec. 14, 2022), https://www.bostonreview.net/articles/the-new-faith-based-discrimination/.

15. John Bowers, *Accommodating Difference; How is Religious Freedom Protected When It Clashes with Other Rights; Is Reasonable Accommodation the Key to Levelling the Field*?, 10 OXFORD J. L. RELIGION 275–297 (2021), https://doi.org/10.1093/ojlr/rwab008 (discussing European Union, England, and Canada).

16. The focus on litigation and competition in law schools may contribute to the dominance of the all-or-nothing approach. *See* Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentleman: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1997).

17. *See* Andrew R. Lewis, *The New Supreme Court Doctrine against Religious Discrimination*, WASH. POST (July 7, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/07/07/scotus-carson-makin-maine-schools-bremerton-football-coach/.

18. *In U.S., Far More Support Than Oppose Separation of Church and State*, PEW RSCH. CTR. (Oct. 28, 2021), https://www.pewresearch.org/religion/2021/10/28/in-u-s-far-more-

In Part I, I explore examples of current intense disputes that feature claims about religion and discrimination, framed in all-or-nothing terms; in Part II, I will consider several alternative approaches. Doing so seems critical at a time in this time of social division. It is not an exaggeration to note that these ingredients—disagreements over religion and debates cast such that only one side can prevail—lead to violence and war. "[V]oices from the seventeenth century . . . a warning of the dangers of entrusting power to those who feel summoned by God to war, or [who] feel that their sense of justice and order is the only one valid," concluded historian Peter Wilson in his history of the devastating Thirty-Years War that killed millions, including a quarter of the German people, and destroyed communities across Europe.[19] Religion itself is not the problem; self-righteous imposition on others can stem from secular beliefs as well. How can laws, institutions, and even conversations set us on a path toward mutual recognition rather than greater conflict?[20]

I. A LANDSCAPE OF DISPUTES

Recently argued in the Supreme Court is the case of *303 Creative LLC v. Elenis*, a constitutional challenge to Colorado's public accommodation law presented on behalf of website designer Lorie Smith.[21] Ms. Smith wants to create websites to celebrate heterosexual marriages but not same-sex marriages because doing so would be inconsistent with her sincerely held religious beliefs. Colorado's public accommodation law forbids a business deemed

support-than-oppose-separation-of-church-and-state/. Besides disagreeing over how separate government and religion should be, people responding to the study differ over whether there is (or should be) an official religion in the United States. *Id.*

19. PETER H. WILSON, THE THIRTY YEARS WAR: EUROPE'S TRAGEDY 851 (2011). *See also* C.V. WEDGWOOD, THE THIRTY YEARS WAR 506 (2005) ("After the expenditure of so much human life to so little purpose, men might have grasped the essential futility of putting the beliefs of the mind to the judgement of the sword. Instead, they rejected religion as an object to fight for and found others."); David Blight, *Was the Civil War Inevitable?*, N.Y. TIMES (Dec. 21, 2022), https://www.nytimes.com/2022/12/21/magazine/civil-war-jan-6.html.

20. This question also prompts consideration of whether some positions asserted either as religious or as interpretations of antidiscrimination should not be recognized on occasion or forever.

21. *See* Amy Howe, *Conservative Justices Seem Poised to Side With Web Designer Who Opposes Same-Sex Marriages*, SCOTUSBLOG (Dec. 5, 2022, 7:18 AM), https://www.scotusblog.com/2022/12/conservative-justices-seem-poised-to-side-with-web-designer-who-opposes-same-sex-marriage/.

a public accommodation from refusing to serve an individual or group on the basis of individual characteristics, including sexual orientation. It also prohibits a public accommodation from communicating that an individual's patronage would be treated as "unwelcome, objectionable, unacceptable, or undesirable" because of the individual's identity.[22]

Although she has not as yet offered her marriage website service to anyone and not therefore faced legal sanctions, Ms. Smith challenges the law under free speech and religious exercise clauses of the First Amendment.[23] A divided panel of the federal Court of Appeals for the 10th Circuit ruled against Ms. Smith by reasoning that the state law was general, neutral, and narrowly tailored to achieve Colorado's compelling interest in ensuring equal access to publicly available goods and services. The Supreme Court granted review limited to the free speech claim, although the relationship of government to individuals' religious beliefs is inevitably implied. Ms. Smith's lawyers assert that the Colorado law imposes governmental orthodoxy about beliefs and expression. Colorado and its supporters note that discrimination on the basis of race and gender historically was defended on claims of religious freedom. This case revives questions left unanswered by *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[24] There the Supreme

22. COLO. REV. STAT. § 24-34-601 (2022).

23. Although the claims are speculative because the plaintiff has not offered web-design services only for opposite-sex marriages, she claims that enforcement of the law would compel her to speak contrary to her conscience. The state argues that the law is narrowly tailored to ensure equal access to a publicly available service. VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10833, RELIGIOUS OBJECTIONS TO NONDISCRIMINATION LAWS: SUPREME COURT OCTOBER TERM 2022, (2022). Even in this hypothetical posture, the web-designer could proceed to provide a service of web-design for sites celebrating opposite-sex marriages, as long as she made this service equally available to any individual, couple, or other purchasers.

24. *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018). A plaintiff seeking a religious exemption in similar case involving an Oregon bakery are pursuing review in the Supreme Court. *Klein v. Oregon Bureau of Labor & Industries Docket No. 22-204*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/klein-v-oregon-bureau-of-labor-and-industries-2/ (last visited Feb. 17, 2023). In another earlier free exercise challenge to a nondiscrimination policy, the Supreme Court permitted the Internal Revenue Service's denial of tax-exempt status to a religious university that claimed religious grounds for banning interracial dating. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). This decision predated both the Supreme Court's shift to permitting generally applicable and neutral laws that do not target religious views or practices for regulation and the legislative responses reinstated protections for religious accommodations. *See* Empl. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

Court found for a baker who refused to make a wedding cake for a same-sex-wedding due to evidence that the Colorado Civil Rights Commission showed hostility to the baker's religious beliefs but reached this result without providing guidance for resolving conflicts between the First Amendment and antidiscrimination laws.[25]

In the past, religious freedom objections have not warranted exemption from laws against racial discrimination. The Supreme Court in 1968 rejected a religious freedom objection by a barbecue franchise to the racial integration required by the Civil Rights Act of 1964. Now, in *303 Creative LLC*, the Court is focusing solely on the free speech claim. A critic of Ms. Smith asks, is it solely a matter of free speech, however, if a store posts a sign saying, "Wedding cakes for heterosexuals only"?[26] Or a sign saying, "We Distrust Blacks"? Further questions include: is refusal to serve individuals seeking services related to a same-sex marriage discrimination on the basis of sexual orientation? And does a state have a compelling interest to protect people against discrimination and exclusion on the basis of sexual orientation? And should the law focus on the practical effect of asserted exemptions from civil rights protections?

In some ways, the case seems fundamentally a contest over endorsements. Should the government endorse religious pluralism, even when it entails discrimination against those seeking a same-sex marriage?[27] Or should the government endorse lawful same-sex marriages despite religiously guided opposition to that practice?

25. The decision emphasized that the baker did not have a sufficient hearing and did not address potential issues of freedom of speech nor relative weight to give to speech or religion claims challenging enforcement of antidiscrimination laws. Richard Lempert, *Masterpiece Cake: Baker Wins but the Supreme Court Leaves Key Questions Unanswered*, BROOKINGS (June 6, 2018), https://www.brookings.edu/blog/fixgov/2018/06/06/masterpiece-cake-baker-wins-but-the-supreme-court-leaves-key-questions-unanswered/ ("Rather than provide guidance on how tensions between First Amendment claims and the right to non-discrimination should be resolved, Justice Kennedy sought to avoid the tensions altogether."). Potential First Amendment claims could be asserted against laws against racial discrimination and even against discriminating against members of minority religions. *Id.*

26. Melling, *supra* note 14.

27. How legal authorities define what is and is not religious for purposes of constitutional and legislative protection is a topic of continuing discussion and efforts at clarification. *See., e.g.*, *Religious Freedom FAQ: Has the Supreme Court Defined "Religion?"*, FREEDOM F. INST. https://www.freedomforum.org/freedom-of-religion/religious-freedom-faq/ (last visited Feb. 17, 2023) (discussing shifting and unresolved historical definitions of "religion" used by the Supreme Court); *What Is "Religion" Under Title VII?*, U.S. CUSTOMS & BORDER PROT., (modified May 24, 2022), https://www.cbp.gov/faqs/what-religion-under-

This case adds a free speech argument to the religious freedom claims that prevailed in the Supreme Court's decision in *Fulton v. City of Philadelphia*.[28] A unanimous Court reasoned that the city wrongly suspended its contract with a religiously affiliated foster care agency that refused on religious grounds to certify same-sex couples as foster parents. There, the Court reasoned that the city's decision violated the free exercise rights of the agency, that foster care agencies are not public accommodations, and the city's rule was not of general applicability because the Commissioner of Human Services had the power to make exceptions.[29] In light of this decision, South Carolina is now seeking dismissal of a complaint by a same-sex couple denied assistance by a government-funded foster care agency for failing to meet the agency's religious criteria and because they are a same-sex couple.[30] The plaintiffs, in the meantime, have moved for summary judgment on the grounds that the government-funded agency acted contrary to the Establishment Clause.[31]

Another set of clashes arise in the context of employment.[32] A woman employed at a Catholic school became pregnant and

title-vii ("For purposes of Title VII, religion includes not only traditional, organized religions, such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others."); "*Churches" Defined*, IRS https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined (last visited Feb. 17, 2022) (offering list of characteristics and contextual features used by the IRS to determine whether an organization is a "church" for purposes of tax exemption status); WINIFRED FALLERS SULLIVAN, CHURCH STATE CORPORATION CONSTRUING RELIGION IN US LAW (2020) (examining instances when organizations are recognized as religious and given privileges as a result).

28. Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

29. N.B. Boston had a similar case and refused to permit an accommodation for the Catholic agency even though it had arranged to refer same-sex couples to another foster care agency.

30. Rogers v. U.S. Dep't of Health & Hum. Servs., 466 F. Supp. 3d 625 (D. S.C. 2020).

31. Plaintiffs' Motion for Summary Judgment Against State Defendants, Rogers v. U.S. Dep't of Health & Hum. Servs., 466 F. Supp. 3d 625 (D. S.C. 2020), (No. 6:19-cv-01567-JD).

32. Exemptions from antidiscrimination laws also applied to relationships between religious institutions' employment their "ministers." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 181–90 (2012) (expanding ministers to include teachers of religious subjects at religious institutions); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020). For an analysis of ways in which employers prompt religious claims by their employees, see Isaac Weiner, *The Corporately Produced Conscience: Emergency Contraception and the Politics of Workplace Accommodations*, 85 J. AM. ACAD. RELIGION 31 (2017), https://doi.org/10.1093/jaarel/lfw049.

because she was unmarried, the school fired her for engaging in sex out of wedlock, contrary to Catholic teachings.[33] The former employee brought suit in state court, noting there was no such enforcement and perhaps no such policy regarding unmarried men engaging in pre-marital sex.[34] She prevailed in the state appellate court; the school has taken it to the Supreme Court of New Jersey.[35]

A set of businesses owned by Christians in Texas have asserted a right not "to employ individuals who are engaged in homosexual behavior or gender non-conforming conduct of any sort."[36] The businesses sued in federal court and argued that, under the Religious Freedom Restoration Act[37] and the First Amendment, any federal statute, executive order, or agency rule or policy burdening their sincere religious beliefs in this area is unenforceable. The businesses obtained both a preliminary injunction and then prevailed on a motion for summary judgment.[38] Ruling further for the plaintiffs, the court accepted the argument that freedom of association would allow the religiously owned, closely held businesses to deny employment to homosexuals and included the finding that employers "may have policies that promote privacy, such as requiring the use of separate bathrooms on the basis of biological sex."[39] There may be further proceedings in this case and in similar cases, even when the business itself does not have a religious purpose.

A public-school music teacher asserted a right to refer to transgender students by their gender at birth because of his religious

33. Tracey Tully, *An Unmarried Schoolteacher Got Pregnant. She was Fired*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/28/nyregion/pregnant-catholic-school-teacher.html.

34. *See* Crisitello v. St. Theresa Sch., 242 A.3d 292, 294 (N.J. Super. Ct. App. Div. 2020).

35. Crisitello v. St. Theresa Sch., 250 A.3d 1129 (N.J. 2021).

36. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 588 (N.D. Tex. 2021).

37. David Schultz, *Religious Freedom Restoration Act of 1993 (1993)*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of-1993 (updated Sept. 2017); *see infra* note 49.

38. Bear Creek Bible Church, 571 F. Supp at 571.

39. *Id.* at 625. *See* Robert W. Small, *Why a Texas District Court Ruled that Religious Employers are Exempt from Title VII's Prohibition of Sex Discrimination Against LGBTQ Employees*, TEX. L. (Jan. 4, 2023, 9:26 PM), https://www.regerlaw.com/files/rws-the-texas-lawyer-bear-creek.pdf.

belief as a Christian that "it is sinful to promote gender dysphoria."[40] Afterward, the school administrators responded by giving the teacher three options: (1) follow the school's name policy of respecting students' preferred names and pronouns, (2) resign, or (3) be fired. The teacher resigned after asserting that he would not call students by their preferred names and gender pronouns. The teacher then sued the school for failing to accommodate his religious beliefs under the requirement of religious accommodation under Title VII of the Civil Rights Act of 1964 and for retaliation for his request for an accommodation.[41] A federal district court rejected his claims. The court noted that an initial accommodation by the school, allowing the teacher to use only students' last names, created distress for students,[42] who have their own religious affiliations, just as the couple seeking a wedding cake may be planning their own religious ceremony.[43]

In contrast, the federal Court of Appeals for the 6th Circuit decided that a district court wrongly dismissed a professor's asserted free speech claim after his employer, a small public university, disciplined him for refusing to refer to a transgender student using the student's preferred pronouns.[44] The court found that the professor had stated a claim for violation of his freedom of speech and rejected the university's reasoning that using a student's preferred titles and pronouns is the "type of non-ideological ministerial task [that] would not be protected by the First Amendment."[45] Instead, the court reasoned:

> [T]itles and pronouns carry a message. The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth. But Meriwether does not agree with that message, and he does not want to communicate it to his students.

40. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 821 (S.D. Ind. 2021) (internal citations omitted).

41. *Id.* at 831. The teacher later asserted his resignation was coerced due to fraud; the district court rejected this claim. *Id.* at 839.

42. *Id.* at 824.

43. *See* Winnifred Fallers Sullivan, *No Cake, No Reservations*, SYNDICATE (May 13, 2019), https://syndicate.network/symposia/theology/consuming-religion/ (imagining Anthony Bourdain seated with the baker and his customers).

44. Meriwether v. Hartop, 992 F.3d 492, 498, 518 (6th Cir. 2021).

45. *Id.* at 507.

> That's not a matter of classroom management; that's a matter of academic speech.[46]

The court of appeals also indicated skepticism toward the university's asserted interest in protecting affected students.[47]

Private religious educational institutions can become the locus of such conflicts when the treatment of students or teachers as a result of religious beliefs is alleged to violate public accommodation laws or employment laws against discrimination. These conflicts may arise when a private religious educational institution's treatment of students is arguably contrary to local public accommodation laws. Yeshiva University, based in New York City, refused to recognize a "Pride Alliance" LGBTQ student club.[48] A state trial judge rejected the university's claim that it was shielded by an exemption for religious corporations under New York City's public accommodations law as the university had been chartered for educational purposes.[49] The court also rejected the university's assertion of free exercise of religion rights and directed the university to recognize the club and give it the same access to resources accorded to other student clubs. The United States Supreme Court declined the request for a stay of the New York court's order.[50] Further review is under way.

This case echoes an earlier one. In 1985, Georgetown University, a Catholic institution was similarly required to grant university recognition and access to support for a gay rights student group.[51] Commemoration of that decision and the advocacy surrounding it prompted an event 25 years later where the law school's dean commended the courage and leadership of advocates behind

46. *Id.*

47. *Id.* at 510. *See Constitutional Law – First Amendment – Sixth Circuit Holds Public University Professor Plausibly Alleged Free Speech Right Not to Use Trans Student's Pronouns –* Meriwether v. Hartop, *992 F.3d 492 (6th Cir. 2021), reh'g en banc denied, No. 20-3289, 2021 BL 257656 (6th Cir. Jul. 8, 2021)*, 135 HARV. L. REV. 2005 (2002).

48. Ariane de Voge, *Supreme Court Declines to Block Order Requiring Yeshiva University to Recognize LGBTQ Student Club*, CNN (Sept. 14, 2022) (discussing *Yeshiva University v. YU Pride Alliance*) https://www.cnn.com/2022/09/14/politics/supreme-court-yeshiva-university-lgbtq-student-club/index.html.

49. YU Pride All. v. Yeshiva Univ., No. 154010/21 2022 WL 2158381 (N.Y. Sup. Ct. Jun. 14, 2022).

50. Yeshiva Univ. v. Yu Pride All., 143 S. Ct. 1, 1 (2022).

51. Gay Rts. Coal. of Georgetown Univ. L. Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).

the effort.[52] Recently, Georgetown University approved funding for a student group favoring traditional marriage over the objection of some students who claimed the group violates the university's own standard of denying support for any group that "foster[s] hatred or intolerance of others because of their race, nationality, gender, religion, or sexual preferences."[53]

Public schools for younger students have also been arenas for conflict. As an example, parents of one student in a Massachusetts public elementary school objected in 2006 to a "diversity" curriculum including materials about same-sex marriage couples.[54] School officials worried that giving parents notice and the chance to opt-out of such a curriculum would be disruptive and could convey negative messages to other students.[55] Conflict and litigation followed.

Perhaps there has been no more vituperative area generating such clashes, however, than health care and religious accommodations. Political contests over abortion and contraception reflect and amplify the positions of some religious groups, influence fundraising, judicial appointments, and legal developments.[56] End-of-life treatment, HIV treatment, and gender-affirming care can also trigger religious accommodation claims. The coverage and antidiscrimination provisions of the Affordable Care Act, for example, have prompted many issues for some religiously affiliated healthcare providers and employers responsible for employee benefits. Because the United States relies heavily on private employers for providing health care coverage and because many employers and health care providers have religious affiliations, there are many potential religiously informed objections to public policies governing reproduction, end-of-life, and other

52. Lacey Henry, *Pride Group Fought Legal Battle*, HOYA (Mar. 22, 2013), https://thehoya.com/pride-group-fought-legal-battle/.

53. Carl Bunderston, *Georgetown Students' Commission Votes not to Sanction Pro-Marriage Group*, CATH. NEWS AGENCY (Nov. 3, 2017), https://www.catholicnewsagency.com/news/37123/georgetown-students-commission-votes-not-to-sanction-pro-marriage-group.

54. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008).

55. For a discussion of the dispute, failed efforts at conciliation, and lawsuit, see Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 761–67 (2010) (discussing Parker v. Hurley, 474 F. Supp. 2d 26 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008)).

56. See MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT (2022); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT (2020); Minow, *Not in the Room*, *supra* note 12 at 35.

health care matters. Such religious objections can be common as religiously affiliated institutions comprise approximately one-sixth of the health systems in the United States.[57] Religiously identified medical professionals as well as patients can have interests in tension with local, state, or federal rules or the practices of health care institutions.[58] Yet patients also assert religious claims, such as those claiming a religiously-informed basis for abortion.[59]

Religiously affiliated health care providers and five states sued the federal government in *Franciscan Alliance v. Burwell*.[60] This suit challenged a U.S. Department of Health and Human Services regulation indicating that the Affordable Care Act (ACA) prohibits federal funding for health care entities that discriminate against patients and employees who are transgender or because they seek reproductive care.[61] In a related case, religious health care providers and employers challenged federal requirements that they cover abortions and gender-transition procedures.[62] The U.S. District Court for the District of North Dakota ruled in favor of the plaintiffs objecting to the coverage of gender-transition procedures, with other parts of the case dismissed without prejudice.[63]

Similar challenges are likely in response to the New Proposed Rule Making announced by the Department of Health and Human Services that would interpret the Affordable Care Act

57. Stephen P. Lucke, *Employer Sponsored Plans and Providers Face Confusion from Conflicting ACA Rulings and Recent HHS Rule*, RECORDER (Sept. 30, 2022), https://www.law.com/therecorder/2022/09/30/employer-sponsored-plans-and-providers-face-confusion-from-conflicting-aca-rulings-and-recent-hhs-rule/.

58. For thoughtful discussions, see Kent Greenawalt, *Objections in Conscience to Medical Treatment: Does Religion Make a Difference?*, 2006 ILL. L. REV. 799 (2006); Crystal Gwizdala, *When Personal and Professional Morals Clash: Conscientious Objection in Medicine*, YALE SCH. OF MED. (July 18, 2022), https://medicine.yale.edu/news-article/when-personal-and-professional-morals-clash-conscientious-objection-in-medicine/; Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethic*s, 150 U. PA. L. REV. 661 (2001).

59. *See The Satanic Temple v. Texas*, SATANIC TEMPLE https://thesatanictemple.com/pages/1594exas-lawsuit (last visited Mar. 14, 2023) (discussing federal district court suit on behalf of a Temple member suing the state of Texas for imposing medically unnecessary abortion regulations including a sonogram, a forced decision to reject the 'opportunity' of seeing the sonogram results, the forced listening to a narrative of the sonogram results, and a mandatory waiting period between the sonogram and the abortion).

60. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

61. *Id*. The Court of Appeals for the 5th Circuit ruled that the RFRA claim is not moot and is still pending. Franciscan All. Inc., v. Burwell, No. 7:16-CV-54 (5th Cir. 2022).

62. Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113 (D.N.D. 2021).

63. *Id*. Parts of the suit became moot while other parts continue.

provisions that prohibit discrimination "on the basis of sex" to cover abortions and gender transitions within the health care providers' offered services.[64]

Other health care related issues include those raised by a suit brought by a Texas employer in federal court under the Religious Freedom Restoration Act.[65] Braidwood Management, Inc. objected to coverage of an HIV prevention drug as required under the ACA.[66] The federal court in this case found that the government failed both to show how the mandate furthered a compelling government interest and to show how the mandate was the least restrictive means of furthering that stated interest.

A recent class action lawsuit on behalf of individuals with opioid use disorder raises religious objections to treatment in this context.[67] Opioid use disorder is classified as a disability protected by federal law and the challenged medication is a recommended treatment for the disorder.[68] The suit challenges a policy prohibiting access to medication for opioid use disorder.[69] The Salvation Army's nationwide network of adult rehabilitation facilities provides services for individuals with substance use disorders, but a Massachusetts Salvation Army representative argues that its shelters can discriminate against people with opioid use disorder in this way because of the organization's long-standing religious beliefs against the use of such medications.[70] A federal district court rejected the Salvation Army's effort to dismiss the suit and proceedings continue.[71]

64. *HHS Announces Proposed Rule to Strengthen Nondiscrimination in Health Care*, U.S. DEP'T OF HEALTH AND HUM. SERV. (July 25, 2022), https://www.hhs.gov/about/news/2022/07/25/hhs-announces-proposed-rule-to-strengthen-nondiscrimination-in-health-care.html.

65. 42 U.S.C. § 2000bb-4. For an update on the federal and state religious freedom restoration acts, see WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020).

66. Braidwood Mgmt. Inc. v. Becerra, 2022 WL 4091215 (N.D. Tex. 2022). Other elements of the case are still pending.

67. *Federal Court Allows Discrimination Case Against Salvation Army's Opioid Use Disorder Policy to Continue*, C.R. EDUC. & ENF'T CTR. (June 27, 2022), https://creeclaw.org/2022/06/27/federal-court-allows-discrimination-case-against-salvation-armys-opioid-use-disorder-policy-to-continue/.

68. *Id.*

69. *Id.*

70. *Id.*

71. Tassinari v. Salvation Army Nat'l Corp., 610 F. Supp. 3d 343 (D. Mass. 2022).

Thus, across areas of healthcare, education, employment, and social services, people can express a grievance arising from their religious beliefs colliding, in their view, with legal safeguards against unlawful discrimination. Such legal disputes involve a variety of regulations, statutes, and constitutional provisions. This translation into lawsuits channels the disputes into adversarial formats, elevating all-or-nothing answers to yes-or-no questions and obscuring or preventing other options.

II. CATEGORICAL AND WINNER-TAKE-ALL APPROACHES

By criticizing the dominance of litigation in framing religious freedom and equal treatment issues, I do not mean to revive largely debunked claims that Americans are now more litigious than in the past or more litigious than people in other nations.[72] Yet Alexis de Tocqueville's observation of over 150 years ago remains resonant. He wrote, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[73]

Court processes create distance between discussion[74] and the actual people involved. They also push disputes into a bipolar framework, even though court rules allow third-parties and friends-of-the-court to weigh in.[75] Multiple lawsuits arising under two presidential administrations forced yes-or-no questions about contraception coverages under federal health insurance requirements without resolving how to address lawful, competing claims. First, a lawsuit brought by religious organizations challenged the ACA's initial requirement of employer contraceptive services coverage and its provision for religious accommodation under the administration of President Barack Obama. The case went all the way to the Supreme Court without participation by employees who would be affected by the result.[76] This suit then became joined

72. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV 4 (1983); Carol J. Greenhouse, *Interpreting American Litigiousness*, *in* HISTORY AND POWER IN THE STUDY OF LAW 252 (June Starr & Jane F. Collier eds., 1989).

73. Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607, 609 (1967) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835))

74. *See* JOHN NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976).

75. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

76. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

with a claim brought by the state of Pennsylvania against the administration then led by President Donald Trump. Pennsylvania objected to financial burdens on it resulting under President Trump's approach that exempted employers with sincere religious or moral objections from the ACA's required contraceptive coverage in employers' insurance plans—again without involvement of affected employees.[77] The combined cases presented many yes-or-no issues—many procedural and disconnected from substance— but did not invite consideration of how the competing interests could be resolved.[78] Defenders admire the adversary system for diverting and narrowing conflicts, for affirming individual dignity, and for pursuing truth. Familiar criticisms point to the risks that the judge is biased or incompetent or that the parties are not equally matched in talent and resources.[79] Yet similar problems can arise with "inquisitorial" adjudication, typical in civil law systems.[80]

Deeper concerns question the suitability of the oppositional process for matters that "are not susceptible to a binary (i.e., right/wrong, win/lose) conclusion or solution."[81] Categorical answers with clear boundaries may miss opportunities for accommodating competing, valid claims.[82] Professor Mary Ann Glendon, who has written extensively in support of banning abortion, has written that "[a] tendency to frame nearly every social controversy in terms of a clash of rights (a woman's right to her own body vs. a fetus' right to life) impedes compromise, mutual understanding and the discovery of common ground."[83] In some circumstances, a better focus would be to engage in problem-

77. *Id.*

78. *See* Minow, *Not in the Room*, supra note 12, at 81–82; The Supreme Court, 2019 Term—Leading Cases, *Little Sisters of the Poor Saints Peter and Paul v. Pennsylvania*, 134 HARV. L. REV. 560 (2020).

79. *See generally* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57 (1998); Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147 (2002).

80. *See* C. Steven Tomashefsky, *We Do Have an Adversary System, Don't We?*, 18 LITIG. 23 (Fall 1991).

81. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996).

82. *Cf.* Phoebe C. Ellsworth, *Legal Reasoning and Scientific Reasoning*, 63 ALA. L. REV. 895, 913 (2012) (comparing categorical judicial reasoning and scientists' use of continuous variables).

83. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE xi (1993).

solving with imagination and creativity.[84] In the context of intensive disagreements over religious and equality claims, a better alternative approach would acknowledge the power of competing commitments and also focus on how conflicting groups can peacefully co-exist over time in a pluralistic society of shared situations, conflicts, and fates.[85] "Better" here also means devising approaches to conflicts that attend to risks of social cleavage and violence, and to choices about preserving both religions and coherent public policies.

Historical and comparative accounts demonstrate the costs and challenges of failing to negotiate religious differences in democratic societies.[86] Failing to negotiate solutions has real costs even beyond the particular conflicts over religious exemptions. For example, some societies may react to religious claims by enacting secularism, imposing increasing state control impinging on religious expression outside the home, while others embrace one sect or a limited number of religions to the detriment of religious freedom and perhaps to democracy itself.[87] The alternative in jeopardy is preservation of religious diversity as a public good, with more accommodation of minority religious views or practices.[88]

Accommodation need not involve abandonment of principle, particularly if it proceeds with acknowledgment and celebration of multiple values and commitments. Providing accommodation for

84. Menkel-Meadow, *supra* note 81, at 33–35, 43; *see* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005). Advocates of negotiation, mediation, and alternative dispute resolution emphasize the avenues for creativity and options where no one entirely loses. *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Penguin Books rev. ed., 2011).

85. Marta Bivand Erdal, *Negotiation Dynamics and Their Limits: Young People in Norway Deal with Diversity in the Nation*, 73 POL. GEOGRAPHY 38 (2019) (reporting on interviews with diverse youth in Norway addressing their shared fate).

86. NEGOTIATING DEMOCRACY AND RELIGIOUS PLURALISM: INDIA, PAKISTAN, AND TURKEY (Karen Barkey et al. eds., 2021) (essays examining legacies of historic treatments of religious pluralism including violence and risks of violence).

87. *See* MEADHBH MCIVOR, REPRESENTING GOD: CHRISTIAN LEGAL ACTIVISM IN CONTEMPORARY ENGLAND (2020); PHILIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY (2022).

88. Thomas Sealy & Tariq Modood, *Western Europe and Australia: Negotiating Freedoms of Religion*, 50 RELIGION, STATE AND SOC'Y 378, 378–95 (2022); *see* Rochana Bajpai, *Religious Pluralism and the State in India: Towards a Typology*, *in* NEGOTIATING DEMOCRACY AND RELIGIOUS PLURALISM: INDIA, PAKISTAN, AND TURKEY 139 (Karen Barkey et al. eds., 2021) (contrasting hierarchical pluralism, integrationist exclusion, integrationist inclusion, and weak multicultural, strong multicultural, and assimilationist approaches toward religious diversity).

an individual whose religious commitments otherwise conflict with an official dress code or work schedule serves the greater good of respecting individual freedom. Even when accommodation requires compromise, it can be defended in service to the greater goods of peaceful co-existence and mutual respect across diverse groups. This, in no small respect, is a foundational principle of the United States. President George Washington stated,

> The establishment of our new Government seemed to be the last great experiment, for promoting human happiness, by reasonable compact, in civil society. It was to be, in the first instance, in a considerable degree, a government of accommodation as well as a government of Laws. Much was to be done by *prudence*, much by *conciliation*, much by *firmness*.[89]

This spirit of accommodation, thus, is deep in the American tradition.

Lessons from history, though, suggest the need for care to ensure that accommodation of religious majorities in public policy does not turn into restricting the freedoms of religious minorities. Judicial approval of laws requiring the closing of commercial enterprises to observe the Christian sabbath, for example, neglected the religious claims of those observing sabbath on a different day and the economic burdens of having to close shop on the Christian sabbath as well as their own sabbath day.[90] A kind of dignitary

89. Letter from George Washinton to Catharine Sawbridge Macaulay Graham (Jan. 9, 1790), NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-04-02-0363.

90. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (allowing Sunday closing laws despite Establishment clause objection); *id.*, at 562 (Douglas, J., dissenting) ("I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors."). The current Supreme Court seems on the road to eliminating any judicial supervision of governmental establishment of religion. *See* Carson v. Makin, 142 S. Ct. 1987 (2022) (rejecting a state tuition program excluding religious schools); *id.*, at 2002–12 (Breyer, J., dissenting) (highlighting potential of state-sponsored religious primary instruction to trigger religious conflict); *id.*, at 2012 (Sotomayor, J., dissenting) (criticizing the Court for "[d]ismantl[ing] the wall of separation between church and state"); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (protecting prayer by a public school coach on the playing field with implicit pressure on student players); Don Byrd, *Top Ten Religious Liberty Stories of 2023 and What We're Watching For in 2023*, BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY (Jan. 5, 2023), https://bjconline.org/top-10-religious-liberty-stories-of-2022-010523/ (quoting Amanda Tyler who stated that the *Bremerton* ruling "focused solely on the religious exercise of one public school employee and not the kids and families, focused only on the free exercise/free speech clauses while severely limiting the Establishment Clause and its important protections for religious freedom").

harm as well as unequal treatment results when the government enacts the holidays of dominant groups as official holidays without comparable recognition of holy days observed by minority religious groups. Similarly, allowing exemptions from federally required contraceptive coverage for any employer with moral or religious objections severely limits health care services for employees who do not share those objections.[91] Religious accommodation should not trump all other rights and concerns. It was for this reason—concerns about elevating religious accommodation over legal protections for women and children—that Ontario, Canada rescinded a law permitting public deference to religious arbitration in family matters.[92] With hopes that the United States can continue to value religious freedom as well as liberal values of equal respect and individual dignity, let's turn to alternatives to the "either-or" judicial solutions.

III. ALTERNATIVES

Within adjudication, the methods and principles of analysis can elevate accommodation of competing interests rather than requiring all-or-nothing reasoning and results.[93] Especially in the face of competing values that are both embraced by law, "proportionality review," illustrated in Canadian constitutional law, provides an alternative to treating rights "as trumps" with absolute yes-or-no answers to asserted claims.

91. *See* Minow, *Not in the Room*, *supra* note 12.

92. Shirish P. Chotalia, *Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*, 15 CONST. F. 63 (2006); Anna C. Korteweg, *The Sharia Debate in Ontario*, 18 ISIM REV. 50 (2006). *See* Minow, *Is Pluralism an Ideal or a Compromise*, *supra* note 12. Recognition of religious tribunals could be accomplished in secular courts, however, through enforceable secular contracts. *See* Schwartz v Schwartz, 913 N.Y.S.2d 313 (N.Y. App. Div. 2010) (explaining that a husband can be held in contempt of court for failing to comply with an earlier agreement to go before the Jewish tribunal (Beth Din) so that the wife could try to obtain a document needed for a religious divorce (Get), since the state court could apply neutral principles of secular law without referring to religious doctrine).

93. Exploring alternatives to all-or-nothing solutions animates important work in designing electoral systems, negotiated peace treaties, and tackling global dangers such as climate change. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 1–20 (1994); TIMOTHY SISK, BETWEEN TERROR AND TOLERANCE: RELIGIOUS LEADERS, CONFLICT, AND PEACEMAKING (2011); Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, COUNCIL ON FOREIGN RELS. (Nov. 4, 2022, 12:30 PM), https://www.cfr.org/backgrounder/paris-global-climate-change-agreements.

An alternative to adjudication is federalism, a form of decentralized control, to allow plural results across different regions. Canada, again, is an example as it decentralized power by permitting its provinces to choose the official language for use in the province, although the Official Languages Act gives both English and French official language status in federal matters. As a result of decentralized control, Quebec has adopted French rather than English as its official language and also provided protection for indigenous languages and cultures.[94]

A third alternative to either-or treatment is negotiation which can generate private settlements, contracts, legislation, or regulations based on compromises or converging positions. Each of these alternatives can address conflicts between claims of religious freedom and protection for individuals against discrimination.

A. Proportionality

Professor Jamal Greene criticizes what he has labeled the "categorical approach" to conflicting rights issues as pursued in American courts.[95] In the categorical approach, analysis seeks to categorize rights in one of several "boxes" to determine the appropriate level of judicial scrutiny meaning the relative degree of skepticism about any governmental intrusion on the asserted right.[96] Legal sources about the meanings of the relevant right and judicial precedent interpreting it are key to the determination of the level of scrutiny; qualitative consideration or comparison of costs and benefits to society are not meant to be part of the categorical approach.[97] In contrast, argues Professor Greene, other constitutional democracies (including Canada, Colombia, South

94. In 1974, Quebec adopted the Official Language Act, S.Q. 1974. (also known as "Bill 22") and in 1977, adopted the Charter of the French Language, CQLR c C-11, https://canlii.ca/t/55h16. A law enacted in 2022 extends the protection of the French language in education, business, and other activities in Quebec. *See* Laura Marchand, *What's in Quebec's New Law to Protect the French Language*, CBC NEWS (May 24, 2022), https://www.cbc.ca/news/canada/montreal/bill-96-explained-1.6460764.

95. Jamal Greene, *Rights as Trumps*, 132 HARV. L. REV. 28 (2018), [hereinafter Greene, *Rights As Trumps*]; *see also* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

96. Greene, *Rights as Trumps*, *supra* note 95, at 54.

97. *Id.*

Korea, and South Africa) use "proportional" analysis in many areas of law.[98]

Proportionality review, in contrast, seeks to avoid categorical analysis and amplification of particular conflicts as symbolic of larger cultural contests. Professor Megan Pearson's analysis maps these four stages of proportionality analysis, based on practices in multiple countries: (1) the reason for restricting religious freedom must be legitimate in a democratic society; (2) the measure must have a reasonable relationship to its aim; (3) there must be no less restrictive measure to achieve the aim to the same extent; and critically, (4) the impact of the restriction of the right must be proportionate to the importance of the contrasting interest.[99] Rather than a general inquiry into the relative importance of religious freedom and freedom from discrimination or exclusion, the judicial focus addressed the specific amount of freedom constrained in comparison to the amount of discrimination at stake.

Professors Richard Fallon and Vicki Jackson suggest that American courts actually use something resembling proportional analysis in some instances.[100] They urge expansion of this approach, for example, into freedom of speech issues, while also preserving a more categorical approach in some areas, based on specific language and conceptual structure articulating a right.[101] Professor Greene suggests that proportionality is at least compatible with American law because categorical reasoning is not "baked into U.S. constitutional arrangements" but "rather an artifact of the second half of the twentieth century, when U.S. constitutional lawyers constructed the categorical frame as a way of reconciling the post-*Lochner* regime of deference to government actors with the unique place of race in the American constitutional order."[102]

98. Greene, *Rights as Trumps*, *supra* note 95, at 59. Proportionality review is also used in supranational adjudication, such as the European Union. *See* Megan Pearson, *Proportionality: A Way Forward for Resolving Religious Claims?*, *in* RELIGION AND LAW 35 (2012). Pearson is based at the University of Southampton.

99. Pearson, *supra* note 98; *see also* Greene, *Rights As Trumps*, *supra* note 95; Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094 (2015).

100. Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1295, 1330–32 (2007); Jackson, *supra* note 99. While sitting as a judge, Nancy Gertner described wishing for proportionality-style analysis in criminal sentencing. Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585 (2012).

101. Jackson, *supra* note 99, at 3166–69.

102. Greene, *Rights as Trumps*, *supra* note 95, at 35.

Proportionality review could assist in the treatment of conflicts between religious claims and other constitutional and statutory claims. Moreover, this approach is designed to ensure there are no actual or perceived permanent winners or permanent losers within the tensions between religious freedom and potentially conflicting rights. I confess, the actual application of proportionality seems to involve unstated or impressionistic judgments about claims and their impacts, but theoretical defenses of proportionality review may work to refine and sharpen its methods.[103] See what you think of some examples.

Consider a claim of religious freedom asserted by Christian schools in defense of the use of corporal punishment, contrary to the rights of children. The European Court of Human Rights recognized the sincerity of the belief, but it found religious expression in this context disproportionate to the harms.[104]

A Canadian provincial court applied proportionality review to assess proposed laws allowing marriage commissioners to opt-out of certifying same-sex marriages because doing so would contravene their religious beliefs.[105] The Saskatchewan Court of Appeals found that the practical effect of the amendments would prevent same-sex couples from enjoying the equal protection of the laws which could be especially burdensome in rural areas; the court also acknowledged that absent such laws, the religious freedom of the marriage commissions would be impaired and hence proportionality review was warranted. The opinion of Judge Robert Richards observed that requiring marriage commissioners to officiate at same-sex unions did not prevent the commissioners from holding their religious beliefs or practicing their religions, while the negative consequences for same-sex couples would be large.

As part of assessing whether the burden on the officiants' religious claims was necessary, Judge Richards considered an alternative: couples seeking to be married could contact a central office rather than a particular commissioner, and commissioners

103. *See* Javier Gallego, Book Review, 18 INT'L J. OF CONST. L. 297 (2020) (reviewing of FRANCISCO URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (2017); Kai Möller, *Proportionality: Challenging the Critics*, 10 INT'L J. OF CONST. L. 709 (2012).

104. Pearson, *supra* note 98, at 38 (discussing R(Williamson) v. Sec'y of State for Edu. and Emp. [2005] UKHL 15.

105. In the Matter of Marriage Comm'rs Appointed Under the Marriage Act (2011), 366 Sask. R. 48 (Can. Sask. C.A.).

who do not wish to perform a same-sex ceremony can be accommodated without denying the couple services.[106] Such a system could offer less restrictions on the religious freedoms of individual marriage commissioners objecting to same-sex marriages while still providing services to same-sex couples.[107] Nevertheless, the court concluded this alternative would cause disproportionate harm because it would undercut the principle of nondiscriminatory and impartial services provided by the government.[108] In this analysis, the marriage commissioners differ from religious officials, who—because they hold religious jobs—are not compelled to perform same-sex marriages contrary to their religious beliefs.[109]

Hence, proportionality analysis involves assessing whether there is a genuine conflict between competing rights or claims, whether a policy interfering with an asserted right pursues a legitimate goal through a means rationally connected with the goal, whether a less intrusive means could achieve the goal or the intrusion is necessary, and whether the resulting burden imposes a disproportionate harm—and hence requires judgments about means, harms, and comparative burdens.[110]

B. Federalism: Decentralized Control

What if another province in Canada offered the alternative system, directing same-sex couples to marriage commissioners who have no religious objection but allowing individual marriage commissioners to opt out? A national government in a federal system can give latitude to the provincial or state government on matters of sharp disagreement, including contests over religious freedom and nondiscrimination. That is "federalism," a multi-tiered governmental system combining elements of regional self-rule (decentralized control) for some purposes with centralized

106. *See also* Jennifer Graham, *Saskatchewan Says Marriage Commissioners Must Wed Same-Sex Couples*, GLOBE & MAIL (Jan. 18, 2011), https://www.theglobeandmail.com/news/politics/saskatchewan-says-marriage-commissioners-must-wed-same-sex-couples/article562374/.

107. *See* KOPPELMAN, *supra* note 11, at 43–65.

108. In the Matter of Marriage Comm'rs Appointed Under the Marriage Act, 366 Sask. R. 48 (Can. Sask. C.A.).

109. Reference Re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

110. *See* Möller, *supra* note 103.

laws and decisions for other purposes.[111] Allocating the locus of decision making on some matters to a province or state is a governance mechanism deployed in multi-ethnic societies such as India, Belgium, Pakistan, South Africa, and Switzerland as well as governments in settings such as Bosnia and Macedonia, emerging from recent conflicts.[112] Minority communities can find ways to advance their interests in a federalist system when concentrated in particular regions; they also can be effective even if the population is spread across the country by collaborating with others to influence the central government.[113]

Monitoring the borders of centralized and decentralized power may be a task for constitutional courts and legislative processes; it will surely include mutual jostling with shifting positions over time.[114] State officials may seek to maximize state authority and minimize national power.[115] Federal officials may impinge on state actions.[116]

111. Ronald L. Watts, *Federalism, Federal Political Systems, and Federations*, 1 ANN. REV. POLIT. SCI. 117 (1998), https://www.annualreviews.org/doi/full/10.1146/annurev.polisci.1.1.117#_i; *see also* RONALD L. WATTS, COMPARING FEDERAL SYSTEMS (3d ed. 2008).

112. LIAM ANDERSON, FEDERAL SOLUTIONS TO ETHNIC PROBLEMS: ACCOMMODATING DIVERSITY (2013); Baogang He, *The Federal Solution to Ethnic Conflicts*, 7 GEO. J. INT'L AFF. 29 (2006); Soeren Keil, *Federalism as a Tool of Conflict-Resolution: The Case of Bosnia and Herzegovina*, 363 L'EUROPE EN FORMATION 205 (2012).

113. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (2004); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249 (1988). For a discussion how federalism can dampen pressures for secession, see Paul Anderson & Soeren Keil, *Federalism: A Tool for Conflict Resolution?* 50 SHADES OF FEDERALISM (2017), http://50shadesoffederalism.com/federalism-conflict/federalism-tool-conflict-resolution/#more-161.

114. Heather Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017), https://www.californialawreview.org/wp-content/uploads/2017/12/3-Gerken-34-updated.pdf; Watts, *supra* note 111.

115. *See Principles for State-Federal Relations*, NAT'L GOVERNORS ASS'N (Aug. 22, 2018), https://www.nga.org/advocacy-communications/policy-positions/principles-for-state-federal-relations/.

116. KEVIN J. HICKEY, BRYAN L. ADKINS, WHITNEY K. NOVAK & JAY B. SYKES, CONG. RSCH. SERV. R45323, FEDERALISM-BASED LIMITS ON CONGRESSIONAL POWER: AN OVERVIEW (2023). Even with constitutional restrictions on federal power, "Congress's enumerated powers may authorize the federal government to enact legislation that affects the scope of power exercised by the states." *Id.* at 1. Contests over the scope of federal versus state power help limit governmental power compared with individual freedom but also demand attention to these structural issues rather than, for example, the most effective health or economic measures. *See* Wendy Parmet, *Fights Between U.S. States and the National Government Are Endangering Public Health*, SCI. AM. (Oct. 19, 2022), https://www.scientificamerican.com/article/fights-between-u-s-states-and-the-national-government-are-endangering-public-health/.

Shifting decision-making to decentralized units can diffuse conflicts over religious issues. When the U. S. Supreme Court overturned *Roe v. Wade*, it returned the treatment of reproductive choice and abortion to the states. Justice Kavanaugh, a pivotal vote in overturning *Roe*, asserted that the Court was ensuring neutrality on the irreconcilable contest between the pregnant woman and the potential new life by leaving it to the states.[117] He also asked, "may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."[118]

National protections of the right to travel and protections for the privacy of communications and purchases surrounding access to abortion can assist those unable to obtain an abortion procedure in their home state. This is very small comfort for those who lack sufficient resources to travel or otherwise navigate the different rules across different states. It is hard to imagine public funds becoming available to cover travel and other costs for those living in states hostile to abortions—and it remains to be seen if the home state's restrictive laws will apply to the case of the pregnant person who travels elsewhere as well as to anyone who assists with such travel, an abortion procedure, or medical abortion.[119] But the example demonstrates the potential role of centralization and decentralization in conflicts between religious views and other individual rights.

The Supreme Court is not consistent, however, in its respect for federalism. Within twenty-four hours after sending abortion back for state regulation, the Court forbade state regulation of guns and the experimentation and variation that would allow responsiveness to different circumstances—such as a highly urbanized versus a largely rural state.[120] States should be considering religious objections to guns which would put squarely a fundamental value to compete with the "right to bear arms."[121]

117. Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2304–07 (2022) (Kavanaugh, J., concurring).

118. *Id.* at 2309.

119. *See* Susan F. Appleton, *Gender, Abortion, and Travel After Roe's End*, 51 ST. LOUIS U. L.J. 655 (2007).

120. N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

121. Jana Riess, *Which Religions Support Gun Control in the US?*, RELIGIOUS NEWS SERV. (Aug. 29, 2019), https://religionnews.com/2019/08/29/which-religions-support-gun-control-in-the-us/.

Greater consistency in the respect for decentralized control and local variety would permit experimentation as well as accommodation of different groups. Decentralization to localities smaller than states can help a nation manage cultural disagreements, especially where a national minority group is concentrated in a state or a region. Although dominance by local majorities can also pose problems for minority groups, decentralization can recognize and respect local cultures and views that vary from region to region. For example, the federal courts have incorporated reference to local community standards to resolve disputes over free speech restrictions addressing obscenity rather than pick one standard to govern the entire nation.[122]

Decentralization allows multiple treatments of a contested issue. Valuable at times, it is not the right way to treat a fundamental right that is meant to be universal. Indeed, the device is troubling to those who insist there is one correct answer. It also may yield rules that many find unacceptable and a diversity that cannot be sustained. The history of slavery in America is a powerful lesson, summarized by Abraham Lincoln as he ran for Senate:

> "A house divided against itself cannot stand." I believe this government cannot endure, permanently half slave and half free. I do not expect the Union to be dissolved - I do not expect the house to fall - but I do expect it will cease to be divided. It will become all one thing, or all the other.[123]

When the Supreme Court imposed a national obligation to enforce slavery, it committed what a later chief justice called the Court's "greatest self-inflicted wound" and exacerbated the tensions leading to the Civil War.[124] Nonetheless, on some matters, a compromise over antagonistic positions in the national scene can be moderated by turning decisions to states or local governments,

122. Miller v. California, 413 U.S. 15 (1973).

123. Abraham Lincoln, Speech at the Illinois Republican Convention (June 16, 1858) (transcript available at https://www.nps.gov/liho/learn/historyculture/housedivided.htm#:~:text=%22A%20house%20divided%20against%20itself,thing%2C%20or%20all%20the%20other).

124. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 1–52 (1997).

closer to the people, unless those local processes are hijacked and fail to reflect actual local views.[125]

Even without formal allocation of decisional power, local variations occur in practice—as when the national ban on prayer in public schools produced distance between "law on the books" and law in practice in many jurisdictions.[126] My mother-in-law, a public-school math teacher, has always explained that prayer before a math test was permitted and persistent in her classes in New Jersey.

Decentralization can also allow individuals to vote with their feet. Deference to state and local communities can be an appealing response for those who cannot win sufficient support nationwide. Freedom to move to a different locale can offer individual choice among diverse policies—though only for those with sufficient resources and latitude to move. Placing authority in decentralized state and lower power—for good or for ill—can be a temporizing technique en route toward national change.[127]

C. Negotiation

Discussions leading to agreements: this is a definition of negotiation. It underlies informal arrangements, contracts, regulations, and legislation and can involve accommodation, compromise, and

125. Jane Mayer, *State Legislatures are Torching Democracy*, NEW YORKER (Aug. 6, 2022), https://www.newyorker.com/magazine/2022/08/15/state-legislatures-are-torching-democracy; Darrell M. West, *Why Federalism Has Become Risky for American Democracy*, BROOKINGS (Sept. 23, 2022), https://www.brookings.edu/blog/fixgov/2022/09/23/why-federalism-has-become-risky-for-american-democracy/.

126. Even before the Supreme Court's recent decision upholding a public-school coach's right to pray—with students—on the playing field, prayer was a practice in many public schools—but more in the South than in other regions. *For a Lot of American Teens, Religion is a Regular Part of the Public School Day* PEW RSCH. CTR. (Oct. 3, 2019), https://www.pewresearch.org/religion/2019/10/03/for-a-lot-of-american-teens-religion-is-a-regular-part-of-the-public-school-day/. For an overview of shifting legal treatment of prayer in public schools, see Ira C. Lupu, David Masci & Robert W. Tuttle, *Religion in the Public Schools*, PEW RSCH. CTR. (Oct. 3, 2019), https://www.pewresearch.org/religion/2019/10/03/religion-in-the-public-schools-2019-update/. The issues were and remain disputed. *See* BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER (2007).

127. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

convergence of competing interests.[128] Negotiations can devise practical arrangements to coexist, whether in international affairs or inside a household. Negotiation is central to legislation, contracting, and mediation, as examined in the following discussions.

1. Legislation[129]

There may be no better example of negotiated resolution when people clash over religious and equality claims than what is known nationally as the "Utah Compromise" of 2015.

State legislators worked with leaders of the Church of Jesus Christ of Latter-Day Saints and leaders of the LGBTQ communities to negotiate a ban against discrimination in housing and employment. Professor Robin Fretwell Wilson aptly described the underlying process as "common ground lawmaking," drawing from it "lessons for peaceful coexistence."[130]

After the Supreme Court's decision ruling that same-sex couples cannot constitutionally be denied the right to marry,[131] many individuals, groups, and businesses turned to constitutional and legislative religious arguments in what can be characterized as a culture war.[132] Utah, with a Republican majority in the legislature and a Republican governor, remains one of the states reporting high percentages of religiously identified residents.[133]

128. An interesting example arose when the administration of President Bill Clinton issued as guidelines rather than binding rules a set of principles developed in some religious leaders and some civil liberties groups. *See* WILLIAM J. CLINTON, MEMORANDUM ON RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS, (1995), https://www.govinfo.gov/content/pkg/WCPD-1995-07-17/pdf/WCPD-1995-07-17-Pg1227.pdf. Thanks to Richard Parker for the example and relevant background.

129. For a sustained and detailed argument in favor of legislative solutions to conflicts between religious claims and antidiscrimination protections on grounds of LGBT identities, see KOPPELMAN, *supra* note 11.

130. Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons for Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise*, 51 CONN. L. REV. 483 (2019).

131. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

132. *See supra* Section I.A; Wilson, *supra* note 130, at 483–504. Wilson notes also the impact of the Supreme Court's decision in *Masterpiece Cakeshop*. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018) (holding that the Colorado Civil Rights Commission violated the Free Exercise Clause by rejecting claims of a cake decorator who refused to provide his services to the couple for their wedding ceremony).

133. In a study of Utah residents, 80% of adults report belief in God and 73% reported that religion is "very important" or "somewhat important" in their lives. *Religious Landscape Study: Adults in Utah*, PEW RSCH. CTR., https://www.pewresearch.org/religion/religious-landscape-study/state/utah/ (study conducted in 2007 and 2014) (last visited Mar. 12, 2023).

Perhaps precisely because of that—and reflecting experiences with historic conflicts and with oppression on the basis of religious affiliation—the Utah lawmakers sought an approach elevating peaceful coexistence.[134] They understood that reliance on litigation could lead instead to continual demands for religious exemptions that would produce binding precedents.[135] The choice of decisionmakers—judges or legislators—also involves different sources of information and latitude for brokering agreement among stakeholders.[136] The state legislators knew from experience both how cultural conflicts harm business activities and how municipal-level ordinances could balance religious rights and protections against gender and social orientation discrimination.[137]

Critically, leaders of the Church led the search for compassionate and fair solutions to the brewing conflict.[138] Replacing the "either-or" approach with a "both-and" conception, the legislators worked with Church leaders, academics, social movement activists, business owners, and others to frame shared values. Professor Wilson summarizes the four pillars behind the legislative consensus as: "respecting all people for who they are; allaying the very real fears expressed by both communities; giving clarity to parties around the immediate challenges; and honoring the non-negotiables of each community."[139] The resulting law adds gender identity and sexual orientation to state bans against discrimination; protects speech of employees that is not harassment; ensures access to marriage for same-sex couples without requiring

134. Wilson, *supra*, note 130, at 518.

135. *Id.* at 506. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989) (noting risk of continuous litigation claiming religious exemptions).

136. Wilson, *supra* note 130, at 507.

137. *Id*. at 508–12.

138. *Id*. at 515–17.

139. *Id*. at 517. These principles are summarized in more detail: "Protect the full LGBT Community; treat protected classes equally to the greatest extent possible; not roll back preexisting protections for anyone; protect faith communities in all their forms, even associated non-profits; protect collectives and individual believers individually; protect all faiths together; not disparage faith-informed views of marriage; impose as few new obligations on economic actors as possible; and preserve the religious character of religious organizations." *Id.* at 527. For an influential and insightful treatment of the underlying issues, see Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 125 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds., 2008).

any particular government actor to participate; and exempts from the antidiscrimination ban decisions based on bona fide occupational requirements or by religious educational institutions preferring individuals from a particular religion.[140] The law does not cover public accommodations or religious adoption and foster care, but it does offer protection from sanction by professional licensing groups for views expressed in nonprofessional settings.[141] Another example of legislative negotiations over religious and equality conflicts has emerged as several states have explored "conscience clause" laws prohibiting graduate programs from disciplining students in psychology programs for refusing to counsel clients about goals that conflict with the students'' sincere religious beliefs. Arizona adopted such a law; Tennessee has recently considered a similar one.[142] The American Psychological Association, however, has noted concerns about such legislative intrusion into the determination of what skills students need to "meet the responsibilities of a practicing psychologist," and at least thus far seems inadequately involved in finding a constructive path.[143]

2. Contract Negotiation

Contract negotiation between leaders in San Francisco in the context of municipal contracts played a central role in resolving conflict. Religious and secular leaders in San Francisco were at an impasse. The city adopted a policy (before the Supreme Court recognized same-sex marriage and before the enactment of the Affordable Care Act) requiring the city's contracting partners to accord domestic partner health care benefits that were equal to those they offered to married spouses.[144] The Roman Catholic

140. UTAH CODE ANN. §§ 34A-5-106(1)(a)(i), -106(3)(a)(ii), -112, 17-20-4.

141. Wilson, *supra* note 130 at 547–48, 550, 553–54.

142. ARIZ. REV. STAT. ANN. § 15-1862 (2011); TENN. CODE ANN. § 49-7-156 (2013). The idea of a "conscience clause" in this context emerged following objections by individual students to the requirement of counselors to avoid imposing their own values or discriminating on the basis of sexual orientation, as articulated under American Counseling Association's Code of Ethics and followed by educational programs. *See* Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011); Ward v. Wilbanks, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. 2010), *rev'd* Ward v. Polite, 667 F.3d 727 (6th Cir. 2012).

143. *The "Conscience Clause" in Professional Training*, AM. PSYCH. ASS'N. (Apr. 2015), https://www.apa.org/ed/graduate/conscience-clause-brief.

144. Nondiscrimination in Contracts, S.F. CAL. ADMIN. CODE § 12B (1986); Nondiscrimination in Property Contracts, S.F. CAL. ADMIN. CODE § 12C (1986).

Archdiocese sought an exemption based on religious conscience and made clear that a lawsuit would be the next step if accommodation was not forthcoming.[145] Speaking for the Church, Archbishop William Levada's message also offered an invitation to find common ground: "I am in favor of increasing benefits, especially health care coverage, for anyone. As the Catholic bishops of the U.S. stated in 1993, 'Every person has a right to adequate health care.' I would welcome the opportunity to work with city officials to find ways to overcome what I believe is a national shame, the fact that so many Americans have no health coverage at all. I can be counted on to raise my voice in support of universal health coverage nationally and locally. I feel sure I could make common cause with city officials in working toward this truly urgent need."[146]

In response, Mayor Willie Brown and four members of the San Francisco Board of Supervisors asked to meet with Archbishop Levada. Together they negotiated a new interpretation of the law reflecting their points of convergence. It took an overture by a Church leader and responsive engagement by the city leaders. The opposing sides treated each other with respect and humility. The result was an announcement by the city to offer different avenues for contracting partners to satisfy the city's legal requirement, including allowing employees to extend benefits to one adult living in their household.[147] By working together, the Church and the city found a way to advance their shared goals of extending health care coverage. And the Church remained a contracting partner with the city, providing valuable services, without ceding principles. Finding ways that an apparent conflict

145. William J. Levada, *The San Francisco Solution*, 75 FIRST THINGS FIRST 17–19 (Aug./Sept. 1997), http://www.firstthings.com/ftissues/ft9708/opinion/levada.html.

146. *Id*. Levada later became a cardinal and Prefect of the Congregation for the Doctrine of the Faith under Pope Benedict XVI. *See* Michael Sean Winters, Opinion, *Cardinal William Levada Strove to Honor All the Church's Teachings*, NAT'L. CATH. REP. (Sept. 27, 2019), https://www.ncronline.org/opinion/distinctly-catholic/cardinal-william-levada-strove-honor-all-churchs-teachings.

147. City and County of San Francisco Human Rights Commission, Overview and Introduction, http://www.sfgov.org/site/sfhumanrights_page_asp?id=5921 (*quoted* in Minow, *Is Pluralism an Ideal or a Compromise*, *supra* note 12.

can be reframed and transformed from an apparent "zero-sum game" may require the assistance, however, of expert mediators.[148]

3. Mediation

In employment and educational settings, mediation—negotiation facilitated by a neutral third-party—may lead to constructive resolutions in conflicts between religious liberty and antidiscrimination norms. Professor Jennifer Gerarda Brown has collected examples of efforts in which efforts to negotiate resolutions without a third-party mediator went awry.[149] Contentious discussions left some participants feeling disrespected, threatened, and more adversarial.[150] Name-calling and hardened positions has stood in the way of seeing others as human beings or offering the kind of respect at the foundation of a shared solution.

Professor Brown's analysis identifies critical elements of effective mediation. These include halting expressions and perceptions of disrespect; promoting understandings of perceptions, experiences, and interests of the other side; framing issues to find points of commonality and benefits rather than losses; and preventing abuses of power.[151] She also discusses the elements of many religious traditions and the experiences of marginalization that provide bases for better communication between individuals and groups facing conflicts over religious views and equal treatment of LGBT individuals.[152] In this vein, Lorie Smith, the web designer behind *303 Creative LLC v. Elenis* and the state could pursue an option serving both of their interests: the web designer could offer websites celebrating opposite-sex marriages and Christian messages as long as it is made equally available to any customer.

148. FREDRIKE BANNINK, HANDBOOK OF SOLUTION FOCUSED CONFLICT MANAGEMENT 5–9 (2010).

149. Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 750–74 (2010).

150. *See id.*; *id.* at 816.

151. *Id.* at 782–94, 817. Brown further explains "four of its comparative advantages over unassisted negotiation or litigation in our paradigmatic cases: (1) it addresses psychological barriers to agreement; (2) it allows each disputant to develop a deeper and more nuanced understanding of the other; (3) it focuses on the parties' ongoing relationship; and (4) it dovetails the parties' different but often complementary interests. The argument here is not that mediation achieves these goals in every case, but that mediation creates opportunities to do these things in ways that are difficult or impossible to do through litigation." *Id.* at 754.

152. *Id.* at 802–03.

One author even imagines the Masterpiece Cakeshop baker sitting down for a meal with the couple who sought his services—alongside a food celebrity. Especially where the parties have or want to have continuing connections, mediation can provide individualized resolutions, attentive to particular contexts.[153] But the parties have to want to find a solution and have to trust enough to explore real possibilities. Unfortunately, barriers to communication and trust required for problem-solving are the walls created and bolstered by social divisions.

IV. COMPROMISED OR PRINCIPLED?

The approaches briefly explored here will not here appeal to those who seek to use litigation and conflict for mobilizing like-minded people or for publicity or fundraising. Advocacy groups on both sides of the conflicts between religious claims and antidiscrimination claims often sharpen rather than resolve conflicts as they work to attract attention and support. Granted, accommodation through private or informal agreement can raise understandable concerns for departing from principle and lacking the force of law, with precedential and symbolic value. Creeping scope of religious concerns collide with heightened perceptions of disadvantage or disregard on the basis of gender, sex, or gender identity.[154] But incentives to exacerbate clashes rather than desires

153. Élise Rouméas, *Religious Diversity in the Workplace: The Case for Alternative Dispute Resolution*, 68 POL. STUD. 207 (2020). The U.S. Equal Employment Opportunity Commission has a substantial mediation program to address individual conflicts in workplaces. *See* Matthew K. Fenton, *Understanding the EEOC Medication Process*, WENZELFENTONCABASSA (Nov. 28, 2022), https://www.wenzelfenton.com/blog/2022/11/28/understanding-the-eeoc-mediation-process/.

154. *See* William Ese, *Seeing Sexism Everywhere*, SPIKED (Apr. 11, 2019), https://www.spiked-online.com/2019/04/11/seeing-sexism-everywhere/ (objecting to expansion definition of sexism and reach into private spheres of antidiscrimination concerns); Andrew M. Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty* (Nw. Pub. L. Rsch. Paper Paper No. 22-01, 2022), https://ssrn.com/abstract=4049209 or http://dx.doi.org/10.2139/ssrn.4049209 (warning of expanding claims for religious exemptions from health and safety laws); Marcia L. McCormick, *The Growing Gender/Religion Divide*, 19 MARQ. BENEFITS AND SOC. WELFARE L. REV. 197 (2018), https://scholarship.law.marquette.edu/benefits/vol19/iss2/6 (growing attention to gender and LGBT issues versus respect for religious views of many); *see also* Carlos A. Ball, *Gender-Stereotyping Theory, Freedom of Expression, and Identity*, 28 WM. & MARY BILL RTS. J. 229 (2019), https://scholarship.law.wm.edu/wmborj/vol28/iss2/2 (advancing approach to discrimination that protects gender expression, beyond fixed categories of gender and sex).

to devise workable solutions. Conflicts over religion and equal treatment also expose the question of what is public and what is private: must one's religious identity and practices be kept at home? Must one's sexual orientation and family affiliation be hidden from public view?[155] Yet, private arrangements are another resource for addressing the conflicts. During the 19th century, utopian religious communities in the United States used contract and property law to create private spaces where they could construct and preserve ways of life unpopular with the mainstream.[156] (Interestingly, a religious community may also become adept at using the tools of law and politics to protect its own seclusion and way of life.)[157]

Yet, perhaps the largest objections to the approaches suggested here will come from those who believe that their views in the conflicts between religious and equality claims are correct and just and the views of others are wrong and dangerous. In response, the positive values embodied in the search for bridges rather than walls are crucial in the contests between religious views and equality protections. Nelson Mandela, who so pivotally led the peaceful toppling of apartheid and the path to democracy in South Africa. He maintained, "I believe that in the end that it is kindness and generous accommodation that are the catalysts for real change."[158]

155. Brown, *supra* note 149 at 755; *See also* Christ Brickell, *Heroes and Invaders: Gay and Lesbian pride parades and the public/private distinction in New Zealand media accounts*, 7 GENDER, PLACE, AND CULTURE 163 (2010), https://doi.org/10.1080/713668868; Brenda Crossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER, SOC. POL'Y & L. 415 (2005), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1297&context=jgspl; R. Jared Staudt, *Relegating the Faith to the Private Sphere Generates a Distortion*, CHURCH LIFE J. (May 15, 2018), https://churchlifejournal.nd.edu/articles/relegating-the-faith-to-the-private-sphere-generates-a-distortion/. Even an argument for keeping religion private acknowledges that the solution subordinates religious identities and practices. *See* Denise Meyerson, *Why Religion Belongs in the Private Sphere, Not the Public Square*, *in* LAW AND RELIGION IN HISTORY AND THEORETICAL CONTEXT 44 (Peter Cane, Carolyn Evans & Zoe Robinson eds., 2009), https://www.cambridge.org/core/books/abs/law-and-religion-in-theoretical-and-historical-context/why-religion-belongs-in-the-private-sphere-not-the-public-square/F0CE246327DDAB6C6985BCDF267BEB93. Some religions reject the public/private distinction as contrary to maintaining coherent and thorough religions commitments. *See* Minow, *Is Pluralism an Ideal or a Compromise*, *supra* note 12.

156. CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980).

157. NOMI M. STOLZENBERG & DAVID N. MYERS, AMERICAN SHTETL (2022).

158. Nelson Mandela, *Nelson Mandela Introduces the Elders*, ELDERS (July 18, 2007), https://theelders.org/news/nelson-mandela-introduces-elders-johannesburg-18-july-2007.

Conflicts between groups are inevitable. So are conflicts between groups and governments. But addressing such conflicts can also reflect and enlarge values of inclusion and freedom. Judge Learned Hand once explained, "Conflict is normal; we reach accommodations as wisdom may teach us that it does not pay to fight."[159] Religious pluralism supports religious freedom and counters harms that come with combining government and religion.

Theocracy—and government by clergy or government claiming divine authority—risks grievous harms to those with different beliefs or affiliations. It prevents self-governance by the people. It also ironically jeopardizes religion, even a religion elevated by the government.[160] History is replete with examples of violence and corruption of theocratic empires.[161] Religious institutions that receive favorable treatment from the state lose ground relative to religious institutions that do not.[162]

Further, religious and cultural pluralism can cultivate within individuals and groups capacities to live alongside people. For many with religious commitments, such experiences can also strengthen qualities advanced by the religious community, qualities such as humility, peacefulness, acceptance, and generosity. Urging tolerance, 19th century American lawyer (and atheist) Robert Green Ingersoll instructed his fellow citizens to "[g]ive every other human

159. Learned Hand, *Democracy; Its Presumptions and Realties*, 1 FED. B. J. 40 (1932), *quoted in* Robert S. Lancaster, *Judge Learned Hand and the Limits of Discretion*, 9 VAND. L. REV. 428, 431 (1956). Judge Hand also said, "Justice is the tolerable accommodation of the conflicting interests of society." *Quoted in* John M. Mitchell, U.S. Att'y Gen., *Remarks at the Department of Justice* (July 1, 1970), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-01-1970.pdf.

160. Bill Leonard, Opinion, *The Problem with Theocracy is That Everyone Wants to Be Theo*, BAPTIST NEWS GLOBAL (July 8, 2022), https://baptistnews.com/article/the-problem-with-a-theocracy-is-everyone-wants-to-be-theo/.

161. *See* Laura Purdy, *What Price Theocracy?*, *in* THE MORALITY AND GLOBAL READER 263 (Michael Boylan ed., 2011). For a warning that the United States Supreme Court is driving a "theocratic bus," see Linda Greenhouse, *Should Courts Assess the Sincerity of Religious Beliefs?*," ATLANTIC (May 5, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-sincere-religious-belief-coach-kennedy/629737/.

162. Dan Koev, *The Influence of State Favoritism on Established Religions and Their Competitors, Politics and Religion*, 16 POL. & RELIGION 129 (2022),https://www.cambridge.org/core/journals/politics-and-religion/article/influence-of-state-favoritism-on-established-religions-and-their-competitors/4C4A242102F5D4AC0EA33E2CC234976A.

being every right you claim for yourself." [163] explained 19th century American lawyer (and atheist) Robert Green Ingersoll. Living and working in a society of religious and cultural pluralism helps individuals learn from and with people who have different views and traditions. Individuals who develop tolerance find openness to new experiences and vantage points. Religious and cultural traditions across human existence have encouraged attitudes and practices of listening, humility, forgiveness, and reconciliation for self-preservation and for higher purposes. Justice William Brennan observed, "Religious conflict can be the bloodiest and cruelest conflicts that turn people into fanatics." [164] Paradoxically, to find brotherhood and sisterhood, peace and transcendence, human societies do better to support pluralism than to commit to a singular path. Religious freedom is very different from imposing religious views on others.[165]

In contrast, history shows how intolerance produces hatred, instability, and violence. Intolerance and the belief in the righteousness of a cause or a group is too often at the root of war. It may seem an exaggeration to bring up war, but the Civil War in the United States is a sobering reminder that friends and relatives can come to kill one another—producing the bloodiest conflict in the nation's history—in the name of beliefs and causes.[166] From his experiences as a soldier during the war, Oliver Wendell Holmes, Jr. concluded that absolute belief was itself a danger.[167]

163. Robert Green Ingersoll, *The Liberty of Man, Woman, and Child*, *in* 1 THE WORKS OF ROBERT G. INGERSOLL 347 (C.P. Farrell ed., 1900).

164. William J. Brennan, Jr., Interview with National Public Radio (Jan. 29, 1987), *quoted in* GREAT QUOTATIONS ON RELIGIOUS FREEDOM 120 (Albert J. Menendez ed., 2010).

165. "Let us distinguish those who seek space for private freedom and those who seek to impose their own views on everyone else. A free society should offer not untrammeled but more latitude of the first kind than the second." Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, *supra* note 12, at 844 n. 375. And: "Religion is like a pair of shoes . . . find one that fits for you, but don't make me wear your shoes." George Carlin *quoted in* Joseph Torres, *Theological Memology: Don't Push 'Religion' on Me*, KINGDOMVIEW (July 8, 2014) https://apolojet.wordpress.com/2014/07/08/theological-memeology-dont-push-religion-on-me/.

166. *See* DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR (2009); Drew Gilpin Faust, *Death and Dying*, NAT'L PARK SERV., https://www.nps.gov/nr/travel/national_cemeteries/death.html.

167. LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 4, 36–38, 61–64, 432 (2001).

Absolute beliefs pressed by conflicting religious groups can lead to disastrous and even violent conflicts.

I previously referred to Europe's Thirty-Years War. Following religious struggles over forced Catholic conversions of Protestants, violent conflicts and related famine and disease produced estimated deaths of 4.5 to 8.0 million soldiers and civilians including some 50% of the German population.[168] Toleration as a philosophic and political value reflects both practical needs and philosophic ideals following that experience of mass violence.[169] Montesquieu concluded, "I acknowledge that history is full of religious wars; but it is an indisputable fact that these wars have not been produced by the multiplicity of religions, but rather by the intolerance or the dominant creed." He continued, "if the attempt to trouble the conscience of our neighbor was not in itself inhuman, if the manifold evil effects which spring from it has no existence, the mere contemplation of such a course would be an evidence of mental unsoundness."[170]

Ours is a world of multiple cultures and religions; economic change and contests over how to manage change. In our country, conflicts come to law and law in turn shapes discussions about our differences and how to navigate change. Can we skip the descent into violent conflicts? Let's try to build bridges instead of walls.

168. Jason Daley, *Researchers Catalogue the Grisly Deaths of Soldiers in the Thirty Years' War*, SMITHSONIAN MAGAZINE (June 6, 2017), https://www.smithsonianmag.com/smart-news/researchers-catalogue-grisly-deaths-soldiers-thirty-years-war-180963531/; Pascal Daudin, *The Thirty Years' War: The First Modern War?*, HUMANITARIAN L. & POL'Y (May 23, 2017), https://blogs.icrc.org/law-and-policy/2017/05/23/thirty-years-war-first-modern-war/. *Cf.* Blight, *supra* note 19.

169. *See* Ernst Wangermann, *Confessional Uniformity, Toleration, Freedom of Religion: An Issue for Enlightened Absolutism in the Eighteenth Century*, *in* DIVERSITY AND DISSENT: NEGOTIATING RELIGIOUS DIFFERENCE IN CENTRAL EUROPE, 1500–1800 209–18 (Howard Louthan, Gary B. Cohen & Franz A. J. Szabo eds., 2011).

170. Charles de Secondat baron de Montesquieu, Letter LXXXIV. Usbek to Rhedi, *in* PERSIAN LETTERS 160 (John Ozell trans., 1972) (1721).