

Response to Call for Input for Thematic Report: Freedom of Religion or Belief (FoRB) and Sexual Orientation and Gender Identity (SOGI)

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1. Tensions regarding competing claims for freedom of religion or belief (FoRB) and sexual orientation and gender identity (SOGI) rights have been central to “culture wars” for many years. Addressing this tension in the context of a thematic report for the United Nations calls for particular wisdom and balance. A holistic approach sensitive to the countervailing considerations is particularly vital in this area. In many parts of the world, resentment of LGBT+ agendas takes the form of general disenchantment with the international human rights movement. On the other hand, FoRB claims in certain quarters are read as masks for bigotry. Such polarized and polarizing positions are both excessive and surely mark a failure of discourse and a deeper failure to apprehend the reciprocal claims to human dignity involved.

2. Varied views of the issues involved extend along an extremely wide spectrum, but the diversity includes the kind of deep difference that constitutes the ultimate challenge to pluralism. Behind the deep differences, however, lies the fundamental reality that all the individuals who hold the varying views have dignity. In the words of Article 1 of the Universal Declaration of Human Rights (UDHR), “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Moreover, as stated in the preamble of the UDHR, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.”

3. Not surprisingly, opposed camps in clashes over FoRB and SOGI rights attempt to capture the concept of dignity and deploy it unilaterally in support of their different views. They view the struggle between FoRB and SOGI rights as a zero-sum game played on a slippery slope where each side seeks domination for its views and each fears that giving an inch will result in an unavoidable slide into submission to the other side. Fear is the underlying dynamic behind the tension—fear felt by both majorities and minorities.

4. The outcome of these polarized debates should not be assessed as a political calculus about which sides are likely to command ultimate political dominance due to shifting beliefs and changing demography. The reality is that deep differences, held by people with equal claims to dignity, persist, and the ultimate question of justice is not which group will prevail, but how the dignity and rights of everyone can be optimized. Stable peace must be anchored in pluralism in which the fears of all are minimized by maximizing protections for all.

5. As recognized by the Punta del Este Declaration on Human Dignity for Everyone Everywhere (see Annex), the concept of dignity has several dynamic features which point toward solutions. First, the “inherent dignity of all people . . . is the foundational principle and the key objective of all human rights, as well as an invaluable criterion for evaluating laws, policies, and government actions.” Second, that inherent dignity has an inner momentum that can help “generate agreement and a common understanding.” Third, because the status of dignity is shared by everyone, it cannot be invoked without recognizing the reciprocal obligations it imposes on everyone. No single viewpoint in culture war disputes can make unilateral claims for dignity-based protection of its positions. Rather, the dynamic of dignity requires all to respect the dignity of others. Fourth, as a political ideal, dignity is a conception with an upward trajectory: it points toward higher conceptions of a common life. It energizes creative, productive, and stable pluralism. Dignity for all is a constant reminder that “human rights are universal, inalienable, indivisible, interdependent and interrelated.”

6. Historically, institutions of religious liberty have the world’s best track record in reconciling deep difference and achieving stable pluralism and peace. While counter-intuitive to those who assumed that social homogeneity was the foundation for peace, religious liberty has turned out to be one of modernity’s most important axioms for good and just governance. The key to peace is not coercing compliance with a particular religion, ideology, or world view, but securing the right to be protected against illegitimate coercion from those holding divergent views. Protection of the right to FoRB helps quell worries that one’s dignity and core concerns will be violated. This key, with its insistence on protecting pluralism, needs to be remembered when dealing with today’s prime examples of deep difference. Doing so respects both the underlying insights drawn from the lessons of implementing FoRB, and simultaneously respects the demands of dignity.

7. Of course, religious liberty rights are not unlimited. As amply recognized under international law, there are carefully described conditions under which religious claims must give way to other fundamental rights and paramount concerns. Limitations on FoRB must comply with the rule of law, and be necessary and proportionate to legitimate interests in public health, safety, order, morals, and the fundamental rights of others. *See, e.g.*, Article 18(3) of the International Covenant of Civil and Political Rights. The challenge, of course, is determining

precisely when these narrow limitations come into play, particularly where FoRB and SOGI rights appear to collide.

8. As a general rule, FoRB does not justify physical violence, except perhaps in defensive settings. More generally, FoRB claims need to be carefully weighed when other fundamental rights are at stake. But the balancing must be sensitive, given the fundamentality of FoRB rights themselves. Moreover, what can be said of violence cannot be automatically extended to the notion of discrimination. There is a profound difference between invidious discrimination and legitimate differentiation. Having “discriminating taste,” for example, is generally viewed as a positive trait. In fact, many fundamental rights, including FoRB, assure individuals the right to make differentiations in their religious beliefs, the opinions they express, those with whom they choose to associate, the structuring of their private sphere, the selection of property to acquire, and so on, through a broad panorama of life choices. Every piece of legislation and every judicial decision makes distinctions. The question is not whether differentiations are made, but whether the differentiations are reasonable and justifiable.

9. Moreover, discrimination against a person on the basis of religion is as much a violation of dignity and human rights as SOGI discrimination. History and current experience are replete with examples of persecution on the basis of both religious and SOGI characteristics. Neither of these species of discrimination is entitled to automatic priority protection vis-à-vis the other.

10. Practical experience in finding livable solutions to FoRB/SOGI tensions presupposes that those with different views come together to discuss actual needs with civility and good faith. The reality that such stores of good faith are available is attested by discussions occurring in many forums, such as the finding at the beginning of the recently enacted Respect for Marriage Act in the United States: “Diverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent and honorable religious or philosophical premises. Therefore, Congress affirms that such people and their diverse beliefs are due proper respect.”

11. To identify workable and livable solutions, it is helpful to distinguish three broad types of social spaces where accommodations must be worked out. First, in genuinely *public spaces*, LGBT+ nondiscrimination norms should generally prevail, subject to some narrow exceptions predicated on particularly salient needs. Second, in *private and sacred spaces*, which are zones of family, faith, and individual-identity formation, personal and religious autonomy should generally prevail. Protections in this area need to extend not only to individual autonomy, but also to the autonomy of religious institutions, including religious organizations per se as well as religiously affiliated educational, healthcare, and other charitable institutions. Third, in *hybrid spaces*, where public interests intersect with private or sacred interests, both nondiscrimination norms and autonomy norms should have legitimate but not absolute sway. (See Dushku, “The Case for Creative Pluralism in Adoption and Foster Care,” *Yale Law Forum* 261-62 (2021), Annex). The third domain is where the most difficult judgments must be made, but by paying attention to concrete needs as opposed to ideological positions, creative pluralism can find workable solutions.

12. The so-called “Utah Compromise” exemplified this approach. See Robin Wilson’s table summarizing “Utah’s Pivotal Bargain,” Annex. What the table shows is that Utah’s legislation provided somewhat broader protections for LGBT+ groups than even many of the “blue” (liberal) states, but at the same time it afforded broad protection to FoRB rights. The Act protected many of the most central concerns for LGBT+ groups such as protection from employment and housing discrimination and assurance of workplace accommodations for transgender individuals. At the same time it assured that neither clergy nor religious organizations would be required to offer wedding contrary to their beliefs either themselves or in affiliated buildings. LGBT+ and religious individuals were also protected from job discrimination for expressive conduct outside the workplace (e.g., teaching in a religious context or participation in a pride parade). The legislation solved a number of practical problems. For example, it provides that the state is obligated to make access to same-sex marriage available. However, where particular individuals object to performing or licensing such marriages, the state can respect their conscientious positions, so long as it finds alternative personnel who are willing to provide the relevant services.

13. The Utah Compromise was criticized by those holding opposing beliefs at both conservative and liberal ends of the political spectrum. However, it has been remarkably effective at reducing polarization on FoRB/SOGI issues. While often described as a compromise, a prominent Yale LGBT+ leader has suggested that the law should be referred to as Utah’s “Statute of Principles,” since it was principled on both sides. See William Eskridge, “Mediating LGBTQ Equality and Religious Liberty Clashes, University of Virginia Lecture (link in Annex). Significantly, little if any litigation has challenged the Utah legislation, and in fact, subsequent survey data shows that by 2019, Utah’s population was tied for second place in the nation regarding highest state level support for LGBT+ non-discrimination protections. See link to Greenberg et al., Public Religion Research Institute survey, Annex. What this demonstrates is that even when legislation does not address all contested issues, polarization levels can be substantially reduced by addressing concrete concerns.

14. In the United States, comprehensive anti-discrimination legislation is stalled. LGBT+ advocacy groups have pulled back from support for the Employment Nondiscrimination Act (“ENDA”), which sought to extend Title VII of the Civil Rights Act to prohibit SOGI discrimination while retaining Title VII’s exemptions for religious organizations. As the political climate has shifted, LGBT+ advocates have switched to supporting the sweeping Equality Act, which does not provide religious liberty exemptions. This legislation was passed by the House of Representatives but is unlikely to win Senate concurrence. The intermediate “Fairness for All Act,” modeled in several respects on the Utah Compromise, seeks to strike a balance between FoRB and SOGI concerns. (For comprehensive analysis, see link to Stewart and Schaerr, Annex.)

15. A “fairness for all” approach has a variety of advantages. It takes the underlying dignity concerns seriously, striving to strike a wise social balance by optimizing dignity for all, rather than assuming that current (or emerging) political might makes right. It is better at acknowledging that deep differences are here to stay, and stable peace and depolarization is best achieved by taking rival concerns seriously. It does not give either FoRB or SOGI claims absolute sway, but helps determine which concerns deserve the greatest deference in which

contexts. It avoids disrupting traditional social structures such as tax exempt status, accreditation of religious institutions, structuring of identity forming institutions, diversity in provision of adoption and foster care, and countless other social institutions, while providing vital protections for SOGI rights.

16. As a matter of general strategy in the quest for solutions, legislative institutions are better positioned than courts to gather broad input and to reach workable compromises. Courts are typically forced to make either/or decisions, and to the extent they are interpreting constitutional texts, their decisions may freeze solutions in constitutional cement, making social adjustments difficult if not impossible. The result may be intensified polarization and controversy with little hope of resolution. Legislation is important not only because of the solutions it finds, but also because of its potential for building consensus both in the legislative process and in society at large. Legislation can also help defuse polarization that leads to radicalization and resulting breaches of social peace. The point here is not to discount the importance of judicial processes, but to emphasize certain inherent advantages of legislation.

17. Retaining the flexibility to accommodate religious differences by making reasonable exceptions to general legislation is vital. A key problem with the Equality Act proposed in the United States is that it fails to make adequate accommodations for sincerely held good-faith beliefs. Failure to make such reasonable accommodations gives undue weight to the political clout of some to the detriment of the dignity claims of others. Allowing appropriate exemptions reduces fears that such overreaching will occur. Worries sometimes cited that FoRB claims are a mask for bigotry are largely ungrounded, but can be unmasked where such unsavory motivations are verified.

18. Leading jurisdictions have tended to favor the reasonable accommodation approach, which recognizes the importance of sensitive exemptions to general legislation. Even when reaching essentially pro-SOGI results, the U.S. Supreme Court has consistently emphasized the importance of respecting religious rights. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (Court emphasized that religious beliefs are honorable and deserve respect while sustaining same-sex marriage); *Bostock v. Clayton County*, 140 S.Ct. 1731, 1753-54 (2020) (Court reaffirmed religious rights in a landmark case extending SOGI protections). Similarly, the Inter-American Court of Human Rights, in a case clearly protecting lesbian rights, went out of its way to stress that freedom of conscience and religion “constitutes a transcendental element in the protection of the convictions of believers and in their way of life,” and that “religious communities must be free from any arbitrary interference by the State in areas related to religious beliefs and the organizational life of the community.” *Pavez v. Chile* (Decision of Feb. 4, 2022), paras. 75, 84, and 119, *available at* https://www.corteidh.or.cr/docs/casos/articulos/seriec_449_ing.pdf.

19. A balanced analysis of how best to address FoRB and SOGI claims should encourage a flexible approach which seeks to optimize dignity protections for all.

ANNEX

Links to helpful articles:

William Eskridge, “Mediating LGBTQ Equality and Religious Liberty Clashes,” <https://mormonstudies.as.virginia.edu/event/william-eskridge-mediating-lgbtq-equality-religious-liberty-clashes/>.

Daniel Greenberg, Emma Beyer, Maxine Janle, Oyindamola Bola, and Robert P. Jones, PRRI (Public Religion Research Institute), “Americans Show Broad Support for LGBT Nondiscrimination Protections,” March 12, 2019, <https://www.ppri.org/research/americans-support-protections-lgbt-people/> .

Chris Stewart and Gene Schaerr, “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act,” 46 *Notre Dame J. of Legislation* 134 (2020), <https://www.nationalaffairs.com/publications/detail/nondiscrimination-for-all>.

Federal Fairness for All Act text: <https://www.congress.gov/bill/117th-congress/house-bill/1440/text>

Respect for Marriage Act: <https://www.congress.gov/bill/117th-congress/house-bill/8404/text>

Punta del Este Declaration on Human Dignity for Everyone Everywhere, <https://www.dignityforeveryone.org/> .

FULL TEXT ANNEXES

From: William W. Bassett, W. Cole Durham, Jr., Robert T. Smith, and Mark Goldfeder, *Religious Organizations and the Law* §6.25 (Thomson Reuters 2020), Chart summarizing religious liberty and SOGI protections in states of the United States.

Alexander Dushku, “The Case for Creative Pluralism in Adoption and Foster Care,” *The Yale Law Journal Forum*, November 5, 2021.

Robin Fretwell Wilson, “Utah’s Pivotal Bargain,” (Chart comparing “Utah Compromise” and LGBT+ and FoRB protections in other U.S. states), adapted from Robin Fretwell Wilson, “Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections,” 64 *Case Western Reserve Law Review* 1161 (2014).

From: William W. Bassett, W. Cole Durham, Jr., Robert T. Smith, and Mark Goldfeder, *Religious Organizations and the Law* §6.25 (Thomson Reuters 2020)

**Overview of state statutes in the United States dealing with religion, sexual orientation, and discrimination
(with thanks to Robin Fretwell Wilson, Sexual Orientation and Gender Identity Protections)**

State	Religious Freedom Laws	Employment Protections and Religious Exemption	Housing Protections and Religious Exemption	Public Accommodation Protections and Religious Exemption	SOGI Public Accommodation Laws and Religious Exemption	Exemptions for Solemnizing Marriage	Adoption Protections
Alabama	RFRA Only Ala. Const. art. I, § 3.01 (constitutional amendment).						Ala. Code §§ 26-10D-1 et seq. (2017).
Alaska	Heightened Scrutiny Only: Larson v. Cooper , 90 P.3d 125, 131–32 n.31 (Alaska 2004); Swanner v. Anchorage Equal Rights Com'n , 874 P.2d 274 (Alaska 1994).			Alaska Stat. 18.80.300.			
Arizona	RFRA Only: Ariz. Rev. Stat. Ann. §§ 41-1493.01, et seq. (2016).						
Arkansas	RFRA & Heightened Scrutiny: Ark. Code Ann. §§ 16-123-401, et seq. (2015); Gipson v.						

	Brown, 295 Ark. 371, 749 S.W.2d 297 (1988).						
California	No RFRA or Heightened Scrutiny: Cal. Gov't Code § 8310.3	Cal. Gov't Code §§ 11135, 12920, 12921(a), 12940; see also Assemb. 2601, 1991–1992 Cal. Leg. Reg. Sess. (Feb. 11, 1992); Assemb. 196, 2003–2004 Leg., Reg. Sess. (Cal. 2003) (enacted 2003, became effective January 1, 2004). Rel. Exem.: §§ 12922, 12926(d), 12926.2, 12940(j)(4)(B)	Cal. Gov't Code §§ 11135, 12920, 12921(b), 12927, 12955. Rel. Exem.: § 12955.4	Cal. Gov't Code § 12926; Cal. Civil Code § 51(b).	Cal. Civil Code § 51(b).	Rel. Exem.: Cal. Fam. Code § 400(a).	
Colorado	No RFRA or Heightened Scrutiny	Colo. Rev. Stat. § 24-34-402 . See also Colorado Anti-Discrimination Act, S. 08-200, 2008 Leg., (Colo. 2008). Rel. Exem.: §§ 24-34-401(3) , 24-34-402(7)	Colo. Rev. Stat. § 24-34-502 . Rel. Exem.: § 24-34-502(3)	Colo. Rev. Stat. § 24-34-601 .	Colo. Rev. Stat. § 24-34-601 Rel. Exem.: § 24-34-601(1)		Colo. Rev. Stat. § 19-5-202

<p>Connecticut</p>	<p>RFRA Only: Conn. Gen. Stat. § 52-571b.</p>	<p>Conn. Gen. Stat. §§ 46a-60, 46a-81c. See also An Act Concerning Discrimination on the Basis of Sexual Orientation, Pub. Acts No. 91-58 (Reg. Sess.) (codified as amended at Conn. Gen. Stat. § 46a-64c); An Act Concerning Discrimination, H.R. 6599, 2011 Leg., Reg. Sess. (Conn. 2011). Rel. Exem.: §§ 46a-81p, 46a-81aa</p>	<p>Conn. Gen. Stat. §§ 46a-64c, 46a-81e. Rel. Exem.: §§ 46a-81p, 46a-81aa</p>	<p>Rel. Exem.: Conn. Gen. Stat. §§ 46a-81p, 46a-81aa</p>	<p>Conn. Gen. Stat. §§ 46a-64, 46a-81d Conn. Gen. Stat. 46a-63(1) Rel. Exem.: § 46a-81p</p>	<p>Passed just after judicial decision requiring same-sex marriage, Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 140-41, 957 A.2d 407 (2008).</p>	<p>Conn. Gen. Stat. § 46b-35b</p>
<p>Delaware</p>	<p>No RFRA or Heightened Scrutiny</p>	<p>Del. Code Ann. Tit. 19, § 711; Gender Identity</p>	<p>Del. Code Ann. tit. 6, §§ 4603, 4604.</p>		<p>Del. Code Ann. tit. 6, §§ 4502(14), 4503, 4504</p>	<p>Del. Code Ann. tit. 13, §§ 101(e), 106</p>	<p>Del. Code Ann. tit. 13, § 903</p>

		Nondiscrimination Act, S. 97, 147th Gen. Assemb. (Del. 2013).	Rel. Exem.: tit. 6, § 4607				
District of Columbia	No RFRA of Heightened Scrutiny	D.C. Code Ann. § 2-1402.11 Rel. Exem.: § 2-1401.03(b)	D.C. Code Ann. § 2-1402.21 Rel. Exem.: § 2-1401.03(d)		D.C. Code Ann. § 2-1402.31 Rel. Exem.: D.C. Code Ann. § 2-1401.03	D.C. Code Ann. § 2-1402.21 ; § 46-406(e)	D.C. Code Ann. § 16-302
Florida	RFRA Only: Fla. Stat. Ann. §§ 761.01, et seq.						
Georgia	No RFRA or Heightened Scrutiny						
Hawaii	Heightened Scrutiny Only: Dedman v. Board of Land and Natural Resources , 69 Haw. 255, 740 P.2d 28 (1987).	Haw. Rev. Stat. Ann. § 378-2 Rel. Exem.: § 378-3(5)	Haw. Rev. Stat. Ann. § 515-3 Rel. Exem.: §§ 515-4 to 515-8	Haw. Rev. Stat. Ann. § 489-3	Haw. Rev. Stat. Ann. § 489-3	Haw. Rev. Stat. Ann. § 572-12.1	
Idaho	RFRA Only: Idaho Code §§ 73-402, et seq.						
Illinois	RFRA Only: Ch. 775 Ill. Comp. Stat. 35/1, et seq.	Ch. 775 Ill. Comp. Stat. Ann. 5/1-102, 5/2-102.	Ch. 775 Ill. Comp. Stat. Ann. 5/3-102 Rel. Exem.: 5/3-106	Ch. 775 Ill. Comp. Stat. Ann. 5/1-103, 5/5-102. Rel. Exem.: 5/5-102.1	Ch. 775 Ill. Comp. Stat. Ann. 5/5-102.	S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); Ch. 750 Ill. Comp. Stat. 75/15, 80/15	Ch. 750 Ill. Comp. Stat. 50/2.

		Rel. Exem.: 5/2- 101(B)(2), 5/2-101(F)					
Indiana	RFRA & Heightened Scrutiny: Ind. Code §§ 34-13-9-1, et seq. ; City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment, 744 N.E.2d 443, 445-51 (Ind. 2001) ; Church of Christ in Indianapolis v. Metropolitan Bd. of Zoning Appeals of Marion County (Division I), 175 Ind. App. 346, 371 N.E.2d 1331 (1978) .						
Iowa	No RFRA or Heightened Scrutiny	Iowa Code Ann. §§ 216.6, 216.6A Rel. Exem.: § 216.6(6)(d)	Iowa Code Ann. §§ 216.8, 216.8A Rel. Exem.: § 216.12(1)(a)	Iowa Code Ann. § 216.7 Rel. Exem.: § 216.7(2)(a)	Iowa Code Ann. § 216.7 Rel. Exem.: § 216.7(2)(a)		
Kansas	RFRA & Heightened Scrutiny: Kan. Stat. Ann. §§ 60-5301, et seq. ; Lower v. Board of					Rel. Exem.: Kan. Stat. Ann. § 60-5322	

	Directors of Haskell County Cemetery Dist., 274 Kan. 735, 56 P.3d 235, 244-46 (2002); State v. Evans, 14 Kan. App. 2d 591, 796 P.2d 178 (1990).						
Kentucky	RFRA Only: Ky. Rev. Stat. Ann. § 446.350; Gingerich v. Com., 382 S.W.3d 835, 844 (Ky. 2012).						
Louisiana	RFRA & Heightened Scrutiny: La. Stat. Ann. §§ 13:5231, et seq.; State v. Victor, 195 So. 3d 128 (La. Ct. App. 5th Cir. 2016), writ denied, 253 So. 3d 1300 (La. 2018), reconsideration not considered, 263 So. 3d 431 (La. 2019) and cert. granted, judgment vacated, 140 S. Ct. 2715, 206 L. Ed. 2d 851 (2020) and on reconsideration, 307 So. 3d 317 (La. Ct. App. 5th Cir. 2020).						

<p>Maine</p>	<p>Heightened Scrutiny Only: Fortin v. The Roman Catholic Bishop of Portland, 2005 ME 57, 871 A.2d 1208, 1227–30 (Me. 2005); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992).</p>	<p>Me. Stat. tit. 5, § 4572 Rel. Exem.: tit. 5, §§ 4553(4), 4573-A</p>	<p>Me. Stat. tit. 5, § 4581-A Rel. Exem.: tit. 5, § 4581(4).</p>	<p>Me. Stat. tit. 5, §§ 4553, 4591</p>	<p>Me. Stat. tit. 5, § 4591</p>	<p>Me. Stat. tit. 19-A, § 655(3)</p>
<p>Maryland</p>	<p>No RFRA or Heightened Scrutiny: Montrose Christian School Corp. v. Walsh, 363 Md. 565, 770 A.2d 111, 123, 153 Ed. Law Rep. 299, 85 Fair Empl. Prac. Cas. (BNA) 859 (2001).</p>	<p>Md. Code Ann., State Gov't §§ 20-602, 20-606. Rel. Exem.: § 20-605</p>	<p>Md. Code Ann., State Gov't §§ 20-702, 20-705.</p>	<p>Md. Code Ann., State Gov't §§ 20-301, 20-303, 20-304</p>	<p>Md. Code Ann., State Gov't §§ 20-301, 20-303, 20-304</p>	<p>2012 Md. Laws §§ 2 to 3</p>
<p>Massachusetts</p>	<p>Heightened Scrutiny Only: Rasheed v. Commissioner of Correction, 446 Mass. 463, 845 N.E.2d 296, 302–03, 308 (2006); Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (1994).</p>	<p>Mass. Gen. Laws Ch. 151B, § 4. See also An Act Making It Unlawful to Discriminate on the Basis of Sexual Orientation, 1989 Mass. Acts 516; An Act Relative</p>	<p>Mass. Gen. Laws Ch. 151B, § 4. See also An Act Making It Unlawful to Discriminate on the Basis of Sexual Orientation, 1989 Mass. Acts 516; An Act Relative</p>	<p>Mass. Gen. Laws Ch. 272, §§ 92A, 98</p>	<p>Mass. Gen. Laws Ch. 272, §§ 92A, 98</p>	

		to Transgender Anti- Discriminati on, S.735, 189th Gen. Ct. (Mass. 2016). Rel. Exem.: Ch. 151B, §§ 1(5), 4.18	to Transgender Anti- Discriminati on, S.735, 189th Gen. Ct. (Mass. 2016). Rel. Exem.: Ch. 151B, § 4.18				
Michigan	Heightened Scrutiny Only: McCready v. Hoffius , 459 Mich. 131, 586 N.W.2d 723, 729 (1998), opinion vacated on other grounds in part, 459 Mich. 1235, 593 N.W.2d 545 (1999); Porth v. Roman Catholic Diocese of Kalamazoo , 209 Mich. App. 630, 532 N.W.2d 195, 100 Ed. Law Rep. 301, 68 Fair Empl. Prac. Cas. (BNA) 27, 66 Empl. Prac. Dec. (CCH) P 43500 (1995).						Rel. Exem.: Mich. Comp. Laws Ann. §§ 400.5a, 722.124e.
Minnesota	Heightened Scrutiny Only: Hill-Murray Federation of	Minn. Stat. Ann. § 363a.08	Minn. Stat. Ann. §§	Minn. Stat. Ann. §§	Minn. Stat. Ann. § 363A.11 ; but	Rel. Exem.: Minn. Stat. Ann. §§ 363A.26, 517.09, 517.201	Rel. Exem.: Minn. Stat. Ann. §§ 260C.212, 260C.215, 517.201

	<p>Teachers, St. Paul, Minn. v. Hill-Murray High School, Maplewood, Minn., 487 N.W.2d 857, 76 Ed. Law Rep. 864, 122 Lab. Cas. (CCH) P 57032 (Minn. 1992); State v. Hershberger, 462 N.W.2d 393, 396-99 (Minn. 1990).</p>	<p>Rel. Exem.: §§ 363A.20, 363A.26</p>	<p>363A.09, 363A.10 Rel. Exem.: § 363A.26</p>	<p>363A.03, 363A.11, Rel. Exem.: §§ 363A.23, 363A.26.</p>	<p>see Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019). Rel. Exem.: §§ 363A.23, 363A.26.</p>		
Mississippi	<p>RFRA & Heightened Scrutiny: Miss. Code Ann. § 11-61-1; In re Brown, 478 So. 2d 1033 (Miss. 1985).</p>					<p>Rel. Exem.: Miss. Code Ann. §§ 11-62-5(1)(a), 11-62-5(5), 11-62-8(a-b)</p>	
Missouri	<p>RFRA Only: Mo. Rev. Stat. §§ 1.302, et seq.</p>						
Montana	<p>Heightened Scrutiny Only: Davis v. Church of Jesus Christ of Latter Day Saints, 258 Mont. 286, 852 P.2d 640 (1993) (overruled by, Gliko v. Permann, 2006 MT 30, 331 Mont. 112, 130 P.3d 155 (2006)); St. John's Lutheran Church v. State Compensation Ins. Fund, 252</p>						

	Mont. 516, 830 P.2d 1271, 1276-77 (1992).						
Nebraska	No RFRA or Heightened Scrutiny: In re Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10, 19 (2008).						
Nevada	No RFRA or Heightened Scrutiny	Nev. Rev. Stat. Ann. § 613.330 Rel. Exem.: §§ 613.320, 613.350	Nev. Rev. Stat. Ann. § 118.100	Nev. Rev. Stat. Ann. § 651.050.	Nev. Rev. Stat. Ann. § 651.070.	Nev. Rev. Stat. Ann. § 112A.110	Nev. Rev. Stat. Ann. § 127.030
New Hampshire	No RFRA or Heightened Scrutiny: Appeal of Trotzer, 143 N.H. 64, 719 A.2d 584, 589 (1998).	N.H. Rev. Stat. Ann. § 354-A:7 Rel. Exem.: § 354-A:2(VII).	N.H. Rev. Stat. Ann. §§ 354-A:10, 354-A:13 Rel. Exem.: § 354-A:18.	N.H. Rev. Stat. Ann. § 354-A:2. N.H. Rev. Stat. Ann. §§ 354-A:16, 354-A:17, 354-A:18. Rel. Exem.: § 354-A:18.	N.H. Rev. Stat. Ann. § 354-A:2. N.H. Rev. Stat. Ann. §§ 354-A:16, 354-A:17, 354-A:18. Rel. Exem.: § 354-A:18.	N.H. Rev. Stat. Ann. § 457:37 (III).	N.H. Rev. Stat. Ann. § 170-B:4
New Jersey	No RFRA or Heightened Scrutiny	N.J. Stat. Ann. § 10:5-12(a). Rel. Exem.: § 10:5-12(a).	N.J. Stat. Ann. § 10:5-12(g).	N.J. Stat. §§ 10:5-5, 10:5-12(f). Rel. Exem.: § 10:5-5(l).	N.J. Stat. §§ 10:5-5, 10:5-12(f). Rel. Exem.: § 10:5-5(l).		
New Mexico	RFRA Only: N.M. Stat. Ann. §§ 28-22-1, et seq.	N.M. Stat. Ann. § 28-1-7A.	N.M. Stat. Ann. § 28-1-7(G).	N.M. Stat. Ann. §§ 28-	N.M. Stat. Ann. § 28-1-7(F).		N.M. Stat. Ann. §§ 32A-5-11, 40-14-5

		Rel. Exem.: § 28-1-9.	Rel. Exem.: § 28-1-9.	1-2 , 28-1-7(F) Rel. Exem.: 28-1-9.			
New York	Heightened Scrutiny Only: N.Y. Exec. Law § 466.13; see also Catholic Charities of Diocese of Albany v. Serio , 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459, 465-68, 35 A.L.R.6th 735 (2006).	N.Y. Exec. Law §§ 296(1) , 466.13; N.Y. Civ. Rts. § 44a Rel. Exem.: N.Y. Exec. Law § 296(11) .	N.Y. Exec. Law §§ 296(5) , 296(2)(a) , 466.13 Rel. Exem.: N.Y. Exec. Law § 296(11) ; N.Y. Civ. Rts. § 18-b .	N.Y. Exec. Law §§ 292 , 296(2) , 466.13; N.Y. Civ. Rts. §§ 40 , 40c, 44(a) . Rel. Exem.: N.Y. Exec. Law § 292(9) .	N.Y. Exec. Law § 296(2) ; N.Y. Civ. Rts. §§ 40 , 40c, 44(a) . Rel. Exem.: N.Y. Exec. Law § 292(9) .	N.Y. Dom. Rel. Law §§ 10-b(1) , 10-b(2) .	N.Y. Dom. Rel. Law § 110 .
North Carolina	Heightened Scrutiny Only: Matter of Browning , 124 N.C. App. 190, 476 S.E.2d 465 (1996).						N.C. Gen. Stat. Ann. § 48-1-103 .
North Dakota	No RFRA or Heightened Scrutiny						
Ohio	Heightened Scrutiny Only: Humphrey v. Lane , 89 Ohio St. 3d 62, 2000-Ohio-435, 728 N.E.2d 1039, 78 Empl. Prac. Dec. (CCH) P 40101 (2000).						Ohio Rev. Code Ann. § 3107.03
Oklahoma	RFRA Only: Okla. Stat. tit., 51 §§ 251, et seq.						

Oregon	No RFRA or Heightened Scrutiny: Meltebeke v. Bureau of Labor and Industries , 322 Or. 132, 903 P.2d 351, 359-62, 69 Fair Empl. Prac. Cas. (BNA) 56 (1995).	Or. Rev. Stat. Ann. tit. 51 § 659A.030 . Rel. Exem.: § 659A.006(4).	Or. Rev. Stat. Ann. tit. 51 § 659A.421 . Rel. Exem.: § 659A.006(3).	Or. Rev. Stat. Ann. Tit. 51 §§ 659A.001 , 659A.400 , 659A.403 . Rel. Exem.: 659A.006(3).			
Pennsylvania	RFRA Only: 71 Pa. Stat. §§ 2403, et seq.						
Rhode Island	RFRA Only: R.I. Gen. Laws §§ 42-80.1-1 , et seq.	R.I. Gen. Laws Ann. § 28-5-7 . Rel. Exem.: § 28-5-6(8)(ii).	R.I. Gen. Laws Ann. § 34-37-4 . Rel. Exem.: § 34-37-4.2.	R.I. Gen. Laws Ann. §§ 11-24-2 , et seq.	R.I. Gen. Laws Ann. § 15-3-6.1 ; R.I. Gen. Laws § 28-5-7 .		
South Carolina	RFRA Only: S.C. Code Ann. §§ 1-32-10 , et seq.	See S.C. Code Ann. § 63.9.60(A)					
South Dakota	No RFRA or Heightened Scrutiny						
Tennessee	RFRA & Heightened Scrutiny: Tenn. Code Ann. § 4-1-407 ; State ex rel. Swann v. Pack, 527 S.W.2d 99, 107 (Tenn. 1975); Wolf v. Sundquist, 955 S.W.2d 626 (Tenn. Ct. App. 1997); State v. Loudon, 857 S.W.2d 878						

	(Tenn. Crim. App. 1993).						
Texas	RFRA Only: Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001, et seq.						Tex. Hum. Res. Code §§ 45.001, et seq.
Utah	No RFRA or Heightened Scrutiny Utah Code Ann. tit. 34A, Ch. 5 § 112, Utah Code Ann. tit. 63G-20-102.	Utah Code Ann. § 34A-5-106. Rel. Exem.: §§ 34A-5-106(3)(a), 34A-5-102(1)(ii)(A).	Utah Code Ann. § 57-21-6. Rel. Exem.: § 57-21-5.			Utah Code Ann. §§ 63G-20-201 to 63G-20-301.	
Vermont	No RFRA or Heightened Scrutiny	Vt. Stat. Ann. tit. 21, § 495. Rel. Exem.: tit. 21, § 495(e).	Vt. Stat. Ann. tit. 9, § 4503. Rel. Exem.: tit. 9, § 4504(5).	Vt. Stat. Ann. tit. 21, § 495d; Vt. Stat. Ann. tit. 9, §§ 4501, 4502. Rel. Exem.: tit. 9, § 4502 (l).	Vt. Stat. Ann. tit. 9, § 4502. Rel. Exem.: tit. 9, § 4502 (l).	Vt. Stat. Ann. tit. 18, § 5144(c).	Vt. Stat. Ann. tit. 15A, § 2-204.
Virginia	RFRA Only: Va. Code Ann. § 57-2.02.	Va. Code Ann. § 2.2-3905. Rel. Exem.: § 2.2-3905(E).	Va. Code Ann. § 36-96.3. Rel. Exem.: § 36-96.2(C).	Va. Code Ann. § 2.2-3904. Rel. Exem.: § 2.2-3904(C).	Va. Code Ann. § 2.2-3904(B). Rel. Exem.: § 2.2-3904(C).		Va. Code Ann. § 63.2-1709.3.
Washington	Heightened Scrutiny Only: City of Woodinville v. Northshore United Church of Christ, 166 Wash.	Wash. Rev. Code Ann. § 49.60.180.	Wash. Rev. Code Ann. § 49.60.222.	Wash. Rev. Code Ann. §§ 49.60.040(2), 49.60.215.	Wash. Rev. Code Ann. § 49.60.215.	Wash. Rev. Code Ann. § 26.04.010(4)	

	2d 633, 211 P.3d 406, 410 (2009); Munns v. Martin, 131 Wash. 2d 192, 930 P.2d 318 (1997).	Rel. Exem.: § 49.60.040 (11).	Rel. Exem.: § 49.60.040 (2).	Rel. Exem.: § 49.60.040(2)	Rel. Exem.: § 49.60.040(2)		
West Virginia	Heightened Scrutiny Only: State v. Everly, 150 W. Va. 423, 146 S.E.2d 705 (1966) (applying a standard of review that is unclear, but inconsistent with Employment Divisions v. Smith).						
Wisconsin	Heightened Scrutiny Only: Coulee Catholic Schools v. Labor and Industry Review Com'n, Dept. of Workforce Development, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, 885-87, 106 Fair Empl. Prac. Cas. (BNA) 1514 (2009); State v. Miller, 202 Wis. 2d 56, 549 N.W.2d 235 (1996).	Wis. Stat. Ann. §§ 111.321, 111.322, 111.36(d)(1). Rel. Exem.: § 111.337.	Wis. Stat. Ann. § 106.50.	Wis. Stat. Ann. § 106.52.	Wis. Stat. Ann. § 106.52(2).		Wis. Stat. Ann. § 48.82.
Wyoming	No RFRA or Heightened Scrutiny						

The Case for Creative Pluralism in Adoption and Foster Care

Alexander Dushku

ABSTRACT. Religious and secular beliefs about marriage and sexuality are often in tension. Partisans on both sides commonly insist that public policy entirely reflect their views, which leads to perpetual conflict. This Essay advocates for pluralistic solutions to such conflicts, using an example from the context of adoption and foster care.

INTRODUCTION

Can we accommodate divergent beliefs about marriage, family, gender, and sexuality? That question has defined America's culture war for the last quarter century, as LGBTQ-rights advocates have clashed with religious traditionalists and their religious-liberty allies. Professor Douglas Laycock noted over a decade ago that "[e]ach side sees the other as a genuine threat to its values and to its own liberty."¹ Those views have only intensified since. Many in each camp believe that their opponents are fundamentally mistaken about basic elements of human life.

Those metaphysical differences are not going away, and neither side has the means to impose a lasting political or legal victory on the other. Today, it is clearer than ever that we need a "negotiated truce"² that can be wrought only by a creative, gritty pluralism that reasonably protects both LGBTQ civil rights *and* longstanding religious liberties. Resolving this conflict has important implications for family law in particular, especially in the area of adoption and foster

1. Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 191 (Douglas Laycock, Anthony R. Picarello, Jr., Robin Fretwell Wilson, eds., 2008).

2. *Id.*

care. Further delay in reaching a sustainable settlement in that context will only harm vulnerable children.

The obvious answer to my opening question, given America's commitment to both freedom and pluralism, should be yes – even, “of course!” But with the tides of elite and public opinion now running in their favor, many ideological progressives do not find that answer so obvious.³ As once occurred with pleas for LGBTQ rights, current pleas for understanding, toleration, and accommodation of traditional religious beliefs and practices often fall on skeptical ears.⁴ But just as the denial and demonization of legitimate claims for LGBTQ rights has led to bitterness and conflict, so too will the refusal to reasonably accommodate the beliefs and practices of those in the conservative faith community. Indeed, the slandering of longstanding religious rights as a “license to discriminate”⁵ is no more legitimate than the old slandering of LGBTQ freedoms as a license to engage in perversion.⁶ The impulse to legally enforce deeply held religious beliefs on matters of sexuality and gender identity is strong, but so is the temptation to enforce their secular opposites.⁷

Often missing from these debates is the humane recognition that good, thoughtful people in a free society can and do understand and experience matters of sexuality and gender identity differently and, in doing so, come to clashing

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3. See, e.g., Louise Melling, *Heterosexuals Only: Signs of the Times?*, in RELIGIOUS FREEDOM, LGBTQ RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 245, 255 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) (arguing against exemptions and accommodations for “those who object on religious grounds” to facilitating events like same-sex marriages).
 4. See, e.g., Mary Anne Case, *Why “Live-and-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 471 (2015) (rejecting religious accommodations in part because “few conservative participants in the sexual culture wars showed any interest in settling for accommodation so long as there was any chance of complete victory for their side”).
 5. The “license to discriminate” trope is now common parlance among some LGBTQ activists. See, e.g., James Esseks, *Supreme Court Again Rejects a License to Discriminate*, ACLU (June 17, 2021), <https://www.aclu.org/news/lgbtq-rights/supreme-court-again-rejects-a-license-to-discriminate> [https://perma.cc/3M5P-R68D]; Melling, *supra* note 3, at 246 (arguing that religious claimants are “turning to the courts for a license to discriminate”).
 6. Denunciations of LGBTQ persons in such terms are legion. See Lou Chibbaro Jr., *New Kameny Book Cover Mimics 1950 Report Calling Gays “Perverts,”* WASH. BLADE, <https://www.washingtonblade.com/2020/01/09/new-kameny-book-cover-mimics-1950-report-calling-gays-perverts> [https://perma.cc/2WCP-DEQZ] (reviewing ERIC CERVINI, *THE DEVIANT’S WAR: THE HOMOSEXUAL VS. THE UNITED STATES OF AMERICA* (2020) and noting *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT*, S. REP. NO. 81-241 (1950)).
 7. See *infra* Part IV (discussing current efforts to suppress dissent on these matters).

moral conclusions.⁸ That recognition, along with a measure of humility, is the starting point for exploring reasonable, pluralistic solutions to the present stand-off. To be clear, in advocating for pluralistic models as the only sensible way forward, I do not mean to suggest moral relativism or that either side should cease advocating for its viewpoints. We need not affirm that all ideas are created equal to afford equal dignity and respect to the diverse individuals who hold them. Meaningful accommodation of differences is not necessarily affirmation. The practical pluralism I espouse seeks a workable, respectful, good-enough peace, not perfection or assent to the other side's ideology or theology. If, as argued below, feuding faith communities can peacefully, even lovingly, coexist despite profound theological differences that once led to violent conflicts, then so can feuding culture-war factions. That is my hope. And with the Supreme Court's evident support for pluralistic solutions, the public policy choice is increasingly between LGBTQ rights with statutory exemptions negotiated by legislators and interest groups in a spirit of compromise and (assuming they can be passed) LGBTQ rights with constitutional exemptions imposed by courts after bitter litigation.

This Essay proceeds as follows. Part I provides background on the Supreme Court's strong support for both LGBTQ equality and religious liberty as part of an emerging jurisprudence of pluralism. Part II makes a normative case for embracing creative pluralism, drawing on the history of religious conflict in the United States. Finally, Part III proposes a framework for developing pluralistic policy solutions that distinguishes between private, public, and hybrid spheres. Further, it details one such solution in the adoption and foster-care space: The child-welfare provisions in the proposed federal Fairness for All Act, which represents a good-faith legislative effort to respect the interests of both LGBTQ and faith communities while advancing the government's overriding interest in meeting the needs of vulnerable children.

I. THE SUPREME COURT'S STRONG SUPPORT FOR PLURALISM

Even as it has advanced LGBTQ rights, the Supreme Court has repeatedly underscored the importance of religious freedom in our pluralistic republic. And it has strongly signaled that it will not countenance the use of governmental power to impose a particular view of marriage or sexuality.

8. See Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 LEWIS & CLARK L. REV. 1093, 1112 (2017) ("Moral pluralism is inevitable in a free society, and it is an important good even when some of the viewpoints expressed are misguided, deeply mistaken, or even repugnant.").

Consider the Court's decision in *Obergefell v. Hodges*.⁹ There, the Court held that traditional religious and ideological beliefs about the sanctity of heterosexual marriage could not be enshrined in the law to the exclusion of same-sex couples.¹⁰ "It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society," the Court reasoned.¹¹ "Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."¹² Unlike the Court's holding over fifty years ago in *Loving v. Virginia*, which struck down an antimiscegenation law because it attempted to enforce invidious beliefs about "White Supremacy,"¹³ the *Obergefell* majority was at pains to emphasize that both the belief in traditional marriage and those who hold it are honorable. "Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held – and continues to be held – in good faith by reasonable and sincere people here and throughout the world."¹⁴ The Court explained that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."¹⁵ The Court would never say that about beliefs or practices it deemed invidious. The majority then concluded its primary analysis with assurances that it would protect religious liberties:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.¹⁶

9. 576 U.S. 644 (2015).

10. *Id.* at 680.

11. *Id.* at 670.

12. *Id.*

13. 388 U.S. 1, 11-12 (1967).

14. *Obergefell*, 576 U.S. at 657.

15. *Id.* at 673.

16. *Id.* at 679-80.

The Court did not specify what exactly “proper protection” for religious organizations and persons might entail, explicitly referencing only advocacy and teaching. Chief Justice Roberts, in his withering dissent, called out the weakness of the majority’s assurance: “The majority graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage. . . . The First Amendment guarantees, however, the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”¹⁷ But the majority did not need to go further. Its recognition of the noninvidious nature of traditional beliefs about marriage – indeed, their “decent and honorable”¹⁸ pedigree – surely constituted recognition that such beliefs are protected not only while being advocated privately or in the public square, but also in their adherents’ lived reality through religious practices. In *Christian Legal Society v. Martinez*,¹⁹ the Supreme Court rejected the distinction between “status and conduct” in the context of sexual identity.²⁰ Likewise, there is no coherent basis for a sharp distinction between the religious beliefs that constitute an individual’s or faith community’s identity and the religious practices that naturally flow from that identity and give it incarnate reality. True, beliefs may enjoy absolute protection while acts do not.²¹ But nothing in *Obergefell* suggests that the Court will allow the effective suppression of religious beliefs about marriage through the suppression of venerable and longstanding faith-based practices.

No Supreme Court decision since *Obergefell* calls this reading into serious question. Quite the contrary. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,²² the Court struck down the enforcement of a nondiscrimination law against a Christian cake-shop owner – the now-famous Jack Phillips – whose sincere religious beliefs prevented him from creating a custom cake for a same-sex marriage ceremony.²³ In his 7-2 majority opinion, Justice Kennedy noted the need to properly reconcile the tension between LGBTQ equality and First Amendment rights:

17. *Id.* at 711 (Roberts, C.J., dissenting).

18. *Id.* at 672 (majority opinion).

19. 561 U.S. 661 (2010).

20. *Id.* at 689. Christian Legal Society had argued “that it does not exclude individuals because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong.’” *Id.* (quoting Brief for Petitioner at 35-36, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 711183)).

21. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (holding that the First Amendment and the Fourteenth Amendment establish that “freedom to believe” is absolute but “freedom to act” is not because “[c]onduct remains subject to regulation for the protection of society”).

22. 138 S. Ct. 1719 (2018).

23. *Id.* at 1724.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment²⁴

Justice Kennedy also explained that “these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”²⁵

The Court’s holding in favor of Mr. Phillips ultimately rested on narrow grounds of objective inconsistency in the application of the nondiscrimination law and clear signs of subjective antireligious animus.²⁶ Had members of the Colorado Civil Rights Commission hidden their contempt for his religious beliefs, the Court’s analysis might have been more difficult.²⁷ But the fact remains that the Court overwhelmingly refused to allow the government to punish someone based on their religious beliefs and closely related practices regarding marriage. By a large majority, the Court noted the need to find a “proper reconciliation” of competing legal “principles,” one rooted in the state’s power to protect LGBTQ persons and the other rooted in “fundamental freedoms under the First

24. *Id.* at 1723.

25. *Id.* at 1732.

26. *Id.* at 1729-30.

27. Members of the Colorado Civil Rights Commission went out of their way to publicly condemn and “disparage Phillips’ beliefs” regarding the requirements of his religion, with one commissioner denouncing his faith-based actions as “despicable” and comparing them to defenses of slavery and genocide. *Id.* at 1729. The Court condemned such rhetoric and sentiments:

To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

Id. With the Court’s holding based on evidence of antireligious animus, arguably it would be easy for a subsequent Commission to evade *Masterpiece’s* holding by simply avoiding disparaging statements, which would trigger more difficult legal questions. See *Scardina v. Masterpiece Cakeshop, Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021) (fining the same *Masterpiece Cakeshop* owner after he refused to bake a cake celebrating a transgender woman’s gender transition where, notably, there was no evidence of antireligious animus).

Amendment.”²⁸ With same-sex couples able to purchase wedding cakes at numerous other locations from supportive bakers – and with Mr. Phillips being the vulnerable religious minority in this instance – the government’s need to infringe his fundamental freedoms to advance the dignity interests of LGBTQ people was attenuated.²⁹ Professors William Eskridge and Robin Fretwell Wilson have commented that “[a]lthough staking out little new ground, *Masterpiece* stands as a call for greater respect for one another, a thicker pluralism where all can be true to who they are. . . . In many ways, Kennedy [in *Masterpiece*] sketches the outer boundaries of an acceptable legislative compromise.”³⁰

Analogous pluralism concerns were evident in *Bostock v. Clayton County*,³¹ where the Court held that Title VII’s prohibition on sex discrimination in employment includes a prohibition on sexual-orientation and gender-identity discrimination.³² By any measure, this was an enormous victory with far-reaching effects for LGBTQ persons. Yet, although the facts of the case did not implicate religious-liberty concerns, the Court went out of its way to acknowledge the “fear that complying with Title VII’s requirement . . . may require some employers to violate their religious convictions.”³³ Seeking to assuage such fears with strong assurances of pluralism, the Court once again confirmed its commitment to the free exercise of religion: “We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.”³⁴ The Court then went on to list ways that the law protects religious interests in this area: Title VII’s “express statutory exception for religious organizations”;³⁵ the First Amendment’s bar on “the application of employment-discrimination laws to claims concerning the employment relationship between a religious institution and its ministers”;³⁶ and the Religious Freedom Restoration Act’s (RFRA) operation “as a kind of

28. *Masterpiece*, 138 S. Ct. at 1723.

29. *Id.* at 1731 (“[G]overnment has no role in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate.”).

30. William N. Eskridge, Jr. & Robin Fretwell Wilson, *Prospects for Common Ground: Introduction*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND, *supra* note 3, at 1, 5.

31. 140 S. Ct. 1731 (2020).

32. *Id.* at 1754 (“In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”).

33. *Id.* at 1753-54.

34. *Id.* at 1754.

35. *Id.*

36. *Id.* (citation and quotation marks omitted).

super statute” mandating strict scrutiny for all federal laws that substantially burden religious exercise.³⁷

While none of the employers in *Bostock* argued that “compliance with Title VII [would] infringe their own religious liberties in any way,” the Court noted that “other employers in other cases [could] raise free-exercise arguments that merit careful consideration.”³⁸ In so doing, the Court appears to have issued a warning—delivered in an opinion by Justice Gorsuch, whose vigorous support for religious freedom is well known,³⁹ and no doubt endorsed by the dissenting Justices—that religious interests will not simply be trampled by invocations of LGBTQ rights, for that would violate the religious liberty “guarantee [that] lies at the heart of our pluralistic society.”⁴⁰

With Justice Gorsuch seemingly more attuned to the concerns of religious dissenters than retired Justice Kennedy, and with Justice Barrett likely more amenable to religious-liberty defenses than the late Justice Ginsburg,⁴¹ the Court’s assurances of pluralism in *Obergefell* are more salient now than ever. Indeed, the current Supreme Court is more likely to sympathize with the serious religious-

37. *Id.*

38. *Id.*

39. As both a Justice and a Tenth Circuit judge, Justice Gorsuch has joined or authored several opinions that express misgivings about the willingness of federal courts to curtail religious freedoms. See, e.g., *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring) (arguing, joined by Justice Gorsuch, that the Establishment Clause resists incorporation against the states and that it merely protects states against the federal government’s imposition of an official religion and mandatory tithes rather than requiring complete state neutrality toward religion); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (mem.) (Kavanaugh, J., dissenting) (arguing, joined by Justice Gorsuch, that the Court should grant in full the application for injunctive relief to allow attendance indoors at houses of worship to resume without limitation during the COVID-19 pandemic); *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315, 1317 (10th Cir. 2015) (mem.) (Hartz, J., dissenting) (stating, joined by then-Judge Gorsuch, that the healthcare law at issue substantially burdened free exercise of religion), *vacated per curiam* No. 15-105 (U.S. May 16, 2016); *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1153-54 (10th Cir. 2013) (Gorsuch, J., concurring) (stating that the Religious Freedom Restoration Act “does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation’s long-held aspiration to serve as a refuge of religious tolerance”).

40. *Bostock*, 140 S. Ct. at 1754.

41. See Eugene Volokh, *Opinion: Supreme Court Nominee Neil Gorsuch on Religious Freedom*, WASH. POST (Jan. 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/supreme-court-nominee-neil-gorsuch-on-religious-freedom> [https://perma.cc/5DEX-3LKH] (discussing Justice Gorsuch’s analysis of free exercise as an irrevocable civil liberty in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014)); Mark Sherman, *Barrett Could Be Ginsburg’s Polar Opposite on Supreme Court*, AP NEWS (Sept. 27, 2020), <https://apnews.com/article/ruth-bader-ginsburg-us-supreme-court-courts-gun-politics-antonin-scalia-726bdo316cd646927b93137575c92966> [https://perma.cc/D5S7-7GV9] (stating that Justice Barrett “looks to conservative Justice Antonin Scalia . . . and not Ginsburg[] on matters of law”).

liberty concerns expressed by the *Obergefell* dissenters than the more cautious views of the majority, though it is unlikely that the Court would ever overturn the holding itself.

Some have characterized the Court's approach to addressing conflicts between religious and LGBTQ rights as one of "live and let live," especially when it comes to religious beliefs about marriage.⁴² If that is indeed what the Court is striving toward, how does that work as a practical matter in sensitive contexts like adoption and foster care, where private religious agencies' beliefs about marriage directly conflict with government prohibitions on discrimination based on sexual orientation and gender identity?

The Supreme Court provided a partial answer in *Fulton v. City of Philadelphia*.⁴³ In *Fulton*, the Court considered whether the city of Philadelphia violated the First Amendment when it ended the centuries-long work of Catholic Social Services (CSS) to find foster parents for vulnerable children. The case arose from a newspaper report. When a reporter asked whether the organization would place a foster child with a same-sex couple, a CSS leader explained that Catholic teachings would prevent him from doing so. Although no same-sex couple had ever been turned away, and despite CSS's willingness to direct such a "couple to one of the more than 20 other agencies in the City" that currently work with same-sex couples,⁴⁴ the Mayor and City Council of Philadelphia condemned CSS as discriminatory and terminated its contract to provide foster-care services. The Third Circuit upheld the City's actions, rejecting CSS's First Amendment claims.⁴⁵

The Supreme Court unanimously reversed. Noting CSS's long and continuous history of benevolent service to needy children "while holding to [its] beliefs" and related policies that "marriage is a sacred bond between a man and a woman,"⁴⁶ the Court held that the City's actions violated the Free Exercise Clause. The Court first deferred to CSS's assertion that certification of same-sex couples as foster parents would constitute an endorsement of their relationships, rejecting the City's contrary assertion. "As an initial matter," the Court reasoned, "it is plain that the City's actions have burdened CSS's religious exercise by put-

42. Chris Stewart & Gene Schaerr, *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, 46 J. LEGIS. 134, 137-38 (2019).

43. 141 S. Ct. 1868 (2021).

44. *Id.* at 1875.

45. See *Fulton v. City of Philadelphia*, 922 F.3d 140, 165 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

46. *Fulton*, 141 S. Ct. at 1875.

ting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.”⁴⁷ The Court then turned to whether the City’s nondiscrimination requirement was religiously neutral and generally applicable and thus entitled to deferential treatment under *Employment Division, Department of Human Resources of Oregon v. Smith*.⁴⁸ The majority rejected the City’s argument that while acting in its managerial role, the government “should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public.”⁴⁹ Instead, the Court found that the City’s policies were not generally applicable under *Smith* because of “a system of individual exemptions, made available . . . at the ‘sole discretion’ of” City officials.⁵⁰ The City’s actions were thus subject to “the strictest scrutiny.”⁵¹

Applying that standard, the Court made quick work of the City’s asserted compelling interests. “The question,” the Court instructed, drawing from its jurisprudence under RFRA, “is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.”⁵² It did not. The Court noted that excluding CSS, which works to bring more foster families into the system, would not advance the City’s asserted interest in maximizing the number of foster families.⁵³ That left the City’s interest in the principle of LGBTQ nondiscrimination to ensure “equal treatment of prospective foster parents and foster children.”⁵⁴ The Court acknowledged “that this interest is a weighty one, for ‘[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.’”⁵⁵ But although never actually used, the existence “of a system of exceptions under the contract undermines the City’s contention that its nondiscrimination policies can brook no departures.”⁵⁶ “The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.”⁵⁷ The City’s actions, therefore, failed strict scrutiny.

47. *Id.* at 1876.

48. *Id.* at 1876-77; *see* *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

49. *Fulton*, 141 S. Ct. at 1878.

50. *Id.*

51. *Id.* at 1881.

52. *Id.*

53. *Id.* at 1881-82.

54. *Id.* at 1882.

55. *Id.* (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018)).

56. *Id.*

57. *Id.*

The decision in *Fulton* can be read narrowly, to be sure. After all, Justice Alito, concurring in the judgment and joined by Justices Thomas and Gorsuch, suggested that all the City had to do was eliminate the provision giving officials discretion to make exceptions to the nondiscrimination rule and it could evade the entire holding.⁵⁸ But with Justices Thomas, Alito, and Gorsuch ready to overrule *Smith* immediately and resurrect strict scrutiny in all cases,⁵⁹ and with at least three others deeply concerned about *Smith*'s viability (though unsure of its replacement),⁶⁰ those seeking an easy end run around *Fulton* are likely to be disappointed. The Court's concluding statements belie that hope:

As Philadelphia acknowledges, CSS has “long been a point of light in the City’s foster-care system.” . . . CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.⁶¹

Once again, the Court's language was not that of regretful tolerance of noxious beliefs, speech, or conduct as the price of upholding First Amendment values, but of respect and accommodation. In praising CSS and its worthy efforts, the Court essentially rejected the notion that CSS's policy materially harms anyone.

The jurisprudential line starting from *Obergefell*'s assurances of dignity for both sides of the marriage debate and concluding in *Fulton* is clear. When it comes to religious beliefs and venerable practices related to marriage, the Court appears very unlikely to allow one side of the debate to use the power of government to anathematize the other by “treat[ing them] as social outcasts or as inferior in dignity and worth.”⁶² The City in *Fulton* sought to make CSS an outcast

58. *Id.* at 1887 (Alito, J., concurring in the judgment).

59. *Id.* at 1888.

60. *Id.* at 1882–83 (Barrett, J., joined by Kavanaugh, J., concurring) (citing textual arguments against *Smith* and stating, “it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination”); *id.* at 1926 (Gorsuch, J., concurring) (“*Smith* failed to respect this Court’s precedents, was mistaken as a matter of the Constitution’s original public meaning, and has proven unworkable in practice.”).

61. *Id.* at 1882 (quoting the City’s merits brief).

62. *Id.* at 1882 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018)).

and the Court *unanimously* said no. At least in this fraught arena, a gritty but respectful pluralism will be the Court's most probable approach.

II. THE NEED FOR CREATIVE PLURALISM

The Supreme Court's endorsement of pluralism as an important aspect of its LGBTQ rights decisions underscores two realities. First, conflicts over beliefs about marriage, family, gender, and sexuality are often deep, irreconcilable, and enduring. They are not going away.⁶³ Second, while the Supreme Court cannot rewrite every law to reconcile these conflicts, it is unlikely to allow one side of this religious/ideological conflict to use the force of law to conclusively impose its will on the other.

The first point seems obvious. Secular accounts of sexual orientation and gender identity conceive of those traits as fundamental aspects of individual identity and autonomy that the law must vigorously protect.⁶⁴ In this view, to permit discrimination against LGBTQ persons in important areas of our shared public life is to countenance harm against a vulnerable minority. By contrast, many faith traditions affirm that gender identity is a divinely ordained attribute, and that sexual activity is moral only within the bonds of marriage between a husband and wife.⁶⁵ Few conservative faith communities now seek to impose

63. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 626 (2015) ("Both gay people and religious conservatives seek space in society wherein they can live out their beliefs, values, and identities. As with the old religious differences that begot the Establishment Clause of the First Amendment, each side's most basic beliefs entail that the other group is in error about moral fundamentals and that the other's entire way of life, predicated on that error, ought not to exist." (footnote omitted)).

64. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) ("Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable." (citing Brief of the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7-17, *Obergefell*, 576 U.S. 644 (Nos. 14-556, 14-562, 14-571, 14-574))).

65. See, e.g., CATECHISM OF THE CATHOLIC CHURCH ¶ 2333, https://www.vatican.va/archive/ENG0015/___P84.HTM [<https://perma.cc/UHQ9-PUD6>] ("Everyone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life. The harmony of the couple and of society depends in part on the way in which the complementarity, needs, and mutual support between the sexes are lived out."); CATECHISM OF THE CATHOLIC CHURCH ¶ 2393, https://www.vatican.va/archive/ENG0015/___P88.HTM [<https://perma.cc/5A9D-MWW2>] ("By creating the human being man and woman, God gives personal dignity equally to the one and the other. Each of them, man and woman, should acknowledge and accept his sexual identity."); The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Sept. 23, 1995), <https://abn.churchofjesuschrist.org/study/scriptures/the-family-a-proclamation-to-the->

those views through the law. After *Obergefell*, the battle over full legal recognition of same-sex unions appears to be over. But conservative faith communities do insist that the law respect their longstanding right both to hold and practice their dissenting religious beliefs. They further insist on not being stigmatized as irrational bigots, excluded from public life, stripped of their jobs, or denied the ability to participate with other groups in performing vital charitable works as they have since before this nation was founded.⁶⁶

So there is work to do. Fortunately, finding ways to live in respectful peace despite profound differences is the unique genius of America. For centuries, Americans have sought to balance the twin imperatives of maintaining civic order and affording freedom to individuals and groups with diverse belief systems and identities. We have not always gotten the balance right, but we have not given up either. In this effort, it has been essential to recognize that protections for personal identity and freedom must include, but also go beyond, the lone individual. Securing the right of individuals to live out their private and personal lives is critical, but so is securing the freedom of individuals to gather and associate in communities of meaning and belonging.⁶⁷ Notably, the fight for legal recognition of same-sex unions was not merely an individualist movement. It was also a demand for legal and social respect for diverse families and for the

world/the-family-a-proclamation-to-the-world?lang=eng [https://perma.cc/48WU-6KQK] (stating that “marriage between a man and a woman is ordained of God,” and that “[a]ll human beings—male and female—are created in the image of God. Each is a beloved spirit son or daughter of heavenly parents, and, as such, each has a divine nature and destiny. Gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose.”).

66. See, e.g., *Fulton*, 141 S. Ct. at 1884-85 (Alito, J., concurring) (describing the Catholic Church’s centuries-old commitment of time and money to care for orphaned and abandoned children).

67. Gathering into civil associations has been an important feature of American life since at least the early-nineteenth century. Tocqueville described that tendency in these terms:

Americans of all ages, of all conditions, of all minds, constantly unite. Not only do they have commercial and industrial associations in which they all take part, but also they have a thousand other kinds: religious, moral, [intellectual], serious ones, useless ones, very general and very particular ones, immense and very small ones; Americans associate to celebrate holidays, establish seminaries, build inns, erect churches, distribute books, send missionaries to the Antipodes; in this way they create hospitals, prisons, schools. If, finally, it is a matter of bringing a truth to light or of developing a sentiment with the support of a good example, they associate. Wherever, at the head of a new undertaking, you see in France the government, and in England, a great lord, count on seeing in the United States, an association.

3 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 896 (Eduardo Nolla ed., James T. Schleifer trans., bilingual ed. 2010) (1835) (footnote omitted). See generally JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012) (detailing the history and significance of the First Amendment right to peaceably assemble).

right to participate equally in an institution of profound social meaning.⁶⁸ Similarly, the fight to preserve religious freedom in America has not merely been a struggle for the individual's right to quietly pray at home or in a chapel or to express a religious opinion on the street corner. It has also been a struggle to maintain—in the face of powerful social, political, economic, and legal pressures—the freedom and autonomy of faith communities that are essential to the identity formation and freedom of millions of Americans. No respectful peace is possible without protection for the unique place and role of America's faith communities. “[R]eligious liberty has little substance if those who join together in churches are not free to manage their ecclesiastical affairs as they choose.”⁶⁹

Justice Holmes once said that “a page of history is worth a volume of logic.”⁷⁰ What is at issue in the culture wars over traditional religious beliefs and LGBTQ interests is new in detail, but not new in nature. Our history of learning to respect religious diversity is analogous and instructive. The United States has long sought to accommodate diverse faith communities with fundamentally different religious beliefs—communities that for centuries had intractable and even violent conflicts. Religious clashes of various sorts—Episcopalian v. Baptist, Protestant v. Catholic, Christian v. Jew—were common and often intense in early American history.⁷¹ During one such conflict in 1838, the Governor of Missouri issued a literal extermination order against members of The Church of Jesus Christ of Latter-day Saints: They were to be driven out of the state by any means required or, if necessary, exterminated.⁷²

From those conflicts and our imperfect but persistent efforts to accommodate religious diversity, a deep consensus emerged that although irreconcilable theological beliefs and practices may be grounds for intense disagreement and

68. See, e.g., Douglas Laycock, *Liberty and Justice for All*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND, *supra* note 1, at 24, 27 (“Same-sex couples claim the right to participate in the social institution of civil marriage and to live their lives as couples in public as well as in private.”).

69. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 86 (1965).

70. *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

71. Such conflicts often found their way into law. See, e.g., N.C. CONST. of 1776, art. XXXII (amended 1835, 1861) (permitting only Protestants to hold office); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (stating the Blaine Amendment's thinly veiled purpose and effect was to bar federal aid to Catholic schools); B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 *YALE L.J.* 659, 672 (1930) (stating that until 1851, Maryland required all officeholders to declare a belief in the Christian religion, though Jews had been exempted since 1826).

72. See EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, at 74 (1988) (describing Governor Boggs's infamous extermination order).

debate, they are not a justification for denying basic rights. Hence, the first clause of the First Amendment forbids Congress from establishing a national religion or church.⁷³ The government cannot create religious tests or deny equal protection of the law based on religious belief or affiliation.⁷⁴ Secular employers cannot discriminate against employees based on religion, while religious employers retain the right to use religious hiring criteria.⁷⁵ Individuals have the right to join any faith community that will have them or to start their own.⁷⁶ Religious groups have the freedom to define themselves and their beliefs, including to determine who qualifies as a believer and thereby a member of the group.⁷⁷ Religious groups can also hire and fire their own religious officials for essentially any reason.⁷⁸ And faith communities cannot be barred from building houses of worship on their property absent important reasons,⁷⁹ or excluded from participating in public programs on equal terms with other groups.⁸⁰

73. U.S. CONST. amend. I, cl. 1.

74. See *id.* art. VI (ban on religious tests for federal office); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (extending the ban on religious tests to state government); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”).

75. See 42 U.S.C. §§ 2000e-1(a), 2000e-2(a) (2018); C.R. Div., *Religious Land Use and Institutionalized Persons Act*, U.S. DEP’T OF JUST. (Oct. 15, 2020), <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act> [<https://perma.cc/P6WS-VBAH>] (“[T]he RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies absent the least restrictive means of furthering a compelling governmental interest.”).

76. See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 71 (2011) (“[T]o be voluntary, religious liberty has to include two distinct rights—a right to join and right to leave.”).

77. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) (“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.”); *id.* at 733 (placing beyond civil power “a matter which concerns . . . the conformity of the members of the church to the standard of morals required of them”).

78. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 194-95 (2012) (holding that the ministerial exception “ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone”) (footnote omitted).

79. See 42 U.S.C. § 2000cc(a) (2018).

80. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017); *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

These and other legal protections for religious freedom secure not only the right to hold and perpetuate diverse religious beliefs individually and in communities, but also the conditions for a vibrant religious pluralism. People of radically different faiths now live together in harmony. Formerly unthinkable friendships across religious lines are now common and deep – not because people stopped caring profoundly about religious differences, but because they have agreed to disagree on such matters and to find common ground on others. Religious pluralism is not just an American article of faith. It is an article of peace.⁸¹

There are important lessons in this history for the effort to find solutions to our perpetual conflicts over diverse conceptions of marriage, family, gender, and sexuality. One lesson is that the present quest to legally enforce ideological domination is futile and destructive. Total dominance for either side is impossible. While progressive beliefs about sexuality and gender identity are certainly ascendant, tens of millions of Americans still understand these matters in terms of traditional religious beliefs that define their identities and lives. Those people and beliefs are not going to disappear, the hopes of some advocates notwithstanding. And, as argued above, the Supreme Court has strongly signaled that it will not allow one side to crush the other. If true, then a creative pluralism is the only feasible way to establish peace between seemingly warring religious and LGBTQ factions.

III. THE ARCHITECTURE OF CREATIVE PLURALISM

The architecture of pluralism is not complex, but it does require an understanding that different spaces involve different values and thus require different legal approaches. I believe there are at least three such spaces.⁸² First, in *public spaces*, LGBTQ nondiscrimination norms should generally prevail. These are spaces that history and tradition consider open and available to everyone, including government institutions and public accommodations.⁸³ Targeted exceptions in cases of true religious hardship may be necessary in unique situations

81. See Andrew Koppelman, *The Joys of Mutual Contempt*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND, *supra* note 3, at 111, 111-12 (stating that despite past “loathing of one another’s theologies,” “[c]oexistence has largely been achieved in the religious sphere” due to respect for basic rights).

82. The following descriptions merely provide a thumbnail sketch. This Essay does not attempt to provide a full account of pluralism and its legal implications and challenges.

83. See Joseph William Singer, *Public Rights*, 38 L. & HIST. REV. 621, 622 (2020) (“William Blackstone characterized any business that was open to the public as a ‘common calling’ with a moral obligation to serve anyone who came in requesting goods or services.”); *cf.* *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968) (holding that a privately owned shopping center was the functional equivalent of a public space, and thus the public could exercise their First Amendment rights there).

like *Masterpiece*, but they should be narrow and relatively rare in a genuinely public space. Second, in *private and sacred spaces*, which are zones of family, faith, and individual-identity formation, personal and religious autonomy should generally prevail. Families, friendships, houses of worship, religious schools, religious charities, and other religious organizations are examples.⁸⁴ In those spaces, nondiscrimination norms should generally give way to personal and religious-autonomy norms. Third, in *hybrid spaces*—shared spaces where public interests intersect with private or sacred interests—both nondiscrimination norms and autonomy norms should have legitimate but not absolute sway.⁸⁵ This hybrid zone requires prudent line drawing to secure fair and durable solutions.

The particularly sensitive context of adoption and foster care illustrates how a pluralistic approach to hybrid spaces might work in practice. Many religious adoption and foster-care agencies should be understood as hybrid (or shared) spaces. They are not truly public and thus should not be subject to broad and invasive regulation—as religious organizations, they are entitled to substantial autonomy. But because they willingly receive public funding for the specific purpose of serving vulnerable children and the families adopting and fostering them, and because the state has a strong interest in securing the safety and best interests of vulnerable children, they are not strictly private spaces either.

Because this is shared space implicating both sacred and secular values, sweeping demands for ideologically pure outcomes should be avoided. In these conflict-laden zones, simplistic invocations of “public money, public values” fail to capture a deeper reality.⁸⁶ The tenor and holding of the Supreme Court’s decision in *Fulton* accurately suggest that far more is at issue, and that the Court

84. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (finding a right to intimate association by reasoning that the courts “have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”); see also *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring) (“We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.”); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (recognizing the right of people to associate together privately for expressive purposes).

85. The decision in *Fulton* can be read as addressing competing demands in a hybrid or shared-space context. See *supra* notes 43-62 and accompanying text.

86. For an example of such an invocation, see Noam Scheiber, *Labor Dept. Moves to Expand Religion Exemption for Hiring and Firing*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/business/economy/religion-exemption-hiring-firing.html> [https://perma.cc/2UAY-93AQ] (“Jennifer C. Pizer, the law and policy director of Lambda Legal, an L.G.B.T. advocacy group, said the law had long held that the government could not deny public bene-

will not allow blanket defunding of religious adoption agencies as the penalty for refusing to abandon deeply held religious beliefs.

American law has never demanded wholesale abandonment of constitutional rights as the price of receiving public money.⁸⁷ For example, the government cannot demand (and never has) that a church become a place of public accommodation in exchange for accepting security grants to protect worshippers from violent attacks. Nor may it demand the abandonment of religious doctrines it dislikes or the hiring of unwanted clergy as the price of public money. Respect for religious freedom and autonomy is itself a preeminent public value – the first right in the First Amendment.⁸⁸ That said, the notion that public money cannot come with any public strings whatsoever is untenable. No principle of law entitles a religious organization to receive public money unconditionally.⁸⁹ The work of religious adoption and foster-care agencies is no exception. Absolutist assertions of nondiscrimination or religious freedom will not lead to reasonable settlements and should thus be avoided.

Instead, in seeking pluralistic solutions to conflicts, both sides should focus on accommodating three primary dignitary and liberty interests in the foster-care and adoption spaces. First and foremost are the interests of vulnerable children and the imperative need for as many qualified adoption and foster agencies as feasible to serve as many children as possible. The humanitarian needs in this context are compelling, indeed wrenching.⁹⁰ Second, prospective LGBTQ parents – like all others – have a substantial interest in a fair opportunity to adopt or

fits to people who have discriminatory views – such as Christians who assert that their religious beliefs forbid homosexual relationships. But organizations have no similar entitlement to federal contracts. Historically, Ms. Pizer said, ‘If you want to work for the public, with public money, you have to be willing to employ the public.’”).

87. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415-17 (1989); see also *id.* at 1415 (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.”).
88. See U.S. CONST. amend. I.
89. Sullivan, *supra* note 87, *passim* (discussing theories for when government may properly condition receipt of money on relinquishing certain rights).
90. See, e.g., Editorial Board, Opinion, *The Crisis in Foster Care*, WASH. POST (Jan. 11, 2020), https://www.washingtonpost.com/opinions/the-crisis-in-foster-care/2020/01/11/81caa67e-33f6-11ea-a053-dc6d944ba776_story.html [<https://perma.cc/6F9W-R5NH>] (“An acute shortage of foster parents has produced a cohort of vulnerable children, many with drug-addicted parents, who are sent away, sometimes out of state, to live in juvenile detention centers, shelters and group homes. In those inhospitable institutions, where some guiltless teenagers grow up

foster children and to receive the benefits of government aid appropriated for that purpose. Third, religious adoption and foster-care agencies have a substantial interest in continuing to help vulnerable children find adoptive and foster parents in a manner consistent with their sincere religious beliefs.

All these interests can be vindicated – not perfectly or absolutely, but substantially and fairly – through a nuanced pluralist approach. The federal Fairness for All Act (FFA Act), drafted by lawyers and advocates for both LGBTQ rights groups and conservative faith communities, is one good-faith attempt at such an approach and a possible model.⁹¹ With respect to adoption and foster care, the FFA Act would (1) prioritize the needs of society’s vulnerable children by maximizing the likelihood that they will find suitable and loving homes; (2) protect the right of qualified LGBTQ couples to claim federal financial assistance in adopting or fostering children; and (3) safeguard the right of religious adoption agencies to be faithful to their own religious beliefs and standards concerning traditional marriage.⁹²

The FFA Act responds to the “national deficit in the number of adoptive and foster parents and the private agencies qualified to serve these children.”⁹³ Negotiators⁹⁴ decided that vulnerable children would fare better if families and private agencies of all types continued to contribute to the adoption and foster-care systems. To that end, the bill expresses a national policy that “guarantee[s] the equal treatment of qualified families seeking to offer foster care or adoption and an equal respect for the diversity of private agencies, including religious agencies, that provide adoption and foster care services.”⁹⁵ Its overarching goal is to serve children by encouraging diversity among adoption and foster-care providers. As Representative Christ Stewart, the bill’s sponsor, has explained, “[c]los-

behind barbed wire and in the company of convicted criminals, their chances of thriving are scant.”).

91. H.R. 1440, 117th Cong. (2021). I was directly involved in the years-long, confidential negotiations between conservative religious groups and LGBTQ rights groups that ultimately led to the FFA Act. Statements here about policy priorities are my own interpretations based on that involvement.

92. The FFA Act goes beyond the holding in *Fulton* by attempting to create an entire pluralistic framework for adoption and foster care, one that would respect the legitimate interests of children, LGBTQ couples, traditional religious couples, and religious adoption and foster-care agencies. In addressing Philadelphia’s wholesale exclusion of Catholic Social Services, *Fulton* never purported to provide a comprehensive solution to these complex conflicts and needs. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1887 (2021).

93. *Id.* (providing for the insertion of § 610(a)(2) into the Civil Rights Act of 1964).

94. This knowledge arises from the author’s personal involvement in private negotiations about the bill.

95. *Id.* (providing for the insertion of § 610(a)(6) into the Civil Rights Act of 1964).

ing down private agencies because of their religious standards reduces the number of agencies providing child welfare services.”⁹⁶ Likewise, “[e]xcluding same-sex couples as adoptive or foster-care parents reduces the number of available homes for needy children.”⁹⁷ Dogmatic approaches, in other words, ultimately harm vulnerable children. The FFA Act “seeks to protect children by avoiding these conflicts wherever possible”⁹⁸ by expanding the pool of qualified families who desire to adopt and foster children.

The FFA Act’s approach turns on the essential distinction between direct and indirect funding. Public funding that flows directly from the federal government to the states and then to private agencies comes with significant conditions, including LGBTQ-nondiscrimination requirements.⁹⁹ But public funding that flows to a private agency as the result of personal choices by prospective adoptive or foster parents justifiably carries fewer restrictions because of the intervening choices of individual beneficiaries. This approach, which has been refined over federal administrations of both parties, is known as “Charitable Choice” and has enjoyed success in other important contexts.¹⁰⁰ The FFA Act’s indirect-funding alternative provides religious agencies with far greater freedom and flexibility to serve children and families consistent with the dictates of their respective faiths.

To operationalize the direct/indirect funding distinction, the FFA Act creates a new funding program.¹⁰¹ Qualified families and individuals would receive a certificate entitling them to certain adoption and foster-care services.¹⁰² All states receiving federal funding for adoption and foster care would be required to participate in the certificate program, and no state could deny a certificate because of a couple’s LGBTQ status.¹⁰³ That certificate could then be used at whatever adoption and foster-care agency the couple chooses – thereby promoting greater diversity in private agencies, including those specializing in serving LGBTQ couples – with only three exceptions.¹⁰⁴

96. Stewart & Schaerr, *supra* note 42, at 185.

97. *Id.* at 185-86.

98. *Id.* at 186.

99. H.R. 1440 § 3 (providing for the insertion of § 610(b) into the Civil Rights Act of 1964, which would bar discrimination “in the course of performing an adoption, foster care, or related service . . . against a prospective parent or a child because of . . . sexual orientation, or gender identity” in directly funded programs under the FFA).

100. See Off. of Faith-Based & Cmty. Initiatives, *Charitable Choice: The Facts*, WHITE HOUSE, PRES. GEORGE W. BUSH ARCHIVES, <https://georgewbush-whitehouse.archives.gov/government/fbc/guidance/charitable.html> [<https://perma.cc/X4RK-8V7G>].

101. H.R. 1440 § 3.

102. *Id.* (providing for the insertion of § 610(c)(1) into the Civil Rights Act of 1964).

103. *Id.* (providing for the insertion of § 610(c)(2)(B), (c)(3) into the Civil Rights Act of 1964).

104. *Id.* (providing for the insertion of § 610(d)(1)-(d)(2) into the Civil Rights of 1964).

First, a private adoption or foster-care agency could decline to accept a certificate, thereby avoiding the requirements that come with accepting federal money.¹⁰⁵ But if it did so, the agency would have to provide a reasonable referral to another adoption agency in the area that would accept the certificate and perform the federally subsidized services.¹⁰⁶ The state would be required to ensure that there is at least one qualified provider of adoption or foster-care placement services for every qualified individual seeking such services.¹⁰⁷ This would ensure that everyone is ultimately served by an agency that is suited to their needs, but that no agency would be forced to act against its religious beliefs. It is likely that private agencies specializing in serving the unique needs of LGBTQ parents would quickly arise under this regime. Second, if a religious agency accepted a certificate, but later discovered that performing adoption or foster-care services would violate its religious beliefs, that agency could “facilitate a mutually voluntary referral” so long as it did not “unreasonably delay or disrupt the adoption or foster care evaluation and placement process.”¹⁰⁸ Third, any agency could terminate a relationship with a certificate holder “who [made] a material misrepresentation of fact that the prospective parent knew or should have known that the agency specifically requested.”¹⁰⁹

Additional provisions would safeguard the integrity of religious agencies. State and local governments could not deny them the opportunity to participate in the certificate program.¹¹⁰ Agencies would have the right to reasonable payment for services performed in reliance on a certificate.¹¹¹ And no state could suspend or deny a religiously affiliated adoption or foster-care agency its license or certification because of its religious teachings or practices.¹¹²

Through these and other creative means, the FFA Act would use a pluralism model to advance the government’s compelling interest in expanding the number of families who could adopt or foster children, while also reasonably reconciling equal treatment for LGBTQ couples with the free-exercise rights of religious agencies, both of which are essential to securing adoptive and foster parents for needy children.

105. *Id.* (providing for the insertion of § 610(d)(1)(A) into the Civil Rights Act of 1964).

106. *Id.* (providing for the insertion of § 610(d)(1)(A) into the Civil Rights Act of 1964).

107. *Id.* (providing for the insertion of § 610(c)(2)(A)(vi) into the Civil Rights Act of 1964).

108. *Id.* (providing for the insertion of § 610(d)(1)(B) into the Civil Rights Act of 1964).

109. *Id.* (providing for the insertion of § 610(d)(2) into the Civil Rights Act of 1964).

110. *Id.* (providing for the insertion of § 610(c)(2)(B)(i) into the Civil Rights Act of 1964).

111. *Id.* (providing for the insertion of § 610(c)(2)(B)(ii) into the Civil Rights Act of 1964).

112. *Id.* (providing for the insertion of § 1107(b)(3) into the Civil Rights Act of 1964).

IV. RELIGIOUS ACCOMMODATION AND ITS DISCONTENTS

Not everyone believes in pluralism or accommodating dissenting religious views. In her bracing essay for this Collection, Louise Melling of the American Civil Liberties Union (ACLU) frankly advocates for government to impose a secular orthodoxy in matters of marriage, family, gender and sexuality.¹¹³ She argues against any accommodation of traditional religious beliefs and practices – even those at the very heart of a religious organization – when they conflict with the enforcement of progressive sexual and gender norms through nondiscrimination, contraception, and abortion laws.

She is explicit about the reasons underlying her view: The culture around the traditional husband-wife-children family undergirds a dangerous “trope,” a “*Leave it to Beaver* mythical archetype” steeped in sexual oppression and racism.¹¹⁴ As diverse family forms have acquired legal protection and social acceptance despite that trope, Melling sees grave peril in the ongoing belief of many faith communities “that children need both a mother and father; [and] that men and women on average bring different gifts to the parenting enterprise.”¹¹⁵ These allegedly pernicious beliefs and related religious practices induce religious institutions not to recognize same-sex marriage, religious schools to insist that teachers comply with their traditional religious teachings about marriage and sexuality, religious wedding vendors to resist catering same-sex marriages, and religious adoption agencies to object to placing children with same-sex couples.¹¹⁶ They also generate opposition to contraception and abortion mandates.¹¹⁷

Melling rejects religious exemptions because they accommodate opposition to the changes in family norms and law of the last fifty years. It would be one thing, she argues, if all religious exemptions did was “create a quiet enclave to which some people may retreat to live according to religious values no longer enshrined in the law”¹¹⁸ – presumably out of sight and without place or voice in our democracy. The problem, in her view, is that the goal of religious exemptions is ultimately political: “It is to contest the very change in family norms that the

113. Louise Melling, *Religious Exemptions and the Family*, 131 YALE L.J.F. 275 (2021).

114. *Id.* at 275.

115. *Id.* at 278 (quoting Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance at 9, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (quoting Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 263 (2011))).

116. *Id.* at 278-79.

117. *Id.* at 279-80

118. *Id.* at 290.

laws and policies being challenged aim to advance, and ultimately undermine and overturn the gains of the last half century for diverse family formulations.”¹¹⁹ Exemptions are therefore problematic, according to Melling, because they “keep alive a very public debate about the legitimacy of the new norms and the morality of those they protect.”¹²⁰ In her view, they are an illegitimate expression of dissent from the new orthodoxy.

It follows that the freedom to hold, practice, and perhaps even “debate” traditional religious beliefs about marriage, family, gender, and sexuality constitutes an existential threat to those who hold and practice different beliefs. That, in Melling’s view, creates a moral and legal imperative to suppress—to the extent reasonably possible through expansive, exception-less nondiscrimination and contraception/abortion-access laws—those who religiously dissent from these new norms.

Much could be written in response to Melling’s forceful argument, but in this limited context, five points must suffice.

First, Melling deserves credit for honesty and clarity. She confirms the fears of religious traditionalists that for groups like the ACLU and their academic supporters, the point of expansive LGBTQ nondiscrimination rights is not “live and let live” pluralism, but rather the enforcement of new family norms and the suppression of traditional ones. Traditionalists once used the law to impose their beliefs on sexual minorities. Now that social and political winds have changed, Melling would argue, progressive advocates should likewise use state power to impose their beliefs on religious traditionalists. Turnabout is fair play. In taking this harsh line, Melling opens further the growing rift with LGBT advocates who support pluralist approaches. She rightly notes that Professors William Eskridge and Andrew Koppelman—two of the intellectual godfathers of the marriage-equality movement whose arguments also prevailed in the seminal *Bostock* decision¹²¹—support approaches to LGBTQ rights that include religious exemptions.¹²²

119. *Id.*

120. *Id.* at 290-91.

121. William N. Eskridge Jr. & Andrew M. Koppelman, Brief Supporting Employees as Amici Curiae, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

122. See Melling, *supra* note 113, at 286 n.55 (“Some prominent proponents of LGBTQ+ rights, such as William Eskridge and Andrew Koppelman, call for compromise on questions of exemptions.”); accord WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 699-700 (2020) (“To make any progress, leaders and staff of conservative religious- and gay-rights groups would at some point need to sit down together and start the process of creating common ground based upon a Golden Rule attitude where each group appreciates the core needs of the others. . . . [B]oth groups of Americans

Second, the factual premise of Melling’s argument is false. There is no traditionalist cabal working to take the law or culture back to the dark days of coverture. There is no effort to preclude women from working in any profession, to force them to be mothers and homemakers (with or without men), or to make ordinary contraception unlawful. Who would vote for such laws? Anyone? Pinprick objections to contraception mandates that some believe include abortifacients (including drugs like Plan B) are hardly a threat to new family norms. Hobby Lobby objected to just four of twenty contraceptive drugs in its Supreme Court battle,¹²³ and in the years since the Court’s narrow holding in *Hobby Lobby*, there has been no corporate stampede to follow suit. Granting a contraception-coverage exemption to an order of celibate Catholic nuns who care for the elderly poor¹²⁴ is hardly a threat to progressive family norms.¹²⁵ Similarly, overwhelming majorities of Americans favor the right of LGBTQ persons to have a job and a place to live and to enjoy public services like everyone else.¹²⁶ And it is very unlikely that the decision in *Obergefell* faces serious risk, despite its contested

need to understand that an expansive, subjective understanding of *harm* is neither constitutionally acceptable nor socially productive in our pluralist polity.”); ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT* (2020).

123. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 691 (2014) (“The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients.”).
124. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).
125. As for abortion and its legality, that is obviously different because it engages the philosophical and legal question of what constitutes human life and when it is morally licit to terminate it. The same is true for “emergency contraceptives” like Plan B, drugs that some sincerely believe (rightly or wrongly) induce abortions. Moreover, forcing religious people and their faith-based organizations to provide or pay for abortion despite profound religious objections to taking innocent human life is a recipe for intense conflict beyond anything seen thus far.
126. Tim Fitzsimmons, *Majority of Americans Back LGBTQ Protections – But Support Is Sliding*, NBC NEWS (Mar. 26, 2019, 7:57 AM EST), <https://www.nbcnews.com/feature/nbc-out/majority-americans-back-lgbtq-protections-support-sliding-n987156> [https://perma.cc/LHF8-MMNV] (“A majority of Americans across every state and almost every demographic support LGBTQ nondiscrimination protections . . .”); Associated Press, *Poll Says Majority of Young Americans Support LGBT Rights*, PBS NEWSHOUR (Aug. 9, 2016, 8:23 AM EST), <https://www.pbs.org/newshour/nation/poll-says-majority-young-americans-support-lgbt-rights> [https://perma.cc/2JDT-7D4J] (reporting a GenForward survey finding that “92 percent of young adults support HIV and AIDS prevention, 90 percent support equal employment, and 80 percent support LGBT adoption. Across racial and ethnic groups, broad majorities support training police on transgender issues, government support for organizations for LGBT youth[,] and insurance coverage for transgender health issues”).

reasoning;¹²⁷ in any event, public opinion now strongly supports same-sex marriage.¹²⁸ And is there really a need to legally persecute the exceedingly rare and often-vilified cake baker or florist who religiously objects to participating in a same-sex wedding while happily serving LGBTQ customers in many other ways?¹²⁹ Does this truly present a material threat to the fabric of civil-rights laws or new family norms? Outsized fears of irredentist cultural forces cannot justify authoritarian approaches to antidiscrimination, reproductive, and family law.

Notably, many of the cases Melling cites are not from the public realm.¹³⁰ The LGBTQ teachers at risk of losing their jobs are not working at the local public high school, as Melling rightly notes.¹³¹ They are working at religious schools with sincerely held religious doctrines about marriage and sexuality. Religious schools have an imperative and stewardship to teach and model their religious beliefs. No one who works for a Catholic or Orthodox Jewish school – much less at a religious organization like a church or synagogue – should be surprised that they are required to live the faith’s sexual ethic, and the law has no business interfering in such religious decisions. Likewise, no one should be surprised that CSS provides adoption and foster-care services in a manner consistent with Catholic beliefs about marriage. Because these and similar settings are predominantly religious in nature, the government lacks the compelling interest necessary to enforce secular family norms that run directly contrary to millennia-old religious beliefs and practices.

127. Jeff Taylor, *How Safe Is Gay Marriage? Advocates Fear Increasingly Conservative Court*, NBC News (Oct. 6, 2020, 1:48 PM EST), <https://www.nbcnews.com/feature/nbc-out/fight-against-gay-marriage-still-alive-well-u-s-advocates-n1242272> [https://perma.cc/3GR2-LXWR] (“When it comes to the Obergefell v. Hodges decision, Paul Smith, a professor at Georgetown Law School, said, “There are a number of reasons why even a very conservative court is probably not going to overrule it.”).

128. Walter Olson, *Gay Marriage Is Here to Stay, Even with a Conservative Court*, WALL ST. J. (July 8, 2018, 2:22 PM EST), <https://www.wsj.com/articles/gay-marriage-is-here-to-stay-even-with-a-conservative-court-1531074136> [https://perma.cc/3T7L-93XN]; Dan Avery, *Support for Gay Marriage Reaches All-Time High, Survey Finds*, NBC NEWS (Oct. 21, 2020, 12:23 AM EST), <https://www.nbcnews.com/feature/nbc-out/support-gay-marriage-reaches-all-time-high-survey-finds-n1244143> [https://perma.cc/CNT5-P259] (stating that seventy percent of Americans support same-sex marriage, including fifty percent of Republicans).

129. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1720–21 (2018); *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671, 2671–72 (2018) (vacating judgment and remanding to the Washington Supreme Court in light of *Masterpiece Cakeshop*). Would not the American Civil Liberties Union – if not now, then twenty-five years ago – defend the Jewish florist who did not want to participate in a Christian wedding, on the ground that no one should be forced to participate in a religious ceremony?

130. Melling, *supra* note 113, at 277–80.

131. *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195 (S.D. Ind. 2020) (firing a guidance counselor at a Roman Catholic school operating under the direction of the Archdiocese of Indianapolis for entering a same-sex marriage).

Third, Melling repeatedly insinuates that white racism is a basis for traditional family culture, an accusation intended to bolster the argument for denying religious accommodations for traditional family beliefs. But traditional, heterosexual marriage is the overwhelming norm for people of all races on all continents, and has been for millennia. To suggest that it is inherently a front for racism is untenable. Melling’s intersectional reach for racism is a rhetorical move to tap into the law’s strict opposition to racial discrimination, as opposed to its more flexible approach to matters of sex. Yet as explained above, in the context of traditional religious beliefs and practices pertaining to marriage, the Supreme Court has rejected the racial analogy. On the contrary, as noted above, the *Obergefell* majority affirmed that such religious beliefs are “honorable.”¹³² Likewise, the *unanimous Fulton* Court described Catholic adoption and foster-care agencies, which are underwritten by the same beliefs, as “a point of light.”¹³³ And the Supreme Court has recently held that with respect to teachers and workers performing important religious functions, religious schools have an absolute constitutional right to make employment decisions based on adherence to such beliefs¹³⁴ — a right rooted in yet another *unanimous* Supreme Court decision.¹³⁵ The Court is not buying the notion that the so-called *Beaver* trope is invidious like racism or that LGBTQ-nondiscrimination norms are of the same severity as claims for racial nondiscrimination.

This underscores a closely related fourth and broader point. Regardless of the academic merits of Melling’s anti-exemption argument, whether based in the racism analogy or other normative claims, the Supreme Court appears to have rejected it and instead adopted a pluralistic approach to sensitive cases involving religious hardship. The choice is not between exemptions and no exemptions. It is between legislative exemptions worked out in careful compromises or constitutional exemptions imposed by the courts. This is consistent with a key doctrinal basis of the Court’s sexual-rights cases: “[C]hoices central to personal dignity and autonomy[] are central to the liberty protected by the Fourteenth Amendment.”¹³⁶ Beliefs and practices about marriage are certainly central to the dignity of millions of religious believers, as the *Obergefell* Court recognized.¹³⁷

^{132.} *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

^{133.} *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2020) (quoting the City’s merits brief).

^{134.} *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

^{135.} *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

^{136.} *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

^{137.} See *Obergefell*, 576 U.S. at 656–57 (“The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions . . .”).

Fifth, Melling’s anti-exemption approach makes political compromise impossible. In 2015, Utah, among the nation’s most religiously conservative states, forged a compromise on LGBTQ rights and religious liberty in what became known as the “Utah Compromise.”¹³⁸ Neither side was perfectly happy, but both sides got much of what they needed. Just as important, the Utah Compromise sparked a new era of goodwill. Support for LGBTQ nondiscrimination rights in Utah is now equal to that of Vermont and greater than every other state but New Hampshire.¹³⁹ By contrast, the hardline, no-exemption approach of the federal Equality Act¹⁴⁰—rejecting the accommodationist model of the Employment Nondiscrimination Act,¹⁴¹ which had religious exemptions and was strongly supported by the LGBTQ community for decades—has resulted in stalemate.¹⁴² As of this writing, despite Democratic majorities in Congress and a Democratic President, the Equality Act appears to lack even fifty votes in the Senate, much less the sixty needed to overcome a filibuster.¹⁴³ LGBTQ persons lack basic protections in many states. The way forward for LGBTQ-nondiscrimination rights lies in pluralistic compromises that protect key LGBTQ rights while also respecting the dignity and rights of religious believers and their institutions.¹⁴⁴

138. See Antidiscrimination and Religious Freedom Amendments, UTAH CODE ANN. §§ 34A-5-106(1), 57-21-5(1) (West 2021)); *How Utah’s Compromise Could Serve as a Model for Other States*, NPR MORNING EDITION (June 1, 2016, 5:07 AM EST), <https://www.npr.org/2016/06/01/480247305/how-the-utah-compromise-could-serve-as-a-model-law-for-other-states> [<https://perma.cc/9SQU-LQM8>].

139. Daniel Greenberg, Emma Beyer, Maxine Najle, Oyindamola Bola, Robert P. Jones, *Americans Show Broad Support for LGBT Nondiscrimination Protections*, PRRI (Mar. 12, 2019) <https://www.prii.org/research/americans-support-protections-lgbt-people> [<https://perma.cc/8FWX-EZMR>] (reporting that seventy-seven percent of Utahans support LGBTQ nondiscrimination rights).

140. Equality Act, H.R. 5, 117th Cong. § 1107 (2021) (“The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.”).

141. See, e.g., Employment Nondiscrimination Act of 2013 § 6, S. 815, 113th Cong. (“Makes this Act inapplicable to corporations, associations, educational institutions or institutions of learning, or societies exempt from the religious discrimination provisions of the Civil Rights Act of 1964 (thereby establishing a religious employer’s exemption).”).

142. See Chris Johnson, *Equality Act, Contorted as a Danger by Anti-LGBTQ Forces, Is All But Dead*, WASH. BLADE (May 20, 2021), <https://www.washingtonblade.com/2021/05/20/equality-act-contorted-by-anti-lgbtq-opponents-as-a-threat-is-essentially-dead> [<https://perma.cc/2KXY-ZCP4>]. Although the FFA Act has not moved in Congress either, the point is that broad LGBTQ rights bills with no religious accommodations likely cannot pass. The path forward for LGBTQ rights is through pluralistic compromises like the FFA Act.

143. *Id.*

144. Rejecting compromise models, Melling argues that abortion exemptions have failed to bring peace. See Melling, *supra* note 113, at 291. But in the case of abortion, the most divisive social

As a concluding comment, Melling notes that her essay “may be cast as another piece that casts those of deep religious conviction as bigots.”¹⁴⁵ If so, that would be accurate, and increasingly par for the course among the culture war’s total-victory battalion. What is notable is not one more distorted caricature of traditional marriage beliefs and practices as akin to racism, but the frank willingness to embrace the real implication of that distortion. If traditional religious beliefs and practices regarding marriage are indeed like racism, as Melling’s Essay contends, then they are evil and dangerously antidemocratic—and thus, to the maximum extent permitted within a liberal democracy, they merit legal and cultural suppression so as to protect LGBTQ persons from the “dignitary and stigmatic harm” they cause.¹⁴⁶ People and institutions who hold such beliefs and engage in such practices must change or become legal and social pariahs. Is there any other implication? A more certain recipe for injustice and perpetual conflict would be hard to imagine.

We can and must do better. The Supreme Court’s words in *Obergefell* may well be the best response to Melling’s essay and to others who sincerely hold such views: “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”¹⁴⁷ Recognition of the implications of this undoubtedly true statement is the first step on the path forward.

CONCLUSION

Religious conservatives and LGBTQ progressives are often at odds. Neither group is going away, and neither will abandon its fundamental ideological and religious commitments. LGBTQ rights have broad support, including from the Supreme Court, but so do the rights of religious people and institutions to maintain their own beliefs and practices surrounding family and sexuality. With the Supreme Court increasingly protective of religious liberty, *Obergefell*’s stated commitment to pluralism in this tense area is now more salient than ever.

So I return to my opening question: Can we live with and accommodate divergent beliefs about marriage, family, gender, and sexuality? As a practical matter, we have no choice. In the interest of respect and peace, it is past time to take seriously our nation’s commitment to ideological and religious pluralism. The Supreme Court seems to be demanding just that, which means prudent policy

issue in the last fifty years, peace is relative. Failure to provide religious and conscience exemptions from abortion mandates would be politically explosive.

145. *Id.* at 293.

146. *Id.* at 285.

147. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

makers should seek reasonable accommodations and protections for both sides rather than domination for one. The FFA Act represents one good-faith effort to use pluralism to reconcile diverse rights in the challenging adoption and foster-care space, and in many other areas of the law. No doubt there are other creative, fair, and durable solutions to these standoffs. Though imperfect to both sides, pluralistic solutions can accommodate competing interests and are far better than winner-take-all measures that foment perpetual, destructive conflict.

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UTAH'S PIVOTAL BARGAIN

LGBT PROTECTIONS

- Protects LGBT individuals from employment discrimination
- Protects LGBT individuals from housing discrimination
- Provides reasonable workplace accommodations for transgender individuals
- Guarantees access to marriage, even in rural areas

RELIGIOUS PROTECTIONS

- Protects the character of faith communities & buildings
- Adds affiliates, religious associations, societies, educ. institutions, & Boy Scouts to existing carve-outs for small employers, religious corporations and subsidiaries
- Permits churches and religious groups to celebrate marriages & do religious counseling consistent with faith

PROTECTIONS FOR BOTH

- Protects political and religious expression outside the workplace
- Places political and religious expression in the workplace on level playing field

SB 297*	Exempts clergy from officiating a wedding	Exempts religious organizations from providing wedding services	Protects objectors from private suits and government penalties**	Exempts religious marriage counseling courses or retreats	Allows adoption/foster agencies to maintain existing placement policies***	Designates only willing clerks	No revocation of professional/business license for expression in nonprofessional setting	Proactively protects character of religious buildings & wedding services	SB 296	Exempts religiously affiliated housing	Permits religious/political expression outside the workplace****	Gives parity to religious/political expression inside the workplace
Delaware	✓		✓			✓			Delaware			
Illinois	✓	✓	✓						Illinois		✓	
Vermont	✓	✓	✓						Vermont		✓	
Hawaii	✓	✓	✓						Hawaii		✓	
Washington	✓	✓	✓	✓					Washington		✓	
New York	✓	✓	✓						New York	✓	✓	
Connecticut	✓	✓	✓		✓				Connecticut	✓	✓	
D.C.	✓	✓	✓	✓					D.C.		✓	
Minnesota	✓	✓	✓		✓				Minnesota	✓	✓	
N.H.	✓	✓	✓	✓					N.H.	✓	✓	
Rhode Island	✓	✓	✓	✓	✓				Rhode Island			
Maryland	✓	✓	✓	✓	✓				Maryland			
Utah	✓ ⁱ	✓ ⁱⁱ	✓ ⁱⁱⁱ	✓ ^{iv}	✓ ^v	✓ ^{vi}	✓ ^{vii}	✓ ^{viii}	Utah	✓ ^{ix}	✓ ^x	✓ ^{xi}

Take-Aways from Utah

- Secures autonomy over marriage in wake of federal court decision
- Makes good on marriage promise, creating new obligation on State
- Includes the "T," which nixed bargain in Michigan
- Unprecedented emphasis on individual protections, not just Big Religion (see circled checks)
- Concrete measures to allay fears of being fired for "wrong" sexuality or views
- Deliberate decision to avoid forced resignations or firings of government workers

Challenges for Additional Bargains

- For some believers, no amount of religious liberty protections can protect them as much as doing nothing for LGBT individuals
- Risks to adoption services & professionals who express disfavored views in professional settings
- Balkanizes world into private religious & public spheres
- The public accommodations conundrum: Is there no way for both communities to share the public square?

*Adapted from Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case Western Reserve Law Review 1161 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448344

**Delaware-"No fine or penalty"; Vermont-Civil claim only

***Connecticut, Minnesota, Maryland-If no public money; Utah- Recognition for "ecclesiastical purposes only." Light check indicates significant restriction on protection

****As of 2012; Adapted from Eugene Volokh, Texas Review of Law & Politics; Utah-Includes religious expression; New York-Recreational activities; Connecticut- Rights protected by First Amendment; New Hampshire-Campaign contributions; others focused on voting and initiatives; light checks indicate narrower scope of protection

i SB297, lines 187-194

ii SB297, lines 195-198

iii SB297, lines 203-207; 238-242

iv SB297, lines 199-201

v SB297, lines 187-189

vi SB297, lines 76-78

vii SB297, lines 209-219

viii SB297, lines 235-242

ix SB296, lines 68; 814-828

x SB296, lines 693-699

xi SB296, lines 700-706