

# BACKGROUND

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## Religious Accommodations and the Common Good

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### Abstract

*Citizens, civic leaders, and jurists interested in good public policy should look to history as a guide to the impact of laws and constitutional provisions aimed at protecting religious actors. American civic leaders and jurists, at both the national and state levels, have long created significant protections for religious Americans who object to neutral, generally applicable laws. At their best, Americans have agreed that government should not force individuals to violate their sincerely held religious convictions unless it has compelling reasons for doing so. Moreover, the nation and the states have still been able to achieve important policy objectives in spite of these accommodations. America's laudable history of protecting religious citizens from otherwise valid laws makes it clear not only that it is possible to protect "the sacred rights of conscience" and promote the common good, but also that religious accommodations themselves promote the common good.*

America has a long history of accommodating citizens who find their religious convictions at odds with government regulations and mandates. Starting in the colonial era, legislators, statesmen, and jurists have crafted accommodations to protect people of faith from neutral, generally applicable laws that nevertheless burden the free exercise of religion even in such areas of extreme importance as national defense, education, drug use, health care, and civil rights.

The explosive growth of government at both the state and national levels in the 20th century has made accommodations even more important for protecting religious actors. Because religious liberty has been highly valued by both Democrats and Republicans,

### KEY POINTS

- Historically, there has been a broad consensus among Americans that religious actors should be protected against otherwise valid laws unless the state has a compelling interest. This consensus may be unraveling.
- Religious liberty is a core American principle. Many accommodations have been passed with significant bipartisan support, and both conservative and liberal jurists have supported judicially created accommodations.
- The national and state governments often create accommodations to protect religious individuals from neutral, generally applicable laws, but this does not exhaust the state's interest in protecting religious citizens and does not prevent states from achieving important policy objectives.
- Legislators have passed laws to protect religious citizens from discrimination by both private and governmental entities.
- As the nation and the states address new threats to what the Founders called "the sacred rights of conscience," they should consider past lessons as they make laws and policies.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3058>

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legislatures have routinely crafted accommodations to protect religious individuals. By one count from the early 1990s, there were approximately 2,000 federal or state laws that accommodated religious citizens.<sup>1</sup>

In virtually all of these cases, there is little evidence that these accommodations have harmed other individuals or kept either the states or the nation from meeting significant policy objectives. America's laudable history of protecting religious citizens from otherwise valid laws makes it clear not only that it is possible to protect "the sacred rights of conscience" and promote the common good, but also that religious accommodations *themselves* promote the common good.

### Why Accommodations?

Virtually every civic leader in the American Founding agreed that governments, in the words of James Madison, should not compel "men to worship God in any manner contrary to their conscience."<sup>2</sup> By the late 20th century, it was a rare legislative body that would even consider explicitly dictating or banning a religious practice.

In one of these extraordinary cases, the town of Hialeah, Florida, banned the slaughter of animals in religious ceremonies but not for other purposes. Members of the Church of Santeria, whose religious practices include animal sacrifices, were prosecuted under this statute. In 1993, the Supreme Court of the United States held unanimously that the law violated the Free Exercise Clause of the First Amendment.<sup>3</sup>

For at least the past 60 years, the chief threats to religious liberty in America have come instead from general laws or policies aimed at advancing the common good that unintentionally burden religious actors. These statutes rarely mention specific religions or religious practices, but they nonetheless prevent certain citizens from acting on their religious convictions (or make it very costly for them to do so).

For example, a state may determine that beards could be used to conceal contraband or to help prisoners escape and so ban inmates from growing them. Yet this neutral, generally applicable rule would keep Muslim prisoners who believe that their faith requires them to grow beards from following the dictates of their religion. What should be done? One possibility would be to abolish the regulation altogether, but assuming that the policy advances its intended goals, such a solution detracts from the common good. Alternatively, the religious convictions of Muslim prisoners could simply be ignored.

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At their best, Americans have opted for a third way. In this situation, many states voluntarily created accommodations to allow prisoners to grow very short beards if required to do so by their faith.<sup>4</sup> Arkansas did not, but the U.S. Supreme Court ruled unanimously that Congress's Religious Land Use and Institutionalized Persons Act of 2000 required such an outcome.<sup>5</sup> One major purpose of this act, which was passed without objection in both houses of Congress, was to ensure that the religious convictions of prisoners were accommodated whenever possible.

Of course, not all religious practices should be accommodated. Religious liberty is not an absolute trump card that empowers citizens to disregard laws. State and national governments there-

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1. James E. Ryan, "Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment," *Virginia Law Review*, Vol. 78, No. 6 (September 1992), p. 1445.

2. Daniel L. Dreisbach and Mark David Hall, eds., *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* (Indianapolis: Liberty Fund Press, 2009), p. 427.

3. Justice Anthony Kennedy did note in his majority opinion that a law banning a religious practice would be constitutional if "it is justified by a compelling interest and is narrowly tailored to advance that interest." See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). It is difficult to find contemporary examples of such a statute, although one possibility might be Kentucky's law against handling "any kind of reptile in connection with any religious service." Revised Statutes of Kentucky, 437.060.

4. Brief for the United States as Amicus Curiae Supporting Petitioner in *Holt v. Hobbes*, May 2014, pp. 28-29.

5. *Holt v. Hobbes*, 574 U.S. \_\_\_\_ (2015).

fore have sometimes refused to protect religious citizens, or have even withdrawn protections when they determine that the actions in question are extremely damaging to the common good. In 1878, for instance, the Supreme Court refused to recognize a First Amendment right to engage in polygamy for religious reasons,<sup>6</sup> and in the 20th century, many states first accommodated parents who had religious objections to providing medical treatment for their children and then abolished these accommodations as it became evident that children were dying from illnesses that medical advances had rendered easily treatable.

Ultimately, there is no theoretical answer to the question of which actions dictated by religious convictions should be protected and which should not. This is a practical question to be decided prudentially on a case-by-case basis. In deliberating about any such case, civic leaders and jurists must balance a concern for securing the common good with a mindfulness of the duties that citizens have to God and the importance of allowing them to discharge them. Civic friendship would also suggest that religious objectors be accommodated so long as doing so does not imperil the common good.<sup>7</sup>

In the later part of the 20th century, the Supreme Court developed a framework for thinking through how to accommodate religious objectors to general laws. In 1963, under the leadership of liberal Justice William J. Brennan, the Court adopted the principle that government actions that burden a religious practice must be justified by a compelling state interest.<sup>8</sup> Later, the Court added the requirement that this interest must be pursued in the least restrictive manner possible.

In other words, citizens should not be forced to violate their religious beliefs unless necessary. Whenever possible, an accommodation should be found. Although this test was developed to help jurists interpret the First Amendment's Free Exercise Clause, it is also a useful guide for legislatively crafted accommodations.<sup>9</sup>

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When a majority of Supreme Court Justices repudiated this test with respect to interpreting the Free Exercise clause in the 1990 case of *Oregon v. Smith* (involving the use of an illegal drug in religious rituals), Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993 to restore it.<sup>10</sup> It is noteworthy that the bill was passed in the House without a dissenting vote, was approved 97 to 3 by the Senate, and was signed into law by President Bill Clinton.

RFRA stipulates that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" except "if it demonstrates that application of the burden to the person" is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."<sup>11</sup>

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

7. On similar grounds, one could argue for the protection of non-religious convictions that are at odds with the law. Legislatures and courts have become better at doing this, but historically, religion has been specially protected in America.

8. *Sherbert v. Verner*, 374 U.S. 398 (1963).

9. There is an extensive scholarly debate over whether America's Founders intended the Free Exercise Clause to require accommodations. See, for instance, Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review*, Vol. 103, No. 7 (May 1990), pp. 1409-1517; Philip A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review*, Vol. 60, No. 4 (April 1992), pp. 915-948; Ellis M. West, "The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription," *Journal of Law and Religion*, Vol. 10, No. 2 (June 1993), pp. 367-401; and Douglas Laycock, "The Religious Exemption Debate," *Rutgers Journal of Law & Religion*, Vol. 11, Part 1 (Fall 2009), pp. 152-154. For reasons of space, this essay does not enter into this debate.

10. See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). This case and its aftermath are discussed in more detail below.

11. Religious Freedom Restoration Act of 1993, Public Law 103-141, November 16, 1993, <http://www.justice.gov/sites/default/files/jmd/legacy/2014/07/24/act-pl103-141.pdf> (accessed October 22, 2015).

The law was meant to apply to all levels of government, but in 1996, the Supreme Court ruled that it could not be applied to the states. In response, 21 states have enacted RFRA laws of their own.<sup>12</sup>

Historically, there has been a broad consensus that religious actors should be protected against otherwise valid laws unless the state has a compelling interest. Alas, this consensus may be unraveling. Robert P. George, of Princeton University, observed in 2012 that there is “a massive assault on religious liberty going on in this country right now.”<sup>13</sup> Although most civic leaders and jurists remain committed to religious liberty in the abstract, support for protecting citizens from neutral laws that infringe upon religious convictions has deteriorated.<sup>14</sup>

For instance, at the national level, the Obama Administration showed little concern for religious liberty when it required businesses to provide contraceptives and abortifacients to employees even though they had religious convictions against doing so. It also offered a rare challenge to the doctrine of ministerial exception, a legal protection which holds that religious groups should be free to choose, in the words of Chief Justice John Roberts, “who will preach their beliefs, teach their faith, and carry out their mission.”<sup>15</sup> In both instances, the Supreme Court rebuffed the Administration and protected religious actors.<sup>16</sup>

At the state level, over the past several years, some small-business owners who have religious objections to participating in same-sex marriage ceremonies have been prosecuted for declining to do so. Courts in these states have given little weight to arguments that the religious liberty provisions of state or national constitutions offer these photographers, florists, and bakers any protection.<sup>17</sup> In 2015, Indiana and Arkansas considered bills similar to the national RFRA, at least in part to help protect such citizens, a virtual firestorm erupted.

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In the academy, professors Marci Hamilton and Brian Leiter, among others, have made well-publicized arguments that religious citizens should seldom, if ever, be exempted from generally applicable laws.<sup>18</sup> On the legal front, others have contended that religious accommodations (or at least some of them) violate the Establishment Clause.<sup>19</sup> With a few minor

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12. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Other states have not enacted such laws, in some cases because courts in these states continue to interpret their state constitutions to require strict scrutiny of laws restricting religious activities. For a helpful compilation of state RFRA laws, see National Conference of State Legislatures, “State Religious Freedom Restoration Acts,” June 5, 2015, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (accessed September 1, 2015).
  13. Quoted in Brian Tashman, “Robert George Warns of Obama’s ‘Massive Assault on Religious Liberty,’” *People for the American Way, Right Wing Watch*, February 15, 2012, <http://www.rightwingwatch.org/content/robert-george-warns-obamas-massive-assault-religious-liberty> (accessed September 1, 2015).
  14. See American Civil Liberties Union, “Using Religion to Discriminate,” <https://www.aclu.org/feature/using-religion-discriminate> (accessed September 1, 2015), and Americans United for Separation of Church and State, *Protect Thy Neighbor*, “Protecting Our Neighbors,” <http://www.protectthyneighbor.org/> (accessed September 1, 2015).
  15. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 710 (2012).
  16. *Ibid.* and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
  17. See, for instance, *Elane Photography, L.L.C. v. Willock*, 2013-NMSC-040, 309 P.3d 53 (concerning a photographer in New Mexico); *In the Matter of Melissa Elaine Klein, Interim Order, Commissioner of the Bureau of Labor and Industries*, Case Nos. 44-14 and 45-14, January 29, 2015 (concerning bakers in Oregon); and *State of Washington v. Arlene’s Flowers*, No. 13-2-008715, February 18, 2015 (concerning a florist in Washington State).
  18. Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law*, 2nd rev. ed. (New York: Cambridge University Press, 2015), and Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013).
  19. See, for instance, Frederick Mark Gedicks and Rebecca G. Van Tassel, “RFRA Exceptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 49, Issue 2 (Summer 2014), pp. 343-384.

exceptions,<sup>20</sup> the Supreme Court has regularly rejected this argument, and legislators have seldom found it persuasive.

Citizens, civic leaders, and jurists interested in good public policy should look to history as a guide to the impact of laws and constitutional provisions aimed at protecting religious actors. This essay shows that American civic leaders and jurists, at both the national and state levels, have long created significant protections for religious Americans who object to neutral, generally applicable laws. Consideration of a range of policy areas reveals that Americans, at their best, have agreed that governments should not force individuals to violate their sincerely held religious convictions unless they have compelling reasons for doing so. Moreover, the nation and the states have still been able to achieve important policy objectives in spite of these accommodations.

### **Military Service**

Among the government's many roles, few are as important as national security. Virtually no one disputes that governments have an obligation to protect their citizens from external threats. In the modern era, states and nations have regularly relied upon compulsory militia service or conscription to raise armies. Religious pacifists often ask to be excused from such service, but some countries have rejected their pleas.

Most American colonies required adult males to serve in the militia. Members of the Society of Friends, better known as Quakers, were often pacifists who refused to do so. As early as the 1670s, they requested to be excused from military service. Rhode Island, North Carolina, and Maryland granted their requests, provided these pacifists paid a fine or hired a substitute.<sup>21</sup>

Many colonies followed their example in the 18th century, often expanding accommodations to include other religious pacifists. During the War for Independence, the Continental Congress supported these accommodations with the following July 18, 1775, resolution:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.<sup>22</sup>

Fourteen years later, during the debates in the First Federal Congress over the Bill of Rights, James Madison proposed a version of what became the Second Amendment that stipulated that “no person religiously scrupulous, shall be compelled to bear arms.”<sup>23</sup> Although largely forgotten today, this provision provoked almost as much recorded debate as the First Amendment's religion provisions. James Jackson, a Representative from Georgia, insisted that if such an accommodation was made, then those accommodated should be required to hire a substitute.

According to newspaper accounts, Connecticut's Roger Sherman objected that it “is well-known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent; many of them would rather die than do either one or the other.” Sherman, however, did not see an absolute necessity for a clause of this kind. “We do not live under an arbitrary government,” he said, “and the states respectively will have the government of the militia, unless when called into actual service.”<sup>24</sup> Sherman was sympathetic to the

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20. For instance, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In this essay, I mention a number of cases in which accommodations have not been held to violate the Establishment Clause, including two decided as late as 2015. For further discussion, see Laycock, “The Religious Exemption Debate,” pp. 152-154, and Carl H. Esbeck, “Third-Party Burdens, Congressional Accommodations for Religion, and the Establishment Clause,” testimony before the Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, U.S. House of Representatives, February 13, 2015, <http://clsnet.org/document.doc?id=829> (accessed September 1, 2015).

21. Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion,” *Harvard Law Review*, Vol. 103, No 7 (1990), p. 1468.

22. Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774-1779* (Washington: U.S. Government Printing Office, 1906), Vol. 5, p. 189.

23. Quoted in Mark David Hall, *Roger Sherman and the Creation of the American Republic* (New York: Oxford University Press, 2013), p. 139.

24. *Ibid.*

plight of pacifists, but he preferred to rely on state and federal legislatures to protect them rather than make it a constitutional principle.

Madison's proposal was approved by the House but rejected by the Senate and thus did not make it into the final text of what would become the Second Amendment. Madison and Sherman returned to the issue two months later when Representatives debated a bill regulating the militia when called into national service. Madison offered an amendment to protect from militia service "persons conscientiously scrupulous of bearing arms."

*It is the glory of our country, said he, that a more sacred regard to the rights of mankind is preserved, than has heretofore been known.* The Quaker merits some attention on this delicate point, liberty of conscience: they had it in their own power to establish their religion by law, they did not. He was disposed to make the exception gratuitous, but supposed it impracticable.<sup>25</sup>

Sherman immediately supported Madison's amendment, arguing that:

[T]he exemption of persons conscientiously scrupulous of bearing arms [is] necessary and proper. He was well convinced that there was no possibility of making such persons bear arms, they would rather suffer death than commit what appeared to them a moral evil—though it might happen that the thing itself was not a moral evil; yet their opinion served them as proof. As to their being obliged to pay an equivalent, gentlemen might see that this was as disagreeable to their consciences as the other, he therefore thought it advisable to exempt them as to both at present.<sup>26</sup>

The amended bill eventually was passed, although with the requirement that conscientious objectors must hire a substitute.<sup>27</sup>

Few men were as influential in crafting the U.S. Constitution and Bill of Rights as Madison and Sherman. Their commitment to protecting religious citizens in this situation is surely noteworthy even if the practical concerns that such accommodations could undermine national security are understandable. Throughout the 19th century, states often accommodated religious pacifists by permitting them to hire a substitute or pay a fine instead of performing military service.

Because states were the main source of soldiers for America's wars into the 20th century, religious pacifists were well, if not perfectly, protected. The nation's first conscription law in the 20th century, the Selective Draft Act of 1917, exempted from combat service members of "any well-recognized religious sect or organization at present organized and existing whose creed or principles forbid its members to participate in war in any form."<sup>28</sup> Instead of fighting, Quakers, Mennonites, Brethren, and members of other historic peace churches were required to perform non-combat duties. If they refused to do so, which some did as a matter of conscience, they were jailed.

A serious objection to the religious accommodation in the Selective Draft Act of 1917 is that it protected members of historic peace churches but not pacifists from other traditions. In 1918, the Supreme Court rejected the argument that this violated the Establishment Clause in *Arver v. United States*.<sup>29</sup> To the relief of other religious pacifists, Congress broadened the accommodation in the Selective Training and Service Act of 1940 to include anyone "who, by reason of religious training and belief, is conscientiously opposed to participation to war in any form."<sup>30</sup> Congress rejected arguments that non-religious pacifists should be accommodated as well and in 1948 defined the phrase "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relations, but [not including] essentially political, soci-

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25. *Ibid.*, p. 145 (emphasis added).

26. *Ibid.*, pp. 144-145.

27. *Ibid.*, p. 145.

28. Robert Miller and Ronald Flowers, *Towards Benevolent Neutrality: Church, State, and the Supreme Court*, 5th ed. (Waco, TX: Baylor University Press, 1996), Vol. 2, p. 642.

29. *Arver v. United States*, 245 U.S. 366 (1918).

30. Miller and Flowers, *Towards Benevolent Neutrality*, Vol. 2, p. 644.

ological, or philosophical views or merely personal moral code.”<sup>31</sup>

The exercise of religion is specially protected by the United States Constitution, and it is not unreasonable for Congress or state legislatures to accommodate religious citizens. Yet it is also reasonable to insist that non-religious individuals who have similar convictions be given similar accommodations. Congress has refused to do this with respect to military service, but the Supreme Court effectively read the Selective Service Act to require such accommodations in *United States v. Seeger*<sup>32</sup> and *Welsh v. United States*.<sup>33</sup> To this day, however, the U.S. Code limits conscientious objector status to religious pacifists:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term “religious training and belief” does not include essentially political, sociological, or philosophical views, or a merely personal moral code.<sup>34</sup>

Not every religious conviction should be accommodated, and it is worth noting that Congress never created an accommodation for selective conscientious objectors (individuals who object to a particular war but not all wars). In *Gillette v. United States*,<sup>35</sup> the Supreme Court ruled that the Free Exercise Clause did not require an accommodation for such citizens. Similarly, Congress and the Supreme Court have refused to exempt religious pacifists from paying the portion of their taxes that supports the military.<sup>36</sup>

The United States has a significant interest in ensuring that personnel needs are met during time of war and that the burdens of conscription are shared fairly. The military’s needs were severely stretched in World War I and World War II, yet Congress saw fit to exempt religious pacifists from military service,

and America, along with her allies, was able to win both conflicts. Personnel needs were met more easily in the Korean and Vietnam Wars as the nation was far from full mobilization. If the United States did not win these wars, it was not due to accommodations granted to religious pacifists.

## Swearing Oaths

Historically, oaths have been seen as essential for ensuring the loyalty and fidelity of citizens and elected officials. They were also viewed as critically important for the effective functioning of judicial systems. In his famous Farewell Address, President George Washington wrote that:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indisputable supports.... A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice?<sup>37</sup>

In the Christian West, oaths usually invoke God as the witness of the oath taker’s veracity; written oaths often end with the phrase “so help me God.” The state obviously has an interest both in the loyalty of its citizens and elected officials and in having a reliable judicial system.

Members of the Society of Friends objected to the taking of oaths as early as the 1650s. Simply put, they took (and take) literally such biblical passages as Matthew 5:33–5:37, where Jesus says: “Swear not at all.... But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.”

In England, Quakers were routinely jailed for failing to swear oaths in courts or, after the Revolution of 1688, to take oaths promising loyalty to the new regime. In the 1690s, Parliament agreed to let Quakers offer an “affirmation” rather than an oath

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31. *Ibid.*, Vol. 2, p. 645.

32. *United States v. Seeger*, 380 U.S. 163 (1965).

33. *Welsh v. United States*, 398 U.S. 333 (1970).

34. 50 U.S.C. App. § 456(j).

35. *Gillette v. United States*, 401 U.S. 437 (1971).

36. *U.S. v. American Friends Service Committee*, 419 U.S. 7 (1974).

37. Dreisbach and Hall, *The Sacred Rights of Conscience*, p. 468 (emphasis in original).

in some cases, but they still faced numerous disabilities. For instance, they were not permitted to be witnesses in criminal cases or to hold civic offices because of their unwillingness to take oaths. In addition to Quakers, many Moravians, Mennonites, and Brethren in Christ have religious objections to taking oaths.

The lot of Quakers and other groups who refused to take oaths varied widely in early America. As one might expect, Pennsylvania, which was founded by the Quaker William Penn, routinely permitted citizens to affirm rather than swear. Other colonies, including Massachusetts, Maryland, and Virginia, banned Quakers altogether and certainly did not tolerate their refusal to take oaths. However, due to Parliament's 1689 Act of Toleration, colonies were forced to tolerate Quakers and even to accommodate their convictions. By 1710, all of the American colonies allowed Quakers to reside within their borders, and many had begun to permit them to use affirmations instead of oaths. New York permitted Quakers to testify by affirmation in civil cases in 1691, and other colonies adopted similar or broader accommodations, including Maryland (1702); New Jersey (1722); and even Massachusetts (1743).<sup>38</sup>

By the Founding era, all states permitted Quakers and other religious minorities to affirm rather than swear, although many states retained the language of "so help me God" when stipulating how an oath or affirmation was to be taken. The most liberal accommodation was found in Rhode Island, which permitted officeholders to swear or affirm but in some cases gave officials the option of saying "this affirmation I make and give upon the peril of the penalty of perjury."<sup>39</sup> Presumably, this was to accommodate atheists and others who did not want to say "so help me God."

It is important to note that the Act of Toleration, which initially had forced American colonies to tolerate Quakers, was no longer binding on the new American states. Moreover, Quakers were a minority in every state and had little political power anywhere in America after the mid-18th century.

The most famous oath accommodations from this era may be found in the United States Constitution. Articles I, II, and VI permit individuals either to swear

or to affirm. The best-known of these provisions is Article II, Section 1, which reads: "Before he [the President] enter on the execution of his office, he shall take the following oath or affirmation: 'I do solemnly swear, (or affirm,) that I will faithfully execute....'" Even more significant is Article VI's requirement that Senators and Representatives "and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution."

Of course, one does not need to be religious to take advantage of these provisions, but in the context in which they were written, there is little doubt that these accommodations were intended for Quakers and others who had religious objections to taking oaths.

There is no reason to believe that exempting Quakers and others from oath requirements has had a detrimental effect on the judicial system at either the state or national level. Nor is there evidence that these citizens have been less loyal to America than other groups. It is also worth noting that in the 18th century, many Quakers became very successful merchants in part because they were known to be particularly trustworthy in spite of their unwillingness to take oaths.

## Mandatory School Attendance

In the 19th century, civic leaders in many states advocated compulsory education laws and creation of public school systems. One motivation behind this movement was the desire for children to learn such basic skills as reading, writing, and arithmetic. Today, there is broad agreement that education is one of the most important services provided by government. Some critics of public schools argue that the government should fund private education as well, but virtually no one contends that states should revoke compulsory attendance laws or eliminate funding for education.

In addition to teaching basic skills, many 19th century reformers wanted public education to help turn the large waves of immigrants into good, democratic, and Protestant Americans. When Catholics objected to requirements that they send their children to what were effectively Protestant schools, they were

38. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," pp. 1467-1468.

39. John D. Cushing, ed., *First Laws of the State of Rhode Island* (Wilmington, DE: Michael Glazier, 1983), pp. 142, 148, and *passim*.

charged with being “sectarian,” and Protestant civic leaders were not amused by Catholic attempts to receive a share of state education funding.<sup>40</sup>

As biased as public schools tended to be toward Protestantism in the 19th century, it was rare for states to require Catholics and other dissenters to attend them. Oregon famously attempted to achieve such an outcome by banning all private schools in 1922. Although the initiative did not specifically prohibit Catholic schools, virtually every private school in the state at the time was Roman Catholic. In 1925, the U.S. Supreme Court declared the law to be a violation of the right of parents to control their children’s education.<sup>41</sup>

Public schools became noticeably less Protestant (or, for that matter, religious) with the advent of the Supreme Court’s modern Establishment Clause jurisprudence. Notably, teacher-led prayer was declared to be unconstitutional in 1962,<sup>42</sup> as was devotional Bible reading in 1963.<sup>43</sup> Parents who wanted to send their children to religious schools were free to do so, provided they could afford private school tuition. In some cases, states attempted to aid these schools, but much of this aid was declared to be unconstitutional in the 1970s and 1980s.<sup>44</sup> Because the licensing of private schools was often onerous and homeschooling was rare at this time, parents who desired a religious education for their children were often unable to provide one.

Included among these parents were a group of Amish who lived in New Glarus, Wisconsin. These families did not object to sending their children to public schools through the eighth grade, but they refused to send them to the public high school. Although Amish generally do not go to court to resolve disputes, an attorney acting on their behalf objected that the Free Exercise Clause required the state to exempt them from the state’s compulsory

attendance law. In 1972, a unanimous Supreme Court (with a partial dissent by Justice Douglas) agreed.<sup>45</sup>

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## States have a powerful interest in ensuring that children are educated. Yet since the early 1980s, they have been increasingly willing to craft exemptions from compulsory attendance laws.

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Since 1972, states have liberalized their compulsory attendance laws and their regulation of private schools and homeschooling so that it is far easier to remove children from public schools. Moreover, the Supreme Court has allowed states to increase aid to these schools, thus making them more affordable.<sup>46</sup> These laws were changed for a complex set of reasons, but among them was the desire of legislators to accommodate citizens who desire a faith-based education for their children.

States have a powerful interest in ensuring that children are educated. Yet since the early 1980s, they have been increasingly willing to craft exemptions from compulsory attendance laws. Because students educated at home or in private schools regularly outperform students in public schools, it seems reasonable to conclude that such accommodations have not had a detrimental effect on the quality of education in these states.<sup>47</sup>

### Laws Requiring “Religious” Acts

Since the advent of the Supreme Court’s modern Establishment Clause jurisprudence in 1947, it has been almost impossible to think that a state would require individuals to support a religious institution

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40. Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002), pp. 191–284.

41. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

42. *Engel v. Vitale*, 370 U.S. 421 (1962).

43. *Abington v. Schempp*, 374 U.S. 203 (1963).

44. See, for instance, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

45. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

46. See, for instance, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upheld Ohio’s school voucher program.

47. See, for instance, Joseph Murphy, *Homeschooling in America: Capturing and Assessing the Movement* (Thousand Oaks, CA: Corwin, 2012); Henry Braun, Frank Jenkins, and Wendy Grigg, *National Assessment of Educational Progress* (2006), <http://nces.ed.gov/nationsreportcard/pubs/studies/2006461.asp> (accessed November 20, 2014).

or conduct a religious exercise. This, however, has not always been the case.

In the early American colonies, from north to south, many civic leaders believed that the state should favor a particular denomination and/or encourage Christianity. States with established churches often required everyone, including non-adherents, to fund them. Thanks in part to Parliament's Act of Toleration, colonial governments began to craft accommodations that allowed dissenters to support their own churches rather than the established church, but independence from Great Britain opened the possibility that states could revoke these accommodations. Fortunately for religious dissenters, by this time, even many supporters of establishments had come to the conclusion that individuals should not be required to support churches to which they did not belong.<sup>48</sup>

For instance, Patrick Henry's famous 1784 Bill for Establishing a Provision for Teachers of the Christian Religion would have required individuals to support their own churches while exempting the Quakers and Mennonites (who objected to any state involvement) from this requirement. When Connecticut revised its statutes in 1783, the state continued to favor the Congregational church, but dissenting Protestants were permitted to direct their ecclesiastical taxes to their own churches (a provision that was unfair to non-Protestants, of which there were virtually none in the state, but useful to the Anglicans, Baptists, and Quakers who resided there).<sup>49</sup> In each case, supporters believed that establishments promoted the common good but were willing to accommodate most (if not all) religious dissenters.

Yet these accommodations did not satisfy all dissenters. Many believers considered supporting their clergy and houses of worship to be a religious duty. For the government to involve itself in such matters, even if the state merely required them to support their own churches, was considered by some to violate their right to religious liberty.<sup>50</sup> Eventually,

debates on these matters were mooted when states voluntarily abolished their religious establishments.

Over the past 150 years, states have rarely passed statutes explicitly requiring individuals to participate in religious acts, but several states did so inadvertently as America headed into the Second World War. In order to promote national unity, a number of states passed laws requiring school children to salute and pledge allegiance to the American flag. Most Americans have no objection to these practices, but Jehovah's Witnesses believe that they violate the Bible's command not to worship graven images (e.g., Exodus 20:4–5). In 1940, eight Justices ruled that the states' interest in promoting national unity permitted them to override these objections.<sup>51</sup>

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### Religious liberty protects the ability of citizens to worship or not worship according to the dictates of their own consciences, not the consciences of others.

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Three years later, the Court returned to this issue. In a stunning reversal, six Justices concluded that states could not compel Jehovah's Witnesses to engage in these acts. In oft-quoted words, Justice Robert H. Jackson averred:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>52</sup>

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48. Of course, many civic leaders had come to oppose establishments altogether. See, for instance, Dreisbach and Hall, *The Sacred Rights of Conscience*, pp. 250–252 and 307–313.

49. *Ibid.*, pp. 252–253 and 246–247; Hall, *Roger Sherman and the Creation of the American Republic*, pp. 83–90.

50. See, for instance, Isaac Backus, "An Appeal to the Public for Religious Liberty" (1773), and John Leland, "The Rights of Conscience Inalienable" (1791), in Dreisbach and Hall, *The Sacred Rights of Conscience*, pp. 204–211 and 335–345.

51. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

52. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

After considering the state's interest in forcing students to salute the flag, Jackson concluded that:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>53</sup>

Justice Jackson's opinion relies on multiple provisions from the Bill of Rights and can certainly be read to protect both religious and non-religious citizens, but his argument is particularly compelling with respect to state laws that command people to participate in what they consider to be religious actions with which they disagree. That most Americans do not view saluting the flag and pledging allegiance to it as equivalent to worshipping a graven image was properly determined by the Court to be completely irrelevant. Religious liberty protects the ability of citizens to worship or not worship according to the dictates of their own consciences, not the consciences of others.

### Laws Banning Alcohol and Drug Use

The abuse of alcohol and drugs has led to untold problems throughout American history. Colonial Americans sought to regulate alcohol, and in the 19th century, a powerful movement arose to ban it altogether. In 1919, the U.S. Constitution was amended to prohibit alcohol. Congress passed the Volstead Act the same year to implement this amendment. For our purposes, of particular interest is Congress's approach to the issue of sacramental wine.

Sensitive to traditional religious belief that wine should be used for the Eucharist (also known as Communion) and other ceremonies, Congress crafted an exemption to the Volstead Act. The language of Title II, Section 6 of this law alludes to two major religious traditions but is broad enough to cover others. It begins:

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites.... No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller.<sup>54</sup>

The text of the bill makes it clear that Congress was committed to protecting religious beliefs held alike by large denominations (e.g., Roman Catholics) and small religious bodies (e.g., Jews) who believed that sacramental wine should be used in religious ceremonies.<sup>55</sup>

Far more difficult for legislators and courts have been the claims of citizens who contend that the use of regulated substances is part of their religious practices. Particularly well-known is the case of Native Americans who use peyote in religious ceremonies. Although peyote is a controlled substance, the national government recognized its legitimate use in "bona fide religious ceremonies of the Native American Church" in 1966.<sup>56</sup> Some states adopted similar accommodations, but Oregon did not.

In *Oregon v. Smith*, the Supreme Court ruled that the First Amendment does not shield Native Americans or others who use peyote in religious ceremonies from neutral, generally applicable laws. Shortly after *Smith* was decided, Oregon passed a statute protecting the right of individuals (not just Native Americans) to use peyote in religious ceremonies. In 1994, without any recorded objections, Congress amended the American Indian Religious Freedom Act to protect Native Americans in 22 states that did not permit Native Americans to use peyote in religious ceremonies.

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53. *Ibid.*, p. 642.

54. Public Law 66-66, National Prohibition Act (Volstead Act), 66th Cong., 1st Sess., October 28, 1919, <http://www.legisworks.org/congress/66/publaw-66.pdf> (accessed September 3, 2015).

55. Many states continue to exempt sacramental wine from general laws prohibiting adults (other than parents or guardians) from serving alcohol to minors. See, for instance, Oregon Revised Statutes, 471.430.

56. 31 Fed. Reg. 4679 (1966); 21 C.F.R. § 1307.31.

As noted, the abuse of drugs and alcohol has caused a great deal of damage throughout American history. At different times and in different ways, the national and state governments have attempted to prohibit alcohol and certain drugs. There have been extensive debates about the efficacy of these endeavors, but there is no reason to believe that accommodations crafted by legislatures to permit the sacramental use of wine, peyote, or other controlled substances<sup>57</sup> by religious citizens have been detrimental to public health. From a historical perspective, these accommodations fit well with similar laws crafted to protect religious practitioners.

### Laws Requiring Medical Treatment

Traditionally, states and the national government have deferred to individuals and families to make their own medical decisions. As medical knowledge improved during the 19th century, it became evident that the decisions of some individuals could have an impact on others. Particularly contested in the late 19th and early 20th centuries were laws mandating vaccinations.

Advocates of vaccinations contended that they are necessary both for the health of the individuals vaccinated and for the well-being of others. If some individuals and families refuse vaccinations, the argument went, others would suffer from the spread of disease. In 1905, the Supreme Court ruled that the state's interest in protecting the "health and safety of the people" was sufficiently weighty to override the liberty of citizens to refuse a vaccine.<sup>58</sup>

Today, all 50 states have laws requiring specified vaccines for students. States usually require vaccination as a prerequisite to attending school, but every state except Mississippi, West Virginia, and California grants exemptions for parents who have religious convictions against immunizations. Eighteen states also allow phil-

osophical exemptions for those who object to immunizations because of personal, moral, or other beliefs.<sup>59</sup>

The health and safety of citizens is a vital state interest, yet there is little reason to believe that accommodating citizens who have religious objections to vaccinations has caused significant harm. However, a 2015 spike in measles cases in California linked to unvaccinated adults and children clearly caused *some* harm. In response to several outbreaks, state legislators revoked the religious and philosophical exemptions to California's vaccination requirement.<sup>60</sup>

Reconsidering previously granted accommodations is certainly appropriate, but a better option might have been to remove only the philosophical exemption and make the religious one more difficult to obtain. This would have protected both the state's interest in public health and the religious liberty of the relatively few citizens who have sincere religious objections to vaccination requirements. An added benefit is that it would prevent some families from withdrawing their children from schools to avoid the vaccination requirement.

As has been repeatedly stipulated, not all religious convictions should be accommodated. In the early to mid-20th century, followers of Mary Baker Eddy, commonly known as Christian Scientists, lobbied successfully for exemptions from state laws that require parents to provide medical treatment for their children. Tragically, hundreds of children died because of easily treatable diseases. As a result, many states properly repealed or revised their exceptions.<sup>61</sup>

### Medical Providers

Perhaps the most contentious and difficult political-moral-legal issue over the past half-century has been abortion. Large numbers of Americans consider it tantamount to murder, whereas others insist that access to the procedure is a fundamental consti-

57. See, for instance, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (protecting the ability of members of the Brazilian church União do Vegetal to use hallucinogenic tea).

58. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

59. See National Conference of State Legislatures, "States with Religious and Philosophical Exemptions from School Immunization Requirements," July 6, 2015, <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (accessed September 1, 2015).

60. See, for instance, Rosanna Xia, Rong-Gong Lin II, and Sandra Poindexter, "Fewer California Parents Refuse to Vaccinate Children," *Los Angeles Times*, January 23, 2015, <http://www.latimes.com/local/california/la-me-immunization-data-20150123-story.html> (accessed September 1, 2015); Kristin A. Feemster, "Eliminate Vaccine Exemptions," *The New York Times*, March 23, 2014, <http://www.nytimes.com/roomfordebate/2014/03/23/making-vaccination-mandatory-for-all-children/eliminate-vaccine-exemptions> (accessed September 1, 2015); California SB 277, June 30, 2015.

61. Alan Rogers, *The Child Cases: How America's Religious Exemption Laws Harm Children* (Amherst: University of Massachusetts Press, 2014); Hamilton, *God vs. The Gavel*, pp. 38-83.

tutional right. Some activists believe that the state or private employers should be able to force medical providers to perform abortions even if they have sincere religious beliefs against doing so. The advent of emergency contraceptives/abortifacients such as Plan B and *Ella* raise similar issues with respect to pharmacists filling prescriptions.

In 1973, shortly after *Roe v. Wade* was decided, Congress passed the Church Amendment to protect health care professionals. The legislation prohibits any court or public official from using the receipt of federal aid to require a person or institution to perform an abortion or sterilization contrary to their “religious beliefs or moral convictions.”<sup>62</sup> The amendment also makes it illegal for health care organizations to discriminate against individuals who refuse to perform these procedures. In arguing in favor of these protections, Senator Frank Church (D-ID) remarked that:

[N]othing is more fundamental to our national birthright than freedom of religion. Religious belief must remain above the reach of secular authority. It is the duty of Congress to fashion the law in such a manner that no Federal funding of hospitals, medical research, or medical care may be conditioned upon the violation of religious precepts.<sup>63</sup>

Subsequent Congresses expanded these protections. For instance, in 1996, Congress passed the Danforth Amendment, according to which:

[T]he federal, state, and local governments [were prohibited] from discriminating against healthcare entities that refuse to (1) undergo abortion training, (2) provide such training, (3) perform abortions, or (4) provide referrals for training or abortions. Specifically, it protected doctors, medical students, and health training programs from being denied federal

financial assistance, certifications, or licenses they would otherwise receive but for their refusal.<sup>64</sup>

While not limited to institutions that oppose these practices for religious reasons, there is little doubt that an important motivation behind this act was protecting religious actors.

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### **It is noteworthy that many (but not all) states specify that their conscience clauses protect individuals who object to abortions on moral or religious grounds.**

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Like Congress, numerous states protect health care providers who have objections to performing certain procedures. According to the National Abortion Rights Action League (NARAL), “47 states and the District of Columbia [have] passed laws that permit certain medical personnel, health facilities, and/or institutions to refuse to provide abortion care.”<sup>65</sup> Only Alabama, New Hampshire, and Vermont do not have such laws.<sup>66</sup>

It is noteworthy that many (but not all) states specify that their conscience clauses protect individuals who object to abortions on “moral or *religious* grounds.”<sup>67</sup> Some of these statutes offer better protection for religious liberty than others, but overall, both the national and state governments have made significant efforts to protect the ability of health care professionals to act (or not act) according to their religious convictions in these policy areas.

Over the past 15 years, heated debates have arisen about various types of emergency contraception (EC). Some activists claim they merely prevent conception, whereas others contend that they can cause

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62. Quoted in Robin Fretwell Wilson, “Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context,” in *Same Sex Marriage and Religious Liberty*, ed. Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson (Lanham, MD: Rowman & Littlefield, 2008), p. 83.

63. Quoted in Robin Fretwell Wilson, “When Governments Insulate Dissenters from Social Change: What *Hobby Lobby* and Abortion Conscience Clauses Teach About Specific Exemptions,” *UC Davis Law Review*, Vol. 48, No. 2 (2014), p. 735.

64. Wilson, “Matters of Conscience,” p. 85.

65. NARAL, “Refusal Laws: Dangerous for Women’s Health” p. 1, <http://www.prochoiceamerica.org/media/fact-sheets/abortion-refusal-clauses-dangerous.pdf> (accessed September 1, 2015).

66. *Ibid.*, p. 8. Cf. Guttmacher Institute, “State Policies in Brief: Refusing to Provide Health Services,” February 1, 2015, p. 3, [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (accessed February 17, 2015).

67. Wilson, “Matters of Conscience,” p. 300 (emphasis added), and, generally, pp. 299–310.

abortions.<sup>68</sup> Some health care providers who believe that ECs can cause abortions and thus end innocent human lives have refused to administer or fill prescriptions for these drugs. With respect to pharmacies, some states permit individual pharmacists to refuse to fill these prescriptions as long as another pharmacist is available to do so. Others permit pharmacies themselves to refuse to carry such drugs (particularly relevant for small, family-owned pharmacies). Currently, between 16 and 22 states (depending on how one interprets broadly worded statutes in six states) protect health care providers and/or pharmacists from having to provide ECs.<sup>69</sup>

A closely related issue concerns state and federal requirements that employers pay for various types of contraception, including ECs. Some employers have refused to provide health plans covering such drugs. States have moved to protect the consciences of such individuals and entities in different ways. According to NARAL, of the 28 states that require health insurance to cover controversial forms of contraception, 20 exempt employers from doing so if they have religious or moral convictions against these drugs.<sup>70</sup>

At the national level, acting under the authority of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act), the Department of Health and Human Services mandated that businesses cover a range of contraceptive devices, including ECs. Religious denominations and houses of worship were exempted from these requirements, but other religious organizations were not.

In response to significant outcry, the Obama Administration issued regulations whereby insurance providers used by religious organizations would offer

these drugs at no cost (in theory) to the religious organizations' employees. Some religious organizations were satisfied by this approach, but others believed they were still complicit in wrongdoing. For-profit businesses received no such protection, but in 2014, the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, that the Religious Freedom Restoration Act requires such an accommodation for a closely held for-profit corporation.<sup>71</sup>

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## Protecting religious actors who are licensed by the state to provide medical services is one of the most complicated policy areas in which religious citizens have been accommodated.

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There is no denying that protecting religious actors who are licensed by the state to provide medical services is one of the most complicated policy areas in which religious citizens have been accommodated. In some instances, such as with ECs, even the basic effect of the drug is debated. Even when it is not, the state's interest in regulating the provision of medical care, which can involve issues of life and death, is undoubtedly high. These cases are further complicated because they raise equal protection issues and sometimes concern what the Supreme Court has called a fundamental right to abortion. It is telling that in spite of these complications, the nation and many states have gone to great lengths to protect the moral and religious convictions of health care providers.

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68. Evaluating these medical claims goes beyond the scope of this paper, although I will suggest that Robin Fretwell Wilson's observation that "[s]ome forms of ECs appear sometimes to act after fertilization as 'contragestives,' meaning they destroy a fertilized egg" seems to me to be a sensible and balanced conclusion. Robin Fretwell Wilson, "The Erupting Clash Between Religion and the State over Contraception, Sterilization and Abortion," in Allen D. Herzke, ed. *Religious Freedom in America: Constitutional Roots and Contemporary Challenges* (Norman: University of Oklahoma Press, 2015), p. 137.

69. Guttmacher Institute, "State Policies in Brief: Refusing to Provide Health Services," p. 3.

70. NARAL, "Refusal Laws: Dangerous for Women's Health," p. 8.

71. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_\_ (2014). The ACA does contain a religious conscience exemption aimed at protecting members of "a recognized religious sect or division" that have sincere religious objections to purchasing health insurance. Although the law protects citizens who are members of particular religious sects but not other citizens, the United States Court of Appeals for the District of Columbia ruled that the provision did not violate either the Establishment Clause or the Equal Protection Clause. For more information about this accommodation, a related one from the Social Security Act, and this particular case, see *Jeffrey Cutler v. United States Department of Health and Human Services*, No. 14-5183, August 15, 2015, [http://www.cadc.uscourts.gov/internet/opinions.nsf/0FCDDBF8AED9D9185257EA10052EE3B/\\$file/14-5183-1567865.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/0FCDDBF8AED9D9185257EA10052EE3B/$file/14-5183-1567865.pdf) (accessed August 16, 2015).

Time and experience may reveal that some of the accommodations mentioned in this section are harmful. Although some advocacy groups fear that these accommodations will lead to great harm, there has been little evidence that this is the case.<sup>72</sup> If substantial evidence arises that some of the policies mentioned in this section are detrimental to the well-being of patients, legislatures may have to rethink existing accommodations. If such evidence does not surface, however, legislatures in states without accommodations should move quickly to protect the religious liberty of all citizens more effectively.

### Civil Rights Laws

As we have seen, the national and state governments often create accommodations to protect religious individuals from neutral, generally applicable laws, but such accommodations—and many more could be discussed—do not exhaust the state’s interest in protecting religious citizens. For instance, legislators have passed laws to protect religious citizens from discrimination by both private and governmental entities.

Most prominently, Title VII of the Civil Rights Act of 1964, as amended, prohibits employers with more than 15 employees from (among other things) refusing to hire or firing someone because of their religion or religious practices. The statute also requires private businesses to make “reasonable accommodations” for their employees’ or potential employees’ sincerely held religious convictions unless the accommodation would create an undue hardship for the employer.<sup>73</sup>

Religious Americans, especially religious minorities, indisputably have benefited from this law. In 2014, for example, Samantha Elauf, a Muslim woman who wore a headscarf for religious reasons

applied for a job at the clothing store Abercrombie & Fitch but was not hired because her scarf violated the company’s dress code. Although she had not explicitly requested an exception from the dress policy at her job interview, the Supreme Court ruled by a margin of eight to one that Title VII “prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship.”<sup>74</sup>

Many Americans agree that employers should not be able to discriminate on the basis of religious practices such as wearing a headscarf, a yarmulke, or a turban. Yet the Congress that passed Title VII recognized that *some* religious discrimination is acceptable and protected by the First Amendment. Accordingly, it crafted an accommodation to Title VII that permits religious institutions to make employment decisions on the basis of religion. Specifically, “a religious corporation, association, educational institution, or society” is exempt “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>75</sup>

As a result, the Roman Catholic Church can insist that only faithful Roman Catholics run its hospitals, an evangelical college may require its employees to be committed evangelicals, and a Jewish social service agency may decide to employ only orthodox Jews. To prohibit religious institutions from making such decisions, Congress reasoned, would constitute a grave threat to religious liberty.<sup>76</sup>

Today, it is not uncommon for activist organizations such as the American Civil Liberties Union to contend that religious individuals and institutions should rarely be exempted from neutral, generally applicable laws.<sup>77</sup> Fortunately, legislators in even the most secular of states often disagree. For instance,

72. Luke W. Goodrich, “The Health Care and Conscience Debate,” *Engage: The Journal of the Federalist Society’s Practice Groups*, Vol. 12, Issue 1 (June 2011), pp. 122-123 (on the lack of evidence that conscience protections “undermine access to health care or harm women’s health”).

73. 42 U.S.C. § 2000e-2(a) (2000); 42 U.S.C. § 2000e(j) (2000). For a general overview how Title VII protects religious Americans, see “Section 12: Religious Discrimination,” in Equal Employment Opportunity Commission, *Compliance Manual*, 2008, <http://www.eeoc.gov/policy/docs/religion.html> (accessed September 1, 2015).

74. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. \_\_\_\_ (2015), [http://www.supremecourt.gov/opinions/14pdf/14-86\\_p86b.pdf](http://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf) (accessed September 1, 2015).

75. 42 U.S.C. § 2000e(1)(a) (2000).

76. Religious liberty concerns prompted Congress similarly to carve out religious institutions from the mandates of the Fair Housing Act, the Americans with Disabilities Act, and Title IX of the Educational Amendments Act of 1972.

77. See, for instance, American Civil Liberties Union, “Using Religion to Discriminate.”

before the Supreme Court redefined marriage for the entire country, some states had passed statutes recognizing same-sex marriage that also protected religious organizations from being compelled to participate in them if it violated their doctrine. Washington State's law recognizing same-sex marriage stipulates that:

- (4) ...No state agency or local government may base a decision to penalize, withhold benefits from, or refuse to contract with any religious organization on the refusal of a person associated with such religious organization to solemnize or recognize a marriage under this section.
- (5) No religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage.
- (6) A religious organization shall be immune from any civil claim or cause of action, including a claim pursuant to chapter 49.60 RCW, based on its refusal to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage.<sup>78</sup>

Washington State recognizes that it is unconscionable to compel religious organizations to participate in or lend their resources to "celebrations" when doing so would violate their religious convictions.

One shortcoming of the Washington statute is that it does not protect small-business owners who have sincere religious convictions that likewise prevent them from participating in same-sex wedding ceremonies. They should also be protected by carefully crafted accommodations. As we have seen, governments regularly create such accommodations and still manage to meet important policy objectives.

## Conclusion

Religious liberty is a core American principle—not a Democratic or Republican one. Many of the accommodations discussed in this essay were passed with significant bipartisan support. Both conservative and liberal jurists have supported judicially created accommodations. As the nation and states address new threats to what the American Founders called "the sacred rights of conscience," they should carefully consider the lessons of the past as they make laws and policies for the future.

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78. RCW 26.04.010. Congress passed a similar provision to protect military chaplains. Section 544 of the National Defense Authorization Act for 2012 reads: "A military chaplain who, as a matter of conscience or moral principle, does not wish to perform a marriage, may not be required to do so." See Section 544, "Freedom of Conscience of Military Chaplains with Respect to the Performance of Marriages," in National Defense Authorization Act for Fiscal Year 2012, Public Law 112-81, December 31, 2011, <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf> (accessed October 22, 2015).