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Religious Accommodation, and Its Limits, in a Pluralist Society

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For the past several years, we have been writing with a view to reconciling commitments to religious freedom, reproductive rights, and LGBT equality in conflicts that arise when laws of general application constrain religiously motivated conduct.[1] Persons of faith object to laws that require them to participate in conduct they deem sinful – such as performing an abortion or officiating a marriage.[2] They also object to complying with laws such as those requiring businesses not to discriminate or requiring health-care professionals to serve patients, on the grounds that compliance enables *others* to engage in sin or sanctions their wrongdoing.[3] In our writing, we have focused extensively on these complicity-based conscience claims.

High-profile examples have proliferated in recent years. After the US Supreme Court's decision recognizing the right of same-sex couples to marry in *Obergefell v. Hodges*, Kim Davis, a county clerk in Kentucky, claimed that religious conscience prevented her from issuing marriage licenses to same-sex couples or allowing others in her office to do so.[4] In Colorado, Jack Phillips, owner of Masterpiece Cakeshop, sought an exemption from his state's nondiscrimination law on the ground that

[1] For extended treatment of questions of religious accommodation arising in these conflicts, see Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015), and Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality (Susanna Mancini & Michel Rosenfeld eds., 2018).

[2] *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2529.

[3] *See id.* at 2535.

[4] *See* Appellant Kim Davis's Emergency Motion for Immediate Consideration and Motion for Injunction Pending Appeal at 7–8, Miller v. Davis, No. 15–5961 (6th Cir. Sept. 7, 2015) (claiming that her religious beliefs make her unable "to issue [marriage] licenses" to same-sex couples or to provide "the 'authorization' to marry (even on licenses she does not personally sign)").

making a wedding cake for a same-sex couple would facilitate a marriage he believes is sinful.[5]

Objections of this kind also feature prominently in conflicts over abortion and contraception. In *Burwell v. Hobby Lobby Stores*, owners of a corporation argued that regulations requiring them to include contraception in health insurance benefits for their employees violated the federal Religious Freedom Restoration Act (RFRA).[6] Providing employees insurance that covers contraceptives, the claimants asserted, would make them complicit in conduct they view as sinful.[7] In 2014, the Supreme Court ruled 5–4 in favor of the employers' conscience objections.[8]

This chapter makes three points about claims for religious exemption from laws that protect contraception, abortion, and same-sex relationships. First, claims for religious exemption from laws that protect contraception, abortion, and same-sex relationships differ from accommodation claims involving ritual observance in dress or prayer, most importantly in their capacity to inflict targeted harms on other citizens who do not share the claimant's beliefs. Second, US constitutional and statutory law recognizes concerns about third-party harm as reason for limiting religious accommodation. Third, religious accommodation serves pluralist ends only when the accommodation is structured in such a way that other citizens who do not share the objectors' beliefs are protected from material and dignitary harm.

I HOW RELIGIOUS LIBERTY CLAIMS DIFFER IN FORM, AND WHY IT MATTERS

We assume that religious objections to contraception, abortion, and same-sex marriage are asserted in good faith. Yet these claims differ in *form* from traditional religious liberty claims involving ritual or ceremonial observance – such as wearing a headscarf or observing a Saturday Sabbath.

Consider two Supreme Court cases involving ritual observance. In *Holt v. Hobbs*, a case decided by the Supreme Court in 2015, a prisoner sought a religious exemption from a rule prohibiting prisoners from wearing beards.[9] The Court granted the accommodation, with Justice Ruth Bader Ginsburg pointing out in her concurring opinion that "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."[10] In a ritual observance case such as *Holt*, members of minority sects with little voice in the political

[5] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16–111, 137 S. Ct. 2290 (2017) (case pending).

[6] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014) (deciding challenge under RFRA, 42 U.S.C. § 2000bb-1(a) to (b) (2012)).

[7] *Id.* at 2765.

[8] *Id.* at 2785. Opponents of same-sex marriage sought to enact state laws that mirror the federal RFRA. *See, e.g.*, IND. CODE § 34–13–9–0.7 to –11 (2016).

[9] Holt v. Hobbs, 135 S. Ct. 853, 856–57 (2015).

[10] *Id.* at 867 (Ginsburg, J., concurring).

process seek exemptions from laws in order to act in conformity with unconventional beliefs or practices generally not considered by lawmakers when they adopted the challenged laws.[11] The religious practitioners' faith claims are not focused on other citizens; the costs of accommodating their claims are minimal and widely shared.

An earlier, and more controversial, Supreme Court case provides an additional illustration. In *Employment Division v. Smith*, members of the Native American Church were denied unemployment benefits after they were terminated from their jobs for using peyote in ritual ceremonies.[12] In response, they sought an exemption from laws criminalizing possession and use of the drug.[13] The burden of accommodating the religious practitioners would not have fallen on an identified group of citizens.[14] Even so, the Court denied the exemption under the Constitution's Free Exercise Clause.[15]

Contrast these religious liberty claims involving ritual observance with the religious liberty claims asserted in conflicts over contraception, abortion, and same-sex relationships. In these cases, religious claimants seek exemptions from laws that protect women's access to contraception and abortion and from laws that protect LGBT people from discrimination. Accommodating these claims can inflict targeted harms on other citizens and so raises concerns less commonly presented by religious liberty claims involving ritual observance.

These claims differ from ritual observance claims in yet another dimension. In the typical ritual observance case, a member of a *minority* religious sect is challenging a law that comports with the dominant faith traditions of the majority. Yet in the cases involving religious objections to contraception, abortion, and same-sex marriage, it is not entirely clear whether to characterize the religious claimant as a member of a minority religious sect *or* as adhering to the dominant faith traditions of the majority. In cases involving religious objections to contraception, abortion, and same-sex marriage, the religious claimant is condemning a practice that the majority itself long condemned, but now, perhaps through court decision, has come to protect. In seeking an exemption from a law that departs from customary morality, the religious claimant defends customary morality. In this way, religious liberty claims offer a framework for opposing an emergent legal order and the newly recognized rights of those the order protects.

Laws authorizing religious objections of health-care workers – which this chapter terms health-care refusal laws – illustrate this dynamic. After *Roe v. Wade*

[11] Employment Division v. Smith, 494 U.S. 872, 874 (1990); Wisconsin v. Yoder, 406 U.S. 205, 209 (1972); Sherbert, 374 U.S. at 409.
[12] Smith, 494 U.S. at 872.
[13] *Id.* at 880.
[14] *Id.* at 911–12, 916 (Blackmun, J., dissenting).
[15] *See infra* text at note 28 and accompanying text.

recognized a constitutional right to abortion,[16] laws were enacted in the United States that authorized doctors with religious or moral objections to refuse to perform abortions or sterilizations, exempting them from duties of care imposed by professional licensing law and tort law.[17] When opponents of abortion rights failed to secure *Roe* 's reversal in 1992,[18] they responded by supporting the enactment of more expansive health-care refusal laws.

The concept of complicity animated this expanded coverage. The more recent health-care refusal laws authorize conscience objections, not only by the doctors and nurses directly involved in the objected-to procedure, but also by others indirectly involved who object on grounds of conscience to being made complicit in the procedure.[19] Today, health-care refusal laws expressly authorize objecting health-care workers *to refuse* to provide counseling or referrals to the patients they turn away that might help those patients find alternative care.[20] Some opponents of abortion and contraception object to referring patients to alternate providers, on the ground that it would make religious health-care professionals complicit in the sins of those they refer.[21]

While health-care refusal laws can facilitate a pluralist regime in which health-care providers and patients with different moral outlooks may coexist, the

[16] 410 U.S. 113, 153 (1973).

[17] The primary example of a health-care refusal law in this early period is the Church Amendment, which was passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93–45, §401(b)-(c), 87 Stat. 91, 95. It allows health-care providers to object, but only in cases of direct involvement in particular procedures. The statute provides that receipt of federal funds would not furnish a basis for requiring a physician or nurse "*to perform or assist in the performance* of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a–7(b)(1) (2012) (emphasis added). The legislative debate distinguishes between objections to performing particular procedures and objections based on more remote forms of involvement. *See Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2537 & notes 87–88. On the duties of care imposed on health-care providers, see *id.* at 2534–35 n. 72–76.

[18] Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).

[19] For a more general discussion of the trajectory and expansion of exemption legislation after the Supreme Court's 1992 decision reaffirming *Roe*, see *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2538–39. Notably, health-care refusal laws also expanded in terms of subject matter, from abortion and sterilization to contraception. *See*, *e.g.*, Act of Mar. 13, 1998, ch. 226, 1998 S.D. Sess. Laws 292, 293 (codified as amended at S.D. Codified Laws § 36–11–70 (2015)).

[20] *See* Miss. Code Ann. § 41–107–3(a) (West 2016); Ark. Code Ann. § 20–16–304 (West 2015); Colo. Rev. Stat. Ann. § 25–6–102 (West 2015); Fla. Stat. Ann. § 381.0051 (West 2016); 745 Ill. Comp. Stat. § 70/4 (2014). Federal legislation allows providers to refuse to refer patients to alternative care. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 245(a), 110 Stat. 1321, 1321–245 (codified as amended at 42 U.S.C. § 238n (a) (2012)).

[21] There is debate among Catholic thinkers regarding the religious constraints on counseling and referral. *See Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2570 n. 222.

health-care refusal laws this chapter describes protect conscientious objection on a different model. Such laws provide conscience exemptions without providing for the needs of patients with different beliefs and may be understood as part of an effort to build a legal order that would restrict access to abortion services for all.

In losing the fight over same-sex marriage, conservatives have expressly invoked health-care refusal laws as a model for continuing the fight over same-sex marriage.[22] And political leaders have encouraged the faithful to seek religious exemptions as they mobilize against laws authorizing contraception, abortion, and same-sex marriage.[23]

Through this lens, one can see that in conflicts over abortion, contraception, and same-sex marriage, religious liberty claims offer a way to oppose emergent legal orders and newly protected rights.[24] Some proponents openly discuss the political goals of religious exemption claims. Considering exemptions in the contexts of reproductive health care and LGBT equality, Sherif Girgis explains that "political potency and moral stigma are *part of the point*."[25] Religious objections have grown to be such an integral part of a political debate that the *Washington Post* casually described conscience objections as if they simply expressed political disagreement, referring to "exemptions for religious believers, schools and corporations *to federal laws they disagree with, including LGBT and abortion rights laws*."[26]

Section II next considers how law responds to these claims.

[22] *See* Ryan T. Anderson, *Will Marriage Dissidents Be Treated as Bigots or Pro-Lifers?*, The Federalist (July 14, 2015), http://thefederalist.com/2015/07/14/will-marriage-dissidents-treated-bigots-pro-lifers/.

[23] *See, e.g.*, *Manhattan Declaration: A Call of Christian Conscience*, Manhattan Declaration (Nov. 2009), http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf. For extended treatment of this mobilization, *see Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2544–51.

[24] Those who oppose the law do not seek to engage in civil disobedience – defying the law as an act of political action and accepting the consequences. Rather, some seek conscience exemptions – that is, legal privileges not to comply with the law – as a means of disabling the law that they opposed as a political matter in recent democratic contests. *See* Robert Post, *The Politics of Religion: Afterword*, *in* The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality (Susanna Mancini & Michel Rosenfeld eds., 2018).

[25] Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 Yale L.J. F. 399, 407 (2016), http://www.yalelawjournal.org/forum/nervous-victors-illiberal-measures. *See also* Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, *in* John Corvino, Ryan T. Anderson & Sherif Girgis, Debating Religious Liberty and Discrimination 108, 170–71 (2017).

[26] Sarah Pulliam Bailey, *Many Religious Freedom Advocates Are Actually Disappointed with Trump's Executive Order*, Wash. Post (May 5, 2017) (emphasis added), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/05/05/many-religious-freedom-advocates-are-disappointed-with-trumps-executive-order/?tid=ss_mail&utm_term=.01d5befecec4.

II ACCOMMODATION AND THIRD-PARTY HARM: THE LAW

US law supports claims to religious accommodation, but imposes limits on such claims when the accommodation would inflict significant targeted harms on other citizens.

For some years, the Supreme Court interpreted the First Amendment's Free Exercise Clause to protect claimants seeking religious exemptions from laws of general application. In *Sherbert v. Verner*, the Court provided free exercise protection to a woman who had been denied unemployment compensation when she refused to accept a job because she observed Sabbath on Saturday.[27] In 1990, in *Smith*, the Court rejected this approach and ruled that a free exercise challenge to a generally applicable law merits only minimal constitutional scrutiny, unless the law targets or singles out religion.[28]

Displeased with the Court's decision to narrow protection for religious liberty, Congress passed RFRA. The statute allows persons to seek an exemption from federal laws that impose a substantial burden on religious exercise, but authorizes courts to reject their claims if judges find that enforcing the law without the sought-after exception is "the least restrictive means of furthering [a] compelling governmental interest."[29] Many states have enacted laws that mirror the federal RFRA.

In 2014, the Court interpreted RFRA expansively in *Hobby Lobby*.[30] Owners of a for-profit corporation sought a religious exemption from a federal law that required employers to include contraception in health insurance benefits for their employees.[31] The employers objected that complying with the law's insurance requirement would burden their religious exercise by making them complicit in their employees' use of contraceptive methods which the Food and Drug Administration (FDA) regulates as "contraception" and "birth control," but the employers' religion leads them to believe are abortifacients.[32] The Court ruled 5–4 in favor of the employers' religious conscience objections.[33]

Hobby Lobby allowed for-profit corporations to make claims for religious exemptions under RFRA and in other ways interpreted RFRA broadly. Even so, both Justice Anthony Kennedy's concurring opinion and the majority opinion in

[27] 374 U.S. 398, 403–05 (1963).
[28] 494 U.S. 872, 883–84 (1990).
[29] 42 U.S.C. § 2000bb-1(a) to (b) (2012).
[30] 134 S. Ct. 2751 (2014).
[31] *Id.* at 2754.
[32] *See id.* at 2760 ("The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients."); *id.* at 2762–63 (discussing FDA regulation of the contraceptive methods as birth control). The dispute has many layers. For some of its legal, religious, scientific, and political dimensions, see *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2582 n. 273.
[33] 134 S. Ct. at 2785.

Hobby Lobby suggest that courts are to consider harms to other citizens in evaluating exemption claims under RFRA.[34] The majority reasoned that because the government could provide the claimants' employees contraception without involving their employer, "[t]he effect of the … accommodation on the women employed by Hobby Lobby … would be precisely zero."[35] This concern with third-party harm as a limiting principle on religious accommodation reflected the reasoning of Justice Kennedy, who in a concurring opinion not only credited the government's compelling interest in protecting women's health but also expressed concern with the impact of the sought-after accommodation on female employees.[36]

Even if the Court was incorrect in its assumption that the accommodation would have "precisely zero" effect on Hobby Lobby's employees,[37] its reasoning demonstrates how third-party harm matters in analysis under RFRA. Although RFRA does not speak explicitly in the register of third-party harm, *Hobby Lobby* shows that third-party harm matters in determining whether unobstructed enforcement of the law is, in the language of RFRA, the "least restrictive means" of furthering "a compelling government interest."[38] If the government is pursuing a compelling interest and if religious accommodation would impose material or dignitary harm on the individuals protected by the law or otherwise undermine the societal interests the law promotes, then unimpaired enforcement of the law is likely the least restrictive means of furthering the government's compelling ends.[39]

A concern with third-party harm also shaped the Supreme Court's subsequent decision in *Zubik v. Burwell*.[40] The government had accommodated religiously affiliated nonprofits with religious objections to providing employee insurance benefits that covered contraception; those organizations needed to notify the

[34] *Id.* at 2779, 2786–87.

[35] *Id.* at 2760.

[36] *Id.* at 2751, 2787 (Kennedy, J., concurring). For analysis, see *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2530–31.

[37] For commentators questioning the accuracy of the Court's premises, see Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 Harv. J.L. & Gender 153, 159–62 (2015); Andrew Koppelman & Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, 9 Catholic St. Thomas J.L. & Pub. Pol'y 223, 234–39 (2015).

[38] *See Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2580–84.

[39] *See id.* at 2580–81 ("An antidiscrimination law can illustrate. In enacting an antidiscrimination law, legislators seek to provide the citizens the law protects equal access to employment, housing, and public accommodations and to ensure that they are treated with equal respect; legislators also seek to promote the growth of a more integrated and less stratified society. If granting a religious accommodation would harm those protected by the antidiscrimination law or undermine societal values and goals the statute promotes, then unencumbered enforcement of the statute is the least restrictive means of achieving the government's compelling ends. If, however, the government can accommodate the religious claimant in ways that do not impair pursuit of the government's compelling interests in banning discrimination, then RFRA requires the accommodation.").

[40] 136 S. Ct. 1557, 1561 (2016).

government of their objections, thus allowing the government to offer coverage to the organizations' employees through other entities.[41] Religiously affiliated nonprofits challenged this accommodation on grounds that it made them complicit in their employees receiving contraceptive coverage from alternative sources.[42] In essence, they objected to "triggering" an obligation on the government to furnish insurance benefits that included contraceptive coverage to employees.[43] In other words, they objected to the religious accommodation itself as a violation of their religious liberty. Instead, the religiously affiliated nonprofits sought a complete exemption from the health-care regulations. In fact, they argued to the Court that their employees should purchase their own (contraception-specific) insurance in the private market[44] – even though insurance of this kind is not available for purchase in the private market.

In response to these claims, the Court issued a *per curium* order remanding the cases to the lower courts in hopes of reaching a negotiated resolution.[45] In doing so, the Court reiterated *Hobby Lobby* 's concern with third-party harm. The parties, the Court instructed, should have "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[46]

As *Hobby Lobby* and *Zubik* demonstrate, accommodation of complicity-based objections raises special concerns about third-party harm. Such accommodation expands the universe of potential objectors, from those directly involved to those who consider themselves indirectly involved in the objected-to conduct. The number of claimants may grow, especially in regions where majorities still oppose recently legalized conduct. Under these circumstances, barriers to access to goods and services may spread, and refusals may demean and stigmatize members of the community. Further, as *Zubik* demonstrates, complicity-based objections may be lodged against efforts to mediate the impact of religious objections on third parties. That is, the logic of complicity offers a ground on which to object to the very principle that limits religious accommodation to prevent third-party harm.

These concerns with third-party harm have intensified in the midst of the Trump administration's efforts to dismantle the Patient Protection and Affordable Care Act. In October 2017, federal agencies issued interim final rules on the coverage of contraception that break with the arrangements that the Court sanctioned in *Hobby*

[41] *Id.* at 1559.
[42] *See* Brief for Petitioners at 44, 51 Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 15–35), 2016 WL 93988.
[43] *Id.* at 50.
[44] *See id.* at 75–76.
[45] *See* Zubik, 136 S. Ct. at 1559.
[46] 136 S. Ct. at 1560.

Lobby and *Zubik*.[47] In these cases the Court allowed employers religious accommodations under RFRA on the assumption that the government would provide the companies' employees with alternative access to contraception, so that the accommodation would have "zero" effect on the employees.[48] Here, in contrast, the rules proposed by the Trump administration offer objecting employers a complete exemption from the contraceptive requirements while doing nothing to ensure that their employees have access to the contraceptive coverage to which they are entitled.[49] Instead, the government dismissed concerns with third-party harm, asserting that contraception is "readily available" and that "contraceptive coverage may be available through State sources or family plans obtained through non-objecting employers."[50] The government simply assumed that women could gain access to contraception in other ways. This line of reasoning was advanced by the claimants in *Zubik* in their unsuccessful attempt to obtain a complete exemption,[51] and now the Trump administration has adopted it. In doing so, the administration has left women to fend for themselves and thus bear the significant costs of other citizens' religious beliefs – a position US religious liberties law ordinarily does not tolerate and the Court did not sanction under RFRA.[52]

The interim final rules not only furnish exemptions without ensuring that employees have access to contraception; they also allow a much wider range of objections than anything the Court sanctioned in *Hobby Lobby* or *Zubik*. While one rule offers "exemptions . . . based on sincerely held religious beliefs,"[53] the other rule extends exemptions to employers with moral, rather than religious, objections.[54] Religious conservatives litigated *Hobby Lobby* and *Zubik* as claims for *religious*

[47] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (interim final rule Oct. 6, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (interim final rule Oct. 6, 2017).

[48] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

[49] In this way, the new rules follow the model of health-care refusal laws. While a robust religious liberties tradition observed under the Constitution and RFRA (and Title VII) demonstrates concern with third-party harm in deciding whether and how to grant accommodations, health-care refusal laws deviate from this norm and commonly exempt institutions and persons from care obligations without efforts to mediate the impact of refusals on patients. For more on the distinction between these two regimes, see *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2524–42.

[50] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,807 (interim final rule Oct. 6, 2017).

[51] Zubik v. Burwell, 136 S. Ct. 1557 (2016).

[52] The government's action has been challenged in court. *See*, *e.g.*, Complaint, ACLU v. Wright, Case No. 3:17–CV–05772 (N.D. Cal. 2017).

[53] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,808 (interim final rule Oct. 6, 2017).

[54] Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,841 (interim final rule Oct. 6, 2017).

exemptions – part of their more general mobilization under the banner of faith.[55] As we have shown, religious arguments for exemptions in the contraceptive coverage setting in fact straddled the line between religion and politics.[56] Now, the interim final rules explicitly cover objections regardless of whether they derive from religious convictions. Those who oppose the contraceptive coverage requirements, even if their opposition does not spring from religious belief, can refuse to comply with the requirements.[57] As a general matter, one might believe that conscience protections should include ethical as well as religious beliefs. But on these facts, what could possibly be the government's interest in countenancing moral objections to women's use of contraception? Further, proceeding down this path undoubtedly expands the universe of potential objectors and, without a mechanism for mitigating third-party effects, is likely to obstruct enforcement of the law.

In accommodating both religious and moral objections and doing nothing to mediate the impact on third parties, the Trump administration's interim final rules follow the logic of the health-care refusals regime that has developed in the last several decades. That regime illustrates the problems that can arise when health-care refusal laws do not honor the principle of *Hobby Lobby* and *Zubik* limiting exemptions that inflict third-party harm. In certain regions of the country, the availability of abortion services is severely restricted and the practice remains stigmatized.[58] It is especially important to notice the material and dignitary harms inflicted by health-care refusal laws given that opponents of same-sex marriage hold up health-care refusals as a model for shaping law in the LGBT context.

III. PLURALISM AND THE QUESTION OF CONSCIENCE

A classic justification for providing conscience exemptions is that protecting conscience facilitates a pluralist regime in which those with different moral outlooks may coexist.[59] But as illustrated by health-care refusal laws, as well as the Trump administration's recent action on insurance coverage for contraception, conscience exemptions do not always serve pluralist ends. Conscience exemptions can be deployed to enforce indirect restrictions on access that, for constitutional or political reasons, cannot be enforced directly. Religious claimants may speak as a minority and yet assert what have long been the norms of the majority against those whose rights the law has only recently and fragilely come to protect.

[55] Zubik v. Burwell, 136 S. Ct. 1557 (2016); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[56] *See Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, *supra* note 1, at 2542–65.

[57] Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,841.

[58] For evidence of the "climate of extreme hostility to the practice of abortion" prevailing in Alabama, see Planned Parenthood v. Strange, 33 F. Supp. 3d 1330, 1334 (M.D. Ala. 2014).

[59] *See, e.g.*, Anderson & Girgis, *supra* note 25, at 147.

An accommodation regime's pluralism is measured, not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objectors' beliefs. Exemption regimes that exhibit indifference to the impact of widespread exemptions on others do not promote pluralism; they sanction and promote the objectors' commitments.

The accommodation of religiously motivated conduct is commonly understood to be part of religious liberty, but in some legal systems, judges understand accommodation to protect the equality of religious practitioners as well as their liberty of conscience.[60] Considerations of equality arise when the polity is divided as to religious affiliation, with some faiths claiming many more members and much greater political authority than others.[61] Judges might ask whether in adopting a law of general application, the government has valued and respected the religious practices of minority faiths in the ways it values and respects the religious practices of majority faiths. In these circumstances, judges may understand religious accommodation as redressing the hostility or indifference of the majority to the minority.

Yet accommodating religion can also entrench inequality between groups. This is especially likely when claimants seek religious exemptions from laws that promote equality for racial minorities and other groups. This of course is the problem raised by claims seeking exemptions from laws that require businesses to serve LGBT individuals on a nondiscriminatory basis. Harm to those individuals protected by the equality mandate – here, LGBT citizens – may be a sufficient reason to deny the sought-after religious exemption. This is also the problem raised by claims seeking exemptions from laws that protect women's reproductive rights. In *Planned Parenthood v. Casey*, the Court recognized that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[62] Opposition to contraception and abortion may reflect traditional views about women's natural and proper role as mothers and can deprive women of control over the timing of motherhood in ways that impair "the ability of women to participate equally in the economic and social life of the Nation."[63]

[60] *See, e.g.*, Multani v. Comm'n Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, para. 79 (Can.) (ordering accommodation for the practices of a Sikh student, the court explained that "[a] total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others," whereas providing an accommodation "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities").

[61] *Cf.* Martha C. Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 116 (2008).

[62] Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

[63] *See* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 Yale L.J. F. 349, 349 (2015), http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right; Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 376–77 (1992).

IV CONCLUSION

Studying religious liberty claims proliferating in conflicts over reproductive health care and LGBT rights leads us to make a series of practical recommendations for courts and legislatures approaching questions of religious accommodation. First, it is important to take account of differences between religious liberty claims for ceremonial observance and religious liberty claims for exemptions from laws protecting abortion, contraception, and same-sex relationships. In cases of ritual observance, generally the claims do not focus on other citizens, and the costs of accommodation are minimal and spread across society.[64] In contrast, in cases involving reproductive health care and LGBT equality, the claims are focused on specific citizens courts and legislatures have acted to protect; and accommodation of the claims would harm those citizens. These differences are important to consider in deciding whether and how to accommodate the claims.

Second, and more concretely, considerations of third-party harm are critical in deciding whether and how to accommodate religious objections. Harm to other citizens may be a reason to deny religious accommodation. If it is not, it nonetheless should influence the shape of religious accommodation. Accommodations should be designed in ways that mitigate the impact on third parties. Here, both material and dignitary harms are relevant.[65] Citizens should be protected not only from deprivations of goods and services, but also from the stigma that refusals and denials can produce.[66] Put differently, accommodations should be structured in ways that (1) ensure access to goods and services, and (2) shield citizens from stigmatizing encounters.

[64] *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853 (2015); Employment Division v. Smith, 494 U.S. 872, 874 (1990); Sherbert, 374 U.S. at 409.

[65] Some have raised First Amendment objections to limiting religious exemptions based on the dignitary harm refusals inflict on other citizens. But, as Robert Post shows, this argument "would suggest that our entire tradition of antidiscrimination law is suspect under the First Amendment." Robert Post, *RFRA and First Amendment Freedom of Expression*, 125 YALE L.J. F. 387, 396 (2015), http://www.yalelawjournal.org/forum/rfra-and-first-amendment-freedom-of-expression. Post explains:

> A fundamental purpose of antidiscrimination law is to prevent "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." Because the law commonly conceptualizes the dignity of persons as dependent upon how they are regarded by others, legal efforts to uphold dignity typically have the purpose and effect of regulating conduct that transmits messages of disrespect. That is why antidiscrimination law characteristically prohibits conduct that creates social meanings associated with the stigmatization or stereotyping of protected groups.

Id. at 394 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88–872, at 16–17 (1964)).

[66] *See* Joseph William Singer, *Religious Liberty and Public Accommodations: What Would Hohfeld Say?*, *in* WESLEY HOHFELD A CENTURY LATER: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyam Balganesh, Ted Sichelman & Henry Smith eds, forthcoming 2018).

Finally, and more generally, courts and legislatures entertaining claims for religious accommodation should consider whether providing the accommodation will promote equality or perpetuate inequality. Before granting religious objectors exemptions from laws designed to promote equality for groups of citizens who historically have been subject to discrimination, decision-makers must decide whether the exemptions will undermine protections provided by the law and frustrate its aim of bringing into being a more egalitarian society.