
RELIGIOUS EXEMPTIONS, STATING
CULTURE: FOREWORD TO *RELIGIOUS
ACCOMMODATION IN THE AGE OF
CIVIL RIGHTS*

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“There is a war against religion!” “Exemptions on religious groups undermine civil rights!” “Pluralism and tolerance are in jeopardy!” “Freedom for some ends up trumping freedom and equality for others!” Whether any of these individual statements is true, the rising claims of catastrophe by opposing groups across the United States prompted an intense and engaging conference, “Religious Accommodation in the Age of Civil Rights,” held at Harvard Law School on April 3–5, 2014, sponsored by Harvard Law School, the Williams Institute at the University of California in Los Angeles, the American Civil Liberties Union, and the University of Southern California Center for Law, History and Culture. Engaging and intense discussions among forty panelists and over 120 participants generated the articles presented in this issue as well as others filling special issues of two other journals.¹ The focus on accommodations for religion reflects both increasing challenges to traditional denials of rights and protections for lesbian, gay, bisexual, and transgender individuals and religious objections to contraception and abortion. Clashes increase with political and legal advances in legal treatment of marriage equality for same-sex couples and expanding recognition of legal claims of businesses for freedom of speech and religion. Ongoing disagreements over the scope of existing and potential federal, state, and local

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1. See 38 HARV. J.L. & GENDER vii–244 (2015); 9 HARV. L. & POL’Y REV. 1–193 (2015).

antidiscrimination laws, health insurance requirements, and other general rules trigger political and social debates but also produce legal questions requiring answers.

Pending at the time of the conference, *Burwell v. Hobby Lobby Stores, Inc.* is one of many high-profile legal disputes about the required scope of accommodation for religion; there, closely held private businesses asserted and obtained protection on the federal Religious Freedom Restoration Act of 1993 (“RFRA”) from the United State Supreme Court in securing an exemption from the Affordable Care Act’s mandate requiring health insurers to provide contraceptives.² Some hint of the scope of disagreement is present not only in the Supreme Court’s four generated opinions and alarm bells from observers on all sides,³ but also in the conflict between the Court and Congress over the issues. The Religious Freedom Restoration Act was an effort by Congress to reinstate a method of analysis once used but then rejected by the Supreme Court. However, the Supreme Court subsequently rejected the application of RFRA to the states,⁴ which was followed by further Congressional and state legislative actions.⁵ American law and politics reflect decades of pitched disagreements over the scope of religious freedom and exemptions from legal requirements on religious grounds.⁶

These disagreements revive debates both at the time of the nation’s origin and in the conflicts elsewhere that prompted many to emigrate to North America in the seventeenth and eighteenth centuries.⁷ The articles

2. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. *Compare, e.g.*, Robert P. George, *What Hobby Lobby Means*, FIRST THINGS (July 1, 2014), <http://www.firstthings.com/web-exclusives/2014/06/what-hobby-lobby-means> (cautioning that applications of the case will determine the future of religious freedom), with Jeffrey Hollender, *Depriving Women of Contraceptive Care is Bad Business*, HUFFINGTON POST (Aug. 5, 2014), http://www.huffingtonpost.com/jeffrey-hollender/contraceptive-care_b_5651812.html, and with Kristina Petersen, *Supreme Court's Hobby Lobby Ruling Ignites Debate Over Religious-Freedom Law*, WALL ST. J. (June 30, 2014), <http://online.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510> (describing partisan controversy in Congress regarding the scope of RFRA’s protections).

4. *City of Boerne v. Flores*, 521 U.S. 507, 507–09 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress’s Fourteenth Amendment enforcement authority and was unconstitutional as applied to states).

5. See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc et seq. (2012)); *State Religious Freedom Restoration Acts*, NAT’L CONF. STATE LEGISLATURES (Mar. 13, 2015) <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

6. See generally Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007) (using various examples to discuss the optimal scope of religious freedom given its potentially inverse relationship with race, sex, sexual orientation and other factors).

7. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT*

here, as in the larger debates they reflect, address deep questions about the nature of truth, the reaches and limitations of empathy and tolerance, the relationships between liberty and equality, the shifting patterns of secularization and religious revival, the deployment of group identities by politicians, the fund-raising and mobilization efforts of political parties, and the rifts by region and between cities and rural populations in an often-contentious heterogeneous society.⁸ A special danger, pointed out at the conference by Professor Nan Hunter of Georgetown University, is the conversion of disagreement into demonization. Given the real risks of misunderstanding and distorting opposing views, this issue and the conversations it reflects offer encouragement that individuals who disagree on these pending and enduring questions can talk productively with one another.

Familiar discussions of tolerance for pluralist accommodations have relied on conventional distinctions, albeit informed by Protestant Christianity, separated by a private sphere that ensures religious exercise and a public sphere that demands compliance with general rules of employment and welfare.⁹ These issues take on a new complexity when economic actors, such as privately held but potentially large corporations, receive accommodations for religious claims asserted by their owners. Historically, both First Amendment practice and common understandings distinguished between private individuals and religious institutions, on the

WE SHOULD DO ABOUT IT 19–56 (2005) (discussing the seventeenth-century debate among the U.S. founding fathers on whether the Constitution should protect religious freedom); EDWIN S. GAUSTAD & LEIGH E. SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA* 23–29 (rev. ed. 2002) (pointing out the important role religion has played in various groups' decision to migrate to North America, such as the French). For primary materials on the subject, see LIBRARY OF CONGRESS, *Religion and the Founding of the American Republic: Exhibition Items*, <http://www.loc.gov/exhibits/religion/obj-list.html> (last visited Jan. 27, 2015).

8. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); KENT GREENAWALT, *RELIGION AND THE CONSTITUTION—VOLUME I: FAIRNESS AND FREE EXERCISE* (2d prtng. 2009); PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011); *THE POLITICS OF TOLERATION IN MODERN LIFE* (Susan Mendus ed., 1999); DAVID O'CONNELL, *GOD WILLS IT: PRESIDENTS AND THE POLITICAL USE OF RELIGION* (2014); STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010); CHARLES TAYLOR, *A SECULAR AGE* (2007); Ziad Munson, *God, Abortion, and Democracy in the Pro-Life Movement*, in *TAKING FAITH SERIOUSLY* 277 (Mary Jo Bane, Brent Coffin & Richard Higgins eds., 2005). For a thoughtful treatment of shifting debate over religion in the public square, see SALLY STEENLAND, *DEBATING THE DIVINE: RELIGION IN 21ST CENTURY AMERICAN DEMOCRACY* (2008).

9. See Alasdair MacIntyre, *Toleration and the Goods of Conflict*, in *THE POLITICS OF TOLERATION IN MODERN LIFE*, *supra* note 8, at 133, 139–44 (“It is a consequence of [various] features of the social life of advanced modernity that there is always tension and sometimes conflict between the demands of state and market on the one hand and the requirements of rational local community on the other.”).

one hand, and economic institutions, on the other, in terms of the spheres of legal protection for religion. Title VII, for example, prohibits discrimination on the basis of religion in employment, with exemptions for religious institutions.¹⁰ The decision in *Hobby Lobby* raises the question why a business can have religious beliefs and as well questions over whose beliefs here should matter. (Majority owner? Majority of all stockholders? Employees?). Further questions include how those religious beliefs shall be identified and under what circumstances, if any, should countervailing interests of the government or third parties matter in assessments of religious accommodation. The *Hobby Lobby* decision marks a new day in the nation's longstanding debates about religious liberty and universal public norms and opens the door to many disputes within companies, communities, and courts.

The articles collected here present thoughtful analyses of the shapes and sources of the contemporary conflicts as well as potential resolutions that deal with legally framed disagreements over religious accommodations for individuals, businesses, and nonprofit organizations. Although diverse in their points of view and particular choice of focus, the articles converge in their recognition that the government in contemporary society inevitably defines national values, whether by imposing them against the objections of individuals and groups or by creating exemptions or accommodations. They echo Professor Robert Cover's powerful articulation, which emphasized the violence of the state, which has the power to destroy what binds a community together even as failure to do so can destroy the state's own project of predictable and uniform rules, guaranteeing individual rights and social order.¹¹ In this light, accommodation—exemptions from otherwise general rules—are an obvious tool to ease coexistence but also mechanisms to express and implement the relative ranking of public commitments. When are accommodations a compromise of important values that extends religious freedom but potentially harms third parties and uniform laws—and when instead an affirmative good, supporting a vibrant pluralism? The contributors help address this question as they explore how the government inevitably shapes cultural values and what the government should pursue.

10. 42 U.S.C. § 2000e-1(a) (exempting from the antidiscrimination requirement “a religious corporation, association, educational institution, or society 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”).

11. Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 45–53 (1983), reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 145–55 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992).

THE STATE INEVITABLY DEFINES CULTURE

The authors here shed light on varied ways in which governments define culture. With a vivid comparison of struggles over same-sex unions in two national contexts, Malick Ghachem traces how past treaties with colonial territories shape the contours of access to marriage, while constitutional commitments to federalism similarly influence access to marriage in the United States.¹² Here, the definition of culture by the government embodies the path that the government's power has taken, whether through shrinking the empire or managing the regional differences. Steven Smith underscores the inevitability of support by the government for one view or another in its treatment of gay marriage and the contest among groups which each want law on their side.¹³ Professor Smith goes further, however, in arguing that failure to accommodate religious objectors to abortion or same-sex marriage would force them either to violate their convictions or be "increasingly relegated to the margins of society," excluded from operating large businesses and universities, and unable to take on roles as physicians, pharmacists, landlords, or photographers.¹⁴ Melissa Murray warns that legal victories by advocates for same-sex marriage endanger not just religious opponents but also those who seek space for non-marital sexual relationships.¹⁵ State endorsement of same-sex marriage, she argues, sets in motion a new potential need for exemptions for those who do not want to marry.

Nomi Stolzenberg argues that it is not just the state, but also the state in conjunction with the economy, that defines culture.¹⁶ Thus, just as the Hobby Lobby owners object to financially assist a practice they abhor—the United States government objects to financial assistance—"material support"—that finds its way to terrorists.¹⁷ She also identifies the surprising mix between progressive and libertarian views of coercion and government that the *Hobby Lobby* case produces for both the owners and their opponents as they fight over who gets to define the terms of the

12. Malick W. Ghachem, *Accommodating Empire: Comparing French and American Paths to the Legalization of Gay Marriage*, 88 S. CAL. L. REV. 511 (2015).

13. Steven D. Smith, *Live and Let Live? The Asymmetry of Accommodation*, 88 S. CAL. L. REV. 703 (2015).

14. *Id.* at 716.

15. Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661 (2015). She also argues that state approval of same-sex marriage aligns with governmental efforts to privatize responsibility for individual welfare and reduce the welfare state. *Id.* at 697–700.

16. Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727 (2015).

17. *Id.* at 744–46.

culture.¹⁸ Because money ties people together in patterns of responsibility and dependency, the government's treatment of money goes to the core of meanings and relationships.

Andrew Koppelman argues that antidiscrimination laws should give priority to tackling economic inequality as an increasing sense of taboo will bring outliers persisting in discriminating against sexual minorities into line.¹⁹ Hence, he urges supporters of rights of gays, lesbians, bi-sexual and transgender persons not to become enmeshed in fights over accommodating religiously motivated claims for exemptions. Asserting that the gay rights movement has won—or is on course for doing so, he looks ahead to future political choices about poverty, violence, and criminal justice to argue about how best to preserve potential coalitions across religious and nonreligious lines. For Michael Helfand, the fact that governments shape culture by dictating what receives approval and what does not supplies critical support for stressing volunteerism as a central value.²⁰ John Inazu suggests that the state's crucial task is to help people live with deep and irresolvable differences, and imposing a contested view would undermine this task at a time when advocates of gay rights are gaining power.²¹

The distinctive contributions of the symposium articles across quite varied contexts do contribute to a common conclusion. Because contemporary government taxes private actors, provides unemployment benefits, governs collective bargaining, licenses providers of services, and otherwise governs economic and private transactions, grants of exemptions redefine otherwise prevailing public policies and give priority to some individuals over others.²² The particular pattern of accommodations may reflect the relative political success of particular groups and their causes or analysis under general principles.²³ But the accommodations granted and defined reveal not only existing public norms but also the direction of change in norms embraced by the dominant culture. No wonder the stakes are high.

18. *Id.* at 755.

19. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015).

20. Michael A. Helfand, *Religious Institutionalism, Implied Consent and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015).

21. John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015).

22. See Minow, *supra* note 6, at 785–91 (describing the “clash” between religious groups’ demands for exemptions from certain civil rights laws and the antidiscrimination norms such laws are designed to protect).

23. *Id.* at 792–814 (comparing treatments of race, gender, and sexual orientation in religious claims for exemption from antidiscrimination laws).

HOW TO PROCEED

The authors may agree about the inevitable role of law in shaping culture, but they diverge over recommended treatments of contemporary claims for religious accommodations. Ghachem argues against creation of new excluded groups as governments extend recognition to same-sex marriage.²⁴ Murray warns that the rising recognition of same-sex marriage jeopardizes individuals who pursue sexual relationships outside of marriage.²⁵ Inazu, Koppelman, and Smith advocate for government accommodation for religious objectors to promote the kind of pluralist communities that encourage humility and tolerance;²⁶ preserve room for dissents and differences;²⁷ or lay the ground for political coalitions for tackling poverty, violence, and injustice.²⁸ Helfand stresses voluntary affiliation by individuals and clear disclosure of religious purposes for any institution recognized by the government as deserving accommodations to protect the autonomy of individuals and to justify a free exercise claim by the institutions, including companies like Hobby Lobby whose religious accommodation affects employees.²⁹ And for Stolzenberg, the government should not “recognize a right not to facilitate government programs because of moral objections to the program” because doing so would “deny the government’s right very ability to raise revenue and determine how that revenue will be used,” and neglect the mutual dependencies inherent in economic relations.³⁰ As this range of positions suggests, whatever the treatment of claims for religious accommodation, law and society should promote co-existence to avoid constant battles and the resentment of minorities in a diverse society.

Conference organizer Mark Tushnet reflected at the live event, “[t]he other thing that struck me was that there were a few people taking a strong separatist position—no accommodation at all—and I was surprised that there were people taking that position.”³¹ During the conference, I argued

24. Ghachem, *supra* note 12 (describing risks to people governed by past treaty relations with France and to people in some of the states in the United States removed from current trends).

25. Murray, *supra* note 15.

26. See Smith, *supra* note 13, at 718–21 (arguing that religious groups have a better track-record in supporting humility and tolerance than do nonreligious groups, maintaining that the religious groups have more to lose from nonaccommodation than secular groups do from accommodation, and noting the economic incentives for ending discrimination against gays and lesbians).

27. See Inazu, *supra* note 21 (arguing that reinforcement of institutions for religious freedom will allow differing groups to coexist until they reach a compromise).

28. Koppelman, *supra* note 19, at 655–59.

29. Helfand, *supra* note 20.

30. Stolzenberg, *supra* note 16, at 763.

31. Dick Dahl, *Religious Accommodation in the Age of Civil Rights*, HARV. L. TODAY (Apr. 30,

for “accommodation in a different sense—the kinds of accommodation that can occur when people of good will can sit across the table from each other to see what they can work out. . . . The more that we litigate these cases, the less accommodation, in the deepest sense, we will have.”³² Yet I am sobered by the cautionary comment of Columbia Law School professor Katherine Franke, who noted at the conference that progress on inclusion and justice does not come from pleas for tolerance.³³ It is an important reminder. Yet, because of the significant effect of state recognition on cultural norms and practices, denials and grants of religious accommodation can each undermine peaceable coexistence across groups. Conflict is inevitable. For that very reason, ensuring fundamental respect for individuals regardless of their views is a predicate for productive debate. Religiously-motivated wars throughout history and erupting around the world today provide sufficient reminders of the precious contributions our legal and political systems offer in supporting coexistence despite disagreement. Tolerance and respect ultimately come not from the government but from the people, and yet how the government’s power is deployed will influence how people come to view their place in society. Religious accommodation demands not only sufficient room for people with diverse beliefs and practices, but also acceptance of ongoing conflict over the meaning and demands of justice.

Richard Garnett rightly emphasizes that the tensions under discussion are tensions among civil rights, for religious liberty is a crucial civil right.³⁴ So too is his assertion of pluralism essential.³⁵ Ours is a diverse society and the mixing—and even the clashes—among cultures, religions, races, and worldviews—are not only unavoidable but also crucial contributors to the creativity and meaning of the experiment that makes the United States so great. Remaining, though, for more sustained discussion, are two basic questions. Firstly, when is the clash about harm, and when about offense; when about jeopardy to one’s very being, and when about discomfort with aspects of other people’s lives? The law can, and does, take into account what people find offensive; but in a free society, sometimes people must tolerate offense in order to accommodate the rights of others.³⁶ This idea

2014), <http://today.law.harvard.edu/religious-accommodation-age-civil-rights-video/>.

32. *Id.*

33. *Id.*

34. Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 500 (2015).

35. *Id.* at 502–04.

36. *See generally* JOHN STUART MILL, ON LIBERTY (1859); Robert Amdur, *Harm, Offense, and the Limits of Liberty*, 98 HARV. L. REV. 1946 (1985) (book review).

applies to those seeking religious accommodations and also to those seeking equal treatment.

And secondly, how can even long-standing religious beliefs change without undermining religious liberty? Religious arguments against racial integration were prevalent and insistent several decades ago. The U.S. Supreme Court acknowledged that the Supreme Court of Appeals of Virginia relied on Biblical references to the intentions of the Almighty in refusing an equal protection challenge to its anti-miscegenation statute, but the Court went on to find “no legitimate overriding purpose independent of invidious discrimination which justifies this classification.”³⁷ Sometimes abstract principles direct the result; sometimes political and social struggles play a significant role.³⁸ Living as we do in the midst of political and social struggles and in the midst of legal arguments, it is not only judicial decisions that matter. Face-to-face discussions, sustained scholarly debates, explorations of attitude compromises like those we explore in this symposium are as vital, and the contributors deserve all of our gratitude.

37. *Loving v. Virginia*, 388 U.S. 1, 3–4, 11 (1967).

38. *See generally* Minow, *supra* note 6.

