

The Religious Wars in Twenty-First- Century America

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Many faith communities are sincerely pro-life and believe in traditional marriage as the union of one man and one woman. Federal, state, and local governments have responded to religious beliefs deemed out of line by regulating religious exercise. The result for an increasing number of Americans is Thomas More’s dilemma of conscience. No longer is it obvious that the Constitution will protect against these conflicts. This article aims to explore these issues. In part 1, I describe the current conflict between sexual liberty and religious exercise and explore how public accommodations laws have been expanded well beyond their common-law roots. In part 2, I review how *Employment Division v. Smith* has drastically undermined the original freedom of conscience protections that prevailed at the time of the founding. Finally, I examine *Stormans, Inc. v. Wiesman* as a case study of the conflict between sexual expression-based government mandates and freedom of conscience.

In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them.

—George Washington¹

The phrases “religious liberty” and “religious freedom” will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.

—Martin R. Castro²

Introduction

“We are a religious people, whose institutions presuppose a supreme being.” That language, from Justice Douglas’s opinion for the Court in *Zorach v. Clausen*,³ is increasingly at odds with the modern state and its expansive understanding of public accommodations and antidiscrimination law. Indeed, as government has expanded to fill in much of the space previously occupied by the private realm, including the private religious realm, tension between religious exercise and government mandates has increased to the point that one or the other must retreat. Government mandates that private employers provide abortifacient drugs (in contravention of their sincerely held religious beliefs) or be subjected to crippling fines,⁴ demands that private pharmacists stock and sell such drugs or be barred from conducting business,⁵ and prosecutions for violating various public accommodation laws for refusing to participate in same-sex “marriage” ceremonies,⁶ all have pitted the force of government against the foundational right to live according to one’s own religious faith, not just in one’s church, synagogue, or mosque, but also in public.

It is that last piece—the public manifestation of religion—that gives rise to such consternation in twenty-first century America. Indeed, resolving disputes between religious liberty and government, or between religious liberty and a slew of private claims, would be an easy matter if religion were merely “some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room,” as the late Justice Antonin Scalia famously wrote with his characteristic flare in dissent from the school graduation prayer case, *Lee v. Weisman*.⁷ But as Justice Scalia recognized, religion “is not that [for most believers], and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech God’s blessings as a people and not just as individuals”—to live in accordance with their understanding of God’s will in their public lives—their businesses, their charitable activities, their speech, their interactions with neighbors and fellow citizens, the marketplace and the public square—and not just behind the curtains of home, church, synagogue, mosque, and temple.

The guarantee of the freedom of conscience was not a tangential or disposable element of the American founding, but a necessary corollary to the self-evident truths of the Declaration. “Almighty God hath created the mind free,” wrote Thomas Jefferson in his Statute on Religious Freedom, and hence “all attempts to influence it by temporal punishment or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy author of our religion.”⁸ But the duties one owes to the Creator extend beyond mere belief; they include the *exercise* of

religion as well, in accordance with those faith tenets. To name but three, drawn from the predominant Judeo-Christian tradition: Keep the Commandments (which both require certain conduct and forbid other conduct); do not be complicit in sin; and seek to dissuade others from sin.

This “free exercise” was not at all in tension with the requirement, in the federal Constitution, that Congress make no law respecting an establishment of religion. To exempt religious dissenters from majoritarian imposition was instead seen as a form of toleration of difference, the opposite of an establishment. In the religious milieu of the early Republic, there were not often calls for religious accommodation because there were rarely conflicts between the legislative demands of a largely Protestant Christian democracy and a largely Protestant Christian population. The most common examples were religious conscientious objection from military service, the confidentiality of the Catholic confessional, objections to oath requirements and jury service, and adherence to a different day of Sabbath. All these gave rise either to legislative accommodation or to court cases (or both).

The expansion of government at every level, but particularly at the federal level, in the wake of the Great Depression and its New Deal response all but guaranteed that there would be far more numerous points of conflict between religion and religiously scrupulous individuals in the twentieth and twenty-first centuries. The rights revolution of the 1960s, which morphed the basic understanding of a liberty rooted in natural law into judicially crafted notions of “privacy,”⁹ of “dignity,”¹⁰ and even “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,”¹¹ likewise all but guaranteed that those of traditional religious and moral views would find themselves at odds with evolving social views, or at least the evolving social views of a majority of the Supreme Court. And the massive expansion of public accommodation laws, which has effectively obliterated the distinction between public and private, between discriminatory state action and selectivity by private individuals, has placed those who would exercise their religious beliefs in their public lives on a collision course with the demands of the expanded state and the dignitary claims of modern culture.

Two examples from the Judeo-Christian tradition bring the problem into stark relief. The first is the command not to be complicit in the wrongdoing of others. Section 1868 of the *Catechism of the Catholic Church*, for example, provides: “We have a responsibility for the sins committed by others when we cooperate in them: by participating directly and voluntarily in them; [or] by ordering, advising, praising, or approving them....”¹² Second is the command to attempt

to dissuade others from their wrongdoing. This, from the Jewish prophet Ezekiel as recounted in the Old Testament:

If I tell the wicked, “O wicked one, you shall surely die,” and you do not speak out to dissuade the wicked from his ways, the wicked shall die for his guilt, but I will hold you responsible for his death. But if you warn the wicked, trying to turn him from his way, and he refuses to turn from his way, he shall die for his guilt, but you shall save yourself.¹³

As government has expanded to operate in and fund activities in the social welfare space previously occupied largely by religious organizations, conflicts between government mandates and religious doctrine became inevitable. Must a church that manages a homeless shelter agree not to advocate its religious message to those who are beneficiaries of its charitable efforts as a condition on receipt of generally available federal funding of a portion of the shelter’s costs? Must it ignore its own religious doctrine about marriage, and its own prohibition against complicity, if it wishes to continue to provide adoption services, in the face of government mandates that it provide those services to unmarried or same-sex couples? Must those who are “religiously scrupulous,” to use a phrase common at the time of the founding,¹⁴ be required to provide services that are contrary to their religious faith as a condition of operating a business—or, in other words, as a condition on earning a living?

To be sure, conscientious objection to laws that make a citizen do something he is under obligation *not* to do is as old as the Republic. Indeed, when claims for free exercise protection came from military draft objectors, non-Christian sects that employ controlled substances as part of their sacramental practices, or other self-evidently minority positions, liberals (even more than conservatives) could champion the cause of religious liberty. But changes in American culture may require a more vigorous defense of religious conscience in free exercise claims. Increasingly, the dissenters in America are adherents to traditional faiths at odds with the progressive norms of a secularized society. The expansions of government, of sexual “liberty,” and of public accommodations law have all played large roles in creating the modern irreconcilable conflict between sexual liberty and religious exercise, to the point that, today, governmental and cultural authorities increasingly classify religious exercise as a threat to human rights, particularly in connection with matters surrounding human sexuality.

Many faith communities sincerely believe in protecting human life from conception to natural death and in limiting marriage to the union of one man and one woman. The mainstream left and media elite caricature religionists of this sort as bigots on the “wrong side of history.” Federal, state, and local governments have

responded to religious beliefs deemed out of line with the prevailing philosophy on human sexuality by regulating religious exercise. Governments either adopt restrictive interpretations of the liberty of conscience to protect only beliefs and not actions, or impose facially neutral legal requirements that religiously motivated businesses and individuals cannot obey in good conscience, such that they are forced to leave the marketplace and civic sphere. The result for an increasing number of Americans is the frightening recapitulation of Thomas More's dilemma of conscience. Will they obey their conscience or bow to the force of the state? No longer is it obvious that the Constitution will protect against these conflicts.

This essay aims to explore these issues. In part 1, I describe the current conflict between sexual liberty and religious exercise, driven by the twin narrative that unrestricted sexual expression is a fundamental good, and that highly accessible birth control and abortion are essential human rights for women. I then explore how public accommodations laws have been expanded well beyond their common-law roots to advance the modern sexual rights agenda. In part 2, I review the understanding of the freedom of conscience that prevailed at the time of the founding, noting how the Supreme Court's decision in *Employment Division v. Smith* has drastically undermined the original protections. Finally, I examine the Ninth Circuit's decision in *Stormans, Inc. v. Wiesman* as a case study of the conflict between the sexual expression-based government mandates and the freedom of religious conscience.

The Modern Conflict between the Sexual Revolution Laws and Religious Exercise

The Expansion of Sexual Liberty

Many tests of religious conscience today arise in response to claims of unrestricted sexuality, facilitated by unlimited access to birth control and abortion. The twin narrative is that complete sexual license is a fundamental good, and that highly accessible birth control, sterilization, and abortion are therefore essential human rights. The rhetoric of sexual liberation, essentially a claim of negative liberty from state regulation, is combined with a rhetoric of sex discrimination, in which the different biological circumstances of men and women are treated as a question of equal protection of the laws—with the dirty little secret that the same nostrums of abortion and birth control that are trumpeted as women's issues also liberate men from the traditional demands placed on them by the consequences of sexual activity. As Catherine MacKinnon has trenchantly observed, "The availability of abortion . . . removes the one remaining legitimized reason that women

have had for refusing sex besides the headache.”¹⁵ That laws protecting abortion are favored by men as much as by women¹⁶ does not seem to detract from the narrative that abortion restrictions are a form of male domination over women.

Most recently the conflict between religious exercise and sexual freedom crystallized when the United States Department of Health and Human Services (HHS) issued the “birth control” mandate purportedly¹⁷ pursuant to the Patient Protection and Affordable Care Act.¹⁸ That mandate required employers, including most religiously affiliated institutions (such as the University of Notre Dame and the Little Sisters of the Poor) and businesses operated by religiously scrupulous individuals (such as Hobby Lobby Stores, Inc.), to buy insurance for services that violate the conscience of the religious organizations or the business owners. The controversial mandate resulted in Supreme Court review of more than a half-dozen cases, and it further sparked a national debate about religious freedom and the importance of highly accessible birth control, sterilization, and abortion to women’s freedom and equality.

My purpose here is not to revisit comprehensively the legal claims at issue in those cases, but rather to note that the mandate demonstrates that the old *détente* in place largely since *Roe v. Wade* was decided in 1973—legal availability of abortion and contraceptives but without taxpayer support or other compulsion that would violate rights of conscience—no longer prevails. The hostility between “pro-life” and “pro-choice” Americans has instead become even more intense, in part because the focus is no longer about legalization, but about women’s unrestricted access, including access facilitated or funded by those with profound moral/religious objections. In the minds of the secular feminists and politicians who shape public language on women’s issues, anyone who objects to facilitating the use of the drugs and devices that enable women’s unfettered sexual expression is waging a “war on women,”¹⁹ part of a historical pattern of men exerting control over women’s lives.²⁰

The Obama administration argued in *Burwell v. Hobby Lobby Stores, Inc.* that it wanted to ensure that all women have access to all FDA-approved contraceptives, and thereby help women avoid unplanned pregnancies.²¹ The *Hobby Lobby* Court did not decide whether stopping unintended pregnancies was a governmental interest compelling enough to force businesses to cover birth control, sterilization, and abortion-drugs for their employees. Rather, it assumed a compelling interest, and then decided the case on the grounds that the government’s mandate was not narrowly tailored to achieve that interest. There were certainly other means available to the government that did not involve forcing religious organizations to be complicit in the provision of contraceptives and abortifacient drugs. Nevertheless, the federal government continued for years

to attempt to force religiously scrupulous businesses and organizations, even including a religious order of nuns, to facilitate the provision of birth control and abortion drugs against their religious conscience.²² With nonconscience-burdening alternatives readily available, one has to question HHS's motives.

The short explanation lies in what Professor Gerard Bradley has called the ideology of "equal sexual liberty."²³ Equal sexual liberty, or "sexualityism," holds that "the expression of human sexuality is *in and of itself* a positive good and limitations on that expression are *in and of themselves* bad."²⁴ Sexualityism no longer requires eugenicists like Margaret Sanger or population bomb theorists to justify unlimited access to birth control and abortion on the basis of dubious social utilitarian calculus. Instead, contraceptive care is simply "good for women, full stop,"²⁵ and a part of an "emerging public orthodoxy about where sexual satisfaction, expression, and identity fit into the good life."²⁶ From a legal point of view, the novel characteristic of this claim is that it is no longer about liberty from state regulation: access to contraceptives and abortion have become positive rights to government assistance, and—more troublingly—to governmental assistance to overcome private conscientious objection.

This marks a contrast with the older freedoms of speech and religion. These were rights against government regulation and restriction. They were not rights to government assistance, and they entailed no protection from private disapproval or opposition. The freedom of speech did not give anyone the right to compel other citizens to assist. Indeed, there is a constitutional right not to be compelled to support private speech with which we disagree—and it would be a plain violation of both free exercise and disestablishment to coerce a person, by force of law, to provide personal services in connection with a religious ceremony. By contrast, advocates of the new sexual freedoms think it necessary for the government to pay for the costs of their exercise (through taxation on everyone, including moral dissenters) and, through the invocation of antidiscrimination laws, to dragoon other citizens into acts that support or condone these exercises.

Accordingly, the compelling governmental interest behind the HHS mandate is expanding equal sexual liberty by "allowing women (and men) to engage in sexual activity free of the biological consequences of sexual activity."²⁷ The mandate "presupposes that women will and should have lots more sexual intercourse than they have interest in conceiving children . . . [and that] sexual license should *never* impede a woman's lifestyle, at least no more than it does a man's."²⁸ The HHS mandate is thus the most extreme example of the government's view that birth control unquestionably contributes to women's freedom and equality, which it "understands to include at the very least nonmarital and nonprocreative sexual expression."²⁹ Those who adhere to different views, particularly views rooted

in religious belief, therefore present a threat to women's freedom and equality that cannot be countenanced.

Since *Roe v. Wade* was decided nearly a half-century ago, the law has vaulted sexual liberty over religious conscience claims by giving certain forms of sexual expression constitutional status³⁰ while at the same time watering down the Constitution's protection for religious liberty. In *Planned Parenthood v. Casey*, for example, Justices O'Connor, Kennedy, and Souter embraced a far-fetched understanding that the essence of the American experiment lies in the claim that "[a]t the heart of liberty is the right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life."³¹ The *Casey* Court transformed an individual's interest in sexual liberty into "a positive responsibility [of government] to ensure that everyone has the ability to engage in sexual conduct without cost or consequences, whether in money, unwanted children, or hurt feelings."³² Under the flawed logic of the claim that sexual liberty is among the weightiest of American rights, any opposition to contraception and abortion is now deemed hostility to women. As Professor Helen Alvaré has persuasively argued, "if this is the constitutional definition of freedom where sex is concerned ... [i]t is a definition that makes it unthinkable to suggest that access to, or even government funding for, birth control or even abortion could be reduced or eliminated without violating an essential freedom."³³

The Expansion of the Law of Public Accommodations

Nearly two decades ago, the Supreme Court noted in *Boy Scouts v. Dale*³⁴ that public accommodations laws, which "were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains," have, "[o]ver time," "expanded to cover more places," including virtually all business establishments and services and even private membership organizations. Indeed, the modern view reflects a significant departure from the narrow rule developed in the English common law, which imposed a duty to serve all members of the public only on certain businesses, like inns, that effectively operated pursuant to a monopoly license from the king or because of some natural monopoly or scarcity.³⁵ Early American law largely adopted the English common law, treating only a narrow class of businesses—innkeepers, theaters, and common carriers such as railroads—as public accommodations obligated to serve the public without unreasonable discrimination.³⁶ As recently as 1964, the Civil Rights Act proscribed discrimination on the ground of race, color, religion, sex, or national origin in places of public accommodation, but the definition of "public accommodation" remained narrowly tailored to hotels, restaurants, and entertainment spaces like theaters and sports arenas.³⁷

Public accommodations laws in the states are no longer narrowly confined to such truly “public” accommodations, however. Rather, they have been expanded to cover virtually every privately owned business and even many private membership organizations. This produces exactly the conflict that the Court anticipated in the *Dale* case, when it recognized that “the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.” What was true even then has become a significant understatement now.

Indeed, religiously motivated private businesses and individuals, usually Christians, are increasingly subjected to laws and regulations that impose on them views of sex and marriage in areas like healthcare, education, and commercial services that are directly contrary to their own religious views. Lower courts applying *Employment Division v. Smith*’s rational basis standard of review³⁸ to “generally applicable” laws have regularly rejected free exercise challenges to public accommodations laws that bar “discrimination” on the basis of sexual status claims inherently tied to conduct that the religiously scrupulous business owner finds morally and religiously objectionable. The continuing vitality of religious conscience claims based on free exercise defenses therefore depends on confronting the implicit first order discrimination by government against the religiously scrupulous³⁹ as government seeks to extend the reach of antidiscrimination principles to private actors dealing with a wide range of social issues.

Nearly half the states today have public accommodation laws that bar discrimination on the basis of sexual orientation or gender identity,⁴⁰ and as the case of *Masterpiece Cakeshop v. Colorado Human Rights Commission* demonstrates, those laws are being interpreted to reach far more broadly than the old lunch counter denial-of-service context in which they originated. Jack Phillips, the religious owner of Masterpiece Cakeshop (who named his company after a passage from Ephesians⁴¹), regularly served customers whom he knew to be homosexual. But he did decline to deploy his significant artistic talents for the celebration of a same-sex wedding, just as he has routinely declined to utilize his talents for the celebration of witchcraft and other occult ideas associated with Halloween, or for the celebration of divorce.

That distinction is significant, but because it is likely clouded by the intensity of feelings on either side of the underlying social issue, perhaps considering the distinction in another context would be helpful. Imagine an African-American owner of a Kinko’s print shop who, because of this country’s history of racism, has an animosity toward whites. The public accommodations laws, traditionally understood (as expanded to cover virtually all business establishments), prohibit the shop owner from refusing to allow whites into his store to make photocopies. That’s the lunch counter denial-of-service scenario. But those same laws do

not—or at least, should not—obligate the shop owner to design a racist flyer advertising an upcoming white supremacist rally. The latter is a threat to the shop owner’s liberty different in kind from the lunch counter denial-of-service scenario. It is compelled speech that runs directly contrary to the shop owner’s own views, just as the interpretation of Colorado’s public accommodations law to require Jack Phillips to design a cake celebrating a same-sex wedding compelled him to engage in expressive activity contrary to his own views and religious beliefs.

As previously noted, lower courts applying *Smith* have been unwilling (or unable) to protect private business owners who wish to operate their businesses according to their religious beliefs, when those beliefs come into conflict with broadly interpreted antidiscrimination mandates. The conflict is viewed as a zero-sum game, and despite the fact that the religious liberty claim is rooted in *constitutional* text, the statute-based mandates have, in most cases, been given priority on the ground that they further the state’s interest in eradicating discrimination in private commercial affairs. This is particularly true in states, such as Colorado, that do not have the heightened scrutiny protections of a state religious freedom restoration act (RFRA), but it has also proved to be true even in states that do, for the state’s interest is said to be “compelling,”⁴² or the state RFRA is said to be applicable only when the government is a party, not merely when the government is enforcing a private suit.⁴³

The result turns the state action doctrine of the Fourteenth Amendment on its head. The prohibition on the denial of equal protection contained in that amendment applies to governmental actors, not private citizens. But as the equal protection idea has been extended to private actors by way of broad, antidiscrimination mandates in public accommodations laws, facially neutral legal requirements imposed by the state, when applied to religious businesses, have resulted in the state itself engaging in antireligious discrimination. In short, given the state-action commands of the Fourteenth Amendment, the real question is whether the state’s first-order discrimination against religiously owned businesses implicates a less compelling interest than eradicating the second-order “discrimination” by private parties acting in accord with their religious obligations. At least absent a monopoly situation where there may be an extraordinary need for the private business to provide all goods and services to everyone, forbidding the free choice of private, religiously scrupulous business owners to determine which services they will provide can be a significant infringement on religious liberty. Phrased differently, legal requirements compelling bakers, florists, or photographers to participate in same-sex weddings, or pharmacists to stock abortifacients, should be viewed as a much greater, *and state-imposed*, imposition on the shop owners’ liberty to practice their religion than the relatively minor, *and purely privately*

imposed, inconvenience to others who would have to look elsewhere to obtain the products or services they desire, or even on the harm caused to their dignity arising out of the knowledge that the religiously scrupulous owner disapproves of their conduct—the expression of which is constitutionally protected. In short, there can be no compelling interest when the government must discriminate against private expressions of religious liberty in order to end conduct-based distinctions made by private religious actors merely because the conduct is tied to claims of status. The first-order discrimination *by government* against religious business owners violates the Fourteenth Amendment’s command of equal protection; selectivity by private business owners in deciding which ceremonies and conduct to support with their business services does not.

The Founding Generation’s Understanding of the Preferred Place for Religious Exercise

The elevation of sexual expression to the status of fundamental right, combined with the expansion of public accommodations law, thus threatens the security of religious freedom. Protecting religious exercise, or the liberty of conscience, is controversial today to such an extent that citizens and policy makers think religious objectors are zealots, hostile particularly to women’s freedom and to homosexual behavior and identity. The statement by the Chairman of the United States Commission on Civil Rights that the phrases “religious liberty” and “religious freedom” have become “code words” for discrimination shows how derogatorily modern culture views claims rooted in religious conscience.⁴⁴ Some academics have even questioned the long-standing precedence given to religious freedom, and argued for the end of accommodations.⁴⁵ However, religious exercise should take priority over sexual liberty and antidiscrimination principles not only because it was written into the text of the First Amendment of our Bill of Rights, but more profoundly because it reflects the most fundamental commitment of a liberal republic: to respect each individual’s own understanding of his or her relation to the Creator under the natural law.⁴⁶ Religious exercise is accommodated because the founders recognized that the higher duty individuals owe to the Creator, or “religion” in the constitutional sense, necessarily trumped one’s duties to the state.⁴⁷ Religious conscience properly understood under the natural law⁴⁸ is of greater import than sexual expression, autonomy, or behavior, for example.⁴⁹ Simply put, “[c]onscience has rights because it has duties.”⁵⁰

Perhaps this is controversial. Some may regard elements of sexual identity as equally important to what they may regard, from a secular perspective, as elements of religious identity. It is hard to know how a diverse culture would

resolve such disagreements. But anyone committed to the primacy of individual liberty should be able to agree that it is more important for a person to be free to live in accordance with conscience than to be able to force others to agree, or to assist. It is no more appropriate to require religious dissenters to lend their creative talents to a same-sex wedding ceremony, or a nurse or doctor to be forced to perform what they may regard as the taking of an innocent life, than it would be to require an atheist or agnostic to lend their talents to a worship service.

The religion clauses alone are not directly dispositive of whether religious conscience claims should be exempted from generally applicable laws. The language of the First Amendment's religion clauses sets out only the outer bounds of proper *federal* governmental action, not of *state* governmental action, so state constitutional provisions would be better evidence for the latter. But we can gain some insight by considering the text of the religion clauses and the debates on these clauses, together with "the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses."⁵¹ Moreover, there is fairly compelling evidence from the founding period that the founding generation recognized the preferred place for religious exercise, and that religious conscience deserves deference and special constitutional treatment, including the right to exemptions from generally applicable laws, Justice Scalia's opinion for the Court in *Employment Division v. Smith* notwithstanding.

Religious Exemptions Are Consistent with the Founding Generation's Understanding of Religious Exercise

Background

The founders likely intended religious conscience to be broadly protected to avoid religious persecutions.

The debate over liberty of conscience in America took place against a backdrop of two centuries of religious conflicts in the wake of the Protestant Reformation. The Reformation and the subsequent history of religious persecution and warfare thus shaped the American experiment in religious freedom before the religion clauses were ever debated in the First Congress in 1789. The Reformation split Western Europe into competing religious and political groups, producing a system of religious pluralism that resulted in serious persecution and warfare.⁵²

These civil and international religious wars continued for two hundred years because some groups resisted, or only reluctantly tolerated, dissenters from the dominant religion.⁵³ In one exceptional case, however, Dutch revolutionaries

in the sixteenth century established a confederate government with religious freedom. When the war with Spain concluded, all seven Dutch provinces ratified constitutions with religious tolerance provisions. In this way, the Netherlands became a safe harbor for religious dissenters in Europe and a legal precedent and constitutional example for the United States that James Madison later believed showed that acceptance of dissenters was “safe, and even useful.”⁵⁴

The New World of colonial America was both a frontier for European religious establishments and a safe haven for European dissenters fleeing religious oppression. The “checkerboard” of rival religious groups in Europe was in part projected onto colonial America, and some of the religious conflicts from Europe were transferred here.⁵⁵ But despite some prosecutions of dissenting views—relatively minor in comparison to what had occurred in Europe—toleration of dissenters from the dominant religion was a principle commonly embraced by the American colonialists and then the Founders.⁵⁶ Due to “recurring occasions of interaction and cooperation among citizens of different faiths—in economic associations, in politics, in the revolutionary struggle itself,” there were ample opportunities and incentives to subscribe to tolerance during the founding era.⁵⁷ There was simply “no significant sentiment of persecution among the Founders.”⁵⁸ Given that the post-Reformation wars over religion were so recent and salient in the memories of the Founders, it follows that they drafted the religion clauses to avoid repeating those bloody conflicts. James Madison reminded his contemporaries in his *Memorial and Remonstrance* that “the forbearance of our laws to intermeddle with Religion” had produced “moderation and harmony” among the sects in sharp contrast to the old world, where so much blood was spilt trying to eradicate religious conflicts by proscribing all religious differences.⁵⁹

To the extent that we can infer from this history and tradition the intention of the Founders to avoid religious persecution in America, Professor Douglas Laycock identifies an important lesson of the post-Reformation religious wars that is still true today: some people will die for their faith, and others will slaughter for it.⁶⁰ This lesson is relevant not only to the original meaning of free exercise, but it also reinforces the importance of securing the ability of modern Americans to live harmoniously in their daily lives under the original understanding of the protections afforded by the free exercise clause.

James Madison defended the importance of strong protections for religious exercise as derived from a preexisting and paramount obligation to the Creator.

James Madison’s famous attack on Patrick Henry’s general assessment bill, *Memorial and Remonstrance*, defended the importance of strong free exercise protections, and articulated the principal religious argument for the right to exemptions

from laws that would unduly burden religious conscience. The *Memorial and Remonstrance* operated on the theory that religious freedom was a natural right that civil society could not properly invade.

Madison defined religion as “the duty [that] we owe to our Creator.”⁶¹ Because beliefs cannot be coerced, the “[r]eligion ... of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate.”⁶² Madison wrote that liberty of conscience is inalienable by its nature because one’s opinions “cannot follow the dictates of other men,” and it involves “a duty towards the Creator.”⁶³ Implicitly articulating the notion of inalienable rights in the Declaration of Independence, he continued: “This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society” and “therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”⁶⁴

The right of free exercise, Madison proposed, precedes government and is superior to the social contract of legitimate civil society. Although these salient passages from *Memorial and Remonstrance* do not definitely prove that Madison supported religious exemptions, as Professor Michael McConnell has pointed out, they do indicate that Madison’s approach toward liberty of conscience was “consonant with them.”⁶⁵ Justice O’Connor made the same point in her dissent in *City of Boerne v. Flores*: “Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.”⁶⁶ Importantly, because conscience properly understood entails obligations to God, the consequence of refusing to exempt religious believers from even facially benign laws would be to unjustly require them to “sin and incur divine wrath.”⁶⁷

The record of the First Congress sheds light on the question of religious exemptions from generally applicable laws.

The record of the First Congress, though relatively sparse on discussion of the religion clauses, suggests that a majority of the House of Representatives also recognized the need for and favored exemptions for religious conscience. There were actually three different proposals dealing with religion that were considered and approved by the House. The first, originally designed by James Madison to be inserted into Article I, Section 9 of the Constitution (which is where prohibitions on the federal government are found) contained an establishment clause idea, a free exercise idea, and a freedom of conscience idea:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

The second, also to be inserted in Section 9, was a conscientious objector clause attached to what became the Second Amendment:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security for a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

And the third, which Madison proposed to be inserted in Article I, Section 10 (which is where prohibitions on state governments are located), also contained a freedom of conscience idea: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”⁶⁸

Madison’s proposals were referred to a select committee of eleven, consisting of one member from each state attending the convention (including Madison himself). The committee then consolidated the various proposals in a report to the full house. That report merged the three parts of Madison’s first religion clause proposal into two parts (thereby effectively recognizing that the free exercise and freedom of conscience ideas were redundant): “No religion shall be established by law, nor shall the equal rights of conscience be infringed.”

That proposal drew some concern that it was not protective enough of religion, but for present purposes, the key points were made by Representatives Daniel Carroll and Madison. The records describe Carroll’s view: “As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words.” And Madison explained what he understood the words to mean:

that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.

That last part of Madison’s speech—the concern that Congress might, under the Necessary and Proper Clause, “make laws of such a nature as might infringe the rights of conscience”—strongly indicates that Madison believed the proposal would require exemption from such laws.

Even more light was shed on the issue of exemptions for conscientious religious belief during debate over the proposal that eventually became the Second Amendment. The report from the Committee of Eleven had retained the conscientious objector portion of the language originally proposed by Madison: “but no person *religiously scrupulous* shall be compelled to bear arms.”⁶⁹ One of the objections to the clause was that, absent the requirement that the religious objector “pa[y] an equivalent,” it would allow some religious objectors to avoid sharing in the burdens of the common defense, but even in the face of such a compelling interest (to use the modern formulation), Roger Sherman noted that the proposed alteration would not be a sufficient accommodation for the religious duty: “It is well known,” he said, “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.”⁷⁰

In response, Representative Egbert Benson proposed to delete the conscientious objector provision altogether, contending (in language that mirrors the position taken by Justice Scalia in *Employment Division v. Smith* two centuries later) that “No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government.” Benson’s motion to delete the clause was defeated, however.⁷¹

Another attempt was then made to delete the conscientious objector clause a few days later, but Rep. Elias Boudinot made a strong defense of the clause, on the ground of both expedience (“Can any dependence ... be placed in men who are conscientious in this regard?”) and principle (“What justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?”). He then made a heartfelt plea: “I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person.” The clause then passed, after a further addition of the words “in person.”⁷² The religious conscience clause limiting the states (which Madison had originally proposed to include in Article I, Section 10) was also approved by the House and sent to the Senate for its consideration.

The Senate then consolidated the various parts of the first proposal, bringing the conscience language under the “free exercise” terminology that eventually became the First Amendment. It also dropped the conscientious objector clause from the Second Amendment, and dropped any of the restrictions that were to

be imposed on the states (likely because, one might reasonably surmise, such restrictions were more appropriate for state constitutions). The Annals of Congress do not record the substance of those debates, however, so we do not know why the Senate made these alterations. What we do know is that the House acceded to the Senate's amendments without further discussion.⁷³ In light of the strong arguments that originally carried the day in the House in favor of the conscientious objector clause, it is fair to assume that members of the House had either come to accept the idea, first suggested by Roger Sherman, that such a clause was not necessary because "[W]e do not live under an arbitrary Government,"⁷⁴ or that the matter was adequately protected by the Senate's "free exercise" language.⁷⁵ Either way, the extant discussion "strongly suggests that the general idea of free exercise exemptions was part of the legal culture."⁷⁶

The state constitutions included the unalienable right to conscience; some of them explicitly required religious exemptions.

All the early state constitutions included provisions for the liberty of conscience.⁷⁷ The constitutions of Delaware and Pennsylvania, for example, stated that "all men have a natural and unalienable right to worship God Almighty according to the dictates of their own consciences."⁷⁸ In every state, the citizens decided that the government had no power to prohibit any peaceful religious practice, although these often contained the pragmatic Jeffersonian caveat that the government could interfere with religion when religious practices break out into overt acts against public peace and good order.⁷⁹ These provisos are important because they challenge the *Smith* Court's holding that religiously informed conduct (as opposed to beliefs) is not protected against neutral, generally applicable laws. Rather, the provisos "tend to confirm that free 'exercise' means what it says—that it includes conduct as well as belief."⁸⁰

Some state constitutions explicitly mandated religious conscience exemptions. The constitution of New Jersey, for example, exempted any person from paying religious taxes.⁸¹ Significantly, the religious consciences of pacifists such as the Quakers and Mennonites were treated with great delicacy even during the Revolutionary War period, which is to say, a time of the utmost "compelling interest." The Pennsylvania constitution contained typical language: "... nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent..."⁸² The Founders acknowledged the Quakers' higher duty and refused to interfere with their interpretation of the divine command against taking human life in the absence of a very dire national security interest, like enemy soldiers overrunning the colonies entirely.⁸³ In light of the foregoing, the founders' preferred place for religion supports heightened scrutiny directly under the free exercise clause.

The Case of Stormans, Inc. v. Wiesman

That original understanding was profoundly rejected by the Ninth Circuit's 2015 decision in *Stormans, Inc. v. Wiesman*,⁸⁴ in which that Court held that pharmacies in the state of Washington must fill prescriptions for emergency contraceptives, including abortifacients, even if offering the drugs for sale violates the pharmacists' religious conscience. In June of 2016, the Supreme Court "ominously" denied certiorari.⁸⁵

The Stormans family runs their Ralph's pharmacy in Olympia, Washington, according to their religious beliefs. They do not stock, for example, emergency contraceptive drugs because they are devout Christians who believe that life begins at conception. Before 2007, they referred customers asking for abortion drugs to another nearby pharmacy.

Once the Washington State Pharmacy Board adopted two rules mandating all pharmacies "to deliver lawfully prescribed drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies," religious pharmacists like the Stormans were compelled to stock and sell the morning-after pill, an emergency contraceptive drug that can sometimes prevent the implantation of a fertilized egg, thereby causing an abortion.⁸⁶ Because the Stormans cannot in good conscience sell drugs that can cause an abortion, the Pharmacy Board's rules required them to violate their sincerely held religious beliefs, or close their business. They challenged the rules as a violation of free exercise under the First Amendment.⁸⁷ The District Court in *Stormans, Inc. v. Selecky* held, based on *Church of Lukumi Babalu Aye v. City of Hialeah*,⁸⁸ that the rules were not neutral and of general applicability, but designed to target religious people who would refuse to dispense abortion-drugs for conscience reasons.⁸⁹ The Ninth Circuit disagreed, overruling the decision.

Stormans is a good case study because it involves the intersection of women's reproductive rights and the conscience rights of religious business owners. Plainly underlying the Ninth Circuit's reasoning is the *Casey* notion that no right to emergency contraceptives shall be denied to women interested in "universe shaping" via sex without biological consequences. The Ninth Circuit further presumes, as has been done in the great expansion of public accommodations law, that the antidiscrimination principle trumps religious claims in the arena of private, commercial conduct. The Court of Appeals in *Stormans* rejected the idea of allowing referrals for Plan B to accommodate religious conscience in part by reasoning that "facilitated referrals could lead to feelings of shame in the patient that could dissuade her from obtaining emergency contraception altogether."⁹⁰ The ACLU's legal director even accused the Stormans of attempting to impose

their beliefs on others and stated, “When a woman walks into a pharmacy, she should not fear being turned away because of the religious beliefs of the owner or the person behind the counter. Open for business means open for all. Refusing someone service because of who they are ... amounts to discrimination, plain and simple.”⁹¹ Of course, there was no claim that the Stormans refused service to anyone; rather, they declined to carry a particular product. Nevertheless, and notwithstanding the harm caused by abortion-drugs to the developing life inside the womb, the Stormans actions apparently caused a “dignity” harm to customers who wanted an abortifacient product that the Stormans could not in good conscience carry. That was enough for the Ninth Circuit. As Professors Erwin Chemerinsky and Michele Goodwin argued in defense of the Ninth Circuit’s decision, “The religious views of some should not allow them to inflict injuries, such as the denial of needed prescriptions medicines, on others.”⁹²

Even if it were the case that a pharmacist choosing to refer a patient to another drugstore to fulfill her Plan B prescription could cause a woman to feel shame—a rather dubious proposition—rules requiring private business owners to carry certain products in violation of their religious conscience “are *not* of the ‘cause no harm to others’ variety that would render them legitimate.”⁹³ But under the modern, progressive idea of positive liberty, “the fact that *the state does not forbid the sale of a drug* is taken to mean that every licensed pharmacist must sell that drug to every consumer legally entitled to purchase it.”⁹⁴ That, of course, drastically imposes on the liberty rights of the pharmacist not to carry certain morally objectionable products. The modern, “positive liberty” claim is therefore irreconcilable with the older, natural-rights based claims of liberty. The state’s mandate of the former to the detriment of the latter is therefore, at bottom, not liberty-enhancing but authoritarian. And given the close connection of the former claim to modern views of unfettered sexual expression, and its disconnect with the free exercise of traditional morality tied to religion, the government will necessarily end up targeting religious people, trampling on conscience rights at best and eliminating them entirely at worst.

Finally, returning to the founding, it is an important matter of conscience whether a pharmacist must comply with legal requirements to fulfill all prescriptions even for an emergency contraceptive. Our nation since its founding has given rights to conscience because, unlike a preference for a particular identity or behavior, religious conscience entails pre-governmental, higher duties to the Creator, which necessarily trumps any duties one owes to the state. The *Stormans* District Court noted, “The right to refrain from taking human life ... was first protected in the colonial era in the context of compulsory military service.”⁹⁵ Forcing the Stormans and others to facilitate what they sincerely believe is the

taking of human life may even be the functional equivalent of asking them to bear arms when their religious scruples prevents them from doing so.⁹⁶ Ever since the founding, “making space for the unpopular exercise of conscience is an American tradition, but that tradition should not be relegated to the Amish-style enclave and isolated military conscript.”⁹⁷ The principle is, and must be, much broader than that.

Conclusion

The preceding discussion suggests that reconstituted heightened scrutiny directly under the free exercise clause of the First Amendment is necessary to give effect to the principle of the founding generation that “we can all share . . . ideas of equal respect for all citizens’ consciences, ‘delicate’ accommodation of conscientious scruples, and fairness to minorities who live in a majority world.”⁹⁸ Yet, if the modern conflicts between the laws of the sexual revolution and religious exercise are ever to be reduced or resolved, the expansion of public accommodation laws implicating even private conduct in commercial settings also needs to be confronted and curbed. There is no compelling state interest that permits the government to coerce religious people to compel their complicity in conduct they deem to be contrary to their religious faith. “[P]rogress . . . not matched by corresponding progress in man’s ethical formation . . . is not progress at all, but a threat for man and for the world.”⁹⁹

Notes

1. George Washington, Letter to the Society of Quakers (13 October 1789), *quoted in* William Lee Miller, *THE FIRST LIBERTY*, 221 (2003).
2. Statement of Martin R. Castro, in U.S. Commission on Civil Rights, “Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties” (September 2016). Castro is Chairman of the U.S. Commission on Civil Rights.
3. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).
4. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
5. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), cert. denied, 136 S.Ct. 2433 (June 28, 2016).
6. *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53, 76 (N.M. 2013), cert. denied, 134 S.Ct. 1787 (April 07, 2014); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), cert. denied sub. nom., *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n*, No. 15SC738, 2016 WL 1645027 (Colo. April 25, 2016), cert. granted, 137 S.Ct. 2290 (June 26, 2017).
7. *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).
8. A Bill for Establishing Religious Freedom (June 18, 1779), *reprinted in* Julian P. Boyd, ed., *THE PAPERS OF THOMAS JEFFERSON*, ed. Julian P. Boyd, vol. 2, 1777–18 June 1779, pp. 545–553 (Princeton: Princeton University Press, 1950).
9. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Roe v. Wade*, 410 U.S. 113, 153 (1973).
10. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 560 (2003); *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).
11. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (Joint opinion of O’Connor, Kennedy, and Souter, Jj).
12. *CATECHISM OF THE CATHOLIC CHURCH* (Vatican City: Libreria Editrice Vaticana, 1993), http://www.vatican.va/archive/ENG0015/_INDEX.HTM.
13. Ezekiel 3:18.
14. *See, e.g., Annals of Congress* 1:749.
15. Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in Jay L. Garfield and Patricia Hennessey, eds, *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 51 (Massachusetts, 1984).

16. The latest Pew Research Poll, in 2017, shows support for abortion slightly higher among women (59% vs. 55%), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>, but in earlier decades this comparison was reversed. *See, e.g.*, Hyman Rodman, Betty Sarvis, and Joy Bonar Walker, *THE ABORTION QUESTION* 142 (Columbia, 1987) (in three of four polls analyzed from 1974 to 1986, more men than women supported abortion).
17. I have previously noted that the mandate was imposed by regulations that exceeded the statute's authority and that were adopted in violation of the procedural requirements of the Administrative Procedures Act. *See* John C. Eastman, *No Free Lunch, But Dinner and a Movie (and Contraceptives for Dessert)?* 10 NYU J. L. & LIBERTY 282 (2016).
18. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).
19. Chris Reeves, “*There is a War on Women*”—*Planned Parenthood Mid-Missouri/Kansas Meets to Discuss the Future*, DAILY KOS (Dec. 14, 2015, 4:38 PM), www.dailypkos.com/story/2015/12/14/1460227/--There-is-a-War-on-Women-Planned-Parent-hood-Mid-Missouri-Kansas-Meets-to-Discuss-the-Future.
20. Helen M. Alvaré, *Religious Freedom Versus Sexual Expression: A Guide* 4 (Geo. Mason Univ. Legal Stud. Res. Paper Series, No. LS 15–28, 2015), https://papers.ssm.com/sol3/papers.cfm?abstract_id=2668741.
21. 134 S. Ct. 2751, 2779 (2014).
22. Paige Winfield Cunningham, *Trump Has Yet to Signal His Approach to Obamacare Birth-Control Mandate* (Apr. 25, 2017, 4:40 PM), https://www.washingtonpost.com/powerpost/trump-defends-birth-control-requirement-under-obamacare/2017/04/25/afc9d5d2-2935-11e7-b605-33413c691853_story.html?utm_term=.2ccd186767ef.
23. Gerard V. Bradley, *What's Behind the HHS Mandate?*, *The Public Discourse* (June 5, 2012), www.thepublicdiscourse.com/2012/06/5562/.
24. Lant Pritchett, *Swimming? Smoking? Solving? Intellectual History of the Population Control Movement*. PowerPoint Presentation at Population Association of America (New Orleans, LA: April 18, 2008), available at <http://www.presentica.com/ppt-presentation/swimming-smoking-solving-intellectual-history-of-the-population-control-movement>.
25. *Id.*
26. Bradley, *supra* note 23.
27. Eastman, *supra* note 17, at 310.
28. Bradley, *supra* note 23.

29. Helen M. Alvaré, *The White House and Sexualityism*, THE PUBLIC DISCOURSE (July 16, 2012), www.thepublicdiscourse.com/2012/07/5757/.
30. See Alvaré, *supra* note 20, at 5–16.
31. Casey, 505 U.S. at 851.
32. Statement of Commissioner Peter Kirsanow, Peaceful Existence Report, *supra* note 2, at 44.
33. Helen M. Alvaré, *Curbing Its Enthusiasm: U.S. Federal Policy and the Unitary Family*, 2 INT’L. J. JURISPRUDENCE FAM. 107, 144 (2011).
34. Boy Scouts v. Dale, 530 U.S. 640 (2000).
35. See, e.g., Allnut v. Inglis, 12 East 527 (1810); see also Hale, *De Portibus Maris*, 1 Harg Tracts 78 (1670), distinguishing between *ius regium* (the King’s duties) and *ius publicum* (the duties to serve owed by businesses “affected with a public interest”), on the one hand, and *ius privatum* (private ownership with no such duties), on the other.
36. See Alfred Avins, *What Is a Place of “Public” Accommodation?*, 52 MARQ. L. R. 1, 2–6 (1968) (discussing the historical development of public accommodations common law in England and the United States).
37. Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (1964) (codified as 42 U.S.C. § 2000a-b).
38. 494 U.S. 872, 878–79 (1990).
39. As this article was going to print, the Supreme Court did just that, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (decided June 4, 2018).
40. *Non-Discrimination Laws: State by State Information*, ACLU, <https://www.aclu.org/other/non-discrimination-laws-state-state-information> (last visited May 4, 2017).
41. Ephesians 2:10 (“For we are God’s masterpiece. He has created us anew in Christ Jesus, so we can do the good things he planned for us long ago” [NLT]).
42. See, e.g., Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274, 282–83 (Alaska 1994); see also Smith v. FEHC, 11 Cal. 4th 1143, 1210 n.7 (1996); cf. *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 31–39 (D.C. 1987).
43. See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 76 (N.M. 2013).
44. Martin R. Castro, U.S. Comm’n on Civil Rights, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016).

45. *E.g.*, Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. WOMEN'S L.J. 1, 23–31 (2015); Brian Leiter, WHY TOLERATE RELIGION, 26 (2013).
46. U.S. CONST. amend. I; *cf.* Decl. of Independence, ¶ 2 (stating that all people are “endowed by their Creator” with “certain unalienable Rights”).
47. Michael Stokes Paulsen, *Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1203–04 (2013).
48. St. Paul’s Letter to the Romans was a cornerstone of the natural law: “Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law. They show that the requirements of the law are *written on their hearts*, their *consciences* also bearing witness, and their thoughts sometimes accusing them and at other times even defending them” (Romans 2:14–15 NIV, emphasis added); Robert J. Spitzer, *Christianity, Natural Rights, and the Law* 4 (2014) (unpublished manuscript) (on file with author).
49. Robert P. George, CONSCIENCE AND ITS ENEMIES 112–13 (2013).
50. John Henry Newman, Letter to the Duke of Norfolk 250 (1875).
51. James Madison, Letter from James Madison to Thomas Richie (Sept. 15, 1821), in vol. 3 *James Madison*, LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES (1865).
52. John Witte Jr., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES, 17–18 (2000).
53. Thomas J. Curry, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 78 (1986).
54. Witte, *supra* note 51, at 18n37.
55. *Id.* at 20.
56. Curry, *supra* note 52, at 78.
57. Steven D. Smith, GETTING OVER EQUALITY 175 (2001).
58. Douglas Laycock, *Text, Intent, and the Religion Clauses*, in 4 NOTRE DAME J. L., ETHICS, AND PUB. POL’Y 683 (1990), *reprinted in* RELIGIOUS LIBERTY: OVERVIEWS & HISTORY 579, 588 (2010).
59. J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), 11, *reprinted in* THE FOUNDING FATHERS AND THE DEBATE OVER RELIGION IN AMERICA, Matthew L. Harris & Thomas S. Kidd, 68 (2012).
60. Laycock, *supra* note 57, at 589.
61. Madison, *supra* note 58, at 63.

62. *Id.*
63. *Id.*
64. *Id.*
65. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990).
66. *City of Boerne v. Flores*, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting).
67. William Penn, *The Great Case of Liberty of Conscience* (1670), in CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA, 31, 57 (Joseph Blau, ed. 1950).
68. 1 ANNALS OF CONG. at 451–52 (J. Gales, ed. 1834) (June 8, 1789).
69. 1 ANNALS OF CONG. at 749 (Aug. 17, 1789).
70. 1 ANNALS OF CONG. at 779 (Aug. 17, 1789).
71. 1 ANNALS OF CONG. at 779–80 (Aug. 17, 1789).
72. 1 ANNALS OF CONG. at 796 (Aug. 20, 1789).
73. 1 ANNALS OF CONG. at 948 (Sept. 23, 1789).
74. 1 ANNALS OF CONG. at 779 (Aug. 17, 1789).
75. *See, e.g.*, Witte, *supra* note 51, at 74 (contending that the founders likely chose the broadest language [“free exercise”] as the “source, summary, and synonym” to describe all the principles of religious freedom, including the liberty of conscience, and to contemplate legal accommodations following the widespread concern for conscience rights in the debates).
76. McConnell, *supra* note 64, at 1501.
77. *See generally* John K. Wilson, *Religion Under the State Constitutions*, 32 J. CHURCH & ST. 753 (1990) (summarizing the developments in early state constitutions).
78. Del. (1776), DECLARATION OF RIGHTS, § 2.
79. *E.g.*, N.Y. CONST. (1777), art. XXXVIII.
80. Laycock, *supra* note 57, at 612.
81. CONST. OF N.J. (1776), art. XVIII.
82. Pa. (1776), DECLARATION OF RIGHTS, art. VIII.
83. *See also* Anthony T. Caso, *Compelling the Conscience: The First Amendment & Government Mandates* 26–27 (2014) (unpublished manuscript) (on file with author) (discussing George Washington’s commitment to the liberty of conscience by not

- compelling the Quakers to fight); Wilson, *supra* note 76, at 763 (noting further provisions in the federal and state constitutions respecting the “affirmation” exception for Quakers refusing to take oaths as accommodation for their religious objection).
84. 794 F.3d 1064, 1071 (9th Cir. 2015).
 85. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting).
 86. WASH. ADMIN. Code § 246–869–010(1) (2009).
 87. U.S. CONST. Amend. I.
 88. 508 U.S. 520 (1993).
 89. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925 (W.D. Wash. 2012).
 90. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1078 (9th Cir. 2015).
 91. *Supreme Court Declines to Hear a Case About Religious Pharmacy Turning Women Away*, AMERICAN CIVIL LIBERTIES UNION (June 28, 2016), <https://www.aclu.org/news/supreme-court-declines-hear-case-about-religious-pharmacy-turning-women-away>.
 92. Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, GEO. L. J. 1,111, 1135 (2016).
 93. Eastman, *supra* note 17, at 326 (emphasis added).
 94. See Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL’Y REV. 83, 96 (2006).
 95. *Stormans*, 854 F. Supp. 2d at 991.
 96. This may be especially true for Catholics, whose view of the world is inextricably connected to the sanctity of life from conception to natural death, and the marriage between one man and one woman. See generally Alvaré, *supra* note 20, at 29–36.
 97. Vischer, *supra* note 93, at 119.
 98. Martha C. Nussbaum, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 174 (2008).
 99. Pope Benedict XVI, SPE SALVI [Saved in Hope], ¶ 22 (2007).