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Religious Freedom and the Common Good

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As fights over religious liberty in culture war contexts contribute to the polarization straining our political institutions and public values, few topics are more important to consider than the relationship between religious freedom and the common good. This relationship is complex and multifaceted, and the failure on all sides to explore this relationship deeply enough has exacerbated our current divisions. This essay, which was delivered as a talk at a conference on The Question of Religious Freedom at Loyola University Chicago, seeks to carefully consider this relationship and focuses, in particular, on four of its facets. First, strong protections for religious liberty, including robust accommodations when laws and regulations burden religious practice, are essential to the common good. Religious freedom does not come at the expense of the common good, and they are not in opposition. Second, religious freedom must be formulated in light of the common good. The common good is the good of all of us, and the right to follow one's religious conscience in society cannot be unlimited. Third, religious liberty must be pursued with the common good in mind. When religious believers seek protections for religious practice, they should consider the effects of their demands on others, and where conflicts arise, all sides should work together to develop solutions that minimize burdens on one another to the greatest extent possible.

Compromises are especially difficult to achieve in culture war contexts because the opposing sides start with different understandings of the human goods of marriage, family, and sexuality, and both believe that getting these understandings right and having them reflected in law and social practice are essential to the well-being of society. As a result, many proponents of same-sex marriage and reproductive freedom have resisted religious accommodations with significant public effects, and many religious

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traditionalists have been unwilling to grant concessions to progressive agendas in exchange for religious protections. However, this dynamic rests on too narrow an understanding of the common good. Human dignity requires room for the exercise of human freedom, and room for freedom will mean space for competing views. For religious believers in today's culture wars, their faith requires even more; they must exercise their rights in ways that witness to the divine love they are called to imitate and model. Listening, engagement, and dialogue are necessary to such a witness, and they are also essential democratic values. Finally, rethinking the relationship between religious freedom and the common good holds the potential for advancing the common good more broadly, and this is a fourth facet of their relationship. If we can move from fights about religious liberty to dialogue and compromise grounded in mutual understanding, this de-escalation can serve as a model and sign of hope for reducing our political polarization more broadly and for charting a new path focused on the common good.

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INTRODUCTION

As fights over religious liberty in culture war contexts contribute to the deepening polarization straining our political institutions and public values, few topics are more important to consider than the relationship between religious freedom and the common good. Today's circumstances demand that we think carefully about this relationship, and, indeed, one of the reasons for the intractability of our current conflicts has been the failure on all sides to explore this connection deeply enough. In some cases, the problem has been a narrow focus on one's own interests and neglect of competing considerations. More often, though, the problem has been partial understandings of what is, in fact, a complex and nuanced relationship. If we are to move forward from our current standoffs, we need to give the relationship between religious freedom and the common good more thought, and we need to consider its complexities and multiple

facets. In what follows, I try my hand at this. There are lessons, I will argue, for those on all sides of our battles, but much of my attention focuses on religious believers. What should our demands for religious freedom entail and how should we pursue our goals?

I. CURRENT CONFLICTS REGARDING RELIGIOUS ACCOMMODATION

It is helpful to begin with some detail about our current conflicts. These conflicts have concerned what those in the law and religion field refer to as religious accommodations. No one is arguing that the government should be able to intentionally burden or suppress religious practice. We all agree that intentional burdens on religious practice would violate any reasonable understanding of religious liberty and should be constitutionally prohibited. Not surprisingly, the Supreme Court has read the Free Exercise Clause of the First Amendment to prohibit this type of discrimination.[1]

However, what about burdens on religious practice that are the result of neutral, generally applicable laws that are not aimed at religion? If the government pursues legitimate public purposes, and in doing so, incidentally burdens religious practice, should we excuse religious believers from the burdensome requirement? And if the answer is yes, should we interpret the Constitution to require such an accommodation? For example, should religious entities with objections to complying with the contraceptive mandate under the Affordable Care Act be exempted from the mandate's requirements or provided another form of effective accommodation?[2] Should for-profit entities with similar objections also

1. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523–24 (1993); Emp't Div. v. Smith, 494 U.S. 872, 877 (1990).

2. The contraceptive mandate requires that group health plans include coverage for all FDA-approved women's contraceptive services at no cost to plan participants. *Women's Preventative Services Guidelines*, HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/womens-guidelines/index.html (last visited Nov. 20, 2018). Implementing regulations finalized in 2012 provided for a narrow exemption designed for churches and their integrated auxiliaries. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725–26 (Feb. 15, 2012) (codified at 45 C.F.R. § 147.130(a)(1)(iv) (2012); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2012); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2012)). (Simplifications of the exemption in 2013 were not intended to make substantive changes. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–74 (July 2, 2013) (codified at 45 C.F.R. § 147.131(a) (2017))). This exemption left out many religious organizations with objections to covering some or all contraceptives in their employee health plans. In response to public outcry from across the political and theological spectrum, federal regulators developed an accommodation designed to retain contraceptive coverage for the plan participants of objecting religious groups but shift its provision and cost to these groups' insurance providers. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (codified at 45 C.F.R. § 147.131 (2017); 29 C.F.R. § 2590.715-2713A (2017); 26 C.F.R. § 54.9815-2713A (2017)) (finalizing this accommodation in 2013); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg.

receive relief?[3] In the context of same-sex marriage, should religious entities have to comply with prohibitions against discrimination on the basis of sexual orientation when providing adoption services, when hiring, or when providing spousal benefits to employees?[4] Should

41,318, 41,322–23 (July 14, 2015) (codified at 45 C.F.R. § 147.131(c)(1) (2017); 29 C.F.R. §§ 2590.715-2713A(b)(1), (c)(1) (2017); 26 C.F.R. §§ 54.9815-2713A(b)(1), (c)(1) (2017)) (modifying the notice requirements of the accommodation). While the government's accommodation was acceptable to many religious organizations, others found it unsatisfactory, and litigation over the mandate has continued for years. In October 2017, the Trump administration issued new interim final rules providing broad exemptions for religious groups and other employers with religious objections to the mandate, and it finalized these rules in November 2018. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 45 C.F.R. §§ 147.131, 147.132; 29 C.F.R. § 2590.715-2713A, 26 C.F.R. § 54.9815-2713A). The administration also adopted slightly narrower protections for employers with nonreligious moral objections to the mandate. Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 45 C.F.R. §§ 147.131, 147.133; 29 C.F.R. § 2590.715-2713A, 26 C.F.R. § 54.9815-2713A). Legal challenges to the interim final rules resulted in preliminary injunctions enjoining the administration from enforcing them. Pennsylvania v. Trump, 281 F. Supp. 3d 553, 560 (E.D. Pa. 2017), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), *and* No. 18-1253 (3d Cir. Feb. 15, 2018); California v. Health & Human Servs., 281 F. Supp. 3d 806, 813–14 (N.D. Cal. 2017), *aff'd in part, vacated in part, and remanded*, California v. Azar, 2018 WL 6566752 (9th Cir. Dec. 13, 2018) (affirming preliminary injunction insofar as it applies to California and other plaintiff states but vacating portion of injunction barring enforcement of the rules nationwide). The plaintiffs in these cases now plan to challenge the final rules.

3. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court construed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), to require an exemption for three closely held for-profit businesses owned and operated by families with religious objections to covering contraceptives they viewed as potential abortifacients. *Hobby Lobby Stores*, 134 S. Ct. at 2759–60. According to the Court, the mandate placed a substantial burden on religious exercise, and the government had less restrictive means of achieving its objectives. *Id.* at 2775–82. For example, the government could have extended the accommodation that it had developed for religious nonprofits with "precisely zero" effects on plan participants. *Id.* at 2759–60, 2780–82. The government took this step after the Court's decision. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,323–28. In November 2018, the Trump administration finalized new rules that permit nonprofit and for-profit employers with religious objections to covering some or all contraceptives to choose between using this accommodation or opting for a full exemption. Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. at 57,537.

4. States that recognized same-sex marriage legislatively prior to the Supreme Court's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), afforded religious groups limited exemptions from antidiscrimination rules. *See* Robin Fretwell Wilson, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, *in* RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 132, app. 6.B, at 174–77 (Timothy Samuel Shah et al. eds., 2016). In most of these states, religious organizations cannot be forced to provide goods, services, and accommodations related to the solemnization or celebration of same-sex marriage or be penalized for failing to do so. *See id.* A few of these states protect religiously affiliated adoption and foster care programs with objections to placing children with same-sex couples, at least as long as these programs do not receive government funding. *See id.* (citing statutory protections in Connecticut, Maryland, Minnesota, and Rhode Island). A number

wedding vendors with religious objections to celebrating same-sex marriages be excused from antidiscrimination rules?[5] All of these cases raise questions of religious accommodation. Should we accommodate religious practice when the demands of faith conflict with the commands of the state, and if the answer is yes, when and to what extent?

Questions related to religious accommodation usually arise when religious practices are out of step with majoritarian norms, and religious exemptions or other forms of accommodation function to make space for

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of other states have also enacted protections for religiously affiliated adoption agencies, most of which have been adopted very recently. *See* ALA. CODE §§ 26-10D-1 to 26-10D-7 (West, Westlaw through Act 2018-579); KAN. STAT. ANN. § 60-5322 (West, Westlaw through 2018 Legis. Sess.); MICH. COMP. LAWS § 710.23g (Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess.); MISS. CODE ANN. § 11-62-5(2) (West, Westlaw through 2018 Reg. and 1st Extraordinary Sess.); N.D. CENT. CODE § 50-12-07.1 (Westlaw through 2017 Reg. Sess.); OKLA. STAT. tit. 10A, § 1-8-112 (Westlaw through 2018 2d Reg. Sess.); FY 2018–19 General Appropriations Act, No. 264, § 38.29, 2018 S.C. Acts 201, 361, *available at* https://www.scstatehouse.gov/sess122_2017-2018/appropriations2018/tap1b.pdf; S.D. CODIFIED LAWS §§ 26-6-36 to 26-6-50 (Westlaw through 2018 Reg. and Spec. Sess.); TEX. HUM. RES. CODE §§ 45.001 to 45.010 (West, Westlaw through 2017 Reg. and 1st Called Sess.); VA. CODE ANN. § 63.2-1709.3 (Westlaw through 2018 Reg. and Sp. Sess. I). In recent years, a few states have adopted provisions to exempt religious organizations from rules prohibiting employment discrimination on the basis of sexual orientation. MISS. CODE ANN. § 11-62-5(1)(b) (West, Westlaw through 2018 Reg. and 1st Extraordinary Sess.) (providing that the state and its political subdivisions cannot discriminate against a religious organization because of employment decisions based on the conviction that marriage is the union of one man and one woman or that sexual relations are reserved to such a marriage); UTAH CODE ANN. §§ 34A-5-102, 34A-5-106(1)(a)(i)(I)–(J) (LexisNexis, Westlaw through 2018 2d Spec. Sess.) (adding sexual orientation and gender identity to state's prohibition on employment discrimination and expanding exemption for religious employers from the statute). However, most states leave these types of conflicts unaddressed.

5. Only one state has legislation exempting these wedding vendors from antidiscrimination rules. MISS. CODE ANN. § 11-62-5(5) (Westlaw through 2018 Reg. and 1st Extraordinary Sess.). Cases involving bakers, florists, wedding photographers, and others have popped up across the country. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (baker); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426 (Ariz. Ct. App. 2018) (custom artwork for weddings), *petition for review granted*, No. CV-18-0176-PR (Ariz. Nov. 20, 2018); Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Iowa Dist. Ct. Polk Cty. Apr. 3, 2014) (art gallery owned by couple and used to plan, facilitate, and host wedding ceremonies); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (wedding photographer), *cert. denied*, 134 S. Ct. 1787 (2014); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016) (farm used to host wedding ceremonies); Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (florist), *petition for cert. granted*, *judgment vacated*, *and case remanded*, 138 S. Ct. 2671 (2018). In *Masterpiece Cakeshop*, decided this past term, the Supreme Court held that the Colorado Civil Rights Commission failed to consider a Christian baker's objection to designing cakes for same-sex weddings with the religious neutrality required by the Free Exercise Clause. 138 S. Ct. at 1729–32. According to the Court, in rejecting the baker's claims, the Commission demonstrated hostility to the baker's religious views by expressing this hostility in its proceedings, *id*. at 1729–30, 1732, and also by treating the baker's case differently than others where it had allowed bakers to decline to make cakes with messages of religious opposition to same-sex marriage, *id.* at 1729–32. The Court's decision was narrow. The Court did not resolve the broader constitutional claims raised by the baker and by wedding vendors in other cases, and it is not clear how the Court would decide a case without the religious hostility present in *Masterpiece Cakeshop*.

religious minorities in the larger political community. Part of what makes our current conflicts over religious accommodation so fierce is that they are occurring against a backdrop of rapid social change. As the tide of the culture wars has turned against those with traditional views regarding marriage, family, and sexuality, religious believers and institutions adhering to those views have increasingly sought exemptions from laws and regulations that reflect and promote new norms. These efforts have met resistance from those who fear that religious accommodations will undermine these new norms and harm those that new laws are designed to protect.[6] Religious believers, in turn, have decried threats to religious liberty, and they have demanded the freedom to follow religious principles in their private and public lives.[7] The stakes on both sides are high.

The bitterness of today's fights is also due, in part, to the publicness of our conflicts. Constitutional requirements for religious accommodation are narrow.[8] This was not always the case. For many years, the Supreme Court interpreted the Free Exercise Clause of the First Amendment to afford robust protection when neutral laws of general applicability impinged on religious practice.[9] Under the Court's rule, religious believers were entitled to an exemption from laws that substantially burdened religious practice unless the government could show that the application of the law to the believer was necessary to achieve a compelling state interest.[10] In 1990, in the landmark case *Employment Division v. Smith*, the Supreme Court reversed course, and it held that in all but a few categories of cases, religious believers are not entitled to exemptions from neutral laws of general applicability.[11] Religious accommodation, the Court stated, is a matter for legislatures.[12]

Six years ago, the Court pulled back somewhat from *Smith* when it recognized what has been referred to as the ministerial exception.[13] The

6. For a description of this dynamic, see generally Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014).

7. *See, e.g.*, *In Defense of Religious Freedom: A Statement by Evangelicals and Catholics Together*, FIRST THINGS (Mar. 2012), *available at* https://www.firstthings.com/article/2012/03/in-defense-of-religious-freedom (last visited Nov. 20, 2018); *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, U.S. CONFERENCE OF CATHOLIC BISHOPS (2012), *available at* http://www.usccb.org/issues-and-action/religious-liberty/upload/Our_First_Most_Cherished_Liberty.pdf (last visited Nov. 20, 2018) [hereinafter *Our First, Most Cherished Liberty*].

8. *See infra* notes 11–12 and accompanying text.

9. The Court adopted this approach in *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963), and affirmed it in *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972).

10. *Sherbert*, 374 U.S. at 406.

11. Emp't Div. v. Smith, 494 U.S. 872, 878–85 (1990).

12. *Id.* at 890.

13. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

First Amendment, the Court held, bars government interference with a religious group's choice of clergy even when the interference results from neutral, generally applicable employment discrimination laws.[14] However, it is unclear how much further this autonomy for religious groups might extend. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, decided this past term, there were intriguing hints that a majority of the Court's justices might further narrow *Smith* in the future.[15] However, whether the Court will do so and in what ways remain unclear.

Sometimes religious believers can frame infringements on religious practice as violations of other constitutional guarantees, such as the First Amendment's right to free speech. For example, wedding vendors who have resisted the application of laws prohibiting discrimination in public accommodations have argued that requirements to provide services that celebrate same-sex marriages involve compelled expression in violation of the Free Speech Clause.[16] The Supreme Court sidestepped this issue in *Masterpiece Cakeshop* when it delivered a narrow win for a Colorado baker on the ground that the state's civil rights commission had demonstrated hostility to the baker's religious views and, thus, failed to consider his case with the religious neutrality required by the Free Exercise Clause.[17] However, the Court indicated that a successful free speech challenge to the application of public accommodations laws would be narrow,[18] and most claims for religious exemptions from neutral, generally applicable laws cannot readily be framed as violations of free speech guarantees or other constitutional provisions. Thus, for the most part today, religious accommodation is the responsibility of legislative and administrative actors, and this has led to bitter public battles about what our rules should be.

14. *Id.* at 188–90.

15. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (stating that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, *might* have his right to the free exercise of religion limited by generally applicable laws") (emphasis added); *id*. at 1724 (referring to the "question of when the free exercise of . . . religion must yield to an otherwise valid exercise of state power" as "delicate"); *see also id.* at 1734 (Gorsuch, J., concurring) (observing that "*Smith* remains controversial in many quarters").

16. *See, e.g.*, *id.* at 1726; Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 431–32, 437 (Ariz. Ct. App. 2018), *petition for review granted*, No. CV-18-0176-PR (Ariz. Nov. 20, 2018); Gifford v. McCarthy, 23 N.Y.S.3d 422, 431 (App. Div. 2016); Elane Photography, LLC v. Willock, 309 P.3d 53, 63, 69 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1118–20 (D. Minn. 2017), *appeal filed*, No. 17-3352 (8th Cir. Oct. 30, 2017); Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 556 (Wash. 2017), *petition for cert. granted*, *judgment vacated*, *and case remanded*, 138 S. Ct. 2671 (2018).

17. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–32.

18. *Id.* at 1727–29.

Examining today's controversies in light of the relationship between religious freedom and the common good is such a compelling exercise because it broadens our vantage points. Those who have resisted religious accommodations in culture war contexts have tended to see religious accommodation as something that comes at the expense of the common good, and they have focused on the costs of accommodation. They do not oppose narrow accommodations with few public effects—for example, the Obama administration's initial decision to finalize the contraceptive mandate with only a narrow exemption designed for churches and their integrated auxiliaries—or the administration's later accommodation for religious nonprofits, which preserved seamless contraceptive coverage for the female employees of objecting groups.[19] However, there has been strong opposition to accommodations that might retard the progress of new norms or place significant costs on third parties like women and same-sex couples.[20] Indeed, some scholars have argued that religious accommodations with significant or meaningful third-party costs violate the Establishment Clause of the First Amendment.[21] That is, such accommodations are not only undesirable as a matter of public policy; they are also unconstitutional.

For their part, religious believers in these conflicts have tended to focus on their own liberties. They have often sought broad protections for religious conscience while paying much less attention to the concerns of those who are affected by these accommodations. For example, with the new influence of religious conservatives in the Trump administration, federal regulators have adopted new rules regarding the contraceptive

19. For these provisions, *see supra* note 2.

20. *See, e.g.*, Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Lawrence G. Sager, *In the Name of God: Structural Injustice and Religious Faith*, 60 ST. LOUIS U. L.J. 585 (2016); Elizabeth Sepper, *The Risky Business of RFRAs after* Hobby Lobby, *in* THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 17 (Robin Fretwell Wilson ed., 2018); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).

21. *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349, 361–62 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for* Hobby Lobby *Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 52, 54 (2014); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328, 329–30, 332–33 (Susanna Mancini & Michel Rosenfeld eds., 2018) [hereinafter Tebbe, Schwartzman & Schragger, *When Do Religious Accommodations Burden Others?*]; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), https://balkin.blogspot.com/2013/11/the-establishment-clause-and.html; Nelson Tebbe, Richard Schragger & Micah Schwartzman, Hobby Lobby *and the Establishment Clause, Part II: What Counts As A Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html.

mandate that provide broad exemptions for those opposed to complying with the mandate.[22] However, there is no assistance in these new rules for female employees who will lose contraceptive coverage as a result of the rules. Newly proposed revisions to the federal government's Title X regulations would allow these women to qualify as members of low-income families eligible for free contraceptives at Title X-supported centers.[23] However, these new regulations would not guarantee access to free contraceptives, and they do not address the goal of mandate proponents to minimize the logistical obstacles to obtaining contraceptives.

Addressing the relationship between religious freedom and the common good is important and timely because it requires us to consider the issue of religious liberty from the perspectives of the many individuals and groups that may be involved. All vantage points must be taken into account.

II. RELIGIOUS FREEDOM: AN ESSENTIAL ASPECT OF THE COMMON GOOD

In the Catholic tradition, the common good has been described as "the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way."[24] In *Dignitatis Humanae*, its Declaration on Religious Liberty, the Second Vatican Council (the Council) stated that these

22. The new rules include provisions for religious objectors, Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 45 C.F.R. §§ 147.131, 147.132; 29 C.F.R. § 2590.715-2713A, 26 C.F.R. § 54.9815-2713A), as well as slightly narrower protections for employers with nonreligious moral objections to providing contraceptive coverage, Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 45 C.F.R. §§ 147.131, 147.133; 29 C.F.R. § 2590.715-2713A, 26 C.F.R. § 54.9815-2713A). For further discussion, including legal challenges to these rules, see *supra* notes 2–3.

23. Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6 (2012), funds family planning services through grants to public and nonprofit entities across the country. For these proposed regulations, see Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502, 25,502, 25,529–30 (proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59). Under existing Title X regulations, low-income families can include those with incomes above 100 percent of the most recent federal Poverty Guidelines if the project director determines that the family is unable, for good reasons, to pay for services. 42 C.F.R. § 59.2 (2017). The proposed revisions further elaborate, as an example, that "a woman can be considered from a 'low-income family' if she has health insurance coverage through an employer which does not provide the contraceptive services sought by the woman because it has a sincerely held religious or moral objection to providing such coverage." 83 Fed. Reg. at 25,530 (to be codified at 42 C.F.R. § 59.2).

24. SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD para. 74 (1965), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 166, 216 (David J. O'Brien & Thomas A. Shannon eds., 1992).

conditions include especially the protection of human rights,[25] and it identified religious freedom as the highest of human rights.[26] Religious liberty, the Council argued, includes the right of believers to follow their religious convictions in society and of religious groups to organize themselves according to religious principle.[27] No one, the Council stated, should be "forced to act against [their] [religious] convictions [or] . . . be restrained from acting in accordance with [these] convictions . . . in private or in public, alone or in associations with others."[28] The Council affirmed religious accommodation as a responsibility of legislators and administrators,[29] and also as something that should be sanctioned by constitutional law.[30]

The Council rested its case for religious freedom on the requirements of human dignity.[31] The human person is created with reason and free will and made for responsible freedom.[32] We have a desire and obligation to seek the truth, especially in religious matters, and we must follow the truth as we come to know it.[33] Religious freedom is the highest of human rights because it concerns the highest of human duties.[34]

America's tradition of religious freedom rests in significant part on a similar justification. Those in our founding era recognized and respected the capacity of persons to seek the divine and their desire to follow conscience where it leads. They also recognized that the demands that religion makes on believers transcend those of the temporal order.[35] Religious believers, James Madison wrote, enter society with a higher "allegiance" to "the Governour of the Universe."[36] Thomas Jefferson agreed: "[T]he relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and

25. SECOND VATICAN COUNCIL, DIGNITATIS HUMANAE: DECLARATION ON RELIGIOUS LIBERTY para. 6 (1965), *reprinted in* 1 VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 799, 803–04 (Austin Flannery, O.P. ed., 1984).

26. *Id.* para. 15, at 812.

27. *Id.* paras. 3–4, at 802–03.

28. *Id.* para. 2, at 800.

29. *Id.* para. 6, at 804.

30. *Id.* para. 2, at 800, para. 13, at 810, para. 15, at 812.

31. *Id.* paras. 2–3, at 800–02, paras. 9–12, at 806–09.

32. *Id.* para. 2, at 801.

33. *Id.*

34. *Id.* para. 15, at 812.

35. According to the Second Vatican Council, "the private and public acts of religion by which men direct themselves to God according to their convictions transcend of their very nature the earthly and temporal order of things." *Id.* para. 3, at 802. Founding-era statements were similar. *See infra* notes 36–37 and accompanying text.

36. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973).

important to every human being."[37] America's long tradition of religious accommodation and the thousands of religious exemptions that exist in our laws today reflect this solicitude for conscience in conflicts with the state.

The centrality of religious freedom to the common good is, then, one facet of the relationship between them. Religious freedom does not come at the expense of the common good as those who have resisted religious accommodation in culture war contexts increasingly suggest. They are not in opposition.[38] To view it this way is to pay insufficient attention to the ways in which religious freedom is a requirement of human nature and its dignity.

Indeed, to overlook this requirement risks the kind of instability and division we see today. Those in the American founding era respected conscience in conflicts with the state, and they also recognized that forcing believers to violate their conscience will result in resentment, resistance, and bitter strife. The European experience gave them a close example of this danger, and their concerns have a renewed salience today. Indeed, our deepening polarization has been fueled, in part, by our continuing standoffs over culture war issues. The Catholic Church has drawn the connection between justice and peace,[39] and in recent years we have seen the kind of civic division that can arise when believers perceive threats to their ability to follow the demands of their faith.

There are additional connections between religious freedom and the common good. Forcing religious believers to violate their conscience weakens moral integrity, and in so doing, it undermines moral dispositions that are essential for democratic government. The betrayal of conscience "beget[s] habits of hypocrisy and meanness," Thomas Jefferson observed as part of his defense of religious liberty,[40] and the loss of public virtue affects us all.

Protections for religious groups, in particular, have additional benefits

37. Fourth Report of Rector and Visitors of the University of Virginia (Oct. 7, 1822), *in* EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL, HITHERTO UNPUBLISHED 470, 474 (J.W. Randolph ed., 1856). Thomas Jefferson was Rector of the Board of Visitors of the University of Virginia at the time. *Id.* at 476.

38. For a description of this growing view, see Laycock, *supra* note 6, at 869–77.

39. POPE FRANCIS, LAUDATO SI': ON CARE FOR OUR COMMON HOME para. 157, at 76 (United States Conference of Catholic Bishops) (2015); POPE JOHN PAUL II, CENTESIMUS ANNUS para. 5, at 13 (Pauline Books & Media) (1991); POPE JOHN XXIII, PACEM IN TERRIS para. 167 (1963), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE, *supra* note 24, at 131, 159.

40. Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON, 1777 TO 18 JUNE 1779, illus. facing 305 (Julian P. Boyd ed., 1950).

for the larger community. As the United States Catholic bishops wrote in 2012 in their statement *Our First, Most Cherished Liberty*, religious organizations serve the common good through a broad range of charitable activities, and they do so creatively and with a unique witness.[41] America's religious groups have always been an important source of public values, and this contribution has included this witness. Religious diversity has been a central aspect of American pluralism, and it has played an important role in the process through which we have continuously deepened, challenged, and renewed our public norms.

III. DEFINING RELIGIOUS FREEDOM IN LIGHT OF THE COMMON GOOD

However, if religious freedom is an essential aspect of the common good, it must also be formulated in light of the common good, and this is a second facet of their relationship. The right to follow one's religious convictions in society cannot be unlimited. The common good, as Pope Benedict XVI put it in the vernacular, is the "good of 'all of us,'"[42] and religious freedom cannot be an entitlement to disregard legal rules no matter the effects of doing so on others. In *Dignitatis Humanae*, the Second Vatican Council identified three types of limits: (1) limits to protect the rights of others; (2) limits to safeguard the public peace; and (3) limits to protect public morality.[43] These are requirements of what the Council referred to as the "public order," which is itself a basic aspect of the common good.[44]

There are parallels between these limits and the limits on religious freedom envisioned by Americans in the founding era. For example, as states drafted their constitutions in the new nation, all three of these types of limits appeared in their protections for religious liberty, though limits where religious practice collides with public morality were the least common.[45] James Madison, one of America's strongest defenders of religious liberty, similarly spoke of limits where the rights of others and the public peace or the safety of the state are at stake.[46]

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41. *Our First, Most Cherished Liberty*, *supra* note 7.

42. POPE BENEDICT XVI, CARITAS IN VERITATE para. 7, at 13 (The Word Among Us Press) (2009).

43. SECOND VATICAN COUNCIL, DIGNITATIS HUMANAE, *supra* note 25, para. 7, at 805.

44. *Id.*

45. *See* KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 237–38 (2015).

46. James Madison, Proposal for the Virginia Declaration of Rights (1776), *reprinted in* 1 THE PAPERS OF JAMES MADISON 174, 175 (William T. Hutchinson & William M. E. Rachal eds., 1962) (proposing that the free exercise of religion be "unpunished and unrestrained by the magistrate, [u]nless the preservation of equal liberty and the existence of the State are manifestly endangered"); Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES

But, of course, the devil is in the details, and if the rights of others or the other aspects of the public order are defined too broadly, there will be little space left for religious exemptions. Public morality is a particularly expansive concept, and, indeed, it is part of what citizens in a democracy argue about. Today's culture wars are fights about how we should understand the basic aspects of public morality, and those who have resisted religious accommodations do so in part because they worry that religious exemptions will undermine important public norms. They also argue that accommodations that deprive third parties of legal benefits like free contraceptive coverage unfairly—and indeed—unconstitutionally impinge on the rights of others.

Defining the limits to religious freedom must also grapple with another challenge that arises from the unique nature of the right. If religious believers have an obligation to follow truth as they come to know it and the demands of religious conscience transcend the temporal order, the limits we draw must be consistent with the primacy of religious concerns. Not just any competing interest, and indeed not just any weighty competing interest, can justify limits on religious freedom.

In practice, it is important to distinguish between the two different contexts in which the question of limits arises. First, to the extent that we recognize a right of exemption protected as a matter of constitutional law, what should our limits to this right be? Second, when legislatures and administrators act to accommodate religious exercise, are there any limits that restrict what they can do to protect religious liberty? In recent years, law and religion scholars have tended to focus on the second question—that is, on limits to legislative and administrative accommodations.[47]

MADISON 98, 100 (Gaillard Hunt ed., 1910) (arguing for the "immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace"); Letter from James Madison to Rev. Adams (1832), *in* 9 THE WRITINGS OF JAMES MADISON, *supra*, at 484, 487 (advocating "an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others").

47. A number of scholars have argued that the Establishment Clause, and perhaps also the Free Exercise Clause, prohibit religious accommodations that place significant costs on third parties. *See infra* notes 59–62 and accompanying text. Other scholars envision the First Amendment's limitations on religious accommodation much more narrowly. *See, e.g.*, Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, FEDERALIST SOC'Y REV., Oct. 2016, at 50, 51; Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 738–49 (2018); Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KY. L.J. 603, 604–06 (2018); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 41–49 (2014); Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUSTICE (Dec. 5, 2013), http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html; Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*,

They have done so both because the Supreme Court's decision to reject a constitutional right of exemption seems deeply entrenched in the Court's jurisprudence, and also because—and this is related—legislative and administrative accommodations are where much of the action is today.[48] Our fights about religious liberty today are primarily about legislative and administrative protections, and this is where the pushback against religious accommodation has focused.[49]

I too will focus on this second question, but at the outset it is important to point out a critical difference between these two contexts. A constitutional right of exemption has the effect of carving out mandatory exceptions to rules that have been adopted by democratic majorities to serve other legitimate public purposes. It is a right with potentially far-reaching implications especially in a pluralistic society like our own, and, indeed, it was these far-reaching implications that contributed to the decision of the Court to reject the right in *Smith*.[50] The *Smith* Court feared that a constitutional right of exemption would risk chaos in a religiously diverse society.[51] By contrast, in the context of legislative or administrative accommodations, it is political actors who are making room for religious minorities in their own regulatory frameworks. Their decisions to accommodate religious practice will include a balance of factors, including a consideration of the costs involved.

When it comes to a constitutional right of exemption, I believe that the Second Vatican Council was correct to affirm the right and identify limits where religious exemptions would endanger the public peace or infringe upon the rights of others, at least where these rights have an importance commensurate with the right to religious freedom.[52] The state plays an important role in protecting religious believers from interference from one another, as it does in protecting human rights in general, and this role requires a state whose existence is secure as well as basic conditions of public peace and order. Consequently, religious believers should not be entitled to exemptions where the application of the government's rule is

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THE VOLOKH CONSPIRACY (Dec. 4, 2013, 5:11 PM), http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/.

48. For current battles over legislative and administrative accommodations in culture war contexts, see *supra* notes 2–5 and accompanying text.

49. For a discussion of this pushback, see Douglas Laycock, *The Campaign against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231 (Micah Schwartzman et al. eds., 2016).

50. Emp't Div. v. Smith, 494 U.S. 872, 885–90 (1990).

51. *Id.* at 888–90.

52. For a discussion of the Second Vatican Council's teaching on religious liberty, see *supra* notes 25–34, 43–44 and accompanying text.

necessary to secure these conditions.[53] Likewise, exemptions should not be required where the application of the government's rule to the believer is necessary to prevent meaningful intrusion on the persons, property, or physical liberties of others; on their intellectual or spiritual freedoms; or on legal rights or benefits designed to secure life, health, safety, property, and economic opportunity.[54] These are basic rights and benefits that protect and nourish the conditions for meaningful and voluntary decision-making, including about religious matters.[55]

On the other hand, the preservation of public morality is not, in my view, a sufficient reason to limit religious freedom. Public morality is deeply contested in American society today, and our disagreements often follow along religious lines. Limits on the basis of public morality risk disadvantaging religious groups with unpopular views. To be sure, some aspects of public morality will be essential for the peace and safety of the state or protecting the rights of others. However, the preservation of public morality, standing alone, should not serve as the basis for restricting religious liberty in a deeply pluralistic society.

What about where the political community itself decides to make sacrifices for religious freedom? What, if any, legal constraints should there be when legislatures or administrators take steps to accommodate religious practice? As I observed earlier, there are thousands of religious exemptions in American laws today, and these exemptions frequently place costs on others. Some of these costs are substantial; some are much less significant. Some are widely shared among the members of the public at large, and others are borne primarily by specific segments of the population. Many have a long pedigree. A familiar example is the clergy-penitent privilege. In the early nineteenth century, a New York court interpreted the free exercise guarantee of New York's constitution to protect a Catholic priest who refused to disclose the contents of a confession in response to a subpoena in a criminal case.[56] The legislature followed with a statutory protection,[57] and now laws in all fifty states recognize some version of the clergy-penitent privilege.[58] The clergy-

53. I have defended this view in BRADY, *supra* note 45, at 238–41.

54. I have defended this limit in *id.* at 241–44.

55. *See id.* at 246.

56. *See* People v. Phillips (N.Y. Ct. Gen. Sess. 1813), *reprinted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199–209 (1955).

57. *Privileged Communications to Clergymen*, *supra* note 56, at 213.

58. Mockaitis v. Harcleroad, 104 F.3d 1522, 1532–33 (9th Cir. 1997) (stating that "[a]ll fifty states have enacted statutes 'granting some form of testimonial privilege to clergy-communicant communications'") (quoting *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1556 (1985)). For further discussion of this privilege, see 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 246–60 (2006).

penitent privilege can significantly handicap the legal system's discovery of truth, and it can greatly disadvantage litigants who would benefit from the excluded testimony. However, we have thought it worth the cost.

In recent years, a number of scholars have argued that the Establishment Clause prohibits religious accommodations that place significant burdens on third parties at least if those impacted constitute a discrete and identifiable group,[59] and some also believe that these burdens violate the Free Exercise Clause as well.[60] These scholars argue that forcing third parties to bear the costs of religious accommodation imposes the accommodated faith on nonadherents[61] and is analogous to coercive tax support for favored faiths.[62] In my view, both of these arguments strain the concepts of religious coercion and tax support for religion. Religious coercion means something more than bearing the costs of religious accommodation. It means being forced to participate in or affirm a faith that is not one's own or to abandon one's own practices. Third-party costs associated with religious accommodations are also very different than government support for a privileged faith. Religious accommodations facilitate free exercise. They are designed to make room for adherents of minority faiths in our larger political community, not to advance favored faiths or promote religious conformity. They make space for practices that depart from majoritarian norms. The Supreme Court has said that religious accommodations must "take adequate account" of the costs they place on others,[63] but the effect of this new proposal would be to invalidate many of the religious accommodations in American law today and to severely restrict the sacrifices we can make in the future. This rule does not fit with our historical tradition of religious accommodation or the values that underlie it.

I believe that there are constitutional limits on legislative and

59. *See supra* note 21 and accompanying text.

60. *See, e.g.*, NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 50, 55 (2017); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 215 (Holly Fernandez Lynch et al. eds., 2017); Tebbe, Schwartzman & Schragger, *When Do Religious Accommodations Burden Others?*, *supra* note 21, at 332–33.

61. TEBBE, *supra* note 60, at 53; Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby*'s Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 49 at 323, 325; Tebbe, Schwartzman & Schragger, *When Do Religious Accommodations Burden Others?*, *supra* note 21, at 332–33, 336; *see also* Gedicks & Koppelman, *supra* note 21, at 66 (referring to burden shifting resulting from a religious exemption from the contraceptive mandate as "religious oppression of others").

62. TEBBE, *supra* note 60, at 52; Gedicks & Van Tassell, *supra* note 21, at 363; Gedicks & Van Tassell, *supra* note 61, at 329, 335.

63. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014) (quoting *Cutter*, 544 U.S. at 720).

administrative accommodations that place costs on others.[64] However, these limits must make sense as Free Exercise or Establishment Clause violations, and they must be consistent with our tradition of making sacrifices—sometimes great sacrifices—to protect religious liberty. This means that these limits will be narrow. Rather than a general rule, such as a general rule against third-party harms, we can better balance free exercise values and concerns about third-party harm if we identify specific situations that involve clear Free Exercise or Establishment Clause violations. The Court has identified two in particular. Religious accommodations violate the First Amendment if they coerce third parties to participate in religious practices that they do not share,[65] and if they force third parties to affirm faiths that are not their own.[66] Accommodations that would require religious participation or affirmation clearly violate free exercise and disestablishment norms.

I would add another constitutional limit that has particular relevance for our current fights over religious accommodation. Accommodations involve unconstitutional religious favoritism if they place serious burdens on unpopular, marginalized, or other politically disadvantaged groups in circumstances where less burdensome alternatives have not been explored or the breadth of the exemption exceeds what is necessary to meet religious needs.[67] Americans have made great sacrifices to protect religious liberty, but burdens like these would not be tolerated if the positions of those benefited and burdened were reversed.

There will not be many accommodations like this, but there will be some. For example, Mississippi's recent legislation protecting businesses with religious or moral objections to providing marriage-related services to same-sex couples is overbroad in this way.[68] The statute goes well beyond the types of conflicts that have arisen in recent years. The conflicts that have arisen have involved small business owners personally providing wedding-related services that are closely connected to the celebration of marriages, such as wedding photography, floral design, and

64. For further discussion, see Brady, *supra* note 47, at 738–43.

65. *See* United States v. Lee, 455 U.S. 252, 261 (1982) (rejecting an exemption for Amish employers from the requirement to withhold and pay Social Security taxes where the effect of this exemption would be to force non-Amish workers to follow the Amish way of life regarding retirement security). For further discussion, see Brady, *supra* note 47, at 740–41.

66. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–11 (1985) (striking down Connecticut statute that gave workers an "absolute and unqualified" right not to work on their chosen Sabbath and, thus, required employers to advantage Sabbath observance over other religious and nonreligious interests and needs). For further discussion, see Brady, *supra* note 47, at 741.

67. For further discussion of this position, see Brady, *supra* note 47, at 742–43.

68. MISS. CODE ANN. § 11-62-5(5) (West, Westlaw through 2018 Reg. and 1st Extraordinary Sess.).

cake design.[69] The individuals involved in these cases have argued that the provision of these services for same-sex weddings would not only facilitate marriages that violate their religious beliefs but would also celebrate and affirm them.[70] The scope of Mississippi's statute is much broader. Its protections extend to closely held businesses of any size and cover the provision of a broad range of goods and services, including, for example, car rentals and jewelry sales.[71] In addition, under the law, businesses with religious or moral objections to serving same-sex couples are entitled to exemptions from otherwise applicable antidiscrimination rules regardless of the ability of same-sex couples to obtain wedding-related services from other comparable providers. There is nothing wrong with efforts to accommodate the needs of religious traditionalists who object to personally providing services affirming marriages they view as religiously prohibited. However, Mississippi's statute does so at potentially great expense to an unpopular group in the state and in a way that exceeds what believers need.

IV. PURSUING RELIGIOUS FREEDOM WITH THE COMMON GOOD IN MIND

However, if constitutional limits on legislative and administrative accommodations will be narrow, there is yet another question to address, and this question—a normative question—is, in my view, the most important today. When accommodations for religious practice implicate competing interests and values, how should we approach the important project of protecting religious liberty? As religious believers, in particular, what should our demands for religious freedom entail, and how should we pursue our goals? In *Dignitatis Humanae*, the Second Vatican Council had an answer: "In availing of any freedom, men must respect the moral principle of personal and social responsibility."[72] They must "have regard for the rights of others, their own duties to others and

69. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (cake design); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426 (Ariz. Ct. App. 2018) (custom artwork for weddings), *petition for review granted*, No. CV-18-0176-PR (Ariz. Nov. 20, 2018); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016) (farm hosting wedding ceremonies); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (wedding photography), *cert. denied*, 134 S. Ct. 1787 (2014); Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (floral design), *petition for cert. granted*, *judgment vacated*, *and case remanded*, 138 S. Ct. 2671 (2018).

70. *See Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1726; *Brush & Nib*, 418 P.3d at 431–32, 437; *Gifford*, 23 N.Y.S.3d at 431; *Elane Photography*, 309 P.3d at 63, 69; *Arlene's Flowers*, 389 P.3d at 550, 556.

71. MISS. CODE ANN. §§ 11-62-5(5)(a)–(b), 11-62-17(3) (West, Westlaw through 2018 Reg. and 1st Extraordinary Sess.).

72. SECOND VATICAN COUNCIL, DIGNITATIS HUMANAE, *supra* note 25, para. 7, at 805.

the common good of all."[73] And "[a]ll men must be treated with justice and humanity."[74] What the Council points to here is yet another facet of the relationship between religious freedom and the common good. Religious freedom is not only essential to the common good and something that must be formulated in light of the common good. It must also be pursued with the common good in mind.

Pursuing religious freedom with the common good in mind means that religious believers must be careful not to focus solely on their own liberties when they seek protections for religious freedom. They must also consider the effects of their demands on others and the larger community. Likewise, those impacted by the protections religious believers seek must also consider the value of religious liberty. When conflicts arise, all of those involved should work together to seek solutions that avoid or minimize burdens on one another to the greatest extent possible. Each side must carefully consider what it really needs and not insist upon advantages that are not really necessary. The goal should be to reach mutually acceptable compromises whenever possible, and achieving this goal will require an openness to listening and hearing what others have to say, a commitment to dialogue, a willingness to work together in good faith, and a recognition that compromise requires a process of give and take. No one can expect to get everything they want, but each side should be willing to address what is most important to the other.

In my own academic work, I have argued that our constitutional rules regarding the requirements and limits of religious accommodation should foster such compromises. For example, if, as I have proposed, legislative or administrative accommodations violate the Establishment Clause when they place serious costs on a vulnerable group in circumstances where alternatives have not been considered or the accommodation is overbroad, there will be incentives for religious believers to examine what they really need and engage with others about less burdensome alternatives.[75] Many of the exemptions in our laws reflect compromises, and give and take has been part of our tradition of religious liberty from the beginning. In the American founding era, for example, most states exempted religious pacifists from compulsory military service, but conscientious objectors were required to secure a substitute, pay a financial equivalent, or perform alternative service.[76] Quakers were also

73. *Id.*

74. *Id.*

75. *See* Brady, *supra* note 47, at 748–49.

76. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1808 (2006).

exempted from oath requirements, but they had to affirm instead.[77] Compromises like these account for both the value of religious liberty and the effects of accommodation on others.

However, there is a reason that we have had such difficulty compromising with one another in culture war contexts. In these contexts, religious believers and their opponents disagree with one another about the common good itself. They start with divergent understandings of the human goods of marriage, family, and sexuality, and both sides believe that getting these understandings right and having them reflected in law and social practice are essential to the well-being of society.[78] The result is an unwillingness on the part of many proponents of same-sex marriage and reproductive freedom to allow religious exemptions with significant public effects, and a corresponding unwillingness on the part of many religious believers to grant concessions to progressive agendas in exchange for religious protections. There has been little give and take, little willingness to live and let live, and much conflict.

However, this dynamic rests on too narrow an understanding of the common good. In a political society with the freedoms and democratic institutions that the Church has long championed,[79] there will be moral disagreement. We cannot expect the legal or social order to fully match our views about marriage, family, and sexuality or any other human good, and we need to make room for one another. Human dignity requires space for the exercise of human freedom. Sometimes we will exercise it well, sometimes we will not, and sometimes it will be hard to tell whether we have exercised it rightly or not. Space for freedom means space for error.

Democratic institutions undergird political stability and provide a fair method for resolving conflicts in conditions of pluralism. They also, as Pope John Paul II wrote, fit human dignity by "ensur[ing] the participation of citizens in making political choices."[80] Democracies require a commitment to give and take. They depend on civic trust and friendship; a willingness to listen to one another and to dialogue about differences; and a determination to seek solutions that are multi-sided, not one-sided. Democracies provide citizens with the opportunity to

77. *See id.* at 1804–05; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1467–68 (1990).

78. For this view in Catholic social thought, see SECOND VATICAN COUNCIL, GAUDIUM ET SPES, *supra* note 24, para. 47, at 195; POPE BENEDICT XVI, CARITAS IN VERITATE, *supra* note 42, para. 15, at 23, para. 28, at 42–43, para. 44, at 71–72, para. 51, at 82–83.

79. Catholic social thought strongly affirms democratic systems and institutions. *See, e.g.*, POPE JOHN PAUL II, CENTESIMUS ANNUS, *supra* note 39, para. 46, at 67; POPE BENEDICT XVI, CARITAS IN VERITATE, *supra* note 42, para. 41, at 64–65. For the Church's support of human rights, see *infra* notes 82–84 and accompanying text.

80. JOHN PAUL II, CENTESIMUS ANNUS, *supra* note 39, para. 46, at 67.

promote their visions of the human good at the level of society, not just in their personal lives, and this is to be expected and welcomed. However, we will not always win, and when we do not prevail, we should respect the outcome even as there must always be space for dissent.

There is a connection between peace and justice, the Church has taught,[81] and justice entails the protection of human rights and freedoms.[82] Religious freedom is the highest of human rights, but it does not exhaust our rights. Moral freedom is also a requirement of human dignity,[83] and we also have other rights, such as rights to the social and economic prerequisites for free and meaningful choice in matters of the mind and spirit.[84] Our culture wars will not end without protections for religious believers to follow the demands of their faith in society and in their institutions. However, they also will not end if protections for religious liberty do not take into account the interests of others whose freedom has led them to different views about the nature of marriage and family.

When and how to compromise requires discernment, and it depends on the particular conflict involved and the limits of what is realistic and practicable.[85] For example, in conflicts regarding same-sex marriage, we might be able to come closer together if conservative religious believers, on the one hand, concede the legitimacy of same-sex marriage as a civil institution reflecting both the exercise of human freedom and the reality of families built on such unions; and if proponents of same-sex marriage, on the other, accept the existence of moral disagreement on this issue and, indeed, the consistency of this disagreement with America's long and valued tradition of religious pluralism. In this conflict, we might find that we hold many goods in common, and if we do, we might find that our disagreements are narrower than they seem today.

For instance, we might agree that religious groups must have the freedom to make hiring decisions that reflect religious principle and doctrine, including when these groups are engaged in charitable work for

81. *See supra* note 39 and accompanying text.

82. *See, e.g.*, POPE JOHN XXIII, PACEM IN TERRIS, *supra* note 39, paras. 8–27, at 132–35.

83. *See* SECOND VATICAN COUNCIL, GAUDIUM ET SPES, *supra* note 24, paras. 16–17, at 174–75.

84. *See id.* para. 26, at 181, para. 31, at 184; *see also* POPE JOHN XXIII, PACEM IN TERRIS, *supra* note 39, paras. 8–27, at 132–35.

85. Practical moral reasoning must always take into account concrete facts and circumstances and the limits of what is possible and feasible. For example, these considerations influenced John Courtney Murray's recommendation that Catholics support the decriminalization of artificial contraception in Massachusetts. *See* Memorandum from John Courtney Murray, S.J. on Contraception Legislation to Cardinal Cushing (1965), *available at* https://www.library.georgetown.edu/woodstock/murray/1965f.

the common good, and even when their charitable work benefits from public funds. The freedom of religious groups to hire in accordance with religious principle is essential to their ability to maintain their unique witness, and this witness has always been a valuable component of American pluralism. For their part, Catholic and other religious groups that have resisted extending health care coverage and other benefits to the spouses of employees in same-sex unions might come to see such benefits as reflecting a legitimate legal relationship though not a religious one.[86] They might even view such benefits as part of a responsibility to care for employees and those whom they support.

When it comes to protections for individual religious believers who do not want to engage in actions that facilitate same-sex marriages, we might agree that no one should be compelled to affirm views about same-sex marriage with which they disagree. Most small business owners offering wedding-related services that are closely linked to marriage celebrations do not view the provision of their services as an affirmation of the marriage involved. There are many other ways to see it; for example, as something morally neutral, or a gesture of reciprocity in a pluralistic community, or even as an occasion for Christian witness. Indeed, there have been very few—though highly publicized—cases brought by wedding vendors who refuse to serve same-sex couples. However, some small business owners do view it as an affirmation of the marriage, particularly where they are personally involved in customizing services that celebrate the marriage[87] or hosting the wedding itself.[88] These views

86. See William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, WASH. POST (Mar. 2, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345_pf.html, for a discussion of the decision of Catholic Charities of the Archdiocese of Washington to stop providing health care benefits to the spouses of new employees or new health plan enrollees in order to avoid being penalized for denying benefits to the spouses of gay employees. Other Catholic groups have extended benefits to the spouses of gay employees. Oralandar Brand-Williams, *Catholic Conference Offering Benefits for Gay Employees*, DETROIT NEWS (Mar. 7, 2016), https://www.detroitnews.com/story/news/local/michigan/2016/03/07/catholic-gay-employees-benefits/81459026/; Joan Frawley Desmond, *Spousal Benefits for Same-Sex Partners at Catholic Universities and Hospitals*, NAT'L CATH. REG. (Oct. 20, 2014), http://www.ncregister.com/daily-news/spousal-benefits-for-same-sex-partners-at-catholics-universities-and-hospit.

87. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (custom cake design); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426 (Ariz. Ct. App. 2018) (custom artwork for weddings), *petition for review granted*, No. CV-18-0176-PR (Ariz. Nov. 20, 2018); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (wedding photography), *cert. denied*, 134 S. Ct. 1787 (2014); Washington v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (custom floral arrangements), *petition for cert. granted*, *judgment vacated*, *and case remanded*, 138 S. Ct. 2671 (2018).

88. *See, e.g.*, Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Iowa Dist. Ct. Polk Cty. Apr. 3, 2014) (art gallery used to plan, facilitate, and host wedding ceremonies); Country Mill Farms, LLC v. City of East Lansing, 280 F. Supp. 3d 1029 (W.D. Mich. 2017) (farm hosting

are not unreasonable, and compelling those who hold them to endorse a position with which they disagree is inconsistent with our commitment to pluralism and to free exercise and free speech values we all share. Accommodations in these circumstances should be made at least as long as same-sex couples have ready access to comparable services from other providers.[89] Burdens on same-sex couples can be minimized by requiring objectors to provide notice of their policies and by developing resources that enable same-sex couples to easily identify willing providers.

If religious believers concede the validity of same-sex marriage as a civil institution, other conflicts involving individual believers could be resolved by reevaluating prior demands. For example, religious believers might revisit demands that government employees be excused from actions that facilitate same-sex marriages, such as the provision of marriage licenses or even the solemnization of same-sex marriages.[90] In this context, what is involved is a clearly civil institution. Actions in the course of one's employment as a government official signal the legitimacy of same-sex marriage as a legal institution, but they usually say nothing about its permissibility as a religious matter or as a matter of sexual morality.[91] It is hard to predict what compromises might emerge

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wedding ceremonies); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016) (same).

89. A number of scholars have advocated this compromise. *See, e.g.*, Letter from Thomas C. Berg, Professor, Univ. of St. Thomas Sch. of Law, et al., to Democratic Representatives, Minn. Legislature (May 3, 2013), http://mirrorofjustice.blogs.com/files/mn-short-letter-pdf---d-1.pdf; Letter from Thomas C. Berg, Professor, Univ. of St. Thomas Sch. of Law, et al., to Republican Representatives, Minn. Legislature (May 3, 2013), http://mirrorofjustice.blogs.com/files/mn-short-letter-pdf---r.pdf; Letter from Thomas C. Berg, Professor, Univ. of St. Thomas Sch. of Law, et al., to Representatives, Minn. Legislature (May 2, 2013), http://mirrorofjustice.blogs.com/files/mn-main-letter-pdf-1.pdf.

90. For analyses of these conflicts, see, for example, KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 174–77 (2016); TEBBE, *supra* note 60, at 164–81; Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274 (2010); Wilson, *supra* note 4, at 163–64; Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1480–85 (2012); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010) [hereinafter Wilson, *Insubstantial Burdens*]; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 97–100 (Douglas Laycock et al. eds., 2008) [hereinafter Wilson, *Matters of Conscience*].

91. Indeed, clerks, magistrates, justices of the peace, and other government officials often facilitate marriages that comply with legal requirements but depart from their own religious and moral standards. My point here is not that governments should reject conscientious refusals when objections are made. Indeed, Title VII of the Civil Rights Act of 1964 may require accommodation in many circumstances. Title VII's prohibition on religious discrimination in employment requires employers to reasonably accommodate the religious practices of employees when accommodation will not result in undue hardship for them, 42 U.S.C. §§ 2000e(j), 2000e-2(a) (2012), and these protections apply to government officials who are not elected, 42 U.S.C. §§ 2000e(f), 2000e-16c(a).

from a process of give and take where both sides carefully examine what they really need and take into account the freedom of others, and the lines that are drawn would probably evolve over time. The possibilities I have suggested are meant to illustrate how the parties might move closer together. They are not necessarily made as recommendations or predictions. Actual compromises will depend on a lot of factors that are hard to anticipate in advance.

With respect to the contraceptive mandate, there have always been many ways to ensure that women receive cost-free contraceptives without involving religious employers. When the Supreme Court in *Zubik v. Burwell* called upon religious plaintiffs and federal regulators to explore the possibility of a mutually acceptable solution to conflicts over the mandate in May of 2016,[92] religious groups came forth with a number of detailed new proposals designed to ensure access to contraceptive coverage with minimal burdens on women and insurers and little or no additional cost to the government.[93] These proposals did not call for the seamless coverage of contraceptives favored by mandate proponents, but they outlined forms of coverage that would require few, if any, steps for women to activate or enroll in. In the waning days of the Obama administration, federal regulators rejected all of these proposals, and suggested that even minor additional burdens on women or insurers were

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Robin Fretwell Wilson has persuasively argued that accommodations can often be made for government employees who do not want to facilitate same-sex marriages with minimal burdens. *See* Wilson, *Insubstantial Burdens*, *supra* note 90, at 335–38, 347–60. My argument here is that conservative religious believers should carefully examine what accommodations they need in these and other circumstances, and accepting the legitimacy of same-sex marriage as a civil institution can reshape how religious traditionalists see their needs in ways that make greater compromise possible.

92. Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016). In *Zubik*, the Court vacated the judgments of the lower courts in a set of cases brought by religious nonprofits challenging the adequacy of the government's accommodation, and it remanded the cases to afford the parties an opportunity to reach a mutually acceptable solution. *Id.*

93. These proposals were in response to a Request for Information issued by the government after *Zubik* was decided. Coverage for Contraceptive Services, 81 Fed. Reg. 47,741 (July 22, 2016). For some of these proposals, see Diocese of Erie Comments on Coverage for Contraceptive Services in Response to the Request for Information CMS-9931-NC (Sept. 15, 2016); Diocese of Pittsburgh Comments on Coverage for Contraceptive Services in Response to the Request for Information, CMS-9931-NC (Sept. 19, 2016); Diocese of Pittsburgh & David S. Stewart Comments on Coverage for Contraceptive Services in Response to the Request for Information CMS-9931-NC (Sept. 20, 2016); Michigan Catholic Conference Comments on Coverage for Contraceptive Services in Response to the Request for Information CMS-9931-NC (Sept. 20, 2016); Archdiocese of Washington, Catholic University of America & Thomas Aquinas College, Comments on Request for Information on Alternative Ways to Provide Contraceptive Services (CMS-9931-NC) (Sept. 20, 2016). *See also* United States Conference of Catholic Bishops, Office of the General Counsel, Comments on Coverage for Contraceptive Services, CMS-9931-NC (Sept. 9, 2016). For these and other comments, see https://www.regulations.gov/docket?D=CMS-2016-0123.

disqualifying.[94] Catholic and evangelical leaders, for their part, also lost interest in favor of the one-sided rules we now have. This was unfortunate.

Religious believers need not concede the merits of the contraceptive mandate to see it as a legitimate outcome of the political process and to see the value of a solution that balances this outcome with religious needs. The Trump administration's new rules may seem like a victory, but their concentration on religious concerns ensures that our conflicts over the mandate will continue. These new rules have been challenged in a number of lawsuits,[95] and regardless of the ultimate outcome of these lawsuits, the missed opportunity for a more balanced solution will leave conservative religious believers vulnerable once again if the political winds change in a few years. Moreover, unilateral solutions to conflicts over religious freedom undermine the community's broader commitment to religious liberty. They make religious liberty seem to be something that belongs only to believers and not to the common good. They send a signal that political power is to benefit the victors and not also other segments of our pluralistic community. None of this is good for religious freedom in the long run or the broader common good.

There are other situations where there will be less room for opposing parties to work together. For example, when it comes to abortion, abortion opponents will not want to concede the recognition of the right and will be reluctant to support policies that promote greater access and availability in exchange for stronger conscience protections for those who object to assisting or facilitating it. Disagreements over abortion implicate matters of human life, not just any policy differences or even any important policy differences. Those who believe that abortion involves the destruction of innocent human life will not concede freedom over this choice, and they will resist political outcomes that make this choice easier.[96] However, even here there can be important areas of

94. *See* FAQs About Affordable Care Act Implementation Part 36, at 4 (Jan. 9, 2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

95. In December 2017, two United States district courts, one in Pennsylvania and a second in California, issued preliminary injunctions enjoining the administration from enforcing its interim final rules. Pennsylvania v. Trump, 281 F. Supp. 3d 553, 560 (E.D. Penn. 2017), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), *and* No. 18-1253 (3d Cir. Feb. 15, 2018); California v. Health & Human Servs., 281 F. Supp. 3d 806, 813–14 (N.D. Cal. 2017), *aff'd in part, vacated in part, and remanded*, California v. Azar, 2018 WL 6566752 (9th Cir. Dec. 13, 2018) (affirming preliminary injunction insofar as it applies to California and other plaintiff states but vacating portion of injunction barring enforcement of the rules nationwide). The Trump administration finalized its new rules in November 2018, and the plaintiffs in these cases now plan to challenge the final rules.

96. A number of scholars have advocated compromises that balance conscience protection with policies to protect access to abortion. *See* Lynn D. Wardle, *Protection of Health-Care Providers'*

compromise. For example, it should be possible to balance strong conscience protections with safeguards for women in emergency situations.[97] These situations are relatively rare, but they have taken on an outsized place in current fights over conscience protections, and they have contributed to a growing pushback against these protections.[98]

This pushback, which has prioritized access to abortion, is regrettable. For many years, opponents and proponents of legalizing abortion have lived with an uneasy but workable truce. The right coexists with a variety of federal and state conscience protections for health care providers who do not want to assist or facilitate abortion.[99] The outer limits of these protections have always been the subject of debate,[100] but in recent years, proponents of abortion rights have been pushing back more strongly and even with respect to core protections when they impede access to abortion.[101]

Rights of Conscience in American Law: Present, Past, and Future, 9 AVE MARIA L. REV. 1, 45–46 (2010); Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 745–49, 758–64 (2014); Robin Fretwell Wilson, *Unpacking the Relationship Between Conscience and Access*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES, *supra* note 60, at 242–43 [hereinafter Wilson, *Unpacking the Relationship*]. However, in practice, it will be difficult to close the gap between what abortion opponents are willing to concede and what proponents of abortion rights demand.

97. Indeed, the Ethical and Religious Directives for Catholic Health Care Services allow for medical care necessary for saving the life of the mother even if the intervention can result in the death of her unborn child. U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES directive 47, at 19 (6th ed. 2018), http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf. For discussion, see Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 71–72 (2017). Catholic hospitals have also transferred patients where abortion might be required to protect the health or life of mothers. *See* Wilson, *Unpacking the Relationship*, *supra* note 96, at 254.

98. *See* Carmella, *supra* note 97, at 71; Wilson, *Unpacking the Relationship*, *supra* note 96, at 254–55.

99. For overviews of these protections, see Wardle, *supra* note 96, at 27–45; Wilson, *Matters of Conscience*, *supra* note 90, at 82–86, 90–91, 299–310; Robin Fretwell Wilson, Essay, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 48–52 (2008). In January 2018, the Trump administration proposed new regulations designed to strengthen enforcement of federal conscience protections. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88).

100. *See* Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593, 1598–1600 (2017); NeJaime & Siegel, *supra* note 20, at 2538–41; Wilson, *supra* note 99, at 57–58.

101. *See, e.g.*, Elizabeth Sepper, *Healthcare Exemptions and the Future of Corporate Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 49 at 305, 318–21. An increase in mergers and acquisitions involving Catholic hospitals has contributed to this pushback. *Id.* at 312–14, 320.

This is a mistake. Our tug of war over the availability of abortion will continue, but requiring individuals and institutions with religious and moral objections to abortion to provide or facilitate it benefits no one in the long run. Forcing a betrayal of conscience over what many view as murder is inconsistent with human dignity, and it undermines moral integrity. In a democratic society, we all depend on the moral integrity of our fellow citizens. There are other ways to increase access to abortion, and proponents of abortion rights should focus their efforts on them.

In all of these contexts, the reminder in *Dignitatis Humanae* that we must treat others with humanity when pursuing our rights is especially important. The Christian faith teaches that one's opponents are not one's enemies. They are persons who are pursued by a divine love so profound that it suffered the Cross. Christians are called to model this love and to share its good news. To do this requires a genuine openness to the other, to hearing things from their point of view, to speaking in ways that can be understood, and to learning from others. These are not just democratic values; they are also Christian values.[102] Culture wars and related fights over religious liberty are a sign that something is wrong. We should not be talking about fighting with people over religious liberty. It is the wrong metaphor, sets the wrong tone, and sends the wrong message. If, finally, culture warriors finish by mowing down their opponents, they will not have won. They will have lost what is most important.

We are used to talking about religious freedom in terms of rights, and I have done so here. However, our tradition has always been deeper than that. When James Madison strengthened the protections for free exercise in Virginia's Declaration of Rights, he kept the admonition that "it is the mutual duty of all to practi[c]e Christian forbearance, love, and charity, towards each other."[103] Later, in his famous *Memorial and Remonstrance against Religious Assessments*, Madison linked these virtues to civic peace and harmony.[104] *Dignitatis Humanae* calls for the exercise of similar virtues. "The love of Christ urges [us] to treat with love, prudence and patience those who are in error or ignorance with regard to the faith," the Council reminds us.[105] Without these virtues, we will not have peace, and we are unlikely to change minds. The highest part of human dignity, Pope John Paul II observed frequently in his social encyclicals, is our

102. *See* SECOND VATICAN COUNCIL, GAUDIUM ET SPES, *supra* note 24, para. 28, at 182; SECOND VATICAN COUNCIL, DIGNITATIS HUMANAE, *supra* note 25, para. 3, at 801; POPE JOHN PAUL II, CENTESIMUS ANNUS, *supra* note 39, paras. 49–50, at 73; *see also* POPE FRANCIS, LAUDATO SI', *supra* note 39, para. 47, at 21, para. 81, at 39.

103. Madison, *supra* note 46, at 175.

104. *See* MADISON, *supra* note 36, at 302–03.

105. SECOND VATICAN COUNCIL, DIGNITATIS HUMANAE, *supra* note 25, para. 14, at 811.

openness to a relationship with a loving and merciful Creator who calls us to imitate his love in self-giving.[106] For Christians, this is what religious freedom is for, and when religious freedom is pursued in a way that clouds this truth, it becomes self-defeating. The common good requires strong protections for the right of religious freedom; but it also requires us to think carefully about how we exercise this right. Our ultimate goal is not the protection of our freedom, but the use of this freedom in love and service to God and others.

V. RELIGIOUS FREEDOM AND THE PROMOTION OF THE BROADER COMMON GOOD

If we can somehow move from fights about religious liberty to dialogue and good faith engagement grounded in mutual understanding, this de-escalation could serve as a model and a sign of hope for reducing our political polarizations more generally. This is yet another facet of the relationship between religious freedom and the common good: the potential that rethinking this relationship has for promoting the common good even more broadly. President Trump's unexpected victory placed the ball in the court of religious conservatives, who now wield considerable power in his administration. This power presents an opportunity for those who felt under attack during the Obama administration to reach out to their opponents to seek fair and balanced solutions to conflicts over religious liberty. However, so far, the ball has been fumbled. For the most part, religious leaders have followed the same well-worn paths focused on protecting their own rights rather than reaching out to others of good will to try to overcome some of our society's deepest divisions. As today's polarization pits Americans against one another and undermines our civic life, religious believers have the opportunity to forge a new path that focuses on the common good, but will they take it? It is late in the game, but I think there is still time.

106. *See* POPE JOHN PAUL II, REDEMPTOR HOMINIS para. 10, at 18–19 (Pauline Books & Media) (1979); POPE JOHN PAUL II, DIVES IN MISERICORDIA para. 1, at 7–9, para. 14, at 41–46 (Pauline Books & Media) (1980); *see also* POPE JOHN PAUL II, SOLLICITUDO REI SOCIALIS para. 40, *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE, *supra* note 24, at 395, 423.