

INTRODUCTION: RELIGIOUS ACCOMMODATION IN THE AGE OF CIVIL RIGHTS

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The papers in this symposium grow out of a conference on *Religious Accommodation in the Age of Civil Rights* that was held at Harvard Law School in April 2014. Co-sponsored by Harvard, the Williams Institute at UCLA School of Law, the American Civil Liberties Union (ACLU), and the University of Southern California Center for Law, History and Culture, the conference was convened at a moment of intense agitation as the nation's attention was trained on the case of *Burwell v. Hobby Lobby Stores, Inc.*,¹ then before the Supreme Court. *Hobby Lobby* posed the question of whether closely held for-profit corporations had the right to a religious exemption from provisions of the Affordable Care Act (ACA) requiring coverage of contraceptive services in their employees' health insurance plans. More broadly, *Hobby Lobby* raised important questions about the meaning and contours of the Religious Freedom Restoration Act (RFRA), including whether businesses are "persons" covered by RFRA, how RFRA's "strict scrutiny" standard should be implemented, and what counts as a "substantial burden" on religion (and who decides). At the time our conference took place, the Supreme Court had heard oral argument in the case, but had not yet issued its decision.

The questions posed in *Hobby Lobby* pushed beyond the ACA, implicating many other legal contexts, most notably antidiscrimination law, in which religious claimants seek exemptions. While for many years exemptions have been sought from laws prohibiting discrimination on the basis of gender, marital status, and sexual orientation, these efforts have intensified in the wake of the growing success of the movement for same-sex marriage. Indeed, LGBT gains have been met by increased mobilization seeking religious accommodation as a statutorily protected civil right. In the weeks before we convened, the governor of Arizona vetoed a bill that would have amended that state's RFRA,² while Mississippi enacted a controversial state

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¹ 134 S. Ct. 2751 (2014).

² S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), *archived at* <http://perma.cc/3ZWF-ZU25>.

RFRA.³ Scholars and advocates (many of whom participated in the conference) wrote influential letters on both sides of these debates.⁴

The irony is that an issue that today is highly polarized, following the well-worn script of “culture war” politics, commanded support across the political spectrum as recently as the early 1990s. The federal RFRA was passed with the support of a coalition of liberal civil libertarians and religious conservatives, both of whom saw the right to religious exemptions as a civil right. Indeed, it is important to remember that claims to religious accommodation are raised by many different kinds of religious groups in many different contexts, many of which do not follow the “culture war” script, and are supported by both liberal and conservative advocates for the protection of religious minorities.⁵ But as religious exemptions have become a key issue in conflicts between religious conservatives and those supporting contraceptive equity and marriage equality, the perception has grown that reproductive and LGBT rights are imperiled by religious accommodation. Accordingly, today we see a confrontation between advocates for gender and LGBT equality and advocates for religious exemptions.

In the face of this politically volatile situation, we sought to bring together leading figures from both sides of the debate. The level of interest was so intense and the number of participants so large that the conference proceedings are being published in symposia in three separate journals. The authors featured in this symposium issue of the *Harvard Journal of Law and Gender* are not only respected authorities on law and religion but also central figures in the ongoing legal and political debates over religious accommodation. They have played key roles in recent events, and in some cases in the longer history of the battle over religious accommodation. Some of the contributors are scholars who have shaped the very field. Ira “Chip” Lupu and Mark Tushnet, long considered two of the country’s most influential scholars of law and religion, are uniquely situated to contextualize the present moment in the longer arc of religious accommodations law. Other authors in this volume are also visibly shaping on-the-ground approaches to questions of religious exemption. Frederick Gedicks’s attention to the Establishment Clause issues posed by the accommodation sought in *Hobby Lobby* sparked significant academic and popular debate leading up to the Court’s

³ S.B. 2681, 2014 Leg., Reg. Sess. (Miss. 2014), *archived at* <http://perma.cc/2CDC-8AY7>.

⁴ *Compare* Letter from Douglas Laycock, Professor, Univ. of Va. Sch. of Law, et al. to Janice K. Brewer, Governor of Ariz. (Feb. 25, 2014), *archived at* <http://perma.cc/3P8V-CD5R>, *with* Letter from Ira C. Lupu, Professor of Law, George Washington Univ. Sch. of Law, et al. to Phillip Gunn, Speaker, Miss. House of Representatives et al. (Mar. 10, 2014), *archived at* <http://perma.cc/3U2M-L2LW>.

⁵ A current example is a case now before the Supreme Court in which a Muslim inmate is seeking an exemption from prison rules forbidding beards under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *Holt v. Hobbs*, 509 F. App’x 561 (8th Cir. 2013) *cert. granted*, 134 S. Ct. 1490 (2014) *cert. limited*, 134 S. Ct. 1512 (2014).

decision. Thomas Berg, who seeks to make space for both progressive state action and religious exemptions, has influenced debates in the contexts of both the ACA's contraceptive coverage requirement and same-sex marriage. Elizabeth Sepper, the newest voice among the authors, centers important concerns with gender and sexual orientation equality in ongoing conflicts over religious accommodation in the contexts of abortion, contraception, and same-sex marriage. And, finally, one of the contributors is among the nation's most influential lawyers working on questions of religious accommodation. Louise Melling is the Director of the ACLU's Center for Liberty, where she leads the ACLU's work on questions of religious exemptions in the domains of reproductive rights and gender and LGBT equality. Indeed, directing work at an organization that supported RFRA but now finds itself defending against RFRA's expanding reach, Melling's perspective grows out of the very shifts that brought us to this moment.

The Articles that follow address the key issues shaping the current debate. These range from the small-bore but nonetheless vitally important questions of how to conceptualize the elements of RFRA's standard of review, to questions of what principles, such as an injunction against third-party harm, should limit accommodation, to the fundamental question of whether a judicially protected right to religious accommodation should be recognized at all. It may seem like an exercise in futility to be arguing against religious accommodation (as a judicially protected right) *tout court*. After all, since the conference was held, the Supreme Court handed down its decision in *Hobby Lobby*, upholding the right to a religious exemption claimed under RFRA and enunciating reasoning that seemingly represents a high-water mark for judicial protection. Yet, in their contributions, Professors Tushnet and Lupu put forth arguments suggesting that the notion that religious accommodation has triumphed may be premature. According to Professor Tushnet, "[c]ontemporary controversies suggest that it can no longer serve as a master concept for the field."⁶ Advancing a "pro-religion" argument against a broad right to judicial accommodation, Professor Tushnet's historical survey and political analysis of the forces behind the development of the principle of religious accommodation over the last thirty years indicate that such a principle may have run its course.

Professor Lupu similarly suggests not just that a sweeping regime of religious exemptions is a "dubious enterprise,"⁷ but that it will prove not to be sustainable. He predicts that, as in the past, the seemingly protective regime will be "strong in rhetoric and weak in practice, with an occasional outburst of religion-protecting vigor."⁸ In response to anxieties over exemption claims pressed in *Hobby Lobby*'s wake—in federal and state courts and

⁶ Mark Tushnet, Accommodation of Religion *Thirty Years On*, 38 HARV. J.L. & GENDER 1, 32 (2015).

⁷ Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 100 (2015).

⁸ *Id.* at 35.

in conflicts over contraception, gender equality, same-sex marriage, and LGBT equality—Professor Lupu suggests that religious exemption regimes “will, yet again, shrivel rather than prosper.”⁹

In the face of recent developments—including ongoing challenges to the religious accommodations offered by the government to those objecting to the ACA’s contraceptive coverage requirement—these predictions might seem quixotic. But it is worth remembering that it was barely twenty-five years ago that *Employment Division v. Smith* had seemed to sound the death knell for judicial religious exemptions. Yet, ironically, it was *Smith* that precipitated mobilization for judicial religious accommodation, not only leading to the legislative backlash that culminated in the passage of RFRA and the subsequent passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), but, on a broader level, emboldening religious groups to make claims to religious exemptions with much greater frequency than they had before *Smith*.

Whether *Hobby Lobby* will prove to be the mirror image of *Smith* in this regard, precipitating a pendulum swing in the other direction, as the *longue durée* analyses put forth by both Professors Lupu and Tushnet suggest, only time will tell. In part this will depend on how *Hobby Lobby* is interpreted. The contributions from Thomas Berg and Frederick Gedicks both make arguments for limiting the scope of its holding. Professor Gedicks, a prominent opponent of the *Hobby Lobby* claim, sees a potential “silver lining” (the subject of his “One Cheer”) in the fact that “five Justices expressly recognized that RFRA does not authorize permissive religious exemptions that shift the costs of observing a religion from those who practice it to those who do not.”¹⁰ Those five are the four dissenting Justices and, in his usual swing role, Justice Kennedy, who joined the majority but wrote a separate concurrence emphasizing that one person’s free exercise of religion cannot be allowed to “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”¹¹ Professor Berg, who is supportive of the accommodation claim sanctioned in *Hobby Lobby*, contends that the scope of religious accommodation in the for-profit sphere should not be—and will not be—too broad. His general position is that “although *Hobby Lobby* is correct that for-profit businesses should be able to assert claims, it is also correct in approaching the scope of accommodations cautiously.”¹²

Of course, not all of our contributors agree that the Court proceeded “cautiously” in *Hobby Lobby*. Professor Elizabeth Sepper and ACLU Dep-

⁹ *Id.* at 100.

¹⁰ Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 175 (2015).

¹¹ *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

¹² Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 148 (2015).

uty Legal Director Louise Melling register grave concern about the reasoning in *Hobby Lobby* and its future consequences. Where others might see silver linings and limits to the scope of the principle announced in *Hobby Lobby*, they see, as Professor Sepper puts it, “a radical break with religious liberty doctrine”¹³ without articulable or meaningful limiting principles. Moreover, they see gender being used as a faux limiting principle, with the Court, again in Professor Sepper’s description, “insist[ing] that its decision was limited to the contraceptive mandate”¹⁴—thereby making it seem as if laws and regulations protecting other interests will not be subject to judicial exemptions while simultaneously undervaluing reproductive rights.

Troubled by existing “laws permitting institutions and individuals to refuse to provide abortion,”¹⁵ Melling expresses apprehension at the prospect of similar laws (or judicial holdings) threatening access to contraception. And seeing threats beyond gender equality and reproductive healthcare, she calls attention to the harms that religious exemptions can inflict on LGBT people. With her keen knowledge of how disputes are playing out on the ground, Melling reveals an often-overlooked danger of religious accommodations. Against those who counsel accommodation as a way to reduce and settle conflict, thereby paving the way for a gradualist approach to cementing egalitarian norms, Melling warns that accommodations, like the one granted in *Hobby Lobby* and those sought from LGBT antidiscrimination laws, can “intensify . . . conflict.”¹⁶ Calling attention to the important role that law plays in shaping social norms, she raises the possibility that accommodation may legitimize and solidify traditional values in the realms of sexuality and gender, rather than (as numerous commentators have proposed) facilitating a gradualist approach to social change.

Ultimately, there is profound disagreement among our writers about the scope of the *Hobby Lobby* holding and what it portends for the future of judicial treatment of religious accommodation. In this set of symposium contributions, Professor Berg stands out as the lone proponent of the type of religious exemption sanctioned in *Hobby Lobby*. (More writings broadly sympathetic to claims to religious accommodation are represented in the conference proceedings being published in the *Harvard Law & Policy Review* and the *Southern California Law Review*.¹⁷) Even beyond his distinc-

¹³ Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 193 (2015).

¹⁴ *Id.* at 222.

¹⁵ Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 186 (2015).

¹⁶ *Id.* at 188.

¹⁷ Of these, only one—the piece by Michael A. Helfand—specifically endorses the holding in *Hobby Lobby*, and that endorsement is qualified, based on the articulation of a test of “implied consent” that would support the right of some for-profit businesses to an exemption from the contraceptive coverage requirement but not others. See Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. (forthcoming 2015).

tive prescriptive position, Professor Berg's analysis represents an interesting contrast with other authors in this symposium issue. Whereas Professor Tushnet advances a "pro-religion" argument in favor of strict separation between church and state and against judicial religious accommodation, Professor Berg offers a "pro-progressivism" argument in favor of religious accommodation. More specifically, he articulates an argument in favor of a right to religious accommodation based on progressive premises generally supportive of government regulation. Whereas Professor Sepper argues that "[l]ike *Lochner's* liberty of contract, *Hobby Lobby's* corporate conscience threatens the integrity of a wide array of regulations of commercial life,"¹⁸ Professor Berg aims for a limited right to religious exemptions (but one capacious enough to support *Hobby Lobby*) which does not threaten the regulatory state. Professor Berg seeks to refute not only progressive critics of religious exemption but also more conservative voices that have linked their advocacy for religious exemptions to a more generally hostile stance toward the "welfare state." In staking out his position, Professor Berg pointedly parts company with Melling, Professor Gedicks, and Professor Lupu. Whereas they identify the dangers of religious accommodations that impose harm on specific third parties, Professor Berg supports the Court's position that, in a world of extensive regulation, any government regulation could be framed as benefiting a third party, "turn[ing] all regulations into entitlements to which nobody could object on religious grounds" and "rendering RFRA meaningless."¹⁹ According to Professor Berg, this does not (or need not) amount to an argument *against* the regulatory state, but rather constitutes an argument for religious accommodation *in* a regulatory state. Ultimately, whereas Melling warns against compromise through religious accommodation, for Professor Berg, "[r]eligious accommodation offers the means to mediate between the expanded state and the free exercise of religion—to affirm the legitimacy of the former while preserving room for the latter."²⁰

Compared to Professor Berg, the other authors in this symposium do not have such a sanguine view. They disagree about the compatibility between a judicial right to religious accommodation and a robust regulatory-welfare state. They are concerned that strong religious accommodation principles can eviscerate gender and LGBT equality. They question the ability of judges to decide accommodation claims impartially. They worry about the possibility that religious accommodation will fuel conflict over social norms and entrench opposition to progressive change. Indeed, they even question whether a judicial right to religious accommodation is compatible with religious freedom, in particular freedom from state corruption.

¹⁸ Sepper, *supra* note 13, at 222.

¹⁹ Berg, *supra* note 12, at 133 (quoting *Hobby Lobby*, 134 S. Ct. at 2781 n.37).

²⁰ *Id.* at 134.

Surely the authors assembled in this issue will continue to shape the law and politics of religious accommodation. We expect that their insightful contributions that follow this Introduction will guide scholars, advocates, and commentators as they debate the meaning and implications of *Hobby Lobby* and the role of religious accommodation more generally. And, more broadly, it is our hope that the conference from which these Articles emerged not only contributed to ongoing discussions over the relationship between religious liberty and civil rights but also initiated a promising new conversation, featuring a range of voices and perspectives, about the specific issues raised—but not resolved—by events over the past several months.

