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## Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics

**ABSTRACT.** Persons of faith are now seeking religious exemptions from laws concerning sex, reproduction, and marriage on the ground that the law makes the objector complicit in the assertedly sinful conduct of others. We term claims of this kind, which were at issue in *Burwell v. Hobby Lobby Stores*, complicity-based conscience claims. Complicity-based conscience claims differ in form and in social logic from the claims featured in the free exercise cases that the Religious Freedom Restoration Act (RFRA) invokes. The distinctive features of complicity-based conscience claims matter, not because they make the claim for religious exemption any less authentic or sincere, but rather because accommodating claims of this kind has the potential to inflict material and dignitary harms on other citizens.

Complicity claims focus on the conduct of others outside the faith community. Their accommodation therefore has potential to harm those whom the claimants view as sinning. Today complicity claims are asserted by growing numbers of Americans about contentious “culture war” issues. This dynamic amplifies the effects of accommodation. Faith claims that concern questions in democratic contest will escalate in number, and accommodation of the claims will be fraught with significance, not only for the claimants, but also for those whose conduct the claimants condemn. Some urge accommodation in the hopes of peaceful settlement, yet, as we show, complicity claims can provide an avenue to extend, rather than settle, conflict.

We highlight the distinctive form and social logic of complicity-based conscience claims so that those debating accommodation do so with the impact on third parties fully in view. We show how concern about the third-party impact of accommodation structured the Court’s decision in *Hobby Lobby* and demonstrate how this concern is an integral part of RFRA’s compelling interest and narrow tailoring inquiries. At issue is not only whether but how complicity claims are accommodated.

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## INTRODUCTION

*“I don’t think the culture wars are over . . . but are moving into a new phase.”*  
— Russell Moore, President, Ethics & Religious Liberty Commission,  
Southern Baptist Convention<sup>1</sup>

In *Burwell v. Hobby Lobby Stores, Inc.*,<sup>2</sup> closely held for-profit corporations asserted claims under the Religious Freedom Restoration Act (RFRA)<sup>3</sup> to exemptions from provisions of the Affordable Care Act (ACA) that require employee health insurance plans to include coverage of contraception. While much attention has focused on the fact that the claimants in these cases were corporate entities,<sup>4</sup> far less attention has been paid to the *kind* of religious liberties claims the corporate claimants asserted.<sup>5</sup> The claimants in *Hobby Lobby* objected to providing their employees health insurance benefits under the ACA. They contended that providing insurance coverage would make them *complicit* with employees who might use the insurance to purchase forms of contraception that the employers viewed as sinful.

Claims of this kind—religious objections to being made complicit in the assertedly sinful conduct of others—are often raised in response to contested sexual norms, and they now represent an important part of courts’ religious

1. Byron York, *Evangelical Leader Shows How GOP Can Finesse Gay Marriage*, WASH. EXAMINER, Mar. 27, 2014, <http://washingtonexaminer.com/evangelical-leader-shows-how-gop-can-finesse-gay-marriage/article/2546413> [<http://perma.cc/9Q9F-YN78>].
2. 134 S. Ct. 2751 (2014).
3. 42 U.S.C. § 2000bb-1(a) to (b) (2012).
4. *But cf.* Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 78-80 (2015) (suggesting that the claim of for-profit corporations was within the contemplation of both free exercise law and RFRA). The coverage of corporate claimants continues to be debated. *See, e.g.*, Letter from Robert P. Bartlett III, Professor, Univ. of Cal. Berkeley Sch. of Law, et al. to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs. (Oct. 8, 2014), <http://ssrn.com/abstract=2507305> [<http://perma.cc/V2BV-9LJY>] (commenting on the proposed definition of “eligible organization” for the purposes of the coverage of certain preventative services under the ACA); Letter from Lyman P. Q. Johnson, Professor, Washington & Lee Univ. Sch. of Law, et al. to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs. (Oct. 20, 2014), <http://scholarlycommons.law.wlu.edu/wlufac/377> [<http://perma.cc/6XY9-S7AP>] (same).
5. *But see* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. (forthcoming 2015), <http://ssrn.com/abstract=2496218> [<http://perma.cc/JDW8-6YT8>]; Nomi Maya Stolzenberg, *It’s About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. (forthcoming 2015), <http://weblaw.usc.edu/centers/clhc/events/feature/documents/Stolzenbergpaper.pdf> [<http://perma.cc/5XYZ-67MM>].

liberties docket.<sup>6</sup> Consider, for instance, claims arising in the same-sex marriage context. A growing number of business owners have begun to voice religious objections to providing goods and services for same-sex weddings.<sup>7</sup> Baking a cake, it is claimed, makes a baker complicit in a same-sex relationship to which he objects.<sup>8</sup>

We term religious objections to being made complicit in the assertedly sinful conduct of others *complicity-based conscience claims*. There are at least two important dimensions to such claims. The claim concerns the third party's conduct—for example, her use of contraception—but, crucially, it also concerns the claimant's relationship to the third party. Complicity claims are faith claims about how to live in community with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful. Because these claims are explicitly oriented toward third parties, they present special concerns about third-party harm.

*Hobby Lobby* did not discuss the kinds of harm that accommodating complicity-based conscience claims can impose on other citizens, but the Court decided the case on grounds that made concerns about the interests of third parties central.<sup>9</sup> It emphasized that because the government had other means of ensuring that women have access to affordable contraception, the plaintiffs' religious beliefs could be accommodated with “precisely zero” effect on female employees and dependents.<sup>10</sup> In what follows, we examine the distinctive features of complicity-based conscience claims in order to give visibility, practical meaning, and principled sense to the concerns about third-party harm that already structure the Court's decision in *Hobby Lobby*.

As we show, complicity-based conscience claims differ in *form* and in *social logic* from the claims featured in the free exercise cases RFRA invokes. The claims may be just as authentic and sincere as any other claim of faith protected by the statute, yet these differences in form and logic matter because they am-

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6. In the 2013 Supreme Court term alone, religious exemption claims of this kind appeared in *Hobby Lobby*, 134 S. Ct. 2751; *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2013); and *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. Ct. App. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

7. See, e.g., *Odgaard v. Iowa Civil Rights Comm'n*, No. CV046451 (Iowa Dist. Ct. Apr. 3, 2014); *Elane Photography*, 309 P.3d 53; Complaint, *Arlene's Flowers, Inc. v. Ferguson*, No. 13-2-01898-2 (Wash. Super. Ct. Aug. 1, 2013).

8. See, e.g., *Mullins v. Masterpiece Cakeshop, Inc.*, No. CR2013-0008 (Colo. Admin. Ct. Dec. 6, 2013).

9. See *infra* Part I.B.

10. *Hobby Lobby*, 134 S. Ct. at 2760 (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”). We probe the accuracy of this claim *infra* Part V.

plify the material and dignitary harms that accommodation of the claims can inflict on other citizens.

In the free exercise cases that RFRA invokes, claims were advanced by religious minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws; the costs of accommodating their claims were minimal and widely shared.<sup>11</sup> Complicity-based conscience claims differ in form. Because the claims concern the conduct of citizens outside the faith community, accommodating the claims can harm those whose conduct the claimants view as sinful. Complicity-based conscience claims also differ in social logic. Complicity claims are now asserted by growing numbers of Americans about some of the most contentious “culture war” issues of our day.<sup>12</sup> As we show, complicity claims are often encouraged by those seeking to mobilize the faithful against laws that depart from traditional sexual morality.<sup>13</sup> When those engaged in “culture war” conflicts encourage the faithful to seek exemptions from laws that protect citizens who depart from customary morality, religious accommodation will affect other citizens in ways not at issue in the free exercise cases RFRA invokes. Faith claims that concern questions in democratic contest will escalate in number, and accommodation of the claims will be fraught with significance, not only for the claimants, but also for those whose conduct the claimants condemn. Accommodating *these* religious liberty claims will have social meaning and material consequences for the law-abiding persons who the claimants say are sinning.<sup>14</sup>

Some, tacitly acknowledging the democratic contests in which complicity claims are entangled, urge religious accommodation in the hopes of peaceful settlement.<sup>15</sup> Yet the complicity-based conscience claims asserted in these contexts are often not simple claims to withdraw. As we show, complicity claims can provide an avenue to extend, rather than settle, conflict about social norms in democratic contest. Those seeking to preserve traditional norms governing sex, reproduction, and marriage may speak as a majority endeavoring to defend or enact laws that enforce community-wide customary norms—or, without change in numbers, they may speak as minorities endeavoring to avoid com-

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11. See *infra* Part I.A.

12. As examples throughout illustrate, complicity-based religious objections are expressed about persons who act outside of traditional family roles; engage in contraception, abortion, or assisted reproduction; cohabit or have children outside marriage; have nonmarital or same-sex sex; or enter a relationship with or marry a person of the same sex. The religious claimants seek exemptions from laws designed to protect others whose beliefs and actions the claimants condemn.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* note 152.

plicity when law departs from those norms.<sup>16</sup> Religious accommodation claims of this kind may continue democratic conflict in new forms, or so at least some advocates hope.<sup>17</sup> Faith claimants are free to assert claims for religious exemption in this context, as in any other, but it is important to consider the exemption's impact on those the law protects in deciding whether and how to restrict the law's enforcement.

To date, the features of complicity-based conscience claims that distinctively endow them with the capacity to inflict harms on third parties have not been well appreciated in debates over accommodation. Our purpose in writing is to draw attention to the distinctive features of these claims so that they are clearly in view in the many legal contexts and institutional settings in which the question of accommodation is now being debated. We examine the distinctive features of complicity-based conscience claims in the belief that these features matter in judgments about accommodation, and in the belief that others will recognize that this is so, even if they may weigh these concerns differently because they hold different views about the importance of integrating religion in public life.<sup>18</sup>

Conscience claims have long played a crucial role in our ethical, political, and religious lives.<sup>19</sup> Yet respect for conscience does not require us to ignore the special features of complicity-based conscience claims that endow them with capacity to harm other citizens. However differently those in the debate may weigh claims for accommodation, few would affirm a result in which some citizens are singled out to bear significant costs of another's religious exercise. Appreciating the consequences for third parties may affect *which* religious liberties claims are accommodated, *how* religious liberties claims are accommodated, and *why* judges and legislators shape religious liberties law in particular ways.<sup>20</sup>

We proceed in five Parts. We begin our analysis of complicity-based conscience claims in *Hobby Lobby*, move outside doctrine to consider mobilization around claims of complicity, and finally return to law to consider how our analysis bears on judicial and legislative approaches to accommodation.

Part I shows that complicity-based conscience claims are distinctive in form, focusing on third parties in ways that the claims in the free exercise cases

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16. See *infra* Part III.B.

17. See *infra* Part III.B.

18. See, e.g., Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015) (raising concerns with third-party harm in an account that is deeply sympathetic to claims for religious accommodation).

19. See *infra* notes 79, 105.

20. See *infra* Part V.

that RFRA invokes do not. It also shows how a concern about third-party harm with deep roots in our religious liberties case law shaped the Court's decision in *Hobby Lobby*. Part II illustrates the third-party effects of complicity claims in legislation that authorizes conscience objections to providing healthcare services—legislation from which the complicity-based conscience claims in *Hobby Lobby* may have descended. Drawing on the example of healthcare refusal laws, Part III begins to explore how claims about complicity have a life in religion *and* in politics. Unlike the claims in the free exercise cases RFRA invokes, complicity-based conscience claims have become a locus of mobilized political action seeking law reform designed to preserve traditional sexual morality. Drawing on this evidence, Part IV demonstrates how the distinctive form and social logic of complicity-based conscience claims amplify the material and dignitary harms that accommodating such claims can inflict. By material harms we mean tangible, practical effects, such as access to goods and services. By dignitary harms, we refer to the social meaning, including stigma, which may result from accommodating complicity-based objections.

In Part V, we reconnect these concerns about third-party harm to doctrine. We show how inquiry into the third-party harms of religious accommodation arises under RFRA's compelling interest and least restrictive means analysis, as well as under other bodies of federal and state law. These third-party harms raise questions of fundamental fairness and can implicate different constitutional values in the many contexts in which claimants now seek accommodation of complicity-based conscience claims.

## I. BURDENS OF ACCOMMODATION UNDER *HOBBY LOBBY*

The claimants in *Hobby Lobby* challenged a law requiring employers to provide their employees health insurance that covered contraceptives the claimants deemed “abortifacients.”<sup>21</sup> The law, they argued, forced them to “provid[e] insurance coverage for items that risk killing an embryo [and thereby] makes them *complicit* in abortion.”<sup>22</sup> The concept of complicity has a richly elaborated

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21. Brief for Respondents at 14, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356). The plaintiffs termed the contraceptives “abortifacients” on the basis of their religious belief that pregnancy begins at fertilization (rather than implantation) of an egg. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2012) (“[O]ne aspect of the Greens’ religious commitment is a belief that human life begins when sperm fertilizes an egg.”). The contraceptives at issue in *Hobby Lobby* operate before implantation of a fertilized egg in the uterus, the point at which medical science (and federal law) understand pregnancy to begin. In fact, several of these contraceptives operate *before ovulation*. See *infra* note 273.

22. See Brief for Respondents, *supra* note 21, at 9 (emphasis added).

theological basis in Catholicism.<sup>23</sup> But evangelical Christians, such as the Greens, who own Hobby Lobby,<sup>24</sup> also assert that their beliefs preclude them from engaging in conduct that would make them complicit in sin.<sup>25</sup> As Justice Alito explained in *Hobby Lobby*, the claimants believe “it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.”<sup>26</sup>

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23. Catholic doctrine on “cooperation” and “scandal” admonishes Catholics to avoid “complicity in the sins of others.” 2 BERNARD HÄRING, *THE LAW OF CHRIST* 494-517 (Edwin G. Kaiser trans., Newman Press 1963) (1954). For more contemporary texts, see ANTHONY FISHER, *CATHOLIC BIOETHICS FOR A NEW MILLENNIUM* 69-98 (2012); 3 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS* 871-97 (1997). Principles of cooperation address the circumstances under which an individual or institution can be involved in others’ illicit actions. The *Catechism of the Catholic Church* explains:

Sin is a personal act. Moreover, we have a responsibility for the sins committed by others when *we cooperate in them*:

- by participating directly and voluntarily in them;
- by ordering, advising, praising, or approving them;
- by not disclosing or not hindering them when we have an obligation to do so;
- by protecting evil-doers.

CATECHISM OF THE CATHOLIC CHURCH pt. 3, ¶ 1868. Formal cooperation, which is morally wrong, occurs when the individual intends the other’s illicit action. Material cooperation, which can be morally licit, occurs when the individual does not intend the object of the other’s action. Even cooperation that in other respects appears morally licit is proscribed if it results in scandal. *Id.* ¶ 2284 (defining scandal as “an attitude or behavior that leads another to do evil”). Scandal occurs when the individual or institution engages in conduct that appears to sanction someone else’s wrongful behavior. *Id.* ¶¶ 2284, 2286 (explaining that “[t]he person who gives scandal becomes his neighbor’s tempter” and that “[s]candal can be provoked by laws or institutions, by fashion or opinion”). As we explain in Part IV, the U.S. Conference of Catholic Bishops (USCCB) has applied these concepts in the context of Catholic-run healthcare delivery. See *Ethical and Religious Directives for Catholic Health Care Services*, U.S. CONF. CATH. BISHOPS, app. at 29 (1995) [hereinafter *1995 Religious Directives for Catholic Health Care Services*] (outlining the principles governing cooperation).

24. See *Hobby Lobby*, 134 S. Ct. at 2765 (describing the Greens as “Christians”); Alan Rappeport, *Family Behind Hobby Lobby Has New Project: Bible Museum*, N.Y. TIMES, July 17, 2014, <http://www.nytimes.com/2014/07/17/us/politics/family-that-owns-hobby-lobby-plans-bible-museum-in-washington.html> [<http://perma.cc/GU56-SERE>] (describing the Greens as an “evangelical Christian family”). The Greens own Hobby Lobby through a trust of which each family member is a trustee. *Hobby Lobby*, 134 S. Ct. at 2765 n.15.
25. Evangelical Protestants do not have the same elaborately developed concept of cooperation. Compare Brief of 67 Catholic Theologians and Ethicists as Amici Curiae in Support of Hobby Lobby and Conestoga et al., *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), with Brief of 38 Protestant Theologians, Southeastern Baptist Theological Seminary, Coalition of African American Pastors, Manhattan Declaration, and Instep International as Amici Curiae in Support of Hobby Lobby and Conestoga et al., *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356).
26. 134 S. Ct. at 2765 (quoting *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 382 (3d Cir. 2013)).



Claims based on complicity are different in form than other kinds of religious liberty claims. Consider the claim the Court most recently confronted. In *Holt v. Hobbs*,<sup>27</sup> a Salafi Muslim inmate claimed an exemption from a rule forbidding prisoners to wear beards.<sup>28</sup> Gregory Holt sought an exemption to groom in accordance with precepts of his religion—not to avoid complicity in what he believed were the sinful acts of another citizen.<sup>29</sup> This difference in the structure of religious exemption claims is relevant—not to the claim’s sincerity or religious significance, but instead to the claim’s potential to inflict harms on specific third parties. The Court held that Holt was entitled to an accommodation.<sup>30</sup> Accommodating Holt’s religious exercise claim imposed modest costs on the public and the prison system; no persons or groups were singled out to bear the burden of Holt’s religious exercise. Indeed, in her very brief concurrence, Justice Ginsburg explained that “accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”<sup>31</sup> In these respects, the claim for religious exemption in *Holt* differs from the claim in *Hobby Lobby* and more closely resembles claims in the classic free exercise cases on which Congress focused in enacting RFRA.

In this Part, we begin to explore differences between the complicity-based claim featured in *Hobby Lobby* and the kinds of religious liberty claims at issue in the paradigmatic free exercise cases Congress invoked in RFRA. Complicity-based claims concern other citizens and so may inflict distinctive burdens on them. The Court has expressed concern about accommodating religious liberty when it may inflict harm on third parties. We show how this concern shaped the Court’s judgment in *Hobby Lobby*.

#### A. Differentiating Claims with Attention to Accommodation’s Impact

RFRA invokes three free exercise cases<sup>32</sup>: *Sherbert v. Verner*<sup>33</sup> and *Wisconsin v. Yoder*,<sup>34</sup> canonical cases representing the high-water mark of free exercise ju-

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27. 135 S. Ct. 853 (2015).

28. Holt asserted his claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that shares significant common ground with RFRA. See *Hobby Lobby*, 134 S. Ct. at 2761 (explaining that RLUIPA “imposes the same general test as RFRA but on a more limited category of governmental actions” and that “RLUIPA amended RFRA’s definition of the ‘exercise of religion’”).

29. Even though Holt believed he should not trim his beard at all, he asked only for permission to grow a half-inch beard. See *Holt*, 135 S. Ct. at 861.

30. *Id.* at 867.

31. *Id.* (Ginsburg, J., concurring).

32. See 42 U.S.C. § 2000bb(a)(4)-(b)(1) (2012).

33. 374 U.S. 398 (1963).

risprudence, and *Employment Division v. Smith*, the precedent departing from this free exercise tradition that prompted the passage of RFRA.<sup>35</sup> None of these cases featured complicity-based claims.

The claimants in these cases were minority religious practitioners who asserted unfamiliar religious convictions.<sup>36</sup> The Seventh-day Adventist in *Sherbert*, the Amish in *Yoder*, and the members of the Native American Church in *Smith* claimed belief systems outside the mainstream.<sup>37</sup> They sought exemptions to act in accordance with unconventional beliefs generally not contemplated by the government when it originally crafted the laws being challenged. The claimant in *Sherbert*, who observed a Saturday Sabbath, asked that the state extend “unemployment benefits to Sabbatarians in common with Sunday worshippers.”<sup>38</sup> The claimants in *Yoder* asked for an exemption from compulsory education laws because they believed secondary school education would

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34. 406 U.S. 205 (1972).

35. 494 U.S. 872 (1990). RFRA explicitly responded to *Smith*, where the Court, in holding that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability,’” *id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)), articulated a standard that most viewed as significantly less protective of religious liberty than prior case law had been. There is debate over whether RFRA “restore[d] the compelling interest test as set forth in [*Sherbert*] and [*Yoder*],” as would be suggested by the language of § 2000bb(b)(1), or merely restored the less demanding standard consistent with the state of the law the “day before *Smith*.” Compare 139 CONG. REC. 26178 (1993) (statement of Sen. Edward M. Kennedy) (explaining that RFRA was “designed to restore the compelling interest test for deciding free exercise claims”), with H.R. REP. NO. 103-88, at 15 (1993) (“The amendments . . . make clear that the purpose of the statute is to ‘turn the clock back’ to the day before *Smith* was decided.”). On this point, see Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 193-98 (1995).

36. See, e.g., Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 221 (2010) (describing *Yoder* as involving an Amish practice that “ran against the strong social norm”); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1420 (1990) (observing that “[j]udicially enforceable exemptions under the free exercise clause . . . ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions by the representative branches”).

37. *Sherbert*, 374 U.S. 398 (involving a Seventh-day Adventist who observed a Saturday Sabbath); *Yoder*, 406 U.S. 205 (involving members of Amish communities who opposed formal education of children after the eighth grade); *Smith*, 494 U.S. 872 (involving members of the Native American Church who used peyote as part of religious practice). Even after RFRA, the Court’s central pre-*Hobby Lobby* precedent applying the statute featured minority religious claimants – “a religious sect with origins in the Amazon Rainforest” – seeking space to engage in an anomalous religious ritual – “drinking a sacramental tea . . . that contains a hallucinogen.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

38. 374 U.S. at 409.

“endanger their own salvation and that of their children.”<sup>39</sup> And the claimants in *Smith* sought an exemption from drug laws that precluded them from engaging in ritual peyote use.<sup>40</sup>

In these central free exercise cases, the effects of the sought-after accommodation were limited and borne by society as a whole. In *Smith*, for instance, the exemption would only have modestly detracted from the public health and safety interests advanced by the drug laws.<sup>41</sup> And in *Sherbert*, where it was clear that a relatively “insignificant number of seventh-day observers [were] involved,”<sup>42</sup> accommodation imposed at most generalized costs on the state unemployment system.<sup>43</sup> Critically, in *Yoder*, the Court conceptualized the interests of the Amish children as aligned with their parents, such that the accommodation benefitted, rather than potentially harmed, the children themselves.<sup>44</sup> In the cases that RFRA cites, accommodating the religious liberty claims would not have harmed specifically identified third parties.<sup>45</sup>

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39. 406 U.S. at 209. While *Yoder* involved claims relating to the conduct of others—the claimants’ children—it did not feature a complicity claim. The claimants did not object to being made complicit in the sins of their children, but rather asserted their own religious duty to comply with religious principles regarding the rearing of their children. *See id.* at 211 (“[T]hey view secondary school education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs.”).

40. 494 U.S. at 874.

41. *Id.* at 911–12, 916 (Blackmun, J., dissenting).

42. Brief of Synagogue Council of America et al. as Amici Curiae at 12, *Sherbert*, 374 U.S. 398 (No. 526).

43. 374 U.S. at 407. Nonetheless, in this situation, the employer may experience a modest increase in its unemployment tax rate. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1199 (2d ed. 1988); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. REV.* 1465, 1513 & n.154 (1999).

44. 406 U.S. at 215. In fact, over the objection of Justice Douglas’s dissenting opinion, the Court dismissed as “highly speculative” the state’s concern with “the possibility that some [Amish] children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life.” *Id.* at 224.

45. In addition to explicit reference to *Sherbert*, *Yoder*, and *Smith*, RFRA also refers to “prior Federal court rulings.” 42 U.S.C. § 2000bb(a)(5) (2012). The only pre-RFRA Supreme Court free exercise decision that includes a claim involving complicity is *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). In that case, the claimant, a Jehovah’s Witness, was denied unemployment benefits after refusing employment because “his religious beliefs forbade participation in the production of armaments.” *Id.* at 709. The claim in *Thomas* differs from the complicity-based conscience claims we are examining in that it does not single out a particular group of citizens as sinning. And in the relatively few times when *Thomas* appears in the legislative history of RFRA, it concerns matters having nothing to do with complicity claims. *See, e.g., Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 121 (1992) (statement of Rep. Stephen J. Solarz) (quot-

The claims featured in *Sherbert*, *Yoder*, and *Smith* differ in form from the claim at issue in *Hobby Lobby*. Complicity-based conscience claims are oriented toward third parties who do not share the claimant's beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn.

RFRA's language sweeps broadly enough to cover complicity-based conscience claims. But, we observe, these are not the kind of claims on which Congress focused when it adopted the statute's framework for protecting religious liberty. In fact, several years later, when Congress encountered a complicity-based claim while considering new religious liberties legislation, members expressed great concern about the third-party harms the claim's accommodation would inflict. In *Thomas v. Anchorage Equal Rights Commission*, a federal appellate court recognized a free exercise claim to exemption from state antidiscrimination law for landlords who refused to rent to unmarried couples based on their belief that "facilitating cohabitation in any way is tantamount to facilitating sin."<sup>46</sup> When Congress confronted the prospect of accommodating *this* type of claim, legislators worried that granting religious exemption claims from state and local antidiscrimination laws could harm vulnerable groups of citi-

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ing *Thomas* for the proposition that the government must use "the least restrictive means of achieving a compelling state interest," 450 U.S. at 718); *id.* at 153 (statement of Edward McGlynn Gaffney, Jr., Dean and Professor of Law, Valparaiso University School of Law) (citing *Thomas* in a string citation of unemployment compensation cases).

"[P]rior Federal court rulings" might also include *Bob Jones University v. United States*, 461 U.S. 574 (1983). After refusing to admit African-American students, Bob Jones University shifted to a policy of refusing to admit unmarried African-American students before ultimately settling on a policy admitting such students but maintaining a disciplinary rule prohibiting interracial dating and marriage, as well as advocacy of interracial marriage. *Id.* at 580-81. The university defended its policy on religious free exercise grounds, which the Court rejected. *Id.* at 603-04. While accommodating this religious exercise claim would have inflicted third-party harms, we do not understand the claim as complicity-based. The university did not object to students' interracial dating and marriage because the university would be complicit in the students' sinful conduct, but rather because the university deemed such conduct to violate the religious principles governing the faith community.

46. 165 F.3d 692, 696, 718 (9th Cir. 1999), *rev'd en banc on other grounds*, 220 F.3d 1134 (9th Cir. 2000). RFRA had passed the Senate 97-3 (after passing by voice vote in the House). U.S. Senate Roll Call Vote No. 331, 103d Cong. (Oct. 27, 1993); 139 CONG. REC. 9680-87 (1993). After the Court struck down RFRA as applied to the states, in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), Congress considered a new religious liberties bill, the Religious Liberty Protection Act (RLPA), which would have applied the RFRA standard to the states pursuant to Congress's Commerce Clause authority. Religious Liberty Protection Act of 1998, § 2(a), H.R. 4019, 105th Cong. (1998); H.R. REP. NO. 106-219, at 12-13 (1999). As it considered this bill, however, lawmakers were confronted with the decision of the Ninth Circuit Court of Appeals in *Thomas*. This became a significant focus of congressional debate over RLPA. See, e.g., *Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 148, 161 (1999); H.R. REP. NO. 106-219, at 14, 38.

zens, including lesbians, gay men, and unmarried parents.<sup>47</sup> Ultimately, Congress did not enact the statute that lawmakers feared would have sanctioned this claim.<sup>48</sup>

This is not surprising. In adjudicated religious liberties law, when accommodation has threatened to impose significant burdens on other citizens, courts have repeatedly rejected the exemption claims. The underlying intuition seems to be that one citizen should not be singled out to bear significant costs of another person's religious exercise.<sup>49</sup> Concerns of this kind are expressed across a range of doctrinal locations.<sup>50</sup> In free exercise case law,<sup>51</sup> the Court has

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47. Congressional members, including Representative Jerrold Nadler, expressed "concern[] that this legislation, as drafted, would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans, including unmarried couples, single parents, [and] lesbians and gays." H.R. REP. NO. 106-219, at 41.

48. Congressional support for RLPA fell apart, and Representative Nadler introduced an amendment that would have foreclosed the use of RLPA to avoid antidiscrimination law. 145 CONG. REC. 16,233-34 (1999). While the House passed RLPA without the Nadler amendment, 145 CONG. REC. 16,245 (1999), the bill never came up for a vote in the Senate, H.R. 1,691, 106th Cong. (1999) (recording that on November 19, 1999, the bill was received in the Senate, read twice, and referred to the Senate Committee on the Judiciary). See also 145 CONG. REC. 31,077 (1999) (listing referred measures).

Cases featuring conflicts between religious exemption claims and antidiscrimination law existed at the time that Congress passed RFRA. See Lupu, *supra* note 35, at 208-10; William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 228 (1995).

49. See *infra* Part V.B.

50. See, e.g., Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 172 (2015); 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, 356-57 (2014); Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 622 (2000); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 290-91 & n.84 (2010); James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99 (2015); Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 801 (1999); Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 206 (2015); Marty Lederman, *Hobby Lobby Part X—A Quick Word on the Conestoga Wood Reply Brief*, BALKINIZATION (Mar. 12, 2014, 12:22 PM), <http://balkin.blogspot.com/2014/03/hobby-lobby-part-x-quick-word-on.html> [<http://perma.cc/5ZL6-XRRD>]. For an argument in favor of a more systematic approach to third-party harm in religious accommodation law, see generally Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433 (2014).

51. E.g., *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 304-05 (1985); *United States v. Lee*, 455 U.S. 252, 261 (1982). Lower courts also have enforced sex discrimination laws against employers despite those employers' requests for religious exemptions. See, e.g.,

rejected exemption claims that would, for example, “impose the employer’s religious faith on the employees.”<sup>52</sup> Under the Establishment Clause, the Court has invalidated accommodations that impose “significant burdens” on third parties.<sup>53</sup> And, in applying the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court has explained that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>54</sup> As we now show, the Supreme Court reasoned in this same tradition in *Hobby Lobby*, where concerns about third parties guided judgments about accommodation.

### B. *Hobby Lobby and the Question of Third-Party Harm*

In *Hobby Lobby*, religious claimants sought to be excused from a law requiring employers who provide health insurance to their employees to cover forms of contraception the claimants viewed as sinful. The Court required the government to provide the exemption, but without declaring that the religious liberty claim trumped the government’s interest in providing employees access to contraception. Instead, the Court resolved the case on grounds that treated as

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*Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1399 (4th Cir. 1990) (holding that a religious school must comply with federal law requiring equal pay for men and women); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368 (9th Cir. 1986) (same); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (holding that a religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, and noting that “it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace”).

52. *Lee*, 455 U.S. at 261. Only in limited circumstances, for example in the context of the ministerial exception for religious institutions, has the Court accommodated religious liberty claims despite direct effects on specific third parties. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). The ministerial exception is a judicially created doctrine grounded in both establishment and free exercise principles; this doctrine can shield churches from some claims by employees, including clergy, whose jobs entail substantial religious obligations. See *id.* at 702. We note also that, in certain circumstances, Title VII allows religious organizations to discriminate in employment on the basis of religion. See 42 U.S.C. § 2000e-1(a) (2012).
53. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). On this point, see Gedicks & Van Tassell, *supra* note 50, at 357-59.
54. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Similarly, in the Title VII context, courts have denied claims to accommodation by employees where the accommodation would burden fellow employees and other third parties. See *Noesen v. Med. Staffing Network, Inc.*, 232 F. App’x 581, 584-85 (7th Cir. 2007) (ruling that “an accommodation that requires other employees to assume a disproportionate workload (or divert them from their regular work) is an undue hardship as a matter of law”); *Endres v. Ind. State Police*, 349 F.3d 922, 925-26 (7th Cir. 2003); *Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337, 1338 (8th Cir. 1995).

weighty both the claimants' religious liberty claim *and* Congress's interest in protecting women's health.

Because the Department of Health and Human Services (HHS) had already offered an accommodation to religiously affiliated nonprofit institutions, the Court reasoned that application of the insurance requirement to closely held for-profit corporations with religious objections was not narrowly tailored.<sup>55</sup> Writing for the majority, Justice Alito several times emphasized that the government could provide plaintiffs the benefit of a similar arrangement without restricting employees' access to contraception.<sup>56</sup> Concern about protecting third parties from harm was a structuring principle of the Court's decision, even if the Court may have erred in assuming that the accommodation would impose no burdens on third parties.<sup>57</sup>

Justice Kennedy appears to have guided the Court to a decision that endeavored to vindicate both the interests of the claimants seeking religious exemptions and of the government in enforcing the statute. Justice Alito's majority opinion proceeded on the assumption that the government has a compelling interest in ensuring women's "cost-free access to . . . contraceptive methods."<sup>58</sup> Justice Kennedy separately concurred in order to emphasize: "It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling in-

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55. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

56. *See id.* at 2780, 2782 (explaining that the government could itself "assume the cost of providing" the contraceptives or could replicate the accommodation provided for religiously affiliated nonprofit organizations). Nonetheless, the Court reserved the question of whether the accommodation provided to religiously affiliated nonprofits would survive a challenge under RFRA. *Id.* at 2782.

57. Significant uncertainty remains. In the wake of *Hobby Lobby*, the government sought comments on a proposal to extend to closely held for-profit corporations the accommodations offered to religiously affiliated nonprofits. *See* 79 Fed. Reg. 51,118 (Aug. 27, 2014); 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2510, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). But as of this writing the government has not yet adopted the proposal. Meanwhile, religiously affiliated nonprofits continue to challenge those accommodation mechanisms. It is not clear how these challenges will be resolved. *Cf.* *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 265 (D.C. Cir. 2014) (observing that the accommodations proposed by the religiously affiliated nonprofits "would add steps . . . or pose other financial, logistical, informational, and administrative burdens," as reason to reject those challenges). For commentators questioning the accuracy of the Court's premises, see Gedicks, *supra* note 50, at 159-62; and Andrew Koppelman & Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, 9 ST. THOMAS J.L. & PUB. POL'Y (forthcoming 2015) (on file with authors). We observe also that the majority focused on the material effects of the accommodation, but not its social meaning. *See infra* notes 272-275 and accompanying text.

58. *Hobby Lobby*, 134 S. Ct. at 2779-80.

terest in the health of female employees.”<sup>59</sup> Along with the four dissenting Justices, he affirmed the government’s compelling interest in enacting laws to promote women’s health.<sup>60</sup>

Justice Kennedy was clearly concerned about the impact of accommodation on the statute’s beneficiaries. At oral argument, he questioned how accommodation would affect “the rights of the employees, . . . [who] may not agree with these religious beliefs of the employer.”<sup>61</sup> And in his *Hobby Lobby* concurrence, he noted that the accommodation of religious liberty may not “unduly restrict other persons, such as employees, in protecting their own interests.”<sup>62</sup>

These concerns about accommodation’s effects on the statute’s intended beneficiaries shaped the terms on which the Court recognized the plaintiffs’ RFRA claim. The Court concluded that an accommodation could be designed so as “to protect the asserted needs of women as effectively as the contraceptive mandate.”<sup>63</sup> Indeed, the Court began its opinion by emphasizing its view that the effect of “accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be *precisely zero*.”<sup>64</sup>

Mere days after issuing its *Hobby Lobby* decision, the Court provisionally recognized another complicity-based conscience claim in its interim order in *Wheaton College v. Burwell*.<sup>65</sup> Again, the Court did so on the assumption that third parties would not bear the impact of accommodation. Wheaton College, a religiously affiliated institution, claimed that the self-certification form—the

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59. *Id.* at 2786 (Kennedy, J., concurring).

60. *Id.*; *id.* at 2799 (Ginsburg, J., dissenting) (noting “compelling interests in public health and women’s well being”); *see also id.* at 2787-88 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.’ Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992))).

61. Transcript of Oral Argument at 33, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

62. 134 S. Ct. at 2787 (Kennedy, J., concurring). Striking a similar note, Justice Kennedy noted in his concurrence in *Board of Education of Kiryas Joel Village School District v. Grumet*: “[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment.” 512 U.S. 687, 722 (1994) (Kennedy, J., concurring). In her *Hobby Lobby* dissent, Justice Ginsburg also made this point: “Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.” 134 S. Ct. at 2790 (Ginsburg, J., dissenting).

63. *Hobby Lobby*, 134 S. Ct. at 2782. *But see supra* note 57 (observing several respects in which the majority’s claim is incorrect).

64. *Id.* at 2760 (emphasis added).

65. 134 S. Ct. 2806, 2807 (2014).



religious accommodation mechanism, referred to above, provided by the government to religiously affiliated nonprofits—would “make it *complicit* in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects.”<sup>66</sup> In ordering accommodation pending appeal, the Court explained, “[n]othing in this interim order affects the ability of the applicant’s employees and students to obtain, without cost, the full range of FDA approved contraceptives.”<sup>67</sup> *Wheaton College*, like *Hobby Lobby*, appears to tie accommodation to the fact that the government has other ways of providing for the statute’s intended beneficiaries so that no third-party harm would result from the accommodation.<sup>68</sup>

Yet if the opinions in *Hobby Lobby* and *Wheaton College* demonstrate concern with third-party harm, they do not examine the kinds of harm that accommodation of complicity-based conscience claims might inflict, nor do they offer guidance about how principles concerned with third-party harm might apply in future cases. The Court’s decision in *Hobby Lobby* is now being cited to support accommodation of complicity-based conscience claims not merely in litigation involving insurance for contraception or claims under RFRA, but in a wide range of legal and institutional settings. In the LGBT context alone, *Hobby Lobby* has been used to bolster arguments for exemptions from state antidis-

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66. *Id.* at 2808 (Sotomayor, J., dissenting) (emphasis added). Other religiously affiliated nonprofits have raised similar challenges. See, e.g., *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 379 (6th Cir. 2014); Reply in Support of Emergency Application for Injunction Pending Appellate Review or, in the Alternative, Petition for Writ of Certiorari & Injunction Pending Resolution at 8, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (No. 13A691).

67. *Wheaton Coll.*, 134 S. Ct. at 2807. Unlike in *Hobby Lobby*, see 134 S. Ct. at 2758, there was no alternative accommodation in place, see *Wheaton Coll.*, 134 S. Ct. at 2807. Accordingly, in lieu of the form to which *Wheaton College* objected, the Court required the college to “inform[] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services.” *Id.*

68. In response to *Wheaton College*, the government issued interim final regulations allowing religiously affiliated nonprofits to use the alternative notice procedure required by the Court in that case. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2510, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). These regulations were immediately challenged and enjoined by a federal district court. See *Ave Maria Univ. v. Burwell*, No. 2-13-cv-630, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014). But see *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (rejecting a challenge to accommodations offered to religiously affiliated nonprofits). The government also sought comments on a proposal to make the same accommodation mechanisms available to for-profit corporations that meet the new definition of “eligible organizations.” Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118.

crimination laws requiring businesses to serve same-sex couples<sup>69</sup> and from the federal executive order banning sexual orientation and gender identity employment discrimination by federal contractors.<sup>70</sup> It is an important moment, therefore, to explore the concerns about third parties that already structure *Hobby Lobby*, and to show how and why these concerns are an integral part of the RFRA inquiry.

To illustrate the third-party effects of complicity-based conscience claims, we examine healthcare refusal laws – a legislated body of religious liberties law in which complicity-based claims predominate. In this body of law, the risk of third-party harm is substantial and yet largely left unaddressed. The legislation makes plain the impact that accommodating complicity claims can have on other members of the community.

## II. ANOTHER RELIGIOUS LIBERTIES ANTECEDENT: COMPLICITY AND HEALTHCARE REFUSALS

A body of state and federal law allows persons and institutions in the healthcare industry to assert conscience-based refusals to provide patient services. While early healthcare refusal laws focused on the conscience claims of professionals opposed to performing certain procedures, over time refusal laws expanded through concepts of complicity to cover an increasing number of

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69. See, e.g., Supplemental Authority Letter of Defendant-Appellant Aloha Bed & Breakfast at 1, *Cervelli v. Aloha Bed & Breakfast*, No. CAAP-13-0000806 (Haw. Ct. App. July 25, 2014) (“alert[ing] the Court to pertinent supplemental authority,” in the form of the *Hobby Lobby* decision, to defend a bed-and-breakfast that discriminated against a same-sex couple); see also Emma Margolin, *How Hobby Lobby Will Reverberate Throughout the LGBT Community*, MSNBC (July 7, 2014), <http://www.msnbc.com/msnbc/hobby-lobby-reverberate-throughout-lgbt-community> [<http://perma.cc/377E-5982>] (“‘I do think that ruling will have a major impact,’ said the Rev. Terry Fox, a Southern Baptist minister in Wichita, Kansas, and a leader of the successful movement to ban same-sex marriage in that state. ‘The Supreme Court has given a strong statement that people have a right in business if they have religious convictions to take a stand.’”); Greg Stohr, *Gay Marriage Stirs Backlash as Businesses Assert Religion*, BLOOMBERG (July 18, 2014), <http://www.bloomberg.com/news/2014-07-18/gay-marriage-stirs-backlash-as-businesses-assert-religion.html> [<http://perma.cc/9ZGR-P2PA>] (suggesting that *Hobby Lobby* “added fuel” to the debate over whether businesses should be exempted from laws requiring them to serve same-sex couples).
70. See Carl H. Esbeck, *Differences: Real and Rhetorical—Responding to Non-Discrimination Executive Order and Religious Freedom*, BERKLEY CENTER FOR RELIGION, PEACE & WORLD AFF.: CORNERSTONE (July 22, 2014), <http://berkeleycenter.georgetown.edu/rfp/blog/non-discrimination-executive-order-and-religious-freedom/responses/differences-real-and-rhetorical> [<http://perma.cc/2JZH-9XZJ>]; Letter from Stanley Carlson-Thies, President, Institutional Religious Freedom Alliance, et al., to President Barack Obama, at 1 (June 25, 2014), <http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf> [<http://perma.cc/2T8Z-KGDV>].

persons and institutions in healthcare services. The complicity-based conscience claims in *Hobby Lobby* resemble and perhaps descended from these legislated exemptions, popularly termed healthcare refusal laws or conscience clauses.<sup>71</sup> A brief look at this body of law illustrates the shape of this statutory religious liberties tradition—significant not only as an antecedent for the claims in *Hobby Lobby* but also as an illustration of complicity-based claims in action. With this illustration, we can then begin to examine the distinctive social logic of complicity claims.

#### A. Understanding Healthcare Refusal Laws

Refusal laws exempt medical providers from duties of patient care that are imposed by various bodies of state and federal law governing institutions and professionals.<sup>72</sup> Licensing boards enforce professional standards against healthcare institutions, doctors, nurses, and pharmacists.<sup>73</sup> Tort law, and specifically medical malpractice, provides redress to patients injured by breaches of professional duties.<sup>74</sup> Institutional actors and individual providers are also subject to common law and statutory obligations, including those imposed on public accommodations and healthcare facilities.<sup>75</sup> And patients have constitu-

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71. Many healthcare refusal laws cover both religious and moral objections. See *infra* note 103 and accompanying text.
  72. Healthcare providers do not generally have legal obligations to accept specific patients, but legal and professional standards may regulate healthcare providers in the selection of patients and impose obligations on providers once care has commenced. See Elizabeth Sepper, *Conscientious Refusals of Care*, in OXFORD HANDBOOK OF AMERICAN HEALTH LAW (Glenn Cohen et al. eds., forthcoming 2015) (manuscript at 2) (on file with authors).
  73. See Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1446-75 (1995) (examining conflicts between conscience claims and patients' rights rooted in professional ethics, common law, and constitutional doctrine).
  74. See, e.g., *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240 (Ct. App. 1989); *Hummel v. Reiss*, 589 A.2d 1041 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 608 A.2d 1341 (N.J. 1992).
  75. See, e.g., *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Ct.*, 189 P.3d 959 (Cal. 2008) (denying doctors' claims that free exercise rights exempt them from compliance with state antidiscrimination law regarding provision of reproductive healthcare to a lesbian patient). Outside the antidiscrimination domain, some states maintain regulations regarding hospital responses to sexual assault, requiring hospitals to provide victims with "[m]edically and factually accurate written and oral information about emergency contraception." ILL. ADMIN. CODE tit. 77, § 545.60(a)(3) (2010); see also N.M. STAT. ANN. § 24-10D-3(A) (West 2014).

tional rights, including reproductive and medical decision-making rights, in the healthcare context.<sup>76</sup>

Against this backdrop, refusal laws allow individuals and institutions in the healthcare industry to express conscience objections to interacting with persons who seek certain medical services – most commonly abortion, sterilization, and contraception. The laws provide religious exemptions for those who assert that abortion, sterilization, and contraception are sinful, and who object to acting in ways that, the claimants assert, would make them complicit in the sinful conduct of others. The laws appear to exempt healthcare providers from duties to patients.<sup>77</sup> And they generally do not provide mechanisms to mediate their impact on patients.

### *B. The Church Amendment*

We can trace the emergence of healthcare refusals legislation to Congress's passage of the Church Amendment in 1973.<sup>78</sup> That legislation followed on the heels of two significant judicial decisions: the Supreme Court's 1973 *Roe v.*

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76. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

77. Many of the statutes have not been authoritatively construed. Litigation over healthcare refusal laws appears to have been more common in the 1970s, when these laws first appeared, than in more recent years. See, e.g., *Doe v. Rampton*, 366 F. Supp. 189, 193 (C.D. Utah 1973); *Doe v. Bridgeton Hosp. Ass'n, Inc.*, 366 A.2d 641, 647 (N.J. 1976). For a recent litigated example in the professional ethics context relating to pharmacists, see *Noesen v. State Department of Regulation and Licensing, Pharmacy Examining Board*, 751 N.W.2d 385, 388, 391 (Wis. Ct. App. 2008), which affirmed that a pharmacist who objected to participating in "certain tasks . . . for contraceptive purposes" and therefore refused to fill a contraception prescription or to transfer the prescription to another store departed from the standard of care. There is also pending litigation by pharmacies and pharmacists challenging, on free exercise grounds, a Washington Board of Pharmacy regulation requiring pharmacies to deliver all lawfully prescribed medications, including emergency contraceptives. See *Stormans, Inc. v. Wiesman*, No. 12-35221 (9th Cir. argued Nov. 20, 2014); see also *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925 (W.D. Wash. 2012). Some state refusal laws indicate that refusal does not constitute unprofessional conduct. See, e.g., GA. COMP. R. & REGS. 480-5-.03(n) (2014) (providing that "[i]t shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs"). More broadly, some state refusal laws provide that the refusal cannot form the basis for civil, criminal, or administrative liability. See, e.g., MISS. CODE ANN. § 41-107-5 (West 2014).

78. The Church Amendment was passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)-(c), 87 Stat. 91, 95.

*Wade* decision invalidating criminal prohibitions on abortion;<sup>79</sup> and a 1972 federal district court decision enjoining a Catholic affiliated hospital, which was deemed to engage in state action because of its receipt of federal funding, from prohibiting sterilization at its facilities.<sup>80</sup> The Church Amendment, which passed with near unanimous support,<sup>81</sup> provided that receipt of federal funds would not provide a basis for requiring a physician or nurse “to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.”<sup>82</sup> It also provided that no “entity” could be compelled to “make its facilities available for the performance

79. 410 U.S. 113. Throughout the 1960s and early 1970s, conscience arguments circulated in debates over war and abortion. Jeremy Kessler explains that “it was during the 1960s that major religious organizations, the press, and the federal judiciary all came to embrace the individual conscientious objector as a legitimate and even laudable kind of citizen.” Jeremy Kessler, *The Legal Origins of Catholic Conscientious Objection 1-2* (Jan. 20, 2014) (unpublished manuscript) (on file with authors). He emphasizes that Catholics played a prominent role “as they used the legal language of conscience to both criticize the American state and insist upon the compatibility of Catholic and American identity.” *Id.*

In the 1960s, “conscience talk” spread from conflict over war to conflict over abortion. *See id.* In this era, conscience appeared on both sides of the abortion conflict, and in support of religious and secular claims. *See* LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* (2d ed. 2012) (excerpting sources in the decade before *Roe* in which conscience was invoked on both sides of the abortion debate, more commonly to assert the case for access to abortion). After *Roe* protected a woman’s choice to end a pregnancy, conscience was increasingly associated with claims to exemption from the responsibility to perform abortions.

80. *See Taylor v. St. Vincent’s Hosp.*, 369 F. Supp. 948 (D. Mont. 1973) (dissolving the preliminary injunction, granted on October 27, 1992, in light of the Church Amendment). For discussion of this decision, see Sara Dubow, “A Constitutional Right Rendered Utterly Meaningless”: *Religious Exemptions and Reproductive Politics, 1973-2014*, 27 J. POL’Y HIST. 1, 6 (2015).

81. *See* Dubow, *supra* note 80, at 1. The Senate first passed the Amendment by a 92-1 vote, the House passed a slightly revised version 372-1, and the Senate ultimately passed the final bill that included the provision in a unanimous 94-0 vote. *See id.* at 25-26 n.2. The Church Amendment emerged at a time when more Republicans than Democrats supported increased access to abortion, and Republicans were just beginning to use the abortion issue to distinguish themselves from Democrats. *See* GREENHOUSE & SIEGEL, *supra* note 79, at 113, 207, 224, 263; Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2034, 2082 n.191 (2011). Nonetheless, some reproductive rights advocates did express concern about the statute’s coverage of institutional entities. *See* Harriet F. Pilpel & Dorothy E. Patton, *Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses*, 6 COLUM. HUM. RTS. L. REV. 279, 280 (1974-75). For Pilpel’s role as an architect of modern privacy law, see generally LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* (2013).

82. 42 U.S.C. § 300a-7(b)(1) (2012) (emphasis added).

of any sterilization procedure or abortion if [such] performance . . . is prohibited by the entity on the basis of religious beliefs or moral convictions.”<sup>83</sup>

The Church Amendment inaugurated a widespread tradition of healthcare refusals legislation at the federal and state levels.<sup>84</sup> Yet the Amendment differed in important ways from the body of healthcare refusal laws that would follow. The Amendment protected from discrimination not only individuals who, following the dictates of conscience, refused to perform abortion and sterilization but also those who, following the dictates of conscience, performed such procedures.<sup>85</sup> More importantly for our purposes, the Church Amendment’s coverage of individuals focused on the conduct of doctors and nurses who “perform[] or assist[] in the performance of a lawful sterilization procedure or abortion.”<sup>86</sup> The legislation was concerned with those professionals directly involved in the procedures. The Congressional debate confirms this focus. Senator Russell Long worried that the accommodation could be invoked by “a nurse or an attendant somewhere in the hospital who objected to [the procedure or] . . . someone who had nothing to do with the matter and was not involved in it one way or the other, just someone who happened to be working in a hospital.”<sup>87</sup> In response, Senator Frank Church explicitly rejected such an expansive reading of the acts and actors covered. Instead, he affirmed Senator Long’s position that the accommodation would not cover “someone working in the hospital . . . who had no responsibility, directly or indirectly, with regard to the performance of [the] procedure.”<sup>88</sup>

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83. 42 U.S.C. § 300a-7(b)(2)(A) (2012). Women’s rights advocates raised objections to this institutional coverage at the time. See Pilpel & Patton, *supra* note 81.

84. A handful of healthcare refusal laws existed at the state level before the Church Amendment. See, e.g., Act of Feb. 17, 1969, No. 61, § 8, 1969 Ark. Acts 177 (codified as amended at ARK. CODE ANN. § 20-16-601 (West 2014)); Act of Apr. 3, 1972, ch. 72-132, §§ 1-6, 1972 Fla. Laws 412, 413-14 (codified as amended at FLA. STAT. ANN. § 381.0051(5) (West 2014)).

85. 42 U.S.C. § 300a-7(c)(1)(B) (2012) (prohibiting federal funding recipients from discriminating against “any physician or other health care personnel . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion [or] because he refused to perform or assist in the performance of such a procedure or abortion”). Willing providers were merely protected from discrimination if they previously performed the procedure or performed it off-site; they had no right to an accommodation allowing them to perform the procedure at an objecting institution. See Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1512-13 (2012).

86. 42 U.S.C. § 300a-7(c)(1)(B) (emphasis added). Notably, the Amendment did not provide an exception to protect the health or life of the patient.

87. 119 CONG. REC. 9597 (daily ed. Mar. 27, 1973) (statement of Sen. Long).

88. *Id.* (statement of Sen. Long); *id.* (statement of Sen. Church) (“The Senator is correct.”). As Senator Church’s response suggests, the focus of the legislation was not on complicity. Still, the language of “assistance,” as well as the coverage of institutions, might be seen to draw on the logic of complicity. However we read the Church Amendment itself, the concept of

C. *The Expansion of Healthcare Refusals: Operationalizing Complicity*

In the immediate wake of the Church Amendment, many states enacted healthcare refusal laws.<sup>89</sup> But the expansion of healthcare refusals legislation occurred on a much larger scale in the 1990s and 2000s. Laws at the state and federal levels grew to include contraception<sup>90</sup> and to cover a much broader range of acts and actors. This new generation of laws went beyond the Church Amendment and plainly sought to accommodate objections to many more forms of conduct, interactions, and associations thought to make the objector complicit in the wrongdoing of another person.

In this period, the federal government and a number of states enacted laws that allowed a range of healthcare professionals and institutions with objections to abortion or contraception *to refuse to refer or counsel patients*. On the federal level, a 1996 omnibus appropriations bill provided that neither the federal government nor any state or local government could “subject any health care entity to discrimination” based on the entity’s refusal to provide abortion ser-

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complicity, as we now show, drove expansion of healthcare refusals legislation in the ensuing decades.

89. Between the decision in *Roe* and July 1973, fifteen states passed conscience clauses regarding abortion. By the close of 1974, twenty-eight states had laws allowing physicians to refuse to participate in abortions, and twenty-seven states had laws that applied to hospitals. See *A Review of State Abortion Laws Enacted Since January 1973*, 3 FAM. PLAN./POPULATION REP. 88, 88-94 (1974); Dubow, *supra* note 80, at 25 n.3. Some of these early laws went beyond the Church Amendment by covering contraception in addition to abortion and/or sterilization, see, e.g., Act of Mar. 7, 1973, No. 235, §4, 1973 Ark. Acts 778, 780 (codified as amended at ARK. CODE ANN. § 20-16-304 (West 2014)), by protecting only individuals who objected to the procedures, rather than also including those whose conscience supported the procedures, see, e.g., Act of Mar. 21, 1974, ch. 177, § 4, 1974 Minn. Laws 265, 267 (codified as amended at MINN. STAT. ANN. § 145.414 (West 2014)), and by including medical personnel beyond doctors and nurses, see, e.g., Act of Oct. 3, 1973, ch. 624, § 1903, 1973 Me. Laws 1259, 1260 (codified as amended at ME. REV. STAT. ANN. tit. 22, § 1903(4) (2014)).
90. A range of potential factors may account for the widespread inclusion of contraception. Religious objections to contraception, most notably from Catholics, clearly predated the inclusion of contraception in healthcare refusal laws. But in the 1990s, new types of contraceptives, including emergency contraception, entered the market, see Office of Population Research, *History of Plan B OTC*, PRINCETON U., <http://ec.princeton.edu/pills/planbhstory.html> [<http://perma.cc/WG4S-Z6KW>], eliciting objections from some who, as a matter of religious conviction, believed them to be “abortifacients.” Around the same time, states began to pass contraceptive equity laws that required healthcare insurance to include coverage of ordinary forms of contraception; these laws often included exemptions for religious employers. See, e.g., Women’s Contraception Equity Act, ch. 538, 1999 Cal. Stat. 3718, 3719 (codified as amended at CAL. INS. CODE § 10123.196(a)(1) (West 2015)); An Act Requiring Health Insurers To Cover Prescription Birth Control, Pub. Act No. 99-79, §§ 1(b)-(c), 1999 Conn. Pub. Acts 198, 198-99 (codified as amended at CONN. GEN. STAT. ANN. § 38a-503e(a) (West 2015)).

vices, abortion training, arrangements for abortion services, or *referrals to other entities that provide abortion services*.<sup>91</sup> Some states, particularly when covering contraception, explicitly included the provision of information among the list of covered acts.<sup>92</sup> Colorado law, for instance, provides: “No private institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and *information* when such refusal is based upon religious or conscientious objection . . . .”<sup>93</sup>

Just as the range of acts continued to grow in ways that gave practical meaning to the concept of complicity, so did the range of covered actors. Mississippi, which in 2004 passed the nation’s broadest healthcare refusal law,<sup>94</sup> provides an illustration of a provision drafted with the evident aim of making as many persons eligible for exemption as possible. The law defines “health care service” to include:

any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.<sup>95</sup>

Mississippi’s law defines “health care provider” with similar breadth:

“Health care provider” means any individual who may be asked to participate in any way in a health care service, including, but not limited to: a physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home employee,

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91. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a), 110 Stat. 1321, 1321-245 (codified as amended at 42 U.S.C. § 238n(a) (2012)).

92. See, e.g., ARK. CODE ANN. § 20-16-304 (2014); COLO. REV. STAT. ANN. § 25-6-102 (2014); FLA. STAT. ANN. § 381.0051 (West 2014); 745 ILL. COMP. STAT. § 70/4 (2014). See generally Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, GUTTMACHER REP. ON PUB. POL’Y, Aug. 2005, <http://www.guttmacher.org/pubs/tgr/08/3/gr080307.pdf> [<http://perma.cc/7APA-Y7D4>].

93. COLO. REV. STAT. ANN. § 25-6-102 (2014) (emphasis added).

94. Mississippi Health Care Rights of Conscience Act, ch. 568, § 2(a), 2004 Miss. Laws 977, 978.

95. MISS. CODE ANN. § 41-107-3(a) (West 2014). For a law that also dramatically increases the number of covered individuals, see OKLA. STAT. ANN. tit. 63, § 1-741(B) (West 2014), providing that “[n]o person may be required to perform, induce or participate in medical procedures which result in an abortion which are in preparation for an abortion or which involve aftercare of an abortion patient . . . .”



pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker or any professional, paraprofessional, or any other person who furnishes, or assists in the furnishing of, a health care procedure.<sup>96</sup>

In particular, as the Mississippi law demonstrates, as healthcare refusal laws grew to include contraception, some states specifically covered *pharmacists and pharmacies* with objections to *selling* contraception.<sup>97</sup>

As changes occurred in the economic organization of the healthcare field, conscience legislation began to apply the logic of complicity to *insurance plans' and HMOs' financial relationships*.<sup>98</sup> In 1997, Congress passed a Balanced Budget Act that provided conscience provisions for Medicaid and Medicare managed care providers that objected to providing, reimbursing for, or covering abortion counseling or referral.<sup>99</sup> A 2004 appropriations bill broadened the de-

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96. MISS. CODE ANN. § 41-107-3(b) (West 2014). For another particularly broad refusal statute in terms of covered acts, actors, and services, see WASH. REV. CODE ANN. § 48.43.065 (West 2014), providing that “[n]o individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.”

97. While Arkansas’s family planning statute, enacted in 1973, covered pharmacists, Act of Mar. 7, 1973, No. 235, § 4(C), 1973 Ark. Acts 778, 780 (codified as amended at ARK. CODE ANN. § 20-16-304 (West 2014)), South Dakota seems to have initiated the recent wave of laws that included pharmacists. See Act of Mar. 13, 1998, ch. 226, 1998 S.D. Sess. Laws 292, 293 (codified as amended at S.D. CODIFIED LAWS § 36-11-70 (2015)) (“No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to: (1) Cause an abortion; or (2) Destroy an unborn child as defined in subdivision 22-1-2(50A)[.]”); S.D. CODIFIED LAWS § 22-1-2(50A) (2015) (defining “unborn child” as “an individual organism of the species homo sapiens from fertilization until live birth”). Other states followed. See, e.g., GA. COMP. R. & REGS. 480-5-03 (2005); 745 ILL. COMP. STAT. §§ 70/3-/4 (2014); MISS. CODE ANN. § 41-107-5 (West 2006). On consideration of third-party harm in this context, see Lora Cicconi, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709 (2007).

98. See, e.g., 42 U.S.C. § 1395w-22(j)(3)(B) (2012) (creating an exemption for managed care providers covering reimbursement for abortion counseling and referral services).

99. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 1852(j)(3)(B), 111 Stat. 251, 295 (codified as amended at 42 U.S.C. § 1395w-22(j)(3)(B) (2012)). For similar legislation, see 42 U.S.C. § 1396u-2(b)(3)(B) (2012). Shortly thereafter when Congress passed a contraceptive equity law that required health insurance plans and carriers participating in the Federal Employees’ Health Benefits Program to include contraceptives in prescription drug coverage, it exempted existing and future plans with religious objections to covering contraceptives. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 656(b), 112 Stat. 2681, 2681-530 (1998) (“Nothing in this section shall apply to a contract with . . . any existing or future plan, if the plan objects to such coverage on the basis of religious beliefs.”).

definition of a healthcare entity to include HMOs and insurance plans, and withheld federal funding from any federal agencies or state governments that discriminated against healthcare entities on the basis of their refusal to cover, pay for, or refer for abortion.<sup>100</sup> In 2008, the Bush Administration adopted regulations that expanded the coverage of the Church Amendment itself, defining “Health Care Entity” to include HMOs and health insurance plans and assistance to include “counseling, referral, training, and other arrangements for the procedure.”<sup>101</sup>

Over time, the body of healthcare refusals legislation took on a very different form than that originally seen in the Church Amendment. While the Church Amendment focused on persons directly involved in religiously objectionable conduct, over time the legislation was self-consciously expanded to reach an ever-widening number of persons who might count themselves as complicit. Fueled by complicity-based objections, refusal laws expanded to cover acts and actors only remotely connected to the challenged healthcare service.<sup>102</sup> And even as healthcare refusal laws offered exemptions for ever-growing numbers of institutions and persons, efforts to offset the impact of refusals on patients remained rare. In fact, many of the laws expressly authorized providers to withhold referrals, as well as the kinds of counseling or information that would provide patients with *notice* that there were alternative forms of treatment available in which they might be interested.

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100. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d), 118 Stat. 2809, 3163 (2004) (“[T]he term ‘health care entity’ includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.”). That provision was repeated annually in subsequent appropriations bills. See, e.g., Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 508(d), 123 Stat. 3034, 3280 (2009).

101. See *Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, 73 Fed. Reg. 78072, 78097 (Dec. 19, 2008). The Obama Administration reversed the regulations in part in 2011, after receiving public comments regarding the attenuated relationship between the covered acts and the performance of an abortion. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968-02 (Feb. 23, 2011) (codified at 45 C.F.R. pt. 88 (2014)).

102. We observe another striking difference between the earlier and later legislation. While the Church Amendment protected from discrimination both those who performed and those who refused to perform an abortion, subsequent healthcare refusal laws provided protection only to those who refused to perform the procedure. See Sepper, *supra* note 85, at 1512 (“Only in the exceptional case does legislation acknowledge the *willing* individual provider.”). State laws that protect from discrimination those willing to perform an abortion, see KY. REV. STAT. ANN. § 311.800(5)(b)-(c) (West 2014); MICH. COMP. LAWS § 333.20184 (2014), cover only “prior or off-site performance.” Sepper, *supra* note 85, at 1512.

Overall, the claims upon which recent healthcare refusal laws are based contrast sharply with the claims featured in the cases that Congress referenced in RFRA. Rather than invoking unfamiliar religious beliefs, the claimants object to laws departing from traditional social norms. The claims for accommodation are generally not asserted in courts; instead, they are primarily asserted in politics, and redressed through legislation. The accommodations provided by healthcare refusal laws are not designed for particular religious claimants, such as the Amish or members of the Native American Church; instead, they authorize exemptions for persons asserting conscience objections based on any religion or, with the inclusion of “moral” objections, no religion at all.<sup>103</sup> Accommodation of these claims does not entail costs borne by society as a whole; instead, accommodation has consequences for the third parties whose conduct is at issue. Crucially, healthcare refusal laws make little or no effort to offset their impact on third parties.

### III. RELIGION IN POLITICS

The concepts of complicity that shape more recent and expansive healthcare refusal laws play a growing role in religious conflicts over contraception, abortion, and same-sex marriage. For example, in *Hobby Lobby*, the employers objected to providing insurance coverage that their employees might use to purchase contraceptives the employers viewed as sinful. Similarly, wedding-related vendors have objected to providing goods and services to same-sex couples because doing so would make them complicit in a relationship they deem sinful.<sup>104</sup>

Not only do these complicity-based conscience claims differ in form from claims at issue in the free exercise cases RFRA invokes, but as this Part demonstrates, complicity claims also differ in social logic. Our brief consideration of healthcare refusals legislation suggests that complicity-based conscience claims are entangled in long-running “culture war” conflicts about laws that break from traditional morality. In this Part we show that political leaders are encouraging the faithful to assert complicity claims. Unlike the claims in the cases to which Congress referred when it passed RFRA, complicity-based conscience claims are asserted in society-wide conflicts by mobilized groups and individuals acting in coalitions that reach across religious denominational lines and in

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103. Indeed, some laws allow refusals without even explicitly invoking conscience. See Sepper, *supra* note 85, at 1510 (citing HAW. REV. STAT. § 453-16(e) (2011); and 20 PA. CONS. STAT. § 5424 (2012)).

104. See *supra* notes 7-8 and accompanying text.

coordination with a political party.<sup>105</sup> Complicity offers a shared language and mode of reasoning that persons can employ in these conflicts to voice objections that are rooted in different faiths and in convictions that are both religious and secular.<sup>106</sup>

Asserting a complicity-based conscience claim can serve larger law reform goals in “culture war” conflicts. Many who join in cross-denominational coalition to assert complicity-based conscience claims endorse laws concerning abortion or same-sex marriage that would preserve traditional morality for the society as a whole. Some invoke complicity-based conscience claims when they cannot entrench traditional morality through laws of general application. As the conditions of conflict change and arguments rooted in traditional morality lose their ability to persuade, movement leaders have advocated shifting to religious liberty arguments for exemption as part of a long-term effort to shape community-wide norms.<sup>107</sup>

It is commonplace for people of faith to engage in political action.<sup>108</sup> We devote special attention to political mobilization around complicity-based con-

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105. See, e.g., *infra* notes 124-129, 132-133 and accompanying text (documenting support for conscience claims in the *Manhattan Declaration* and by the Family Research Council); *infra* notes 140-141 and accompanying text (documenting the Republican Party platform’s support for complicity-based conscience claims).

106. The cross-denominational claims on complicity growing out of this coalition have begun to shape religious liberties law. In *Hobby Lobby*, when Justice Alito discussed the religious beliefs of the claimants, who are not Catholic, he appealed to Catholic sources on cooperation. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 n.34 (2014) (citing THOMAS J. HIGGINS, *MAN AS MAN: THE SCIENCE AND ART OF ETHICS* 353, 355 (1949); and HENRY DAVIS, *MORAL AND PASTORAL THEOLOGY* 341 (1935)).

107. See *infra* notes 175-179 and accompanying text.

108. It has become so common for religious leaders to speak to political questions that the Alliance Defending Freedom (ADF) now objects to the restrictions on religious institutions supporting particular candidates that are imposed as a condition for these institutions securing tax-exempt status. See *Speak Up.: Protect and Promote the Rights of Our Churches*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/content/docs/issues/church/Pulpit-Freedom-Sunday-FAQ.pdf> [<http://perma.cc/U4KM-9FT7>] (describing a campaign “to generate test cases” to end IRS restrictions “on the rights of pastors to use moral and biblical standards to support or oppose candidates for public office”); see also *Pulpit Freedom Sunday*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/pulpitfreedom> [<http://perma.cc/3HV3-BHXQ>] (noting that thousands of pastors “violated the [restrictions],” “preached an election sermon,” and support ADF’s position).

Other examples are too numerous to count. Religious faith moved many of those who both supported and opposed segregation earlier in our nation’s history. See, e.g., William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct To Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 669-670, 678-79 (2011). And examples of political action grounded in religious identity are common in other countries. See Nancy L. Rosenblum, *Religious Parties, Religious Political Identity, and the Cold Shoulder of Liberal Demo-*

science claims for two reasons. The first should be self-evident. Mobilization will amplify the effects of accommodating complicity claims. Complicity claims concerning issues in democratic contest will increase in number, and accommodation of the claims will have significance, not merely for the claimants, but for the other citizens who the claimants believe are sinning.

Considering mobilization is important for a second reason. Many who advocate accommodation of complicity-based conscience claims assert that doing so will settle conflict. By examining how complicity-based conscience claims are part of a contest over community norms, we can see how religious accommodation may extend, rather than resolve, conflict.

*A. Complicity's Social Logic: Cross-Denominational Mobilization*

Today, Catholics and evangelical Protestants assert shared religious beliefs in conflicts over sexual norms. This coalition did not exist at the time of *Roe*, for example, when evangelical Protestants had different views about abortion and were unwilling to join in political coalition with Catholics in opposing it.<sup>109</sup> But the views of evangelical Protestants about abortion have changed in the intervening years,<sup>110</sup> as has their willingness to assert claims of common faith with Catholics on the question. Theological differences, of course, persist. But since the era of Ronald Reagan's election, when Republican leaders encouraged evangelical Protestants to enter politics in common cause with Catholics opposed to abortion,<sup>111</sup> a conservative, cross-denominational coalition of Christians has pursued self-consciously traditional and conservative ends.

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*cratic Thought*, 6 ETHICAL THEORY & MORAL PRAC. 23, 24-27 (2003) (analyzing religious parties and religious political identity in democratic societies).

109. At the time of *Roe*, evangelical Protestants had a variety of positions on abortion and had not mobilized in politics against abortion, in part because they saw abortion as a "Catholic issue" with which they did not wish to be associated. See Greenhouse & Siegel, *supra* note 81, at 2063.

110. For evolving views on abortion asserted by various religious denominations in the decade before and after *Roe*, see GREENHOUSE & SIEGEL, *supra* note 79, at 69-80; and Greenhouse & Siegel, *supra* note 81, at 2063 n.132.

111. In the late 1970s, Republican leaders helped build a political coalition of evangelical Protestants and Catholics to oppose abortion. See Greenhouse & Siegel, *supra* note 81, at 2065-67 (drawing on historical accounts, as well as sources recounting the recollections of participants); see also MICHELE MCKEEGAN, ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT 20-21 (1992); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 420-24 (2007); Deana A. Rohlinger & Jill Quadagno, *Framing Faith: Explaining Cooperation and Conflict in the US Conservative Christian Political Movement*, 8 SOC. MOVEMENT STUD. 341, 345-49 (2009). This cross-denominational organizational work continued in the 1990s. See, e.g., *Evangelicals and*

We can see an example of this coalition in the *Manhattan Declaration: A Call of Christian Conscience*, the 2009 manifesto of conservative Christian principles set forth by Robert George and Chuck Colson and endorsed by Catholic and evangelical Protestant leaders as well as conservative political activists.<sup>112</sup> The *Declaration* calls upon Christians to unite across denominational lines in support of three central principles: “the sanctity of human life, the dignity of marriage as a union of husband and wife, and the freedom of religion.”<sup>113</sup> The *Declaration* presents claims for religious liberty—prominently including complicity-based conscience claims about healthcare and marriage—alongside planks opposing abortion and same-sex marriage.<sup>114</sup>

From the perspective of the various religious traditions that find common ground in this cross-denominational coalition, the practices that form the basis of today’s complicity-based conscience claims are related: same-sex marriage, abortion, and contraception divert sex and marriage from procreative ends. Same-sex marriage, the *Manhattan Declaration* argues,

would lock into place the false and destructive belief that marriage is all about romance and other adult satisfactions, and not, in any intrinsic way, about procreation and the unique character and value of acts and relationships whose meaning is shaped by their aptness for the generation, promotion and protection of life.<sup>115</sup>

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*Catholics Together: The Christian Mission in the Third Millennium*, FIRST THINGS, May 1994, at 15.

112. *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 2009), [http://manhattandeclaration.org/man\\_dec\\_resources/Manhattan\\_Declaration\\_full\\_text.pdf](http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf) [<http://perma.cc/MGW8-7WTE>]. See generally MANHATTAN DECLARATION, <http://manhattandeclaration.org> [<http://perma.cc/3XB9-2TV2>]. The first signers included leading social conservative advocates, such as Gary Bauer, Brian Brown, James Dobson, Maggie Gallagher, Tony Perkins, and Alan Sears, and religious figures, such as the Reverend Jonathan Falwell, the Reverend Jim Garlow, the Reverend Ken Hutcherson, Bishop Harry Jackson, a number of Roman Catholic archbishops, and the primate of the Orthodox Church in America. See *List of Religious & Organizational Leaders Signatories*, MANHATTAN DECLARATION, [http://manhattandeclaration.org/man\\_dec\\_resources/list\\_of\\_religious\\_leaders.pdf](http://manhattandeclaration.org/man_dec_resources/list_of_religious_leaders.pdf) [<http://perma.cc/6U2Q-3FPM>]; see also Laurie Goodstein, *Christian Leaders Unite on Political Issues*, N.Y. TIMES, Nov. 20, 2009, <http://www.nytimes.com/2009/11/20/us/politics/2oalliance.html> [<http://perma.cc/EF85-5Z34>].

113. See *Manhattan Declaration: We Make the Following Declaration*, MANHATTAN DECLARATION, <http://manhattandeclaration.org/#2> [<http://perma.cc/EG8R-XNMB>].

114. *Manhattan Declaration*, *supra* note 112, at 7-8.

115. *Id.* at 5.

While the *Declaration* opposes abortion as “deliberate killing,”<sup>116</sup> abortion also detaches sex from procreative ends. A 1996 statement signed by the *Declaration*’s authors, as well as many other social conservatives and religious leaders, declared: “The abortion license is inextricably bound up with the mores of the sexual revolution. Promotion of the pro-life cause also requires us to support and work with those who are seeking to reestablish the moral linkage between sexual expression and marriage, and between marriage and procreation.”<sup>117</sup> Putting it more succinctly, Pat Robertson recently explained on the *700 Club* that abortion and same-sex marriage are connected because both “destroy [our] opportunities to reproduce.”<sup>118</sup>

Religious conservatives opposed to practices that separate sex from procreation may object not only to same-sex marriage and abortion, but also to contraception. While *Hobby Lobby* featured an objection to contraceptives the claimants viewed as “abortifacients,”<sup>119</sup> many religious claimants object to contraception generally. There are Catholics and evangelical Protestants who object to a “contraceptive mentality” that separates sex from procreation.<sup>120</sup> The

116. *Id.* at 3.

117. *The America We Seek: A Statement of Pro-Life Principle and Concern*, FIRST THINGS, May 1996, <http://www.firstthings.com/article/1996/05/005-the-america-we-seek-a-statement-of-pro-life-principle-and-concern> [<http://perma.cc/A7P8-8QCD>].

118. *The 700 Club – March 26, 2014*, CHRISTIAN BROADCASTING NETWORK (Mar. 26, 2014), <http://www.cbn.com/tv/3394811325001> [<http://perma.cc/B345-MV36>] (video at 22:50). As Alan Keyes boldly asserted at a 2006 Protecting Life and Marriage Rally, “Abortion does at the physical level what homosexual marriage does at the institutional level.” Ryan Woodard, *Speakers Rally Against Abortion, Gay Marriage*, RAPID CITY J., Oct. 16, 2006, [http://www.rapidcityjournal.com/news/local/article\\_4cd6bab0-77f1-547b-9857-97e41fc52b2b.html](http://www.rapidcityjournal.com/news/local/article_4cd6bab0-77f1-547b-9857-97e41fc52b2b.html) [<http://perma.cc/XAH4-P2TW>]; see also Anthony Esolen, *Marriage Is Not a Water Fountain*, PUB. DISCOURSE (Sept. 29, 2014), <http://www.thepublicdiscourse.com/2014/09/13730> [<http://perma.cc/7ZX7-ZDCT>] (connecting same-sex marriage to the broader debate over sex and family, including sexual liberty, abortion, gendered notions of parenting, and no-fault divorce, such that “the whole sexual revolution is at issue”).

119. See *supra* note 21; see also *infra* note 273.

120. See, e.g., *Bishop Burke on the Dignity of Human Life and Civic Responsibility*, ZENIT (Jan. 10, 2004), <http://www.zenit.org/en/articles/bishop-burke-on-the-dignity-of-human-life-and-civic-responsibility> [<http://perma.cc/PP8Y-VH8N>] (printing a pastoral letter from Bishop Raymond Burke of Wisconsin, stating: “The port of entry for the culture of death in our society has been the abandonment of the respect for the procreative meaning of the conjugal act. It is the contraceptive way of thinking, the fear of the life-giving dimension of conjugal love, which very much sustains that culture.”); Brian Clowes, *The “Contraceptive Mentality” and Its Consequences*, LIFEISSUES.NET, [http://www.lifeissues.net/writers/clo/clo\\_10contraceptivrmind.html](http://www.lifeissues.net/writers/clo/clo_10contraceptivrmind.html) [<http://perma.cc/X286-6CLL>] (“And once a person, Catholic or non-Catholic, has adopted the aberrant contraceptive mentality, other disordered views and behaviors follow in their wake.”); Albert Mohler, *Can Christians Use Birth Control?*, ALBERTMOHLER.COM (June 5, 2012), <http://www.albertmohler.com/2012/06/05/can-christians>

plaintiffs in *Hobby Lobby* were supported by amici who opposed contraception<sup>121</sup> and advised the Court that contraception harms women.<sup>122</sup> And in other litigation over the ACA, claimants have expressed objections to coverage of any FDA-approved contraceptives.<sup>123</sup>

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-use-birth-control-4 [http://perma.cc/3CGX-QE7P] (“[W]e must start with a rejection of the contraceptive mentality that sees pregnancy and children as impositions to be avoided rather than as gifts to be received, loved, and nurtured. This contraceptive mentality is an insidious attack upon God’s glory in creation, and the Creator’s gift of procreation to the married couple.”); Jerry J. Pokorsky, *Obama and the New Evangelization*, CATH. THING (July 9, 2014), <http://www.thecatholicthing.org/2014/07/09/obama-and-the-new-evangelization> [http://perma.cc/ZA8G-PJL5] (discussing “[t]he consequences of the sexual revolution and the widespread availability of contraception” and asserting that “[t]he contraceptive mentality reduces men and women to mere objects of sexual pleasure, destroys marriages and is arguably the ultimate justification for ‘gay marriage’”).

121. A number of amicus briefs in *Hobby Lobby* made claims in opposition to contraception generally, rather than confining opposition to the four methods identified by Hobby Lobby. See Brief of 67 Catholic Theologians and Ethicists as Amici Curiae in Support of Hobby Lobby Stores, Inc., and Conestoga Wood Specialties Corp., *supra* note 25, at 12; Brief of Beverly LaHaye Institute and Janice Shaw Crouse, Ph.D. as Amici Curiae in Support of Hobby Lobby Stores Inc. and Conestoga Wood Specialties Corp., et al. at 20-21, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356); Brief of Amicus Curiae Women Speak for Themselves in Support of Hobby Lobby Stores, Inc. and Conestoga Wood Specialties, et al. at 24-26, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).
122. A brief filed in support of Hobby Lobby by Women Speak for Themselves, a project of the non-denominational Chiaroscuro Institute, argued that “the persistence or worsening of high rates of unintended pregnancy, abortion, STIs [sexually transmitted infections], and nonmarital births are the ‘logical’ results of the new marketplace for sex and marriage made possible by increasingly available contraception and legal abortion.” Brief of Amicus Curiae Women Speak for Themselves in Support of Hobby Lobby Stores, Inc. and Conestoga Wood Specialties, et al., *supra* note 121, at 25. In contemporaneous writing, the brief’s lead author remarked that “the churches opposing the Mandate hold, and teach women and men to maintain, an understanding of the sacredness of sexual intercourse, and its intrinsic connection with the procreating of new, vulnerable, human life.” Helen M. Alvaré, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 435 (2013).
123. See, e.g., *Newland v. Sebelius*, 542 F. App’x 706 (10th Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), *vacated by Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014). The *Hobby Lobby* decision applies to claimants with such objections. See Lyle Denniston, *Wider Impact of Hobby Lobby Ruling?*, SCOTUSBLOG (July 1, 2015, 12:05 PM), <http://www.scotusblog.com/2014/07/wider-impact-of-hobby-lobby-ruling> [http://perma.cc/34HM-AJSN]. And, of course, many religiously affiliated nonprofit organizations continue to assert complicity-based objections to the religious accommodations offered by the government from the contraceptive coverage requirement. See *Geneva Coll. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, Nos. 13-3536, 14-1374, 14-1376, 14-1377, 2015 WL 543067 (3d Cir. Feb. 11, 2015); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014).



Christians mobilize across religious denominations to enforce traditional morality in the law of abortion and marriage and to seek conscience-based exemptions from laws that depart from traditional morality. The *Manhattan Declaration* invokes Christian principles as it urges signers “to labor ceaselessly to preserve the legal definition of marriage as the union of one man and one woman” and “to roll back the license to kill that began with the abandonment of the unborn to abortion.”<sup>124</sup> At the same time, the *Declaration* exhorts Christians to seek conscience exemptions from laws on marriage and healthcare that do not conform to its understanding of Christian values.<sup>125</sup> The *Declaration*’s authors understand themselves as “build[ing] a movement—hundreds of thousands, perhaps millions, of Catholic, Evangelical, and Eastern Orthodox Christians”<sup>126</sup>—seeking to influence law and politics.<sup>127</sup> Signers are urged to “share information” about the document at meetings of a “civic group like Kiwanis or Rotary,”<sup>128</sup> and Christian social clubs, like the Christian Motorcyclists Association, have distributed the document.<sup>129</sup>

The *Manhattan Declaration* offers one prominent example of an organization that mobilizes a cross-denominational coalition of Christians to advocate for laws of general application that preserve traditional values and to assert conscience claims under a banner of religious liberty. The Family Research Council (FRC) is another.<sup>130</sup> FRC works to pass laws banning same-sex mar-

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124. *Manhattan Declaration*, *supra* note 112, at 3, 7.

125. *See id.* at 7–9. Robert George’s strong endorsement of judicially enforced religious exemptions arguably departs from his earlier views. *See* James M. Oleske, Jr., *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75 (2015) (reviewing ROBERT P. GEORGE, *CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM* (2013)), <http://harvardlawreview.org/2015/01/the-born-again-champion-of-conscience> [<http://perma.cc/FT9E-7U6Z>].

126. Letter from Robert George, Timothy George & Chuck Colson to All Signers of the Manhattan Declaration (Dec. 2, 2009) [hereinafter Letter from Robert George et al.] (on file with authors).

127. For a list of some of those who have endorsed the *Manifesto*, *see supra* note 112. Those who sign on to the *Declaration* are exhorted to engage in politics. When the document was first disseminated, its recipients were asked to “let [their] representatives know what [they] think about the issues,” including the then-pending ACA. Letter from Robert George et al., *supra* note 126.

128. Letter from Robert George et al., *supra* note 126; *see also* DANTE CHINNI & JAMES GIMPEL, *OUR PATCHWORK NATION* 53 (2010).

129. *See* E-mail from Jim Oliver, Christian Motorcyclists Ass’n (CMA), to CMA Brothers and Leaders (Dec. 3, 2009, 08:34 AM EST) (on file with authors).

130. FRC was founded by evangelical Christian leaders and eventually merged with Focus on the Family, a Christian evangelical ministry. *FAQs*, FAM. RES. COUNCIL (2015), <http://www.frc.org/faqs> [<http://perma.cc/ZL88-GMJD>]; *History of Family Research Council*, FAM. RES. COUNCIL (2015), <http://www.frc.org/historymission> [<http://perma.cc/FB6U-3QRP>]. FRC’s

riage and abortion.<sup>131</sup> At the same time, the organization supports religious exemptions for business owners whose “consciences prevent them from participating in”<sup>132</sup> a same-sex marriage and “health care professionals and organizations who have conscientious objections to . . . participation in or cooperation with the delivery and marketing of abortion or abortifacients, sterilization, [and] contraception.”<sup>133</sup>

To create collective political action in the name of Christian principles, FRC sponsors “Watchmen on the Wall,” a conference that brings to the nation’s capital approximately five hundred Christian pastors, who represent various denominations as well as non-denominational Christian ministries,<sup>134</sup> to facilitate advocacy for laws that reflect Biblical values.<sup>135</sup> The 2014 conference focused on defending “Biblical marriage” and responding to perceived attacks on religious liberty, including in the domain of abortion and contraception,<sup>136</sup> while the 2013 conference featured back-to-back sessions on “Threats to Religious Freedom” and “Protecting Marriage and Life in America.”<sup>137</sup> FRC provides pastors with a Voter Impact Toolkit created with the Southern Baptist Convention’s Ethics and Religious Liberty Commission, as well as a Culture Impact Manual, which, for example, instructs pastors to stop others from

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self-described “mission is to advance faith, family and freedom in public policy and the culture from a Christian worldview.” *Vision and Mission Statements*, FAM. RES. COUNCIL (2015), <http://www.frc.org/mission-statement> [<http://perma.cc/34MP-ZXCP>].

131. FRC “believes that homosexual conduct is harmful” and “supports state and federal constitutional amendments” banning same-sex marriage. *Homosexuality*, FAM. RES. COUNCIL (2015), <http://www.frc.org/homosexuality> [<http://perma.cc/3KDG-C4E2>]. And it seeks to “build a culture of life” and to ensure that *Roe*’s “grave error will be corrected.” *Abortion*, FAM. RES. COUNCIL (2015), <http://www.frc.org/abortion> [<http://perma.cc/8ACK-MZMK>].
132. *Hostility to Religion: The Growing Threat to Religious Liberty in the United States*, FAM. RES. COUNCIL 22 (July 30, 2014), <http://downloads.frc.org/EF/EF14G83.pdf> [<http://perma.cc/6GR5-A3ZR>].
133. *Conscience Protection*, FAM. RES. COUNCIL (2015), <http://www.frc.org/conscience-protection> [<http://perma.cc/Z3D7-UEUJ>].
134. See *Watchmen on the Wall 2014: Schedule of Events*, FAM. RES. COUNCIL (May 9, 2014), <http://www.watchmenpastors.org/wp-content/uploads/2014/05/Abbreviated-schedule.pdf> [<http://perma.cc/9KME-77T8>] (listing some of the various churches represented).
135. See Elizabeth Dias, *Watchmen on the Wall: Pastors Prepare To Take Back America*, TIME, May 30, 2014, <http://time.com/138134/watchmen-on-the-wall-pastors-prepare-to-take-back-america> [<http://perma.cc/SH74-QYW4>].
136. *Id.* The 2014 conference speakers included elected officials, social movement advocates, and pastors from Christian churches from around the country. See *Watchmen on the Wall 2014: Schedule of Events*, *supra* note 134.
137. *Watchmen on the Wall 2013: Schedule of Events*, FAM. RES. COUNCIL (May 13, 2013), <http://downloads.frc.org/EF/EF13E28.pdf> [<http://perma.cc/U5G4-PMZ8>].

“misus[ing] civil rights laws to protect homosexual conduct and gender identity disorder.”<sup>138</sup>

The movements asserting complicity-based conscience claims regularly act in coordination with a political party that shares the movements’ law reform goals.<sup>139</sup> The Republican Party platform asserts “support [for] a human life amendment to the Constitution” and “reaffirm[s] . . . support for a [c]onstitutional amendment defining marriage as the union of one man and one woman,” at the same time that it brings together the issues of healthcare, same-sex marriage, and abortion under the banner of a “war on religion.”<sup>140</sup> As the Party’s 2012 platform asserted: “The most offensive instance of this war on religion has been the current Administration’s attempt to compel faith-related institutions, as well as believing individuals, to contravene their deeply held religious, moral, or ethical beliefs regarding health services, traditional marriage, or abortion.”<sup>141</sup>

Republican Party support for complicity-based conscience claims is not limited to the statement of principles in the Party’s platform. The Party has long supported healthcare refusal laws.<sup>142</sup> And, after passage of the ACA, which the Party fiercely opposed, Republican leaders attempted to pass legislation providing conscience exemptions from the law’s requirement that employer-provided healthcare insurance cover particular items and services. In 2012, the

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138. See Dias, *supra* note 135. For another example of an effort to mobilize evangelical pastors, see Jason Horowitz, *Evangelicals Aim To Mobilize an Army for Republicans in 2016*, N.Y. TIMES, Mar. 15, 2015, <http://www.nytimes.com/2015/03/16/us/evangelicals-aim-to-mobilize-an-army-for-republicans-in-2016.html> [<http://perma.cc/M8XJ-R8X6>] (quoting David Lane, founder of the American Renewal Project, speaking to an audience of pastors: “If the Lord were to call 1,000 pastors in America—1,000—and they ended up with an average of 300 volunteers per campaign in 2016, that would be 300,000 grass-root, precinct-level, evangelical conservatives coming from the bottom up . . . It would change America.”).

139. For example, FRC connected pastors with Republican lawmakers at “Watchmen on the Wall.” See Dias, *supra* note 135.

140. See *Republican Platform 2012: We Believe in America*, REPUBLICAN NAT’L CONVENTION 10, 12, 14 (2012), [http://www.presidency.ucsb.edu/papers\\_pdf/101961.pdf](http://www.presidency.ucsb.edu/papers_pdf/101961.pdf) [<http://perma.cc/QM2E-5CPV>].

141. *Id.* at 12.

142. *Republican Party Platform of 2000*, AM. PRESIDENCY PROJECT (July 31, 2000), <http://www.presidency.ucsb.edu/ws/index.php?pid=25849> [<http://perma.cc/2NG2-7AXW>] (“Because we treasure freedom of conscience, we oppose attempts to compel individuals or institutions to violate their moral standards in providing health-related services.”). The Republican platform began to champion “conscience” in 1996. See *Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT (Aug. 12, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=25848> [<http://perma.cc/CC5Z-JFD3>] (“[T]he extraordinary things about our country . . . result when men and women live in obedience to their conscience, not to the state.”).

Respect for Rights of Conscience Act, commonly referred to as the Blunt Amendment, sought to amend the ACA to exempt any employer from “providing coverage” and any plan from “paying for coverage” of any “items or services . . . contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan.”<sup>143</sup> Debate over the Blunt Amendment focused on employers’ coverage of contraception.<sup>144</sup>

The Blunt Amendment was narrowly defeated in the Senate, voted down 51-48.<sup>145</sup> The vote largely tracked party lines, with only one Republican opposing the bill.<sup>146</sup> After supporters failed to secure a legislated accommodation from the ACA’s employer coverage requirement, public interest law firms sought the same sort of accommodation through litigation. An attorney from the Becket Fund for Religious Liberty approached the general counsel of Hobby Lobby about filing suit.<sup>147</sup> In the months that followed, Hobby Lobby, represented by the Becket Fund, and Conestoga Wood, represented by Alliance Defending Freedom (ADF, formerly Alliance Defense Fund), brought RFRA challenges to the ACA’s requirement that employer-provided insurance cover

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143. S. 1467, 112th Cong. § 3(a) (2011). While seeking to amend the ACA, the Blunt Amendment itself was proposed as an amendment to a highway-funding bill. 158 CONG. REC. S538 (daily ed. Feb. 9, 2012) (recording the amendment proposed by Sen. Blunt). The Amendment also provided that no “individual or institutional health care provider” could be required “to provide, participate in, or refer for a specific item or service contrary to the provider’s religious beliefs or moral convictions.” S. 1467 § 3(a).

144. See, e.g., N.C. Aizenman & Rosalind S. Helderman, *Birth Control Exemption Bill, the ‘Blunt Amendment,’ Killed in Senate*, WASH. POST, Mar. 1, 2012, [http://www.washingtonpost.com/national/health-science/birth-control-exemption-bill-the-blunt-amendment-killed-in-senate/2012/03/01/gIQA4tXjkR\\_story.html](http://www.washingtonpost.com/national/health-science/birth-control-exemption-bill-the-blunt-amendment-killed-in-senate/2012/03/01/gIQA4tXjkR_story.html) [<http://perma.cc/5N9K-CAVH>]. The ACA already included a refusal provision relating to abortion: “No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.” 42 U.S.C. § 18023(b)(4) (2012).

145. See Aizenman & Helderman, *supra* note 144.

146. *Id.*

147. Janet Adamy, *Are Firms Entitled to Religious Protections?*, WALL ST. J., Mar. 21, 2014, <http://www.wsj.com/articles/SB10001424052702304026304579451342576281698> [<http://perma.cc/5CWL-WYS9>] (“In 2012, a lawyer for the Becket Fund for Religious Liberty, a nonprofit Washington law firm, called Hobby Lobby’s general counsel to inform him of the health law’s contraception requirement and to ask whether the company wanted to file a suit.”). At that point, David Green, the founder of Hobby Lobby, was “shocked to discover Hobby Lobby was in fact offering in its insurance plan some of the emergency contraceptives at issue. He called for the insurer to revoke that coverage and signed onto the lawsuit.” *Id.* See also Verified Complaint ¶¶ 14-15, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000-HE (W.D. Okla. Sept. 12, 2012) (seeking declaratory and injunctive relief against the ACA’s contraceptive coverage requirement).

contraception.<sup>148</sup> After failing to achieve a complicity-based exemption through legislation, lawyers encouraged claimants to assert complicity-based claims to exemption through litigation.<sup>149</sup>

### B. Preservation Through Transformation

We now examine how complicity-based conscience claims can serve the law reform goals of cross-denominational movements. As we have seen, many advocates of complicity-based conscience claims are interested in changing the sexual mores of the wider community. Seeking an exemption to avoid complicity in the sins of others can serve this same end. In seeking an exemption, a claimant need not withdraw but instead can employ the religious objection to criticize norms governing the entire community. Describing *Hobby Lobby* as “a mandate for evangelization,” Bishop James Conley explained a goal of religious exemption claims:

Our religious liberty is not an end in itself. Instead, religious liberty is the freedom for something real—the freedom to “make disciples of all nations”—to spread the Gospel, and its fruits, joyfully. If we want to protect our religious liberty, the very best thing we can do is to use it—to transform culture by transforming hearts for Jesus Christ.<sup>150</sup>

Religious actors can evangelize by advocating for laws on abortion or marriage that conform to traditional and religious values. Or, as these comments suggest, they can evangelize by seeking religious exemptions from laws of gen-

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148. Verified Complaint, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (No. 5:12-cv-06744) (raising RFRA and free exercise challenges); Verified Complaint, *supra* note 147 (same).

149. Senator Roy Blunt himself had predicted that the Supreme Court would ultimately resolve the issue. See Jennifer Haberkorn & Kate Nocera, *Blunt Amendment Defeated in Senate*, POLITICO, Mar. 1, 2012, <http://www.politico.com/news/stories/0312/73497.html> [<http://perma.cc/2DX4-UKD3>]. Blunt filed an amicus brief along with other members of Congress supporting the challengers in *Hobby Lobby* and later issued a statement praising the decision. See Brief of Amici Curiae Members of Congress in Support of Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356); Press Release, Roy Blunt, Senator Blunt Applauds Supreme Court Decision in *Hobby Lobby*, *Conestoga Wood* (June 30, 2014), <http://www.blunt.senate.gov/public/index.cfm/news?ID=1a41b7fb-f3d8-4296-b8c9-ed857fia3478> [<http://perma.cc/CU8R-U5VC>].

150. Bishop James Conley, Op-Ed., *Hobby Lobby Decision Is Also a Mandate*, S. NEB. REG., July 11, 2014, <http://www.lincolndiocese.org/op-ed/bishop-s-column/2093-hobby-lobby-decision-is-also-a-mandate> [<http://perma.cc/L2F2-L88C>] (quoting Pope Francis, *Evangelii Gaudium*, VATICAN PRESS ¶ 19 (Nov. 24, 2013), [http://w2.vatican.va/content/dam/francesco/pdf/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium\\_en.pdf](http://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium_en.pdf) [<http://perma.cc/E7MJ-GAVS>] (quoting *Matthew* 28:19-20)).

eral application that they believe contravene traditional and religious values. Without change in numbers or belief, religious actors can shift from *speaking as a majority* seeking to enforce traditional morality to *speaking as a minority* seeking exemptions from laws that offend traditional morality. Changing the form of the claim in this way matters. When defenders of traditional marriage can no longer persuade by appeal to shared beliefs about the wrongs of same-sex relationships, they may instead appeal to beliefs about the importance of protecting religious pluralism, revising the secular rationale for the claim in a way that gives more direct and uninhibited expression to its religious logic. Accommodating complicity-based conscience claims in these circumstances may function to enable “preservation through transformation”: when an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that preserve elements of the challenged regime.<sup>151</sup>

For these reasons, accommodating religious exemption claims may not settle conflict, as many contend.<sup>152</sup> Instead, claims for religious exemption can provide a way to continue conflict over community-wide norms in a new form. To demonstrate this dynamic, we first look back at how healthcare refusals le-

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151. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997). In the sexual orientation context, see Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Perpetuation of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1212-13 (2012).
152. To see this argument made by the cross-denominational coalition itself, see Ryan T. Anderson, *The Defense of Marriage Isn’t Over*, PUB. DISCOURSE (Oct. 8, 2014), <http://www.thepublicdiscourse.com/2014/10/13889> [<http://perma.cc/UA54-7EH5>], which argues that “[p]rotecting religious liberty and the rights of conscience is the embodiment of a principled pluralism that fosters a more diverse civil sphere. Indeed, tolerance is essential to promoting peaceful coexistence even amid disagreement”; and Thomas M. Messner, *From Culture Wars to Conscience Wars: Emerging Threats to Conscience*, HERITAGE FOUND. (Apr. 13, 2011), <http://www.heritage.org/research/reports/2011/04/from-culture-wars-to-conscience-wars-emerging-threats-to-conscience> [<http://perma.cc/5HBD-WBCX>], which argues that “[i]n pluralistic societies where consensus is elusive, protecting religious liberty and rights of conscience is one of the most effective and principled ways to promote social peace and civic fraternity.” Legal scholars supportive of religious exemptions in these settings—for instance, for wedding-related, for-profit businesses—commonly argue that such exemptions will reduce or resolve conflict. See, e.g., Berg, *supra* note 36, at 207 (“[R]ecognizing same-sex marriage without significant religious exemptions will multiply the number of conflicts and create new legal exposure for objectors, either immediately or in the long term.”); 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, 1431 (2012) (arguing that accommodations “impose some costs on both sides, but also turn down the temperature on heated social debates”). For an insightful response, see Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 752-56 (2014).

gislation has functioned within the broader anti-abortion agenda. As we then show, advocates look to the healthcare context as a model for how similar conscience claims might function within campaigns against same-sex marriage and LGBT equality.

### 1. *Healthcare Refusals*

Americans United for Life (AUL) annually publishes a comprehensive set of model abortion restrictions to “enable[] legislators to easily introduce bills without needing to research and write the bills themselves.”<sup>153</sup> The model laws restrict abortion in different ways, including “informed consent,” “clinic regulation[],” and bans at earlier points in pregnancy.<sup>154</sup>

AUL’s model legislation includes a Healthcare Freedom of Conscience Act.<sup>155</sup> The 2013 model act opens with a statement of purpose: “It is the purpose of this Act to protect as a basic civil right the right of all healthcare providers, institutions, and payers to decline to counsel, advise, pay for, provide, perform, assist, or participate in providing or performing healthcare services that violate their consciences.”<sup>156</sup> The model act defines “healthcare provider” broadly to include “any individual who may be asked to participate in any way in a healthcare service, including” not only a physician or nurse but also a “physician’s assistant . . . nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker, or any professional, paraprofessional, or any other person who furnishes, or assists in the furnishing of, healthcare services.”<sup>157</sup> And the model act provides that “participate” means not just “perform” or “assist in” but also “counsel, advise, provide . . . refer for, admit for purposes of providing, or participate in providing any healthcare service or any form of such service.”<sup>158</sup> The

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153. *Legislation*, AMS. UNITED FOR LIFE, <http://www.aul.org/legislative-resources> [<http://perma.cc/B4HP-4PBL>].

154. *Defending Life 2015: Celebrating Ten Years of Defending Life*, AMS. UNITED FOR LIFE 292, 305 (2015), [http://aul.org/downloads/defending-life-2015/AUL\\_Defending\\_Life\\_2015.pdf](http://aul.org/downloads/defending-life-2015/AUL_Defending_Life_2015.pdf) [<http://perma.cc/F24W-2BBA>].

155. *Healthcare Freedom of Conscience Act: Model Legislation and Policy Guide for the 2014 Legislative Year*, AMS. UNITED FOR LIFE (2013), [http://www.aul.org/downloads/2014-Legislative-Guides/ROC/Healthcare\\_Freedom\\_of\\_Conscience\\_Act\\_-\\_2014\\_LG.pdf](http://www.aul.org/downloads/2014-Legislative-Guides/ROC/Healthcare_Freedom_of_Conscience_Act_-_2014_LG.pdf) [<http://perma.cc/SD4B-E2VC>] [hereinafter *Healthcare Freedom of Conscience Act*].

156. *Id.* § 2(a)(3).

157. *Id.* § 3(b).

158. *Id.* § 3(f).

AUL model act seeks to spread the logic of complicity-based conscience claims to more types of healthcare, to more actors, and to more acts.

The network of conscience exemptions that the anti-abortion movement seeks to enact functions like other laws pressed by the movement: it impedes access to abortion.<sup>159</sup> For example, Mississippi's broad healthcare refusal law, described in Part II, is explicitly based on the AUL model statute.<sup>160</sup> Unlike the Church Amendment, which protected those who supported and those who opposed abortion and sterilization, Mississippi's law protects only individuals or institutions opposing abortion. At the same time, Mississippi has enacted a range of other measures, including some based on other AUL model statutes, to restrict access to abortion.<sup>161</sup> Indeed, the Fifth Circuit Court of Appeals recently blocked enforcement of an admitting privileges law that would have closed the only remaining clinic in the state.<sup>162</sup>

As Mississippi illustrates, the anti-abortion movement seeks expansive conscience clauses at the same time that it continues to seek *Roe*'s overturning and to pursue a variety of measures to limit access to abortion.<sup>163</sup> Given the numbers mobilized in opposition to abortion in the region, exemptions, like other forms of anti-abortion legislation, can obstruct and stigmatize abortion, functioning as part of a broader legislative strategy to make access to abortion – and contraception – increasingly difficult.

This use of conscience clauses illustrates how opponents of abortion can change the kinds of rules and reasons they employ to enforce contested

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159. See *Legislative Victories*, AMS. UNITED FOR LIFE, <http://www.aul.org/legislative-resources/legislative-victories> [<http://perma.cc/6YKD-9NZ8>]; see also Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POL'Y REV., Winter 2014, at 9, <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.pdf> [<http://perma.cc/9T8N-YEH6>] (discussing a new wave of state-level anti-abortion measures introduced in the past three years).

160. See *Mississippi 2014 Report Card*, AMS. UNITED FOR LIFE, <http://www.aul.org/states/mississippi> [<http://perma.cc/GVZ9-GJGK>] [hereinafter *Mississippi 2014*]. AUL has a state director in Mississippi. See *Legislation*, AMS. UNITED FOR LIFE, *supra* note 153.

161. See *Mississippi 2014*, AMS. UNITED FOR LIFE, *supra* note 160.

162. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014).

163. See *Legislation*, AMS. UNITED FOR LIFE, *supra* note 153 (explaining that the organization's model laws, which include its Freedom of Conscience Act, "help legislators enact new pro-life laws . . . while continuing to roll back *Roe v. Wade* in the courts"). On this point, see Cathleen Kaveny, *The Right To Refuse: How Broad Should Conscience Protections Be?*, COMMONWEAL, May 8, 2009, at 6 ("Many prolife arguments for abortion conscience clauses take this form: 'A decent society ought to ban abortion, but at the very least, it ought to protect those morally courageous doctors who refuse to perform it.' This appeal to conscience is provisional. When we are in political power, we will try to ban abortion, when we are out of power, we will claim the protections of conscience.").



norms—an example of “preservation through transformation.”<sup>164</sup> Constitutional decisions protecting the right to privacy have partly disestablished social norms that were once enforced through laws criminalizing contraception and abortion.<sup>165</sup> Advocates seek the reversal of these decisions. But where unable to reinstate a law of general application that enforces traditional sexual morality, they seek exemptions in the name of religious liberty from laws that contravene customary morality. In this way, anti-abortion advocates shift from speaking as a majority enforcing customary morality through the criminal law to speaking as a minority seeking religious exemptions in the civil law.

Through this lens, we can appreciate how conscience provisions allow advocates to rework a traditional norm that was once enforced through the criminal law into a norm that is now enforced through a web of exemptions in the civil law. With the law’s authority, traditional and religious norms can be enforced against third parties outside the religious community. By enacting laws exempting individuals and institutions in the healthcare industry from duties of patient care and authorizing them to express complicity-based objections to associations with certain patients, the state creates a parallel legal order.

The separate normative order authorized by healthcare refusal laws may take a highly institutionalized form. For example, Catholic healthcare delivery is governed by the Ethical and Religious Directives for Catholic Health Care Services (Directives), promulgated by the U.S. Conference of Catholic Bishops (USCCB).<sup>166</sup> Implementation of the Directives, which ensure that healthcare is delivered in conformance with Catholic theological principles regarding cooperation and scandal,<sup>167</sup> is enabled by healthcare refusal laws. According to the Catholic Health Association, one in six patients in the United States is treated

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164. See *supra* note 151 and accompanying text.

165. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

166. The USCCB was previously known as the National Conference of Catholic Bishops.

167. See, e.g., *Ethical and Religious Directives for Catholic Health Care Services: Fifth Edition*, U.S. CONF. CATH. BISHOPS 36 (Nov. 17, 2009), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf> [<http://perma.cc/5GTX-FSUF>] [hereinafter 2009 *Religious Directives for Catholic Health Care Services*] (“If a Catholic health care organization is considering entering into an arrangement with another organization that may be involved in activities judged morally wrong by the Church, participation in such activities must be limited to what is in accord with the moral principles governing cooperation.”); *id.* at 37 (“The possibility of scandal must be considered when applying the principles governing cooperation.”).

by a Catholic hospital.<sup>168</sup> (In Washington State, approximately half of the state's healthcare system is now Catholic-run.<sup>169</sup>) It is clear, then, that healthcare refusal laws empower a substantial segment of the healthcare industry to operate in conformity with religious principles that dictate limitations on services relating to abortion and contraception.

But the Catholic hospital system is not the only organization coordinating claims on refusal laws. Religious hospitals represent nearly a fifth of the healthcare delivery system in the United States,<sup>170</sup> and eight of the twenty-five largest healthcare systems are religiously owned.<sup>171</sup> Even secular hospitals may act on a traditional norm widely shared in the community.<sup>172</sup> And other loosely affiliated providers may act on the basis of shared convictions. For example, resistance to emergency contraception may be widespread and include both hos-

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168. *Catholic Health Care in the United States*, CATH. HEALTH ASS'N U.S. 1 (Jan. 2014), [https://www.chausa.org/docs/default-source/general-files/cha\\_miniprofile\\_final.pdf](https://www.chausa.org/docs/default-source/general-files/cha_miniprofile_final.pdf) [<http://perma.cc/J3WL-Z4SA>].
  169. See Danny Westneat, *Is Catholic Church Taking Over Health Care in Washington?*, SEATTLE TIMES, May 22, 2013, [http://seattletimes.com/html/localnews/2021029685\\_westneat22.xml.html](http://seattletimes.com/html/localnews/2021029685_westneat22.xml.html) [<http://perma.cc/7LCU-MLUY>]. Hospital mergers have substantially extended the reach and influence of Catholic healthcare in rural Washington. See Kirk Johnson, *Hospital Mergers Reset Abortion-Access Battle*, N.Y. TIMES, May 12, 2013, <http://www.nytimes.com/2013/05/13/us/hospital-mergers-in-northwest-raise-issue-of-abortion-barriers.html> [<http://perma.cc/6MX9-TJZG>] (“Ten counties out of 39 in the state would have 100 percent of their hospital beds in Catholic health system hands by year’s end if all the proposed mergers went through.”).
  170. Jennifer Harper, *Doctors Face Religious Conflicts at Hospitals*, WASH. TIMES, Apr. 14, 2010, <http://www.washingtontimes.com/news/2010/apr/14/doctors-report-religious-conflicts-at-hospitals> [<http://perma.cc/TN3T-UDBE>].
  171. See Karen Branz, *Ranking the Nation’s 25 Largest Healthcare Systems by Employees*, DARK DAILY (Aug. 25, 2010), <http://www.darkdaily.com/ranking-the-nations-25-largest-healthcare-systems-by-employees-825> [<http://perma.cc/E9B6-CDVJ>]. Religious hospitals, of course, do not necessarily claim belief systems that support restrictions on access to abortion and contraception.
  172. See Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 824 (“[T]here certainly are nonreligious hospitals—public and private—in areas where many people condemn abortion. The directors of such hospitals might wish not to have abortions performed there for moral or political reasons, and their moral reasons might be religiously informed. They might wish to have hospital policy reflect their sense of what is morally acceptable practice.”). The *New York Times*, for instance, reported that in Mississippi, “hospitals, especially in conservative and rural areas, have refused to grant privileges to abortion clinic doctors in order to avoid controversy.” Campbell Robertson & Erik Eckholm, *Judges Block Abortion Curb in Mississippi*, N.Y. TIMES, July 29, 2014, <http://www.nytimes.com/2014/07/30/us/mississippi-abortion-clinic-federal-court-blocks-closing.html> [<http://perma.cc/N7WX-83L2>].

pitals and pharmacies.<sup>173</sup> In states and regions where abortion and certain forms of contraception are stigmatized, healthcare refusal laws, along with other restrictions, may create a system in which the disestablished sexual norms continue to be enforced. With widespread, cross-denominational assertion of claims for exemption, accommodation of complicity-based conscience objections can have far-reaching effects.

## 2. Same-Sex Marriage and LGBT Equality

Looking back at the spread of healthcare refusals legislation raises questions about the future trajectory of religious exemptions concerning same-sex marriage. In the sexual orientation context, complicity-based conscience claims, which are beginning to proliferate, have been modeled on healthcare refusals.<sup>174</sup> As religious groups opposing same-sex marriage suffer losses in

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173. See Editorial, *Moralists at the Pharmacy*, N.Y. TIMES, Apr. 3, 2005, <http://www.nytimes.com/2005/04/03/opinion/03sun2.html> [<http://perma.cc/B9MF-M9WU>] (describing a series of denials of contraception and support for these refusals by Pharmacists for Life); Rob Stein, *Pharmacists' Rights at Front of New Debate; Because of Beliefs, Some Refuse To Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html> [<http://perma.cc/GA27-GDVQ>] (same); see also Rob Stein, *'Pro-Life' Drugstores Market Beliefs*, WASH. POST, June 16, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/15/AR2008061502180.html> [<http://perma.cc/J37X-UBEE>] (reporting on the proliferation of pharmacies refusing to stock birth control). Cross-denominational organizing against contraception continued during the ACA debates. See Tom Howell Jr., *Holy Alliance: Catholics, Southern Baptists Unite Against Obamacare Contraception Mandate*, WASH. TIMES, June 21, 2013, <http://www.washingtontimes.com/news/2013/jun/21/catholics-southern-baptists-against-obamacare> [<http://perma.cc/3MP8-7VTT>].

174. See Lynn D. Wardle, *Religious Liberties: "Conscience Exemptions"*, ENGAGE, Feb. 2013, at 77, [http://www.fed-soc.org/library/doclib/20130628\\_ConscienceExemptions.pdf](http://www.fed-soc.org/library/doclib/20130628_ConscienceExemptions.pdf) [<http://perma.cc/CDJ3-EEJX>] ("At least forty-seven states and the District of Columbia also have enacted conscience-protection laws relating to abortion. Likewise, when it appeared that some state [sic] might legalize same-sex marriage, and especially since 2003 when the [sic] Massachusetts became the first state to announce that it would legalize same-sex marriage, there has been proposal, discussion, and some limited adoption of 'conscience exemptions' that protect some individuals and entities with religious or moral objection to same-sex marriage from any legal duty to or liability for declining to assist in creating same-sex marriages." (internal citations omitted)); Letter from Robin Fretwell Wilson, Class of 1958 Law Alumni Professor of Law, Wash. & Lee Univ. Sch. of Law et al. to Brian E. Frosh, Chairman, Judicial Proceedings Comm., Md. State Senate 2, 6 & n.15 (Jan. 31, 2012), <http://mirrorofjustice.blogs.com/files/maryland-letter.pdf> [<http://perma.cc/CC5R-KZKC>] (arguing for "marriage conscience protection" in the same-sex marriage context by appealing to laws "accommodating health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization"). For scholarly analysis connecting exemptions in the same-sex marriage context to those in the healthcare, and specifically abortion, context, see Berg, *supra* note 36, at 233-34; and Robin Fretwell Wilson, *Matters of Conscience*:

politics and litigation, critics of same-sex marriage, including the *Manhattan Declaration*'s Robert George, encourage them to look to the abortion context for a model for long-term change.<sup>175</sup> The abortion example illustrates how to resist legal settlement of conflict. As Ryan Anderson<sup>176</sup> wrote in *National Review*, "we must . . . make clear that court-imposed same-sex marriage via a *Roe*-style decision will not settle the marriage debate any more than it has settled the abortion debate."<sup>177</sup> He immediately pivoted to religious freedom: "Whatever the Court does will cause less damage if we . . . highlight the importance of religious liberty. Even if the Court were to redefine marriage, government should not require third parties to recognize a same-sex relationship as a marriage."<sup>178</sup> It is not accidental that at the very moment general arguments for "traditional marriage" are failing, Anderson urges claims on religious liberty. As Anderson emphasizes, the abortion context illustrates how creative advocacy can adapt to conditions of loss. Unsurprisingly, then, conscience clauses se-

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*Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 77-81 (Douglas Laycock et al. eds., 2008). For a response, see Sepper, *supra* note 152.

175. See, e.g., ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 145-46 (2013); Ryan T. Anderson, *Marriage: Where Do We Go From Here?*, NAT'L REV. (May 22, 2014, 4:00 AM), <http://www.nationalreview.com/article/378538/marriage-where-do-we-go-here-ryan-t-anderson> [<http://perma.cc/5A7X-XSJ9>]; David Cray, Associated Press, *Losing Streak Lengthens for Foes of Gay Marriage*, HUFFINGTON POST (June 15, 2014, 1:00 PM), [http://www.huffingtonpost.com/2014/06/15/gay-marriage-opponents\\_n\\_5496806.html](http://www.huffingtonpost.com/2014/06/15/gay-marriage-opponents_n_5496806.html) [<http://perma.cc/GK2V-ACJP>] (noting remarks by National Organization for Marriage's Brian Brown); Carson Holloway, *Premature Talk of Surrender on Same-Sex Marriage*, PUB. DISCOURSE (May 15, 2014), <http://www.thepublicdiscourse.com/2014/05/13106> [<http://perma.cc/4WPM-DBW5>].
176. Anderson is a fellow at the Heritage Foundation, the editor of *Public Discourse*, the Witherspoon Institute's online journal, and the co-author of a leading defense of "traditional marriage." See SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012). Justice Alito cited this book in his dissenting opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2715, 2718 (2013) (Alito, J., dissenting), where the majority voted to strike down Section 3 of the federal Defense of Marriage Act.
177. Ryan T. Anderson, *The Roe of Marriage*, NAT'L REV., Aug. 11, 2014, <https://www.nationalreview.com/nrd/articles/383581/roe-marriage> [<http://perma.cc/DQW7-DHE9>].
178. *Id.* Anderson makes the same sequence of arguments in other places. See, e.g., Ryan T. Anderson, *7 Reasons Why the Current Marriage Debate Is Nothing Like the Debate on Interracial Marriage*, DAILY SIGNAL (Aug. 27, 2014), <http://dailysignal.com/2014/08/27/7-reasons-current-marriage-debate-nothing-like-debate-interracial-marriage> [<http://perma.cc/XU2F-SE5Y>]. For similar claims, see Russell D. Moore, *Same-Sex Marriage and the Future*, MOORE TO THE POINT (Apr. 15, 2014), <http://www.russellmoore.com/2014/04/15/same-sex-marriage-and-the-future> [<http://perma.cc/2VT9-2VGT>].

cured in the abortion domain have become an aspiration for same-sex marriage opponents.<sup>179</sup>

We can see how advocates are adapting their arguments in the marriage context. For example, social conservatives long used arguments from traditional morality to oppose recognizing same-sex relationships.<sup>180</sup> But these arguments about lesbians and gay men now sound illegitimate – like “bigotry.”<sup>181</sup> In response, advocates have changed the secular rationale for their position in ways that give increasingly uninhibited expression to its religious logic. Advocates now emphasize different justifications for excluding same-sex couples from marriage<sup>182</sup> – for example, that marriage is about biological procreation<sup>183</sup>

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179. See Anderson, *supra* note 177; see also Richard Fausset & Alan Blinder, *States Renew Fight To Stop Gay Marriage*, N.Y. TIMES, Jan. 28, 2015, <http://www.nytimes.com/2015/01/29/us/battles-over-same-sex-marriage-roil-statehouses-ahead-of-supreme-courts-decision.html> [<http://perma.cc/668E-YTQF>] (quoting South Carolina Republican state senator Lee Bright, who introduced legislation that would exempt government employees from duties to issue marriage licenses to same-sex couples: “We have similar language for folks that work in health care that don’t want to participate in abortions.”); Wardle, *supra* note 174, at 77–78. An ADF representative explains: “Are the situations morally different between a health-care provider and a business owner? Each person’s conscience is being wrongly violated. . . . [T]he same breach of conscience occurs . . . because both facilitate inherently immoral activity.” Jeffrey J. Ventrella, *Resist or Accommodate Evil: There Is No “Third Way”*, PUB. DISCOURSE (Jan. 27, 2015), <http://www.thepublicdiscourse.com/2015/01/14264> [<http://perma.cc/J3ET-T28R>].

180. See, e.g., Answer Brief of Campaign for California Families on the Merits, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Brief of Ass’n of Maryland Families & Liberty Counsel as Amici Curiae in Support of Appellants, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44).

181. See Reva B. Siegel, *The Supreme Court, 2012 Term – Foreword: Equality Divided*, 127 HARV. L. REV. 1, 78–79 (2013) (tracing debates in law and politics over allegations of bigotry). Litigation over anti-sodomy laws from the 1980s through the early 2000s relied on traditional norms to justify criminal prohibitions on homosexuality. See, e.g., Brief of Concerned Women for America Education & Legal Defense Foundation in Support of Petitioner at 2, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (arguing that laws that would grant “legal protection to those who engage in homosexuality . . . are an affront to public morality and our dedication to family life”); Brief of the Rutherford Institute et al. as Amici Curiae in Support of the Petitioner at 18–19, *Bowers*, 478 U.S. 186 (No. 85-140) (describing “homosexual conduct” as “perverse and deviant”). Subsequent litigation focused less on sex and more on marriage, yet continued to draw on traditional morality for the purpose of preserving restrictions on same-sex sex. See, e.g., Brief of the Family Research Council, Inc. & Focus on the Family as Amici Curiae in Support of the Respondent at 10, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). On the layering of anti-gay arguments, see William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1331, 1346 (2000).

182. For discussion of the evolving justifications for opposing same-sex marriage, see Siegel, *supra* note 181, at 83–84 & n.422. See also William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1353

or that preserving “traditional marriage” protects religious liberty.<sup>184</sup> At the same time, in anticipation of the possibility of defeat, they argue for exemptions from laws that recognize same-sex marriage.<sup>185</sup> In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.<sup>186</sup>

As in the case of healthcare refusals, these claims for religious exemption have spread and expanded through the concept of complicity. Many states that allow same-sex couples to marry have enacted legislation making clear that religious denominations and clergy have no obligation to solemnize a same-sex marriage.<sup>187</sup> These actors can be analogized to the doctors and nurses covered

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(2010); Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 89-93 (2013).

183. See, e.g., Brief of Robert P. George et al. as Amici Curiae in Support of Hollingsworth & Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 20-23, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Nos. 12-144, 12-307).
184. See, e.g., Brief of Manhattan Declaration as Amicus Curiae in Support of Respondent Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (“Religious freedom is our first, most cherished liberty, and its guarantee is threatened today by the redefinition of marriage. Such redefinition in practice would bring a new orthodoxy that circumscribes the ability of the Christian faithful to put their beliefs into practice.”); Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Hollingsworth & the Bipartisan Legal Advisory Group Addressing the Merits at 5, *Hollingsworth*, 133 S. Ct. 786 (Nos. 12-144, 12-307) (arguing that “the threat to religious liberty” furnished “a rational basis for Congress to proceed cautiously by enacting DOMA and for the people of California to return to the traditional definition of marriage by voting for Proposition 8”).
185. See Richard Fausset & Alan Blinder, *States Weigh Legislation To Let Businesses Refuse To Serve Gay Couples*, N.Y. TIMES, Mar. 5, 2015, <http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html> [<https://perma.cc/FH32-829R>]; see also Anderson, *supra* note 152 (“Governmental recognition of same-sex relationships as marriages need not and should not require any third party to recognize a same-sex relationship as a marriage. We must vigorously advance the arguments for a classically liberal form of limited government and highlight the importance of religious liberty.”).
186. See Complaint at 5-13, *Arlene’s Flowers, Inc. v. Ferguson*, No. 13-2-01898-2 (Wash. Super. Ct. Aug. 1, 2013) (asserting that a florist who voted against same-sex marriage in the state referendum is now being coerced by the state’s antidiscrimination laws into violating her religious beliefs and thus seeks an exemption); Ryan T. Anderson & Leslie Ford, *Protecting Religious Liberty in the State Marriage Debate*, HERITAGE FOUND. (Apr. 10, 2014), <http://www.heritage.org/research/reports/2014/04/protecting-religious-liberty-in-the-state-marriage-debate> [<http://perma.cc/3MDG-LVBG>] (“Even in jurisdictions that have redefined marriage, individuals and businesses that believe marriage is between a man and a woman should be free to live in accord with their moral and religious convictions.”).
187. See, e.g., 750 ILL. COMP. STAT. ANN. 5/209(a-5) (West 2014) (“Nothing in this Act shall be construed to require any religious denomination . . . or any minister, clergy, or officiant acting as a representative of a religious denomination . . . to solemnize any marriage.”). Of

by the healthcare refusal laws who object to performing abortions or sterilizations.<sup>188</sup> But as with healthcare refusals, advocates draw on concepts of complicity to seek exemptions for those who object to facilitating or sanctioning another's sinful conduct. Ryan Anderson describes the expanding sequence of these claims: "Some will conclude that they cannot in good conscience participate in same-sex ceremonies, from priests and pastors to bakers and florists."<sup>189</sup>

As recent litigation illustrates, business owners working in wedding-related fields are asserting complicity-based objections to serving same-sex couples.<sup>190</sup> Jack Phillips, the owner of Denver's Masterpiece Cakes, turned away same-sex couples because he "believes that the Bible commands him . . . not to encourage sin in any way."<sup>191</sup> He contended that baking and selling a cake for a same-sex wedding would force him to "participate" in a sinful same-sex relationship.<sup>192</sup> Similarly, owners of an Iowa art gallery used as an event space turned away a same-sex couple because "their religious beliefs prevent them from . . . facilitating . . . same-sex wedding ceremonies."<sup>193</sup> Moreover, through concepts

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course, this largely restates constitutional constraints. See Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 174, at 189, 200.

188. See Sepper, *supra* note 152, at 745 ("Granting a license and officiating a marriage come closer to the direct and proximate involvement exempted by medical conscience clauses. Both are central to the marriage, and the officiant is as proximate as a cooperator could possibly be to the act.").
189. Anderson, *supra* note 152; see also Ryan T. Anderson, *Government to Ordained Ministers: Celebrate Same-Sex Wedding or Go to Jail*, DAILY SIGNAL (Oct. 18, 2014), <http://dailysignal.com/2014/10/18/government-ordained-ministers-celebrate-sex-wedding-go-jail> [<http://perma.cc/CV9B-367M>] (moving from the example of "ordained ministers . . . in their own chapel" to "any third party [having] to recognize a same-sex relationship as a marriage"); Ryan T. Anderson, *Why These Citizens Voted To Repeal a Bad 'Civil Rights' Law*, DAILY SIGNAL (Dec. 10, 2014), <http://dailysignal.com/2014/12/10/citizens-voted-repeal-bad-civil-rights-law> [<http://perma.cc/5VVM-DJM8>] ("[N]o one has the right to have the government force a particular minister to marry them, or a certain photographer to capture the first kiss, or a baker to bake the wedding cake.").
190. See *supra* notes 7-8 and accompanying text. Up to this point, the religious claimants have not prevailed in litigation, nor have states passing marriage equality legislation included religious exemptions from antidiscrimination law that cover for-profit businesses. Nonetheless, litigation continues, and legislative activity has shifted to more conservative states lacking antidiscrimination laws that include sexual orientation.
191. *Mullins v. Masterpiece Cakeshop, Inc.*, No. CR2013-0008, slip op. at 3 (Colo. Admin. Ct. Dec. 6, 2013).
192. *Id.*
193. Complaint at 2, *Odgaard v. Iowa Civil Rights Comm'n*, No. CV046451 (Iowa Dist. Ct. Oct. 7, 2013); see also *Elane Photography, LLC v. Willock*, 284 P.3d 428, 440 (N.M. Ct. App. 2012) (discussing how the owners of a photography company litigated for an exemption from a

of complicity,<sup>194</sup> these exemption claims move beyond wedding-related services. For example, legislative proposals supported by social conservative advocacy groups would allow some for-profit employers who seek to avoid complicity in their employees' sinful conduct to refuse to provide health insurance that covers employees' same-sex spouses.<sup>195</sup>

Many assert that accommodating claims for religious exemption will help settle conflict,<sup>196</sup> including claimants and their defenders who seek a "live-and-let-live" resolution.<sup>197</sup> In assessing the prospects for conflict settlement, it is important to recognize that accommodating religious objections may also enable the conflict to persist in a new, revitalized form. The claim to exemption may not be a simple claim to withdraw, conceding a new consensus in favor of same-sex marriage while preserving space for faith groups to maintain their religious views. Instead, as in the healthcare refusals context, complicity-based conscience claims can function as part of a long-term effort to contest society-wide norms.<sup>198</sup>

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state antidiscrimination law because it forced them "to photograph [a lesbian client's] ceremony, and thus engage in conduct [they] believe is disobedient to God's commands").

194. Exemption proponents, for instance, use the language of "facilitation" and "participation." See, e.g., Letter from Robin Fretwell Wilson et al. to Pat Quinn, Governor of Ill. (Dec. 18, 2012), <http://mirrorofjustice.blogs.com/files/ill-letter-12-2012.pdf> [<http://perma.cc/N7X9-SHWY>]; *Pending Illinois Same-Sex Marriage Bill Would Be Worst in US in Protecting Religious Liberty*, THOMAS MORE SOC'Y 2 (May 29, 2013), <http://illinoisfamily.org/110files/uploads/201307/144752590-Thomas-More-Society-Letter-to-IL-House-Reps-Regarding-Same-Sex-Marriage-Pending-Illinois-Same-Sex-Marriage-Bill-Would-Be-Worst-in-US-in-Protecting-R.pdf> [<http://perma.cc/M3J3-M2UF>]. On the reach of these concepts in the same-sex marriage context, see NeJaime, *supra* note 151, at 1230-35.
195. Letter from Robin Fretwell Wilson et al. to Pat Quinn, *supra* note 194, at 3. The "marriage conscience protection" advanced in the Wilson letter, for example, was supported by the Thomas More Society and the Illinois Family Institute. See THOMAS MORE SOC'Y, *supra* note 194. While some proponents of accommodation have proposed a limitation based on "substantial hardship" to the same-sex couple, it is unclear what exactly would constitute an inability to "obtain . . . employment benefits . . . without substantial hardship." Letter from Robin Fretwell Wilson et al. to Pat Quinn, *supra* note 194, at 3.
- For an argument that some religious employers should refuse to provide employee spousal benefits to same-sex couples, see Gerard V. Bradley et al., *The Implications of Extending Marriage Benefits to Same-Sex Couples*, PUB. DISCOURSE (Feb. 22, 2015), <http://www.thepublicdiscourse.com/2015/02/14522> [<http://perma.cc/EM2Z-L6N8>].
196. See *supra* note 152 and accompanying text.
197. See, e.g., Berg, *supra* note 36, at 208; Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 852, 878.
198. Brian Brown, the Executive Director of the National Organization for Marriage, recently explained how work against same-sex marriage will continue even if the Supreme Court recognizes a nationwide right for same-sex couples: "There's a ton that will happen on religious liberty. We're already preemptively moving in this direction." Richard Wolf, *Gay*



With growing acceptance of the contested conduct, appeals to religious liberty offer a more persuasive secular ground on which to base persisting objections to the conduct. The goal may be not only to restrict the legal recognition of same-sex marriage, but also to forestall or restrict an antidiscrimination regime that includes sexual orientation. In states with antidiscrimination laws that cover sexual orientation, religious objections to same-sex marriage have provided a basis on which to seek the expansion of already-existing exemptions in the laws.<sup>199</sup> For instance, enacting an exemption that allows an institution or individual to refuse to “facilitate the perpetuation” or “treat as valid” a same-sex couple’s marriage would significantly broaden existing exemptions to permit sexual orientation discrimination in situations that have nothing to do with weddings.<sup>200</sup> In states without antidiscrimination laws covering sexual orientation, lawmakers have worked to restrict any future nondiscrimination obligations that may exist.<sup>201</sup> While framed around marriage, the proposed legisla-

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*Marriage, Once Inconceivable, Now Appears Inevitable*, USA TODAY, Oct. 6, 2014, <http://www.usatoday.com/story/news/politics/2014/10/02/supreme-court-gay-lesbian-marriage/16264389> [<http://perma.cc/GP9L-AZZQ>]; see also Anderson, *supra* note 152 (“Whatever happens, it is essential to take the long view and to be ready to bear witness to the truth even if law and culture grow increasingly hostile. There are lessons to be learned from the pro-life movement.”).

199. See, e.g., Letter from Robin Fretwell Wilson et al. to Pat Quinn, *supra* note 194, at 15 (“In short, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions. A Marriage Bill that provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution) would effectively leave any individual who refuses to assist with same-sex wedding ceremonies open to suit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.”).
200. The proposed “marriage conscience protection” would allow “individuals and small businesses” to refuse to “(A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly *facilitate the perpetuation of any marriage*; or (B) provide benefits to any spouse of an employee,” and would allow “religious organizations” to refuse to “*treat as valid any marriage*.” Letter from Robin Fretwell Wilson et al. to Pat Quinn, *supra* note 194, at 2, 3 (emphasis added). With this language, not only would some wedding venues be permitted to turn away same-sex couples, but some restaurants would also be permitted to refuse to provide space for a same-sex couple’s anniversary dinner years after their wedding. And some employers would be allowed to refuse to provide family benefits to LGBT employees at any point in time. On the expansive reach of these provisions, see NeJaime, *supra* note 151, at 1230-32.
201. See, e.g., S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014); H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014). Indeed, some social conservative advocates have begun to refer to LGBT nondiscrimination measures as “forced participation ordinances” to highlight their impact on those with complicity-based objections. See Mont. Family Found., *Montana: True Tolerance vs. Forced Participation*, CITIZEN LINK (May 16, 2014), <http://www.citizenlink.com/2014/05/16/montana-true-tolerance-vs-forced-participation> [<http://perma.cc/KG3X-DFS8>].

tion would allow businesses to refuse to serve same-sex couples more generally.<sup>202</sup>

These state-level campaigns appear to rehearse arguments to be made on the federal level. Recently, a cross-denominational coalition sought a broad exemption from President Obama's executive order barring federal contractors from engaging in sexual orientation and gender identity employment discrimination.<sup>203</sup> This effort introduced arguments that will play a central role when there is support for the enactment of a federal antidiscrimination law that would cover sexual orientation discrimination.<sup>204</sup> In addition, congressional lawmakers anticipating a Supreme Court ruling in favor of a nationwide right to marry for same-sex couples have introduced the Marriage and Religious Freedom Act, which would prohibit the federal government from taking "an adverse action against a person, on the basis that such person acts in accordance with a religious belief that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage."<sup>205</sup> In this context, we can see how complicity-based claims for religious exemption are a part of society-wide conflict over LGBT equality.

Having considered how complicity-based conscience claims have proliferated as part of society-wide conflicts over contested sexual norms, we are in a better position to understand how their accommodation can inflict material and dignitary harm on the individuals whose conduct the claims target.

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202. States have considered both sexual-orientation-specific measures and broad RFRA's clearly aimed at same-sex couples. *See, e.g.*, Ariz. S.B. 1062; Kan. H.B. 2453.

203. Letter from Stanley Carlson-Thies to Barack Obama, *supra* note 70, at 1. Even though the President did not provide such an exemption, the possibility of claims to exemption in this context continues to be debated. *Compare* Esbeck, *supra* note 70 (arguing that accommodations can be claimed under an existing executive order applying to religious employers and under RFRA), *with* Marty Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors To Discriminate Against Their LGBT Employees*, BALKINIZATION (July 31, 2014), <http://balkin.blogspot.com/2014/07/why-law-does-not-and-should-not-allow.html> [<http://perma.cc/26CP-ET8C>] (challenging Esbeck's arguments).

204. Detecting the potential for religious accommodations to undermine employment nondiscrimination legislation in a post-*Hobby Lobby* world, major LGBT rights organizations withdrew their support for the recent version of the Employment Non-Discrimination Act (ENDA) that included a religious exemption much broader than that in Title VII. *See* Chris Johnson, *Major Legal Groups Won't Support ENDA Because of Religious Exemption*, WASH. BLADE (June 5, 2014), <http://www.washingtonblade.com/2014/06/05/nclr-wont-support-enda-religious-exemption> [<http://perma.cc/R2XX-EVHU>]; Chris Johnson, *State LGBT Groups Split on ENDA's Religious Exemption*, WASH. BLADE (June 12, 2014), <http://www.washingtonblade.com/2014/06/12/state-lgbt-groups-split-enda-religious-exemption> [<http://perma.cc/AFB6-HU2R>].

205. H.R. 3133, 113th Cong. (2013); *see also* S. 1808, 113th Cong. (2013) (having nearly identical language).

#### IV. HARMS

Complicity-based conscience claims assert a relationship to third parties whose conduct the claimants view as sinful. In this sense, the third-party effects of accommodation are bound up in the form of the claim itself. But exploring the social logic of complicity-based conscience claims suggests how the consequences of accommodation may be amplified. Mass mobilization of claimants assures that accommodation will affect large numbers of persons, especially in certain areas of the country. The impact is not only material. When a religious claim objecting to others' sinful conduct is based on a traditional norm that is reiterated by a mass movement over time and across social domains, accommodating the claim has the distinctive power to stigmatize and demean third parties. In this Part, we demonstrate some of the material and dignitary harms that result from accommodating complicity-based conscience claims.

##### A. Material Harms

Accommodation of complicity-based conscience claims may impose material burdens on third parties by deterring or obstructing access to goods and services. This can occur as objectors deny services; it can also occur as objectors withhold information that would enable an individual to pursue alternative providers.

Consider the healthcare refusal laws. A striking feature of these laws is that they provide expansive exemptions while only rarely furnishing mechanisms that would blunt the impact on third parties. Refusal laws might accommodate individuals with conscience objections within a framework that endeavors to ensure continuity of care for the patient.<sup>206</sup> But many healthcare refusal laws allow doctors or nurses to refuse to treat a patient even in an emergency situation<sup>207</sup> and do so without requiring that healthcare professionals provide ad-

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206. In fact, this is what the American College of Obstetricians and Gynecologists (ACOG) recommends. See *The Limits of Conscientious Refusal in Reproductive Medicine*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS 5 (2007), <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co385.pdf> [<http://perma.cc/5RSR-QF9X>] (recommending that “at the very least . . . systems be in place for counseling and referral, particularly in resource-poor areas where conscientious refusals have significant potential to limit patient choice,” and that “[i]nstitutions . . . work toward structures that reduce the impact on patients of professionals’ refusals to provide standard reproductive services”).

207. These refusal laws appear to contradict professional guidance. The ACOG document instructs: “In an emergency in which referral is not possible or might negatively affect a patient’s physical or mental health, providers have an obligation to provide medically indicated and requested care regardless of the provider’s personal moral objections.” *Id.*

vance notice of their objection to the employer so that the patient receives needed care.<sup>208</sup> In addition, some of these laws allow healthcare workers and institutions to refuse to provide referrals, counseling, or information that would notify the patient of the availability of alternative care.<sup>209</sup> Unlike the assumption on which the Court granted the accommodation in *Hobby Lobby*—that accommodation would have “zero” impact on third parties—healthcare refusal laws generally do not provide for alternative means of addressing patients’ healthcare needs. In fact, these laws authorize refusals that appear to contravene state-law duties<sup>210</sup> and professional obligations to patients.<sup>211</sup>

An exemption’s material effects are amplified when the laws authorize large numbers of networked actors to refuse to provide services. This is a threat when institutionalized religious principles govern—such as with Catholic healthcare. The Ethical and Religious Directives for Catholic Health Care Services, which draw on Catholic principles regarding cooperation and scandal, govern how Catholic hospitals deliver healthcare.<sup>212</sup> If the local hospital is a

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208. See, e.g., MICH. COMP. LAWS ANN. § 333.20181 (West 2014) (not imposing any employer notice requirement or creating any exceptions for emergency situations); MINN. STAT. ANN. § 145.414 (West 2013) (same); MISS. CODE ANN. § 41-107-5 (2004) (same); see also Sonfield, *supra* note 92 (“Only a handful of these laws specifically provide an exception to refusal rights in emergency circumstances; most do not require health care providers to notify their employers if they intend to opt-out of certain services, and only three require any notice to patients; and about a dozen go so far as to allow providers to refuse to provide information.”). Nonetheless, the federal Emergency Medical Treatment and Active Labor Act requires hospitals to stabilize patients with an “emergency medical condition” or in active labor, and provides directives regarding transfer of patients to other hospitals. See 42 U.S.C. § 1395dd (2012).

209. See, e.g., ARK. CODE ANN. § 20-16-304 (West 2014); MISS. CODE ANN. § 41-107-5 (2004); GA. COMP. R. & REGS. § 480-5-.03(n) (2001).

210. There has been little litigation to clarify the scope of the exemptions and their relationship to professional duties and obligations. See, e.g., *Noesen v. State Dep’t of Regulation & Licensing, Pharmacy Examining Bd.*, 751 N.W.2d 385 (Wis. Ct. App. 2008); Complaint, *Means v. U.S. Conference of Catholic Bishops*, No. 2:13-cv-14916 (E.D. Mich. Nov. 29, 2013).

211. See AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, *supra* note 206, at 1 (“In an emergency . . . providers have an obligation to provide medically indicated and requested care.”); *id.* at 5 (“[A]t the very least . . . systems [must] be in place for counseling and referral . . .”); AM. PHARMACISTS ASS’N, 1997-1998 POLICY COMMITTEE REPORT, PHARMACIST CONSCIENCE CLAUSE (1998) (“Pharmacists choosing to excuse themselves from such a situation continue to have a responsibility to the patient—ensuring that the patient will be referred to another pharmacist or be channeled into another available health system.”).

212. The Directives provide that “Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel.” 1995 *Religious Directives for Catholic Health Care Services*, *supra* note 23, at 7. Of course, the Directives bind not only Catholics

Catholic affiliated or sponsored institution,<sup>213</sup> patients in the area may not have much or any access to goods or services proscribed by the Directives.<sup>214</sup>

Concern over access has only increased with the growth of mergers and partnerships involving Catholic hospitals.<sup>215</sup> In fact, the 1995 Directives elaborated concepts of cooperation and scandal in ways that explicitly reached these circumstances,<sup>216</sup> thereby extending Catholic principles to a larger universe of

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but also non-Catholics administering healthcare in Catholic-run facilities. See JEAN DEBLOIS & KEVIN D. O'ROURKE, *THE REVISED ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES: SEEKING UNDERSTANDING IN A CHANGING ENVIRONMENT* 5 (1996) (explaining that the Directives “call on non-Catholics as well as Catholics to manage and administer Catholic healthcare facilities in accord with the norms contained in [the Directives]”). Nonetheless, it should be noted that at least in the context of medical malpractice litigation, USCCB has argued that while the Directives “provide authoritative guidance on certain moral issues that face Catholic health care today, . . . [t]he USCCB has no mechanism to enforce them . . . [and] does not credential doctors, hospitals, or other health care providers.” Defendant’s Motion to Dismiss at 6-7, *Means*, No. 2:13-cv-14916 (E.D. Mich. Mar. 12, 2013) (quoting *1995 Religious Directives for Catholic Health Care Services*, *supra* note 23, at 3-4).

213. Ann Kutney-Lee et al., *Distinct Enough? A National Examination of Catholic Hospital Affiliation and Patient Perceptions of Care*, 39 *HEALTH CARE MGMT. REV.* 134, 135 (2014) (“In certain areas, Catholic hospitals are the primary or only hospital available.”).
214. As merely one example, *60 Minutes* reported in 2000 that a New Hampshire woman endured an eighty-mile cab ride in order to obtain an emergency abortion after being turned away by the Catholic hospital in her area. See Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 *OR. L. REV.* 625, 626-27 (2003). The Catholic hospital may govern healthcare according to Catholic principles even though Catholics do not constitute a majority faith in the particular community. See Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 *MERCER L. REV.* 1087, 1102-03 (1996) (reporting that “[o]f the forty-six Catholic sole community providers, only two are located in counties where Catholics constitute a majority of the population”).
215. See Reed Abelson, *Catholic Hospitals Expand, Religious Strings Attached*, *N.Y. TIMES*, Feb. 20, 2012, <http://www.nytimes.com/2012/02/21/health/policy/growth-of-catholic-hospitals-may-limit-access-to-reproductive-care.html> [<http://perma.cc/3NJ5-XKD7>]. Such concern may grow as the ACA produces additional consolidation in the healthcare industry. See Elizabeth B. Deutsch, Note, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act’s Nondiscrimination Mandate*, 124 *YALE L.J.* 2470 (2015).
216. *1995 Religious Directives for Catholic Health Care Services*, *supra* note 23, at 25, 27 (after noting that “[i]n ever-increasing ways, Catholic health care providers have been involved with other health care organizations and providers,” instructing hospitals to act “in accord with the moral principles governing cooperation” and warning that “[t]he possibility of scandal . . . is an important factor that should be considered when applying the principles governing cooperation”); see also M. Cathleen Kaveny & James F. Keenan, *Ethical Issues in Health-Care Restructuring*, 56 *THEOLOGICAL STUD.* 136, 144-45 (1995) (explaining how changes in healthcare delivery and payment, including mergers and partnerships involving Catholic hospitals, prompted increased concern regarding principles of cooperation).

non-Catholic providers and institutions.<sup>217</sup> Those Directives expressed concern that scandal would result from Catholics' association with non-Catholic healthcare providers, even if the association did not amount to illicit cooperation.<sup>218</sup> For instance, the Directives warned that scandal may be caused by "any association with abortion providers."<sup>219</sup>

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217. The implications of increasing consolidation in the healthcare field are not limited to abortion. Care regarding miscarriages may be affected as well. See Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774 (2008) (finding that physicians at Catholic-owned hospitals were restricted in their ability to undertake urgent uterine evacuation for miscarrying patients). Catholic-run healthcare systems may also proscribe access to contraception on a widespread basis. For instance, when the local hospital in Bartlesville, Oklahoma, was acquired by a Catholic healthcare organization, the parent company issued a directive apparently attempting to prohibit local doctors with admitting privileges at the hospital from prescribing contraceptives for the purpose of birth control. See Kelli Williams, *Reports: JPMC Doctors No Longer Allowed To Prescribe Birth Control*, BARTLESVILLE EXAMINER-ENTERPRISE (Okla.), Mar. 29, 2014, <http://examiner-enterprise.com/news/local-news/reports-jpmc-doctors-no-longer-allowed-prescribe-birth-control> [<http://perma.cc/GJE5-HUM6>]. A representative from the Catholic healthcare organization that had acquired the local hospital explained: "Consistent with all Catholic health care organizations, St. John Health System operates in accordance with the Ethical and Religious Directives for Catholic Health Facilities." *Id.* After the reporting of the issue, the healthcare organization issued a statement explaining that "St. John Health System operates in accordance with the Ethical and Religious Directives for Catholic Health Care Services, and therefore does not approve or support contraceptive practices," but noting that "[w]hile our physicians agree to abide by the Directives, they also have the ability to prescribe medications, including hormonal medications, in accordance with their independent professional medical judgment." *St. John's Health System Responds to Birth Control Issue*, BARTLESVILLE EXAMINER-ENTERPRISE (Okla.), Mar. 31, 2014, <http://examiner-enterprise.com/news/local-news/st-john-health-system-responds-birth-control-issue> [<http://perma.cc/6ZB2-LN47>]. As this situation suggests, issues arise when a religious hospital seeks compliance from physicians who simply affiliate with it. See Ikemoto, *supra* note 214, at 1102 n.84 (explaining that in Lane County, Oregon, a Catholic health system not only provided about seventy percent of hospital services but also required physicians joining its integrated delivery network to cease abortion and alternative insemination services).
218. *1995 Religious Directives for Catholic Health Care Services*, *supra* note 23, at 27 ("Cooperation, which in all other respects is morally appropriate, may be refused because of the scandal that would be caused in the circumstances.")
219. *Id.* at 19. With regard to the 1995 provisions discussed here, the most recent 2009 Directives retain essentially the same guidance on issues regarding abortion, sterilization, and contraception. *2009 Religious Directives for Catholic Health Care Services*, *supra* note 167. Yet while the 1995 Directives included an Appendix on cooperation, these most recent Directives omit this Appendix. See *id.* at 35-36 ("This new edition of the *Ethical and Religious Directives* omits the appendix concerning cooperation, which was contained in the 1995 edition. Experience has shown that the brief articulation of the principles of cooperation that was presented there did not sufficiently forestall certain possible misinterpretations and in practice gave rise to problems in concrete applications of the principles."). The USCCB is currently working on revisions to the specific Directives pertaining to "collaboration with non-Catholic

Concerns with complicity may lead not only to the refusal to provide goods or services, but also to the refusal to provide information that would lead the patient to obtain those goods or services elsewhere.<sup>220</sup> The Directives provide:

Free and informed consent requires that the person . . . receive all reasonable information about the essential nature of the proposed treatment . . . and any reasonable and morally legitimate alternatives . . . . The free and informed health care decision of the person or the person's surrogate is to be followed so long as it does not contradict Catholic principles.<sup>221</sup>

The Directives define informed consent as requiring the patient to receive information on the proposed treatment and “morally legitimate” alternatives, and in this way seemingly instruct healthcare providers counseling patients to withhold information on services the Directives oppose.<sup>222</sup>

A number of healthcare refusal laws sanction denying patients information. On the logic of complicity, these laws authorize healthcare institutions and

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health entities . . . .” *Bishops Approve Items on Liturgy, Ethical and Religious Directives, Cause for Canonization at General Assembly*, U.S. CONF. CATH. BISHOPS (Nov. 11, 2014), <http://www.usccb.org/news/2014/14-186.cfm> [<http://perma.cc/6T5E-RB29>].

220. For instance, in Wisconsin, a pharmacist who refused, based on the notion of complicity, to fill a prescription for contraception also refused, based on the notion of complicity, to provide an alternative means for the customer to obtain her medication. According to the state's Pharmacy Examining Board, which disciplined the pharmacist, when the customer asked “where she could go to have her prescription refilled, [the pharmacist] stated that he would not tell her because he did not want to be a part in her receiving the contraceptives.” See Amended Final Decision and Order ¶ 28, Neil Noesen, No. LS031009PHM (Wis. Pharmacy Examining Bd. Oct. 29, 2008).

221. 2009 *Religious Directives for Catholic Health Care Services*, *supra* note 167, at 20 (emphasis added).

222. Some Catholic thinkers and healthcare practitioners take the position that the provision of factually relevant information does not constitute proscribed cooperation. See, e.g., Michael R. Panicola & Ronald P. Hamel, *Conscience, Cooperation, and Full Disclosure: Can Catholic Health Care Providers Disclose “Prohibited Options” to Patients Following Genetic Testing?*, HEALTH PROGRESS 52 (2006). For broader discussions of the application of cooperation, see CATHLEEN KAVENY, LAW'S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY 245-51 (2012), which explains the principles regarding cooperation and scandal, including how they have been applied in the context of healthcare; M. Cathleen Kaveny, *Appropriation of Evil: Cooperation's Mirror Image*, 61 THEOLOGICAL STUD. 280, 284 (2000), which argues that “[t]he Catholic moral tradition has developed an elaborate and sometimes abstruse matrix for evaluating cases of cooperation with evil. . . . [T]he matrix is not designed automatically to generate undebatable answers to what are undeniably complicated questions . . . .”; and M. Cathleen Kaveny, *Complicity with Evil*, 42 CRITERION 20, 24-26 (2003), which reviews the Roman Catholic manualist tradition of cooperation.

professionals to refuse to provide *information, counseling, or referrals* regarding abortion services and contraception.<sup>223</sup>

When patients are denied information about treatment options, they are denied the opportunity to seek services from an alternative provider. For example, in one litigated case, a Catholic hospital allegedly refused to provide any information to a rape victim whose mother explicitly asked about pregnancy prevention options.<sup>224</sup> According to the victim, she did not get medical care from her own physician until more than seventy-two hours later, precluding her from availing herself of emergency contraception.<sup>225</sup> In Michigan, a recently filed complaint alleges that a woman whose water broke when she was eighteen weeks pregnant was twice sent home from her local Catholic hospital without being treated for her pain and bleeding or given information that her pregnancy was not viable and that the safest medical course was abortion.<sup>226</sup> The

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223. See *supra* Part II.C. In response to a federal rule that would require an organization with religious objections to providing healthcare services to refer the patient to an alternate provider or notify the government of the refusal to provide the patient relevant services, a cross-denominational group of Catholic and evangelical organizations objected on the grounds that the requirements would impose “a duty on the conscientious objector to refer for the very item or procedure to which it has a religious or moral objection.” See Letter from Galen Carey et al. to Office of Refugee Resettlement 5 (Feb. 20, 2015), <http://www.usccb.org/about/general-counsel/rulemaking/upload/02-20-15-comments-UM.pdf> [<http://perma.cc/QY5M-YYLG>].

224. See *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d. 405, 409 (1989).

225. See *id.* In some situations, refusals can function as a de facto bar to goods or services. With emergency contraceptives, a narrow time window may render the availability of alternatives moot. For example, a forty-two-year-old married mother of two reported being denied emergency contraception by both her primary care physician and her internist, leaving her no other way to obtain the prescription within the seventy-two-hour effectiveness window. Having run out of time to have a prescription filled, she became pregnant and, due to health concerns, obtained an abortion. She explained that the refusal made it “impossible for [her] to get emergency contraception that would have prevented the pregnancy” and forced her into an “awful, painful, sickening” choice to have an abortion. Dana L., Op-Ed, *What Happens When There Is No Plan B?*, WASH. POST, June 4, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/02/AR2006060201405.html> [<http://perma.cc/W5VU-UKAQ>].

226. Complaint at 2, *Means v. U.S. Conference of Catholic Bishops*, No. 2:13-cv-14916 (E.D. Mich. Nov. 29, 2013). The patient’s complaint alleges that she was nearly sent home a third time, despite presenting with severe pain and signs of infection, and was only treated when the fetus eventually breached her cervix. *Id.* at 3. It further alleges that the Directives required the hospital “to abide by their terms, even when doing so places a woman’s health or life at risk.” *Id.* at 2. In moving to dismiss on jurisdictional grounds, USCCB challenged the plaintiff’s assertion that the hospital’s alleged treatment was required by the Directives. See Defendant United States Conference of Catholic Bishops, Inc.’s Motion to Dismiss, *supra* note 213, at 6-7. On this point, see Cathleen Kaveny, *The ACLU Takes on the Bishops: Tragedy at a Catholic Hospital Leads to a Misguided Lawsuit*, COMMONWEAL, Jan. 10,



patient claimed that during her encounters with the hospital, she had not been told that certain care was being withheld. As she put it, “They never offered me any options. . . . They didn’t tell me what was happening to my body.”<sup>227</sup>

While the example of Catholic healthcare systems suggests that denials can become widespread through institutionalized norms, widespread denials are also a threat when norms are simply widely shared. As we have seen, healthcare refusal laws that accommodate claims of complicity are not limited to Catholics, and these laws have become a major focal point of a cross-denominational coalition that includes evangelical Protestants.<sup>228</sup> In some areas, the accommodations furnished by healthcare refusal laws may align the actual provision of hospital services with majority religious and moral beliefs in the locality.<sup>229</sup> Widely shared norms may result in the systematic denial of goods or services, even without formal organization around a governance instrument like the Directives. Healthcare providers may subscribe to those norms or may feel pressure to conform to them in order to avoid controversy and maintain community standing.<sup>230</sup> Indeed, some healthcare refusal laws do not even specify that the refusal be based on the provider’s religious or moral objection, thereby seemingly authorizing refusals for any reason.<sup>231</sup>

Healthcare refusals explicitly intersect with LGBT concerns. Healthcare providers have sought exemptions from state antidiscrimination law to avoid

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2014, <https://www.commonwealmagazine.org/aclu-takes-bishops> [<https://perma.cc/6T9T-YL56>], who states that “when it comes to secular law, what makes the directives binding on the Catholic hospital are their inclusion in its bylaws—a decision made by its religious sponsor, not the USCCB or even the local bishop.” Kaveny also argues that the Directives *do* allow a hospital to induce labor in situations like the plaintiff’s under the principle of double-effect. In such a case, the death of the unborn child, who would not have survived anyway, is not intended; it is foreseen and accepted as a side effect of treating the mother’s illness. *Id.*

227. *ACLU Sues Bishops on Behalf of Pregnant Woman: Press Release*, AM. C.L. UNION (Dec. 2, 2013), <https://www.aclu.org/religion-belief-womens-rights/aclu-sues-bishops-behalf-pregnant-woman-denied-care-catholic-hospital> [<https://perma.cc/WPV9-TSDQ>].

228. *See supra* Part III.A; *see also* Letter from Galen Carey et al., *supra* note 223.

229. For a vivid depiction of the “climate of extreme hostility to the practice of abortion” prevailing in Alabama, *see* *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala. 2014).

230. The market share of commercial actors without a religious affiliation thus becomes relevant. For instance, Wal-Mart initially refused to carry emergency contraception. But the company reversed its decision partly in response to concern that it served as the only pharmacy in some areas of the country. *See* Michael Barbaro, *In Reversal, Wal-Mart Will Sell Contraceptive*, N.Y. TIMES, Mar. 4, 2006, <http://www.nytimes.com/2006/03/04/business/04walmart.html> [<http://perma.cc/87RU-8FKQ>]. Nonetheless, Wal-Mart announced that it would carry emergency contraception while also allowing individual pharmacists to refuse service and refer customers to another pharmacist or pharmacy. *See id.*

231. *See* Sepper, *supra* note 72 (manuscript at 12).

providing reproductive services to lesbian patients, for instance.<sup>232</sup> Some healthcare refusal laws cover any service to which a provider objects, and the AUL model healthcare refusal act specifically includes not only abortion, contraception, and sterilization, but also “artificial insemination [and] assisted reproduction,”<sup>233</sup> services vital to lesbian and gay family formation. Moreover, religious objections rooted in complicity historically have informed policy on HIV prevention. Some religiously affiliated organizations have resisted prevention efforts that include condom distribution.<sup>234</sup> And some Catholic hospitals have refused to counsel HIV-positive patients regarding condom use.<sup>235</sup> As we have seen, there are healthcare refusal laws that authorize providers to deny this information.<sup>236</sup>

Examining the spread of refusals in healthcare over the last several decades suggests how refusals could spread in the marriage context, where they have only recently been asserted. Religiously affiliated nonprofits regularly interact with persons in same-sex relationships, when acting as employers and in providing social services. In the for-profit sector, members of faith communi-

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232. See, e.g., *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty.* Superior Court, 189 P.3d 959 (Cal. 2008). On the potential impact of healthcare refusal laws on same-sex couples, see Sepper, *supra* note 152, at 758.

233. *Healthcare Freedom of Conscience Act*, *supra* note 155, § 2(a)(3). And Maryland’s healthcare refusal law specifically covers “artificial insemination.” MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2014).

234. John Rivera, *CRS Revising HIV Prevention Document*, CATH. RELIEF SERVICES. NEWSWIRE (Aug. 31, 2012), <http://http://newswire.crs.org/crs-to-revise-hiv-prevention-document> [<http://perma.cc/3YQA-XVXA>]; see also *Engaging Faith-Based Organizations in HIV Prevention: A Training Manual for Programme Managers*, UNITED NATIONS POPULATION FUND 10 (2007), [http://www.unfpa.org/webdav/site/global/shared/documents/publications/2007/HIVTrainingManual\\_eng.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2007/HIVTrainingManual_eng.pdf) [<http://perma.cc/QL4S-RCVT>]. Most recently, LGBT advocates have raised concern over whether employers might object to providing insurance that covers Pre-exposure Prophylaxis (PrEP), a daily drug regimen that has been recommended to reduce the risk of HIV transmission for some men who have sex with men. See Matt Baume, *Does Hobby Lobby Have To Pay for My PrEP?*, ADVOCATE.COM (Oct. 27, 2014, 7:00 AM), <http://www.advocate.com/31-days-prep/2014/10/27/does-hobby-lobby-have-pay-my-prep> [<http://perma.cc/ZB2Z-3AS7>]. On the federal government’s guidelines regarding PrEP, see *Preexposure Prophylaxis for the Prevention of HIV Infection in the United States*, U.S. PUB. HEALTH SERVICE (2014), <http://www.cdc.gov/hiv/pdf/PrEPguidelines2014.pdf> [<http://perma.cc/49UM-SBSJ>].

235. See Mireya Navarro, *Ethics of Giving AIDS Advice Troubles Catholic Hospitals*, N.Y. TIMES, Jan. 3, 1993, <http://www.nytimes.com/1993/01/03/nyregion/ethics-of-giving-aids-advice-troubles-catholic-hospitals.html> [<http://perma.cc/UL97-H23Z>] (explaining a Catholic hospital’s “official policy” on HIV/AIDS care that “staff cannot counsel patients on condoms . . . or refer them out for such counseling”).

236. See *supra* Part II.C. In addition, the AUL model healthcare refusal act, see *supra* note 153, would allow such denials.

ties are beginning to assert complicity-based refusals to engage in transactions with same-sex couples in public accommodations, in employment, and in housing. As in healthcare, refusals may vary regionally. While high-profile refusals directed at same-sex couples first arose in states with antidiscrimination laws that include sexual orientation, refusals are now cropping up in states that, in the wake of court rulings, license same-sex couples' marriages but do not include sexual orientation in state antidiscrimination laws.<sup>237</sup> Some of these states are considering laws authorizing religiously motivated refusals.<sup>238</sup> Such laws might provide exemptions from other state nondiscrimination obligations that could apply to same-sex couples,<sup>239</sup> and exempt claimants from city and county nondiscrimination ordinances prohibiting sexual orientation discrimination. Going forward, refusals may be most likely to occur in states where same-sex couples are most legally vulnerable—able to marry because of a judicial decision but insufficiently protected from private discrimination.<sup>240</sup> Ultimately, in more conservative, religious, and rural parts of the country, complicity-based refusals have the capacity to construct separate, localized legal orders in which same-sex couples face an unpredictable marketplace and labor market and continue to encounter stigma and rejection.

### B. Dignitary Harms

To this point, discussion has focused on how claims for religious exemption can obstruct access to service and information regarding alternative sources. But of course a refusal to serve also has dignitary effects. This objection became clear during the civil rights movement, when denials of service at

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237. See Carol Kuruvilla, *Pennsylvania Bridal Shop Turns Away Lesbian Couple To Avoid Breaking 'God's Law'*, N.Y. DAILY NEWS, Aug. 9, 2014, <http://www.nydailynews.com/news/national/pennsylvania-bridal-shop-don-serve-lesbians-article-1.1898001> [<http://perma.cc/G8CB-ML7X>]; Meghan Packer, *Bakery Denies Cake to Gay Couple*, WFMZ (Aug. 13, 2014), <http://www.wfmz.com/news/bakery-denies-cake-to-gay-couple/27463270> [<http://perma.cc/47MK-BJZX>].

238. See *supra* note 202.

239. These might include nondiscrimination obligations relating to both sex and marital status.

240. Cf. Oleske, *supra* note 50, at 136 (“As the debate increasingly moves from blue states to purple and red states, exemptions that provide protection to business owners who oppose same-sex marriage on religious grounds may well find greater political support.” (footnote omitted)). In some regions, refusing service to same-sex couples may help, not hurt, the business itself. See Mark Meredith & Will C. Holden, *Cake Shop Says Business Booming Since Refusal To Serve Gay Couple*, FOX 31 DENVER (July 30, 2012), <http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple> [<http://perma.cc/USF9-XRG9>].

lunch counters were understood as meaning-making transactions.<sup>241</sup> As the Court has observed, when Congress adopted the Civil Rights Act, it made “clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”<sup>242</sup> In current discussions of complicity-based conscience claims, by contrast, the social meanings of accommodating refusals to serve often recede from view. Just as Congress took the social meaning of refusals into consideration in fashioning antidiscrimination laws governing public accommodations, so too should the social meaning of refusals factor in judgments about whether and how to grant persons religious exemptions from laws of general application.<sup>243</sup>

In *Hobby Lobby*, the corporate claimants objected “to provid[ing] employees with insurance coverage that they believe implicates them in an immoral practice.”<sup>244</sup> Their refusal to furnish insurance covering contraception labels an

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241. In prohibiting refusals of service in public accommodations, Congress appreciated their capacity to impose “humiliations.” 110 CONG. REC. 6531 (1964) (statement of Sen. Humphrey). Bruce Ackerman explains how the Congress that passed the Civil Rights Act, and specifically Title II’s prohibition on discrimination in public accommodations, understood the social meaning conveyed by refusals that impose “institutionalized humiliation.” 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 142 (2014). Indeed, Ackerman links this to the legacy of *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the Court recognized that subordinated groups do not choose the social meanings imposed on them by society’s institutions. See ACKERMAN, *supra*, at 150. For commentary drawing on this history, see Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL’Y 705 (2014); and Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons To Say No*, 38 HARV. J.L. & GENDER 177 (2015).

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

243. Some readers have questioned whether it would raise First Amendment issues to make expressive conduct an element of harm in religious accommodation cases. At issue is conduct—conduct that is motivated by religious convictions and often has a clear and sometimes even expressly articulated pejorative social meaning. It is hard to see why the First Amendment would apply any differently to a religiously motivated refusal to serve than a racially motivated refusal to serve of the sort at issue in the paradigmatic cases considered by Congress in enacting Title II. See *supra* note 241 and accompanying text. The Court has repeatedly upheld restrictions on conduct against First Amendment challenge, even when the law singles out conduct with reference to the beliefs that animated it. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (“[M]otive plays the same role under the Wisconsin [penalty enhancement] statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.”). Business owners with religious objections to same-sex marriage who serve customers in compliance with antidiscrimination laws are still free to voice their objections to same-sex marriage.

244. Plaintiffs’ Motion for Preliminary Injunction & Opening Brief at 9, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000-HE (W.D. Okla. Sept. 12, 2012).

entire group of employees – women using certain contraceptives – as sinners.<sup>245</sup> In other cases, the refusal is targeted. For instance, the bakery owner who turns away a same-sex couple treats that particular couple as sinners. Both the general condemnation expressed by the corporate claimants in *Hobby Lobby* and the individualized condemnation in the bakery are actions that address third parties as sinners in ways that can stigmatize and demean.

In some situations, social meaning is explicitly communicated during the religiously based refusal of service. Consider the operation of complicity-based conscience claims in the context of same-sex marriage. A bakery customer, for instance, reported being told, “[we] don’t do same sex weddings because [we] are Christians and being gay is an abomination.”<sup>246</sup> A woman shopping for a wedding dress reported that, after a day of trying on dresses at a shop, the owner “would not work with [her] because [being gay is] ‘wrong.’”<sup>247</sup>

We can observe a similar dynamic in the healthcare context. Patients can be gravely injured when they are denied service in emergency situations or deprived information regarding treatment options. But even aside from these injuries, refusal of service can inflict dignitary harms. A Walgreens pharmacist in Wisconsin refused to fill an emergency contraception prescription for a mother of six, reportedly telling her, “You’re a murderer! I will not help you kill this baby. I will not have the blood on my hands.”<sup>248</sup> Similar meanings can be conveyed when a pharmacist simply refuses to fill or transfer a birth control prescription because he deems it “wrong” or “a sin.”<sup>249</sup>

Even when not stated explicitly, the meaning of the refusal is intelligible to the recipient because it reflects and reiterates a familiar message about contested sexual norms.<sup>250</sup> Gays and lesbians understand objections to same-sex mar-

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245. See *infra* text accompanying notes 272-273.

246. Rachel C., Review for Sweet Cakes, YELP (Jan. 17, 2013), [http://www.yelp.com/user\\_details?userid=a4fuAn84fRddJT7jJEo7g](http://www.yelp.com/user_details?userid=a4fuAn84fRddJT7jJEo7g) [<http://perma.cc/7VBA-CY7P>].

247. Alix G., Review for Here Comes the Bride, YELP (Aug. 16, 2011), [http://www.yelp.com/user\\_details?userid=3sMW6WLn3wVbmy-knXNd3g](http://www.yelp.com/user_details?userid=3sMW6WLn3wVbmy-knXNd3g) [<http://perma.cc/M75S-PRYS>]. On the potential psychological harms of religiously based refusal of service, see Sepper, *supra* note 152, at 759.

248. *Pharmacy Refusals 101*, NAT’L WOMEN’S L. CENTER, 2 (Apr. 24, 2012), [http://www.nwlc.org/sites/default/files/pdfs/pharmacy\\_refusals\\_101\\_4.19.12.pdf](http://www.nwlc.org/sites/default/files/pdfs/pharmacy_refusals_101_4.19.12.pdf) [<http://perma.cc/4UJG-Z6PE>].

249. See *Pharmacist Cites Sin in Birth Control Case*, WASH. TIMES, Oct. 11, 2004, <http://www.washingtontimes.com/news/2004/oct/11/20041011-115311-7515r> [<http://perma.cc/Z2WU-6KMA>] (describing the refusal at a Wisconsin K-Mart in the *Noesen* litigation discussed *supra* at notes 77 and 220); NAT’L WOMEN’S L. CENTER, *supra* note 248 (describing a refusal at a Seattle Rite-Aid).

250. Cf. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 69 (1996) (“Stigma inflicts its greatest harm when the individual is part of the same community of shared meanings as those who stigmatize him.”).

riage as status-based judgments.<sup>251</sup> Women encountering objections to contraception may as well. For example, a college student whose regular doctor was not in the office when she called seeking emergency contraception reported being passed around to multiple staff members before eventually speaking to a doctor who “coldly” refused her request. As a result, the young woman said “I felt judged, embarrassed, mortified . . . I felt like a whore. That’s how those people made me feel. I wasn’t about to go back to them for anything.”<sup>252</sup> In a New Jersey hospital, a nurse allegedly refused, in front of the patient receiving abortion services, to provide any pre- or post-operative care. According to the hospital, the patient, understanding the meaning conveyed by the refusal, “was extremely upset and had to be counseled by other members of the nursing staff.”<sup>253</sup>

Similarly, in the LGBT context, accommodation’s power to stigmatize derives from the fact that the refusal reflects a widely understood message about a contested sexual norm. The individual or group a person of faith asserts is sinning will immediately comprehend the social meaning that refusal expresses. A bakery customer planning a same-sex wedding reported that she had “never felt so low in [her] life” as when the owner terminated the cake tasting upon finding out that the woman was a lesbian.<sup>254</sup> Another customer recalled “walk[ing] away feeling hurt and disgusted.”<sup>255</sup> A lesbian couple turned away by a wedding venue near Albany, New York, reported to the state’s Division of Human Rights feeling “shell-shocked” and “horrible.”<sup>256</sup> According to the Human Rights Division, while one of the women had been “feeling a lot more

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251. On the relationship between same-sex marriage objections and sexual orientation discrimination, see generally NeJaime, *supra* note 151. Of course, from the perspective of the religious objector, there may be a distinction between the sin and the sinner.

252. Eileen Loh Harrist, *Bitter Pill: Though Emergency Contraception Is Legal—and Similar to the Common Birth-Control Pill—It’s Not Always Easy To Obtain in Louisiana*, GAMBIT (Nov. 23, 2004), <http://www.bestofneworleans.com/gambit/bitter-pill/Content?oid=1243558> [<http://perma.cc/FG5P-PNR6>].

253. Affidavit of Tammy Ludwig ¶ 27, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Nov. 22, 2011).

254. Alison S., Review for Masterpiece Cakeshop, YELP (July 30, 2012), [http://www.yelp.com/not\\_recommended\\_reviews/masterpiece-cakeshop-lakewood?not\\_recommended\\_start=10](http://www.yelp.com/not_recommended_reviews/masterpiece-cakeshop-lakewood?not_recommended_start=10) [<http://perma.cc/D3CM-TLYJ>].

255. Jennifer J., Review for Masterpiece Cakeshop, YELP (Aug. 10, 2012), [http://www.yelp.com/not\\_recommended\\_reviews/masterpiece-cakeshop-lakewood?not\\_recommended\\_start=10](http://www.yelp.com/not_recommended_reviews/masterpiece-cakeshop-lakewood?not_recommended_start=10) [<http://perma.cc/K2K2-5RU7>]. Cf. Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 174, at 123, 153 (“If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt.”).

256. Notice and Final Order at 10, *McCarthy v. Liberty Ridge Farm, LLC*, Nos. 10157952, 10157963 (N.Y. Div. Hum. Rts. July 2, 2014).

comfortable” with herself since coming out, she experienced the refusal as a “kind of blow” to her coming-out process.<sup>257</sup> Indeed, the rejection upset the women so much that they stopped looking for venues in the area because they doubted they “would feel comfortable” holding the wedding there.<sup>258</sup>

Beyond the individual transaction, refusing services creates social meaning on a larger scale. The refusals are asserted across a range of settings, and occur at the same time that advocates seek laws of general application condemning the third party’s conduct.<sup>259</sup> Indeed, some who assert religious refusals in the LGBT context have become important figures in the broader movement opposing same-sex marriage.<sup>260</sup> These dynamics intensify the stigmatization that accommodation of complicity-based conscience claims can produce. The claim’s reiteration by a mass movement amplifies its power to demean.

When complicity-based conscience claims exist side-by-side with efforts to oppose abortion, contraception, and same-sex marriage, the refusals animated by these claims play a key role in society-wide conflict over sexual norms. Indeed, for those who view accommodation as “a mandate for evangelization,” religious exemptions provide an opportunity “to spread the Gospel, and . . . to transform [the] culture.”<sup>261</sup>

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257. *Id.*

258. *Id.* at 11.

259. *See supra* Part III.

260. Oregon bakery owners who refused to sell cakes for same-sex weddings were recently featured at the 2014 Values Voter Summit, which is sponsored by the Family Research Council, on a panel called “Marriage in America: The Road Ahead,” along with Eric Teetsel, the Manhattan Declaration’s executive director. *See VVS 2015 Schedule*, VALUES VOTER SUMMIT (2015), <http://www.valuesvotersummit.org/schedule> [<http://perma.cc/Z97F-E3T8>] (displaying the schedule from the 2014 Values Voter Summit). The Values Voter Summit “was created in 2006 to provide a forum to help inform and mobilize citizens across America to preserve the bedrock values of traditional marriage, religious liberty, sanctity of life and limited government that make our nation strong.” *VVS 2015: About VVS*, VALUES VOTER SUMMIT (2015), <http://www.valuesvotersummit.org/about> [<http://perma.cc/JDY6-5CT5>].

Entire sections of ADF’s website are dedicated to its work on behalf of the florist who refused to provide flowers for a same-sex couple’s wedding and the photographer who refused to photograph a same-sex commitment ceremony. *The Cost of Being a Christian*, ALLIANCE DEFENDING FREEDOM, <https://www.alliancedefendingfreedom.org/Home/Detail/4333> [<http://perma.cc/7AJD-A7CM>]; *The Story of Barronelle Stutzman*, ALLIANCE DEFENDING FREEDOM, <https://www.alliancedefendingfreedom.org/arlenes-flowers> [<http://perma.cc/D8YX-Q33Q>].

261. Conley, *supra* note 150; *see also Defending Religious Liberty in America*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/issues/religious-liberty> [<http://perma.cc/S9RY-UQU2>] (stating that religious liberty “[k]eep[s] the Door Open for the Spread of the Gospel”).

**V. CONSIDERING ACCOMMODATION**

Now that we have examined the form and social logic of complicity-based conscience claims and explained the impact of their accommodation on third parties, we turn back to doctrine to consider how our analysis bears on the enforcement of the law. We start with RFRA and *Hobby Lobby*, before considering the wider variety of judicial and legislative contexts in which these claims are arising. The impact on third parties of accommodating complicity-based conscience claims varies across contexts, and as it does, it implicates different kinds of values. We consider some of the fundamental and constitutional values that might shape approaches to accommodation.

In what follows, we identify questions that courts and lawmakers need to ask if they are concerned—as our law directs them to be—about the harms to other citizens that accommodating complicity-based conscience claims may inflict. Decision makers may weigh the goods and harms of religious accommodation differently, but few would endorse the principle that one group of citizens should be singled out to bear significant costs of another’s religious exercise. Once we recognize that accommodating complicity claims inflicts distinctive forms of harm on other citizens, even proponents of expansive accommodations should be committed to minimizing those harms. (If they are not, it is likely because the argument for exemption is part of a larger effort to enforce norms of the faith on society as a whole.)

*A. Reconsidering Harm in Hobby Lobby’s Wake*

RFRA prohibits the federal government from “substantially burden[ing] a person’s exercise of religion” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>262</sup> In what follows, we return to *Hobby Lobby* to show how the question of third-party harm arises as part of the RFRA analysis.<sup>263</sup> We then consider questions of accommodation in contexts outside RFRA.

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<sup>262</sup>. 42 U.S.C. § 2000bb–1(a) to (b) (2012).

<sup>263</sup>. RFRA does not explicitly mention third-party harm. This is not surprising given the specific cases to which Congress referred when it enacted the statute. As we observed in Part I, the free exercise claims in *Sherbert*, *Yoder*, and *Smith*—the cases mentioned in RFRA—did not focus on the conduct of persons outside the faith community.

We focus on how third-party harm arises under the “compelling governmental interest” and “least restrictive means” prongs of RFRA. For cases discussing questions of complicity under the “substantial burden” analysis, see, for example, *Geneva College v. Secretary of Unit-*



1. RFRA

The *Hobby Lobby* Court granted the religious accommodation on the premise that it would have “precisely zero” effect on the claimants’ female employees.<sup>264</sup> As we showed in Part I, this concern with third-party harm has been a cross-cutting constraint in adjudicated religious liberties law arising under both the Constitution and civil rights statutes.<sup>265</sup> In *Hobby Lobby*, this concern played a critical role. Justice Kennedy, who specifically noted in his concurrence that accommodation may not “unduly restrict other persons, such as employees, in protecting their own interests,”<sup>266</sup> provided the majority its decisive fifth vote. The majority opinion reiterated that concern with third-party harm. Justice Alito instructed that “in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’ That consideration will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.”<sup>267</sup>

In this passage Justice Alito explains that the injunction against third-party harm that we observed across religious liberties case law is an integral part of RFRA’s compelling interest and least restrictive means analysis. The government’s compelling interests in enacting a law often include individual and societal interests, and these interests often have material and expressive dimensions.<sup>268</sup> If religious accommodation (1) would inflict material or dignitary harm on those the statute is designed to protect or (2) would produce effects and meanings that undermine the government’s society-wide objectives, this impact is evidence that unimpaired enforcement of the law is the least restrictive means of furthering the government’s interest.

An antidiscrimination law can illustrate. In enacting an antidiscrimination law, legislators seek to provide the citizens the law protects equal access to em-

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*ed States Department of Health & Human Services.*, Nos. 13-3536, 14-1374, 14-1376, 14-1377, 2015 WL 543067 (3d Cir. Feb. 11, 2015); and *Priests for Life v. United States Department of Health & Human Services.*, 772 F.3d 229 (D.C. Cir. 2014).

<sup>264</sup>. See *supra* Part I.B and note 64.

<sup>265</sup>. See *supra* notes 51-54 and accompanying text.

<sup>266</sup>. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring).

<sup>267</sup>. *Id.* at 2781 n.37 (majority opinion) (citing *Cutter v. Wilkinson*, 544 U. S. 709, 720 (2005)).

<sup>268</sup>. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) (in addressing a First Amendment challenge to a law proscribing sex discrimination, the Court observed “the importance, *both to the individual and to society*, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women”) (emphasis added); see also Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, 1032-35 (2015).

ployment, housing, and public accommodations and to ensure that they are treated with equal respect; legislators also seek to promote the growth of a more integrated and less stratified society.<sup>269</sup> If granting a religious accommodation would harm those protected by the antidiscrimination law or undermine societal values and goals the statute promotes, then unencumbered enforcement of the statute is the least restrictive means of achieving the government's compelling ends. If, however, the government can accommodate the religious claimant in ways that do not impair pursuit of the government's compelling interests in banning discrimination, then RFRA requires the accommodation.

Looking back at *Hobby Lobby*, we are now situated to make several observations. The Court decided the case on the basis of least restrictive means analysis. The Court required the accommodation because it thought the government had alternative means of providing the employees access to insurance for contraception, so that the accommodation would have “precisely zero” effect on them.<sup>270</sup> In fact, the Court may have erred in assuming that accommodation would inflict no costs.<sup>271</sup> If the Court was in error in asserting that accommodating *Hobby Lobby* would have “precisely zero” effect on its employees' access to insurance for contraception, we learn something about narrow tailoring analysis. Narrow tailoring requires determining whether an alternative method of serving the government's interests is available and adequate—whether it is feasible for the government to accommodate religious objections without imposing costs on the citizens the statute protects.

Our analysis prompts another observation about the least restrictive means inquiry in *Hobby Lobby*. In concluding that religious accommodation was possible with “precisely zero” effect on the statute's beneficiaries, the Court seems to have focused entirely on material, rather than dignitary, harm. The Court never considered whether accommodating the employers' belief—that paying for employee health insurance would make the employers complicit in the employees' sinful practices of contraception—might create harmful social meanings that undermine individual and societal interests the statute promotes. Accommodating such religious beliefs may stigmatize women who use contraception, either by entrenching old norms that condemn women for seek-

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269. See KOPPELMAN, *supra* note 250, at 8 (explaining that “the antidiscrimination project” seeks to reconstruct social reality to eliminate or marginalize the shared meanings, practices, and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage”).

270. *Hobby Lobby*, 134 S. Ct. at 2760.

271. See *supra* note 57 and accompanying text (reporting on the pending proposal to offer the accommodations available to religiously affiliated nonprofits to some for-profit corporations, and on continuing litigation over the adequacy of those accommodations).

ing sex while avoiding motherhood<sup>272</sup> or by labeling contraception as an “abortifacient.”<sup>273</sup> In these ways, sanctioning the employer’s refusal to pay can create

272. Judgments about contraception have long been entangled in beliefs about women’s natural role as mothers. A year after Justice Bradley explained that “the constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood,” *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), Congress criminalized contraception. The Comstock Act was premised on the view that it was obscene to separate sex and procreation. Act of Mar. 3, 1873, ch. 258, 17 Stat. 598 (prohibiting circulation in U.S. mail of information regarding contraception, which was deemed obscene) (repealed 1909); see also Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 3 (1966) (describing the enactment of a Connecticut law criminalizing contraception that was modeled on the Comstock Act and later declared unconstitutional in *Griswold v. Connecticut*, 381 U.S. 479 (1965)). In this period, women who indulged in sex while endeavoring to avoid its natural procreative consequences were condemned as engaging in “physiological sin.” See Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 292-96 (1992) (quoting doctors on the sins and health harms of preventing pregnancy). For an account that ties judgments about the use of contraception in the nineteenth and twentieth century to gendered double standards in sex and parenting, see Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349 (2015), <http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right> [<http://perma.cc/MHL9-QRC9>]. For an illustration of how religious refusal of contraception can make a woman feel “like a whore,” see text accompanying note 252; cf. KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT 44 (1975) (explaining that a woman may avoid taking steps, such as accessing and using contraception, that “notify [others] that she is participating in sexual behavior which she has reason to suppose they will disapprove” on religious and other grounds).

273. In *Hobby Lobby*, the plaintiffs asserted a claim for religious exemption based on the belief that pregnancy begins at fertilization (rather than implantation) of an egg. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013). By contrast, the scientific community and federal law define pregnancy as beginning with the implantation of a fertilized egg in a woman’s uterus. See Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER REP. ON PUB. POL’Y, May 2005, at 7, <https://www.guttmacher.org/pubs/tgr/08/2/gro80207.html> [<http://perma.cc/NA27-ARWD>] (“According to both the scientific community and long-standing federal policy, a woman is considered pregnant only when a fertilized egg has implanted in the wall of her uterus . . .”).

The methods of contraception characterized as abortifacients in *Hobby Lobby* do not operate post-implantation, and so do not cause abortion in the view of medical science or the federal government. See, e.g., Brief of Physicians for Reproductive Health et al. as Amici Curiae Supporting Defendants-Appellees at 10-12, *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (2013) (No. 13-1144), 2013 WL 1792349 (citing authority); James Trussell & Eleanor Bimla Schwartz, *Emergency Contraception*, in *CONTRACEPTIVE TECHNOLOGY* 113, 121 (Robert A. Hatcher et al. eds., 20th ed. 2011). In fact, all but one of the challenged contraceptive methods are now understood to operate *before ovulation*, and so may well not count as abortifacients *even under the plaintiffs’ religious definition of pregnancy*. See Kristina Gemzell-

meanings that deter women from using contraception, compromising both the individual and societal interests that the statute furthers.<sup>274</sup> Perhaps, however, the government has alternative means of providing employees insurance for contraception that would not create these pejorative social meanings.<sup>275</sup>

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Danielsson et al., *Emergency Contraception—Mechanisms of Action*, 87 *CONTRACEPTION* 300 (2013).

One observer points to evidence suggesting that advocates intend to blur the line between abortion and contraception, including the fact that advocates (1) have characterized contraceptive methods as abortifacients, when the contraceptives in question do not satisfy their religious definition of abortifacients; and (2) have appealed to religious criteria for defining abortifacients in some contexts but not in others, so as to avoid condemning popular methods of contraception. See Joerg Dreweke, *Contraception Is Not Abortion: The Strategic Campaign of Antiabortion Groups To Persuade the Public Otherwise*, *GUTTMACHER POL'Y REV.*, Fall 2014, at 14, <http://www.guttmacher.org/pubs/gpr/17/4/gpr170414.html> [<http://perma.cc/D8YF-27MF>]. Efforts to stigmatize contraception as “the new abortion” might appeal to some critics of contraception. Cf. *supra* notes 120-123 and accompanying text (discussing Christians who condemn the “contraceptive mentality” and who argue that contraception harms women).

274. See Siegel & Siegel, *supra* note 268, at 1028 (observing that the government’s compelling interest in providing employees access to contraception “encompass[es] not only core concerns of the community in promoting public health and facilitating women’s integration in the workplace,” but also “crucial concerns of the employees who are the intended beneficiaries of federal law’s contraceptive coverage requirement—interests that sound in bodily integrity, personal autonomy, and equal citizenship”). As the Department of Health and Human Services explained: “Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive access . . . allow[s] women to achieve equal status as healthy and productive members of the job force.” Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725-01 (Feb. 15, 2012). Cf. *Hobby Lobby*, 134 S. Ct. at 2779-80 (discussing the government’s asserted interests in requiring employers to provide employees insurance for contraception, including “‘public health’ and ‘gender equality’” (citing *Griswold*, 381 U.S. 479)).

275. We know that religious refusals to provide contraception in a face-to-face encounter can demean and stigmatize. For illustrations of the dignitary dimensions of the transaction, see *supra* notes 248-252 and accompanying text. Providing and withholding insurance may present a different case. Some have argued that because insurance benefits are fungible goods, the rerouting of benefits through an alternative mechanism neither harms the statutory beneficiaries nor undermines the government’s interest. See Berg, *supra* note 18, at 124-25 (citing Vikram David Amar & Alan E. Brownstein, *The Narrow (and Proper) Way for the Court To Rule in Hobby Lobby’s Favor*, *VERDICT* (Apr. 11, 2014), <http://verdict.justia.com/2014/04/11/narrow-proper-way-court-rule-hobby-lobbys-favor> [<http://perma.cc/6UDL-F929>] (“The benefits provided by the Act . . . are fungible, intangible goods that can be provided by either the public or private sector. And the Act’s beneficiaries have no reason to care about the source of the insurance.”)). Whether a government accommodation expresses the message that contraception is sinful would depend on the way the government structures the accommodation.

In short, the least restrictive means analysis requires examining the meanings as well as the material arrangements that a proposed accommodation of a religious claim would create.<sup>276</sup> If the accommodation does not obstruct the attainment of any compelling governmental ends, then RFRA directs accommodation of the claim. If such an accommodation cannot be devised, RFRA allows the government to pursue its compelling interests through unobstructed enforcement of the statute. Yet even in these circumstances, the religious claimant has resources for expressing concerns of conscience and for advocating change of religiously objectionable laws. The claimant has at her disposal all of the resources of speech and political advocacy available to others in society, but does not have the special advantage of an exemption from complying with the law.<sup>277</sup> (RFRA confers that advantage on persons engaged in religious exercise only in the circumstance where the exemption does not obstruct the attainment of compelling governmental interests.)

*Hobby Lobby* is distinctive: it focused on a claim for religious accommodation in circumstances in which the Court believed that the government already had devised alternative means of vindicating its interest in the statute's enforcement. In adjudicating complicity-based claims to religious accommodation not involving the ACA—arising under RFRA, under state RFRAs that resemble the federal statute,<sup>278</sup> and outside the RFRA context—it will be

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276. See Loewentheil, *supra* note 50, at 495 (“[T]here may be cases in which the state could conceivably have produced a more narrowly tailored practical solution to a given problem, but could not produce a more narrowly tailored solution that would respect the expressive equality norms at stake . . .”).

277. At least one commentator sympathetic to religious refusals has suggested that religious objectors comply with antidiscrimination laws while voicing their objections. See Russell Nieli, *Gay Weddings and the Shopkeeper's Dilemma*, PUB. DISCOURSE (Dec. 17, 2014), <http://www.thepublicdiscourse.com/2014/12/14190> [<http://perma.cc/4A6A-EYTV>] (encouraging business owners to “obey the law and serve gay weddings, but [to] make it known publicly that you believe that the law forcing you to do this is unjust, needs to be changed, and is obeyed only out of your respect for law and the democratic process”); see also Russell Nieli, *Challenging Unjust Laws Takes Prudence, Courage, and Common Sense*, PUB. DISCOURSE (Jan. 28, 2015), <http://www.thepublicdiscourse.com/2015/01/14335> [<http://perma.cc/H5UJ-LEGK>] (“Even if, under the ‘hostile work environment’ exception, a workplace sign of protest were prohibited, nothing would prevent a business owner from taking out ads in local media publicly announcing his conscience-based objections to serving same-sex weddings.”). Speech may in fact serve to quell some concerns with the apparent sanctioning of conduct—concerns associated with complicity claims sounding in scandal. (For a discussion of scandal as occurring when the individual or institution engages in conduct that appears to sanction someone else's wrongful behavior, see *supra* note 23.)

278. Many states have their own RFRAs that track the federal RFRA. To the extent they do, our analysis of the federal RFRA will be relevant. On state RFRAs, see Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); and Eugene Volokh, 1A. *What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2,

important to examine carefully the existence and adequacy of alternatives, as well as the material and dignitary effects of an accommodation.

2. *Non-RFRA Contexts*

Complicity-based conscience claims arise under bodies of law other than federal and state RFRA. They are asserted in a variety of statutory settings, as healthcare refusal laws and debates over same-sex marriage illustrate.<sup>279</sup> In these settings, decision makers will have to determine not only whether but how to accommodate religious exercise. Concern about material and dignitary harm to third parties might lead legislators to reject a proposed accommodation or, at the very least, to consider strategies to minimize the accommodation's impact on other citizens. Accommodations that do not include mechanisms to offset significant third-party effects—such as those common in healthcare refusal laws—single out some citizens to bear the cost of others' religious convictions.<sup>280</sup>

The question of how to minimize the impact on third parties will vary across circumstances.<sup>281</sup> The feasibility of providing alternative access to services may depend on the availability of other willing providers—an assessment that may include consideration of the claimant's market position<sup>282</sup> as well as

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2013, 7:43 AM), <http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act> [<http://perma.cc/43MG-QXAQ>].

279. Complicity-based conscience claims are being made to support “marriage conscience protection” provisions in state legislation codifying same-sex marriage. *See, e.g.*, Letter from Robin Fretwell Wilson et al. to Pat Quinn, *supra* note 194. Some state legislatures have considered statutes that would allow businesses to refuse service to same-sex couples based on notions of complicity. *See, e.g.*, H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014), [http://www.kslegislature.org/li/b2013\\_14/measures/hb2453](http://www.kslegislature.org/li/b2013_14/measures/hb2453) [<http://perma.cc/R2LC-P9VC>]; S.B. 1428, 126th Leg., 2d Reg. Sess. (Me. 2014), [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?paper=SP0514&snum=126](http://www.mainelegislature.org/legis/bills/display_ps.asp?paper=SP0514&snum=126) [<http://perma.cc/M8YS-U6DN>].

280. Some healthcare refusal laws do not provide an exception for emergency situations. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.20181 (West 2014); MINN. STAT. ANN. § 145.414 (West 2014); MISS. CODE ANN. § 41-107-5 (West 2014); *see also* Sonfield, *supra* note 92. And some of these laws permit providers to withhold referrals or other information that would notify patients of restrictions on services and enable them to find alternative providers. *See, e.g.*, 42 U.S.C. § 238n (2012); ARK. CODE ANN. § 20-16-304 (West 2014); COLO. REV. STAT. ANN. § 25-6-102 (West 2014); FLA. STAT. ANN. § 381.0051 (West 2014); MISS. CODE ANN. § 41-107-3 (West 2014); *see also* Sonfield, *supra* note 92.

281. Proposals to balance access against accommodation have been extensively considered by scholars of health law and bioethics. For a helpful summary, *see* Sepper, *supra* note 72 (manuscript at 9).

282. *See* Berg, *supra* note 18, at 139 (noting a problem “if religious objectors are numerous or large enough to hold market power over the matter in question”); *cf.* Att’y Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994) (inquiring into whether accommodation of a complicity-

the likely number of other claims for accommodation.<sup>283</sup> For example, when a Catholic-affiliated hospital is the only hospital in a particular locale, exercise of exemptions by the institution and its affiliated personnel could significantly affect residents' access to certain healthcare services.<sup>284</sup>

Even if the government can provide for affected third parties in alternative ways, these alternatives may not shield third parties from dignitary harms.<sup>285</sup> The question of whether a complicity claim can be accommodated in terms that ameliorate the dignitary affront to other citizens is at root practical. In the healthcare context, for example, decision makers might respond by requiring internal procedures that shift patients away from refusing providers and toward their willing colleagues, in ways that shield the patient from stigmatizing encounters.

More broadly, lawmakers might consider the message the government sends in furnishing an exemption. Context matters in assessing social meaning. Are there ways to accommodate religious persons without giving legal sanction to their view that other law-abiding citizens are sinning? If the government grants an accommodation, is the accommodation structured to block or amplify dissemination of religious claims about the sins of other citizens?

### *B. The Values To Guide Approaches to Accommodation*

We have been focusing on the practical considerations that should guide approaches to accommodation of complicity-based conscience claims. But there

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based conscience claim from state housing law that prohibited marital status discrimination would "significantly imped[e] the availability of rental housing for people who are cohabiting or wish to cohabit").

283. See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 968 (2004) ("Exemptions prompt the worry that granting one will invite a series of future claims whose cumulative effect on social interests will be damaging. But the smaller and more unconventional the group, the fewer the likely prospective claims."). As Martha Minow has observed in her treatment of conflicts between civil rights laws and religious objections: "Because of the size of relevant religious groups, exemptions would enormously affect the number of workplaces and other settings where the antidiscrimination norm is bent or broken." Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 822-23 (2007).

284. See *supra* Part IV.A; see also Ikemoto, *supra* note 214, at 1102; Laycock, *supra* note 197, at 848, 879.

285. See, e.g., *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) ("The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination.").

are broader normative and constitutional concerns at stake, some of which will vary across the contexts in which these claims are asserted.

In courts, and especially in legislatures where complicity-based conscience claims will be subject to negotiated settlements, government actors will make judgments about which claims to accommodate and how to design accommodations. In doing so, they will continually grapple with questions of fundamental fairness. As our religious liberties case law emphasizes, one group of citizens should not bear the significant costs of another's claim to religious exercise.<sup>286</sup>

A different kind of fairness concern is likely to arise as lawmakers and courts distinguish *among* religious claimants.<sup>287</sup> There is evidence that claimants who appeal to religious convictions consistent with mainstream Christian faiths may be more likely to secure judicial or legislative exemptions than those invoking minority religious convictions.<sup>288</sup> This would seem to be especially likely in the context of complicity-based claims, where the relationship between the claimant and the objectionable conduct may be quite attenuated. In these circumstances, there is a risk that decision makers may recognize a burden on religious exercise when the claimant invokes familiar norms condemning the

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286. See *supra* notes 51-54 and accompanying text; see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) (“[A]ccommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”).

287. Complicity claims are asserted by religious claimants who represent minority faiths in the United States. See, e.g., John Reinan, *Taxi Proposal Gets Sharp Response*, STAR TRIB. (MINNEAPOLIS), Feb. 27, 2007, <http://www.startribune.com/local/11586646.html> [http://perma.cc/9G2F-EDAN] (explaining that the Minnesota chapter of the Muslim American Society instructed that taxi drivers should not carry “passengers with alcohol ‘because it involves cooperating in sin according to Islam’”).

288. Recent empirical work suggests that the religion of a claimant seeking accommodation in court correlates with the likelihood of accommodation being granted, with Catholics and Protestants, for instance, having higher success rates than Muslims. See Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371 (2013); Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012). On judicial accommodation, see Mark Tushnet, “Of Church and State and the Supreme Court”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 383, which argues that “[t]he less familiar the claim is – that is, the less connected it is to the kinds of worship that the Justices of the Supreme Court are accustomed to – the less likely it is that they will regard infringements on those forms of worship as really serious.” On legislative exemptions, see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 318 (1991), which suggests that “[l]egislators are more likely to be aware of majoritarian religious practices (their own) when they fashion general regulations, and thus are unlikely to place disabilities on those practices. Similarly, they are less likely to be concerned with religious practices outside their religious tradition and accordingly are more likely to place burdens on those practices inadvertently.”



conduct or when decision makers themselves believe the conduct to be wrongful.<sup>289</sup>

In addition to basic questions of fairness, specific constitutional norms may be implicated when one citizen is asked to bear the costs of another's religious exercise. Granting an accommodation may not rise to the level of an independent constitutional violation, yet it may still be in deep tension with important constitutional values. For example, healthcare refusal laws may violate duties of care that healthcare institutions and professionals owe patients and may also impair exercise of patients' constitutionally protected reproductive rights.<sup>290</sup> Accommodation of complicity-based conscience claims may also undermine equality norms.<sup>291</sup> Although legislative exemptions from antidiscrimination law do not ordinarily constitute freestanding equal protection violations, some recent proposals would specifically allow refusals of same-sex couples.<sup>292</sup> Such singling out might undermine the forms of respect that guarantees of equal protection promote.<sup>293</sup> Finally, accommodation of complicity-based conscience

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289. Cf. Greenawalt, *supra* note 172, at 821 ("A legislator might think that protecting conscience is so important that persons should not be made to act against conscience, however odd the basis for their judgments. But a legislator who believes that a particular procedure is seriously wrongful, and should be performed as little as possible, might approve a right of refusal independent of any special sensitivity about the conscience of those who refuse.").

290. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Concerns are heightened by the combination of institutional exemptions and increasing mergers involving Catholic hospitals. See Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 683-84 (2001) ("[T]he number of mergers between Catholic and non-Catholic hospitals is rising sharply. In about half of the mergers over the past decade, all or some reproductive health services previously provided by the non-Catholic institution have been eliminated. State attorneys general, entrusted with the responsibility of approving such mergers, . . . could consider the impact of the mergers on the constitutionally-protected right for individuals to make their own reproductive choices.").

291. Cf. Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069 (2011) (addressing claims to religious exemptions from antidiscrimination laws that include race, sex, religion, sexual orientation, and gender identity). In the LGBT context, see NeJaime, *supra* note 151, at 1226-29, 1236; and Oleske, *supra* note 50, at 144. For the sex equality dimensions in the healthcare context, see Sepper, *supra* note 72 (manuscript at 19); and Sepper, *supra* note 50, at 208-11. As Laurence Tribe has shown, liberty and equality "are profoundly interlocked in a legal double helix." Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

292. See H.R. 3133, 113th Cong. (2013); S. 1808, 113th Cong. (2013); H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014).

293. See Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. (forthcoming 2015) (manuscript at 19) (on file with authors) ("The constitutional concerns are

claims may implicate concerns about religious establishment, as the costs of claimants' religious practices are imposed on other citizens.<sup>294</sup>

## CONCLUSION

Pluralism is commonly invoked as a value that justifies religious accommodation.<sup>295</sup> Indeed, religious exemptions historically have protected minority practitioners from the operation of generally applicable laws.<sup>296</sup> Accommodation, therefore, respects and preserves religious diversity. Today, many scholars and advocates cite this pluralistic tradition to support accommodation of com-

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compounded when one considers . . . that the brunt of the proposed exemptions will fall almost exclusively on individual members of historically disadvantaged groups, notably gay men, lesbians and other women, creating equal protection problems.”); Oleske, *supra* note 50, at 144 (“Only after same-sex couples were allowed to marry was there an effort to allow business owners to discriminate for religious reasons, and such an ‘unusual deviation from the usual tradition’ would appear to be ‘strong evidence’ under *Windsor* of an unconstitutional intent ‘to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages.”); Letter from Dale Carpenter, Douglas NeJaime, Andrew Kopelman, Ira C. Lupu & William P. Marshall to Michael Madigan, Speaker, Ill. House of Representatives, at 10 (Oct. 15, 2013) (on file with authors) (“[T]he inclusion of the proviso means that the law would single out lesbians and gay men, carving out from antidiscrimination law only this discrete group, a form of discrimination that may well be unconstitutional.” (citing *United States v. Windsor*, 133 S. Ct. 2675 (2013))).

294. See *supra* note 53 and accompanying text. On the general conflict between accommodation and the Establishment Clause, see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 n.25 (2014) (Ginsburg, J., dissenting), which explains that “the government’s license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause”; and *TRIBE*, *supra* note 43, at 1195, which warns that “unbounded tolerance of governmental accommodation in the name of free exercise neutrality could eviscerate the establishment clause.” In fact, some scholars have argued that independent Establishment Clause violations may arise in some of these contexts. See, e.g., Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25, 46-52 (2015). For instance, in the same-sex marriage context, legislative exemptions from antidiscrimination laws impose costs on same-sex couples. See *id.* at 47-48. Some statutory regimes, such as healthcare refusals legislation, may avoid these issues by covering both religious and moral objections. See *id.* at 44. Nonetheless, exemptions in the healthcare context may still raise constitutional issues by “impos[ing] restraints that are too severe on private actors,” including the employers. Greenawalt, *supra* note 172, at 821.

295. See, e.g., Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in MATTERS OF FAITH: RELIGIOUS EXPERIENCE AND LEGAL RESPONSE 194 (Austin Sarat ed. 2012); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161 (2015); John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. (forthcoming 2015), <http://ssrn.com/abstract=2470788> [<http://perma.cc/3922-MCZM>]; see also *supra* note 152.

296. See generally McConnell, *supra* note 36.

plicity-based conscience claims.<sup>297</sup>

Yet examination of the form and social logic of these claims suggests that their accommodation may subvert, as well as serve, pluralistic ends. Complicity-based conscience claims are faith claims about how to live in community with others who do not share one's religious beliefs on contested questions of sexual morality. The claimants treat the lawful conduct of other citizens as sinful and object to being associated with those citizens. Many believe their religious convictions should govern the conduct of citizens who do not belong to their faith community.

In this sense, complicity-based conscience claims can be animated less by a pluralistic interest in preserving space for distinctive religious beliefs and practices and more by what political theorist Nancy Rosenblum has described as an "integralist" orientation.<sup>298</sup> The religious integralist believes that "religious authority should guide every aspect of social and political life of the nation as a whole."<sup>299</sup> Some advocates for cross-denominational coalitions asserting and supporting complicity-based conscience claims aspire to a legal and political

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297. See, e.g., Berg, *supra* note 36, at 207-08, 211-12, 216, 218, 226-28; Wilson, *supra* note 152, at 1437, 1482-83, 1487-89, 1508; Ryan T. Anderson, *Sexual Liberty and Religious Liberty Can Coexist. Here's How*, DAILY SIGNAL (Nov. 9, 2014), [http://dailysignal.com/print/?post\\_id=164652](http://dailysignal.com/print/?post_id=164652) [<http://perma.cc/NN7P-PB7A>].

298. See Nancy L. Rosenblum, *Introduction to OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* 3, 15 (Nancy L. Rosenblum ed., 2000) (explaining that "integralism" is "a set of challenges to democratic government in the name of faith"); Rosenblum, *supra* note 108, at 25 (describing "integralism" as "the view that values and practices in every sphere must be religious and congruent"); see also Mark Jensen, *The Integralist Objection to Political Liberalism*, 31 SOC. THEORY & PRAC. 157 (2005). On the distinct, specific tradition of Catholic integralism, see Christopher van der Krogt, *Catholic Fundamentalism or Catholic Integralism?*, in *TO STRIVE AND NOT TO YIELD: ESSAYS IN HONOUR OF COLIN BROWN* 123 (James Veitch ed., 1992).

299. Nancy L. Rosenblum, *Faith in America: Political Theory's Logic of Autonomy and Logic of Congruence*, in *RELIGION AND DEMOCRACY IN THE UNITED STATES: DANGER OR OPPORTUNITY?* 382, 384 (Alan Wolfe & Ira Katznelson eds., 2010). As Paul Horwitz explains, this integralist perspective is also reflected in claims that seek to bring religion further into the commercial sphere and the public square. See Paul Horwitz, Comment, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 180 (2014) ("To a growing and increasingly visible extent, a range of faiths and sects take an 'integralist' view that sees 'religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life.'") (quoting Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 474 (2009)). Some scholarly commentators supporting broader religious exemptions for for-profit corporations have drawn on the integralist ethos animating some of today's claimants. See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 18 (2013) ("Although religious integralism is not ordinarily a feature of mainstream Protestantism in America, it is a feature of the fastest growing religious groups in America: Islam, Orthodox Judaism, Mormonism, fundamentalist and evangelical Protestantism, and the more traditional expressions of Catholicism.").

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COMPLICITY-BASED CONSCIENCE CLAIMS

order shaped by their underlying religious convictions.<sup>300</sup> For instance, they seek generally applicable laws that reflect traditional religious views about marriage and abortion. In the absence of laws enforcing traditional sexual norms, they seek to enforce those norms through a web of religious exemptions. Religious liberty, through this lens, is a “mandate for evangelization.”<sup>301</sup>

Asserted in this spirit, the claim for accommodation is not simply an act of withdrawal. Instead, in advancing complicity-based claims for exemption, mobilized groups and individuals may seek to enforce traditional norms against those who do not share their beliefs. Accommodation of *these* claims may undermine, rather than advance, pluralistic values.

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<sup>300.</sup> See *supra* Part III.A; see also *supra* note 108 (describing ADF’s campaign to end IRS regulations that condition religious institutions’ tax-exempt status on restrictions on supporting particular candidates).

<sup>301.</sup> Conley, *supra* note 150.