
Religious Exemptions and the Family

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ABSTRACT. This Essay highlights the threat claims for religious exemptions to antidiscrimination laws pose to the diverse family arrangements that now populate society. It argues we should not abide efforts to thwart, undermine, and ultimately overturn advances in equality norms in the family based on religious belief. The promise of nondiscrimination laws for our families and our ability to move freely in the public sphere is undercut if LGBTQ+ people and women must confront actual or metaphorical, embraced by the courts, “Your kind of family is not welcome here.”

INTRODUCTION

For many years, the American family trope resembled a kind of *Leave It to Beaver* mythical archetype, featuring a white male head of household, his white stay-at-home wife, and their two children. This trope was false and exclusionary in many respects. To begin, the family was white. Single parents, working mothers, and intergenerational families – all of which are more likely to be or consist of people of color¹ – are missing from the picture. One parent can afford to stay at home, and the family lives in a detached house that they own. The family roles are gendered and the couple heterosexual. While we all now know this trope

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1. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents> [<https://perma.cc/GN9D-Z7S7>] (reporting that nearly sixty percent of solo mothers are people of color); *A Snapshot of Working Mothers*, NAT'L WOMEN'S L. CTR. (Apr. 2017), <https://nwlc.org/wp-content/uploads/2017/04/A-Snapshot-of-Working-Mothers.pdf> [<https://perma.cc/ZY9C-V29F>] (“Black mothers are more likely to be in the labor force than mothers of any other race.”); D’vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RSCH. CTR. (Apr. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households> [<https://perma.cc/PA27-KBZV>] (showing that white people are less likely than other racial or ethnic groups to live in multigenerational households).

stands for few families and perhaps even fewer aspirations, it persists to this day, with the assumption still being that women are the primary caregivers; that if a woman wearing a wedding ring buys two coffees, one is for her husband, not her wife;² that chosen families include two adults; and that women are wanting—perhaps even monsters—if they do not embrace motherhood.³

There are, of course, significant advances that have begun to broaden our understanding of the family. Today, as a matter of law, same-sex couples can marry, be foster parents, and adopt.⁴ Assisted reproduction has facilitated parenthood for same-sex couples and people seeking to single-parent. People have a greater ability to decide whether and when to parent, and women who parent continue to work out of need, as always, but also out of desire. Culture is making this change possible, as is law, even if the law may not always appear in family-law casebooks.

These legal developments, and the freedom they represent, are, however, under attack. Specifically, these advances are challenged in the name of religious freedom, with the avowed goal of returning to the *Leave It to Beaver* trope. These religious-freedom arguments are most often discussed as challenges to civil rights.⁵ This Essay highlights the less-often discussed threat that religious exemptions to antidiscrimination laws pose to the diverse family arrangements that populate our society. Part I discusses current religious-freedom challenges, and Part II speaks to the courts' changing response to these challenges. Finally, Part III argues that we should not abide efforts to thwart, undermine, and ultimately overturn advances in equality norms in the family based on religious belief.

This Essay focuses on claims for religious exemptions made by institutions, most often institutions that serve the public, whether businesses, foster care agencies, or hospitals. This is the space most regulated, subject to antidiscrimination rules, and thus the focus of legal disputes about religious exemptions. It

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2. Ria Tabacco Mar, Opinion, *Longing for the Freedom Not to Hide Myself*, WASH. POST (Apr. 15, 2018), https://www.washingtonpost.com/opinions/longing-for-the-freedom-to-not-hide-myself/2018/04/15/201c7680-3f30-11e8-a7d1-e4efec6389fo_story.html [https://perma.cc/9BZP-U9A8].
 3. E.g., Mary Katharine Tramontana, *Women Who Said No to Motherhood*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/style/childfree-women.html> [https://perma.cc/X2K3-XC4V].
 4. See *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).
 5. The titles of many recent books in the field are illustrative. *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* (Susanna Mancini & Michel Rosenfeld eds., 2018); *NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017); *JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* (2017).

is also the space in which the religious exemptions to antidiscrimination rules will do the most harm.⁶

I. THE CURRENT CONTEST

The cultural and legal vision of the family is undergoing profound change. Gone are the bans on same-sex couples marrying and adopting and fostering children. One in three children live in a single-parent household,⁷ the percentage of women who have never married and who have children is increasing,⁸ stay-at-home parents are increasingly fathers,⁹ and most children live in families in which all the adults work.¹⁰

But these changes are resisted in the name of religious freedom. The United States Conference of Catholic Bishops' amicus brief in *Obergefell v. Hodges*, for example, left no doubt about their vision of appropriate family and gender roles: "If same-sex partnerships were recognized as marriages . . . no civil institution would any longer reinforce the notion that children need both a mother and

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6. Claims for exemptions must always be considered with several lenses in mind. Is this a claim by an institution or an individual? If an institution, does it open its doors to and serve members of the public? Or does it hire and serve principally members of the faith? Does it receive government funding or perform a government function? If an individual, is the person a public official? The questions help assess the extent to which an exemption will impose harm on others. A rule permitting discrimination in the hiring of a priest, for example, is different from one permitting discrimination in wages by an arts-and-crafts chain or in services by a hospital. Alexander Dushku and I thus agree that different rules are appropriate for different contexts. See Alexander Dushku, *The Case for Creative Pluralism in Adoption and Foster Care*, 131 YALE L.J.F. 246, 261 (2021) ("The architecture of pluralism is not complex, but it does require an understanding that different spaces involve different values and thus require different legal approaches."). We disagree, however, about how spaces are categorized and what rules should apply.
 7. Gretchen Livingston, *About One-Third of U.S. Children Are Living with an Unmarried Parent*, PEW RSCH. CTR. (Apr. 27, 2018), <https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent> [<https://perma.cc/9DWH-PWUA>].
 8. Gretchen Livingston, *They're Waiting Longer, but U.S. Women Today More Likely to Have Children than a Decade Ago*, PEW RSCH. CTR. (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago> [<https://perma.cc/H79Z-FGNP>].
 9. Gretchen Livingston & Kim Parker, *Eight Facts About American Dads*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/fathers-day-facts> [<https://perma.cc/AA6M-JDD8>].
 10. *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RSCH. CTR. (Nov. 4, 2015), <https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load> [<https://perma.cc/7TFE-C3N2>].

father; [and] that men and women on average bring different gifts to the parenting enterprise”¹¹ The Bishops warned of what would come were the Court to recognize, as it did, a federal constitutional right for same-sex couples to marry. They promised “church-state conflict for generations to come” that would embroil the federal courts, “pitting claims of constitutional right squarely against one another . . . until one or the other is diminished.”¹² The conflict, they predicted, “may be even greater than [that surrounding] abortion.”¹³

The conflict between religious rights and LGBTQ+ equality is charged and consequential. Citing their religious beliefs, institutions object to recognizing the marriages of same-sex couples. Businesses – most famously the Masterpiece Cakeshop bakery – claim a right to refuse to provide wedding-related services to same-sex couples.¹⁴ Religiously affiliated schools assert a right to fire teachers and other staff if they marry someone of the same sex.¹⁵ County clerks and civil judges object to recognizing marriages of same-sex couples.¹⁶ And employers assert a right not to comply with state laws requiring insurance coverage for partners in same-sex marriages on the same terms as for different-sex couples.¹⁷

Institutions are also refusing to serve same-sex couples seeking to parent. Catholic Social Services (CSS) and other agencies object to complying with requirements that – as a condition of securing a government contract to screen

11. Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance at 9, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (quoting Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 263 (2011)).

12. *Id.* at 4-5.

13. *Id.* at 23.

14. See, e.g., *Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Arlene’s Flowers, Inc., v. Washington*, 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021); Petition for Rehearing, *Arlene’s Flowers, Inc.*, 141 S. Ct. 2884 (No. 19-333). As Jack Phillips, the owner of Masterpiece Cakeshop, has plainly stated, “I believe the Bible is very clear on what God intended marriage to be – the union between one man and one woman – so I don’t create cakes for same-sex weddings.” Jack Phillips, *Masterpiece Cakeshop Owner Jack Phillips: How I Became the Face of ‘Rights of Conscience’ Litigation in U.S.*, FOX NEWS (May 17, 2021), <https://www.foxnews.com/opinion/masterpiece-cakeshop-owner-rights-conscience-jack-phillips> [<https://perma.cc/8LS9-2RLB>].

15. See, e.g., *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195 (S.D. Ind. 2020). Schools have also asserted a right to fire staff who use in vitro fertilization, a position with implications for LGBTQ+ family formation. *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014).

16. See, e.g., *Umphress v. Hall*, 500 F. Supp. 3d 553 (N.D. Tex. 2020), *appeal filed*, No. 20-11216 (5th Cir. Dec. 11, 2020); *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 3 (2020).

17. Complaint, *Texas Values v. City of Austin*, No. D-1-GN-18-006108, 2018 WL 4896373 (Tex. Dist. Ct. Oct. 6, 2018).

foster parents—they not discriminate against same-sex couples.¹⁸ And medical institutions have argued that they have a right to refuse to provide artificial insemination to a woman because her partner was a woman.¹⁹ In these and other cases, institutions have argued that their faith ensures their right not to comply with antidiscrimination laws.

Institutions also resist more longstanding precedents aimed at advancing women’s independence and equality, both within and outside the family. For example, religiously affiliated institutions argue that they have a right to fire women who are pregnant and unmarried, or who have used assisted reproductive technologies, in violation of federal laws prohibiting sex discrimination, including pregnancy discrimination.²⁰

Central to the family-law context is resistance to abortion and contraception access. Rules requiring insurance coverage for contraception as part of the Affordable Care Act met with fierce resistance in the name of religion, with more than one-hundred lawsuits filed challenging the rules.²¹ State laws requiring insurance plans to cover abortion where they already cover other pregnancy-related care have similarly given rise to lawsuits predicated on religious freedom.²²

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18. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Buck v. Gordon*, 429 F. Supp. 3d 447 (W.D. Mich. 2019); Verified Complaint for Declaratory Judgment and Injunctive Relief, *Cath. Charities W. Mich. v. Mich. Dep’t of Health & Hum. Servs.*, No. 2:19-cv-11661 (E.D. Mich. Apr. 24, 2019); Complaint, *Welch v. U.S. Dep’t of Health & Hum. Servs.*, No. 6:19-cv-01567-TMC (D.S.C. May 30, 2019). For religious reasons, agencies have also refused to certify unmarried couples, see *Fulton v. City of Philadelphia*, 922 F.3d 140, 148 (3d Cir. 2019) (recounting Catholic Social Services’ recent practice), and turned families away based on their faith, see Complaint, *Maddonna v. U.S. Dep’t of Health & Hum. Servs.*, No. 6:19-cv-03551-TMC (D.S.C. Dec. 20, 2019).
 19. See *N. Coast Women’s Care Med. Grp. v. San Diego Cnty. Superior Ct.*, 189 P.3d 959, 963 (Cal. 2008).
 20. See, e.g., *Crisitello v. St. Theresa Sch.*, 242 A.3d 292 (N.J. Super. Ct. App. Div. 2020), cert. granted, 250 A.3d 1129 (N.J. 2021); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998).
 21. See, e.g., *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Mary Tschann & Reni Soon, Contraceptive Coverage and the Affordable Care Act*, 42 *OBSTETRICS & GYNECOLOGY CLINICS OF N. AM.* 605, 611 (2015) (“To date, 101 cases have been filed challenging the mandate.”); *HHS Case Database*, BECKET, <https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database> [<https://perma.cc/JGP2-SYQR>] (listing cases filed challenging the rule on religious grounds).
 22. See, e.g., *Cedar Park Assembly of God v. Kreidler*, 458 F. Supp. 3d 1290, 1292 (W.D. Wash. 2020), *rev’d in part*, 2021 WL 3087873 (9th Cir. July 22, 2021); *Skyline Wesleyan Church v. Cal. Dep’t of Managed Care*, 968 F.3d 738 (9th Cir. 2020); *Roman Cath. Diocese of Albany v. Vullo*, 127 N.Y.S.3d 171 (App. Div. 2020), *pet. for cert. filed sub nom.* *Roman Cath. Diocese of Albany v. Lacewell*, No 20-1501 (U.S. Apr. 23, 2021); Complaint at 1-2, *Ill. Baptist State Ass’n v. Ill. Dep’t of Ins.*, No. 2020MR000325 (Ill. Cir. Ct. June 10, 2020).

Providers have even challenged on religious-freedom grounds laws that require them to inform patients of treatment options and provide referrals if they refuse to provide services based on their religious beliefs.²³

These are family-law issues for several reasons. The ability to decide whether and when to have children is fundamental to the ability to define one's family. Laws providing access to contraception and abortion—and resistance to those laws—are also central to family law because of their import for disrupting traditional gender roles within families.²⁴ They are about control, a promise of independence, and resistance to the longstanding centrality of motherhood in any vision of women. The Supreme Court has recognized:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.²⁵

Contraception and abortion have played a critical role in liberating women from the traditional conception of the family in which only the (white) man had a right to vote because he was to represent the interest of the family (and those he owned).²⁶ As the *Casey* Court stated, “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.”²⁷

These cases are about the family, the changing norms our laws reflect and foster, and a concerted effort to revert to “laws and precedent that recognize the

23. See, e.g., Complaint, Nat'l Inst. of Fam. & Life Advocs. v. Rauner, No. 3:16-cv-50310 (N.D. Ill. Sept. 29, 2016).

24. Access to abortion and contraception are, of course, central also to the lives of transgender men and some nonbinary people. This Essay talks of abortion and contraception for women because, to date, the Court's conversation about their import, and the push for exemptions in this context, has focused on women. The threat to transgender people is much more frontal: It is a fight over transgender people's right to exist and have rights. Questions of religious exemptions only arise after the core rights are established.

25. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

26. Reva Siegel has documented how suffrage met religious resistance based on women's proper role in the family. Antisuffragists spoke of suffrage as “a revolt against the position and sphere assigned to woman by God himself.” Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981 n.96 (2002); see also *id.* at 978 (detailing faith-based objections to women's suffrage).

27. *Casey*, 505 U.S. at 835.

important differences between men and women and honoring God’s design for marriage between one man and one woman.”²⁸

II. THE LEGAL LANDSCAPE

For decades, courts have rejected religious resistance to emerging antidiscrimination rules affecting the family.²⁹ For example, in *Loving v. Virginia*, the Supreme Court struck down Virginia’s ban on marriage for interracial couples.³⁰ The *Loving* Court quoted—and repudiated—the trial court’s faith-based reasoning about bans on interracial marriage:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.³¹

Several years later, the Court rejected Bob Jones University’s claim that the government infringed on its free-exercise rights when it denied the university tax-exempt status as a charitable institution because it barred students who advocated or engaged in interracial dating.³² The Court reasoned that the government had “a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history.”³³ That interest outweighed

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28. Alliance Defending Freedom, a Christian legal organization that brings many suits pressing for religious exemptions and opposes LGBTQ+ and abortion rights, defines its vision of family in this way. See *Marriage & Family*, ALLIANCE DEFENDING FREEDOM, <https://adflegal.org/issues/marriage/overview> [<https://perma.cc/8A4X-C82R>].
29. The story was different in the nineteenth and early-twentieth centuries, when courts cited religious beliefs to justify slavery and segregation, as well as restrictions on women’s roles. For a recounting of this history, see Brief for Julian Bond et al. as Amici Curiae Supporting Petitioner at 10-27, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Nos. 13-354, 13-356); see also Brief for NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Respondents at 6-12, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111) (explaining how religious beliefs have historically been used to justify racial discrimination).
30. 388 U.S. 1 (1967).
31. *Id.* at 3. One year later, the Court in *Newman v. Piggie Park Enterprises, Inc.* rejected faith-based objections to serving Black customers, in violation of the Civil Rights Act. 390 U.S. 400, 401 n.5 (1968).
32. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580-81, 602-04 (1983).
33. *Id.* at 604 (footnote omitted).

whatever “burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”³⁴

Courts also rejected free-exercise arguments that threatened gender equity inside and outside the family. They dismissed arguments that Bible teachings, which assert that “the husband is the head of the house, head of the wife, head of the family,” justified lower pay for women.³⁵ More recently, the highest courts of New York and California rejected free-exercise challenges to state laws requiring employer-based insurance plans that covered prescription drugs to include prescription contraceptives.³⁶ And the Ninth Circuit found wanting a pharmacy’s faith-based challenge to a law requiring that it fill prescriptions for contraception.³⁷

The initial trend was also promising for diverse family arrangements. In Hawaii, New Mexico, Oregon, and Washington, state courts ruled against businesses arguing that antidiscrimination laws requiring them to serve same-sex couples violated their religious freedom.³⁸ The California Supreme Court rejected a medical practice’s assertion that it had a free-exercise right to refuse to artificially inseminate a woman in a same-sex relationship.³⁹ A number of state courts similarly rejected landlords’ claims of a free-exercise right to refuse

34. *Id.*

35. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990); *see id.* at 1393-99 (holding that a religious school’s policy of paying a head-of-household bonus only to men violated the Fair Labor Standards Act and rejecting the school’s free-exercise defense); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364-69 (9th Cir. 1986) (holding that a religious school’s provision of health insurance only to heads of household, which excluded married women, violated Title VII and the Equal Pay Act and rejecting the school’s free-exercise defense).

36. *Cath. Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007); *Cath. Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004).

37. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

38. *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919, 923 (Haw. Ct. App. 2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58-59 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014); *Klein v. Or. Bureau Lab. & Indus.*, 410 P.3d 1051, 1056-57 (Or. Ct. App. 2019), *vacated by* 139 S. Ct. 2713 (2019); *Washington v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1210 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021); *Petition for Rehearing*, *supra* note 14.

39. *N. Coast Women’s Care Med. Grp. v. Superior Ct.*, 189 P.3d 959, 962 (Cal. 2008).

housing to unmarried couples.⁴⁰ And federal courts rejected employers' claims of a religious right to fire women who were unmarried and pregnant.⁴¹

Time and again, courts recognized the state's interest in advancing equality and rejected claims for religious exemptions. They did so even before the Supreme Court in *Employment Division v. Smith* stopped applying heightened scrutiny to incidental burdens on religious exercise.⁴² Diverse visions of family—most rooted in the Constitution—retained robust protection in the law.

But the pattern is changing. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that the Affordable Care Act rule requiring insurance to cover contraception violated the Religious Freedom Restoration Act where it did not allow objecting businesses to opt out by signing a form noting their objection, and then the insurance company would provide coverage.⁴³ In *Zubik v. Burwell*, the Court did not reject employers' even more audacious and attenuated claim that simply signing such a form violated their religious rights.⁴⁴ In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court construed the ministerial exemption to bar teachers' claims of employment discrimination, even where the job did not require the teacher to be of the faith.⁴⁵ In *Masterpiece Cakeshop*, the Court invalidated the state's enforcement action under its Anti-Discrimination Act where it found that the state had demonstrated hostility toward a bakery that refused to provide a cake for the wedding reception of a same-sex couple.⁴⁶ And

40. See *Swanner v. Anchorage Equal Rts. Comm'n*, 874 P.2d 274, 278 n.4 (Alaska 1994); *Smith v. Fair Emp. & Hous. Comm'n*, 913 P.2d 909, 912 (Cal. 1996). *But see* *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 234-35 (Mass. 1994) (remanding at the summary-judgment stage for the state to make a showing of compelling state interest).

41. See cases cited *supra* note 20.

42. *Employment Division v. Smith*, 494 U.S. 872, 881-90 (1990), changed the test used to evaluate free-exercise claims. Under *Smith*, burdens on religious exercise must serve a compelling state interest only if the law imposing the burden is not neutral and generally applicable. *Id.* at 885-86. Many recent petitions for certiorari that call for religious exemptions also ask the Court to overrule *Smith*. *E.g.*, Petition for Rehearing, *supra* note 14, at 9-11; Petition for a Writ of Certiorari at 31-34, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 18-2574).

43. 573 U.S. 682, 690-91 (2014). In so ruling, the Court emphasized that the decision should result in zero harm to the intended beneficiaries of the contraceptive coverage rule. *Id.* at 693. The Court also indicated that the rule would not have been the least restrictive alternative, where the government could simply pay for contraceptives for employees of objecting entities, *id.* at 728-31, an approach markedly different from that of decisions from California and New York cited in note 36 *supra*.

44. 578 U.S. 403 (2016). Nor did the Court embrace the claim. The point is that the decision is break from the earlier trend recounted above.

45. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2071-72 (2020) (Sotomayor, J., dissenting).

46. 138 S. Ct. 1719, 1725, 1729 (2018). This approach contrasts with that of the Court when confronted with racially biased statements of a juror, where there must be a showing that bias

most recently, in *Fulton v. City of Philadelphia*, the Court ruled that the City violated the free-exercise rights of CSS when it denied the agency a contract to screen foster families because the agency refused to comply with the antidiscrimination rule, rejecting the notion that the City's interest in enforcing its antidiscrimination policy satisfied strict scrutiny.⁴⁷

The Court's recent shadow-docket rulings further suggest that it may be moving toward a standard that favors religious-exercise claims.⁴⁸ In the context of COVID-19 restrictions, the Court stated that government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, "whenever they treat *any* comparable secular activity more favorably than religious exercise."⁴⁹ It struck down COVID-19 restrictions on gatherings for in-home worship – no different from those for any in-home gathering – because the same limitations did not apply to hair salons, retail stores, and other businesses.⁵⁰

These decisions are often described as narrow.⁵¹ They make no bold announcement, for example, that the Free Exercise Clause requires exemptions for institutions that object to complying with antidiscrimination rules. Their holdings do not announce a constitutional right to discriminate. At the same time, the Court's recent jurisprudence on religious exemptions to antidiscrimination rules is radical for the change it suggests. The Court in *Fulton*, for example, makes no mention that what is at stake is government funding of discrimination.⁵² The Court suggests that there would be no harm in an agency refusing to

"cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict," *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), or when confronted with statements of religious bias in the context of President Trump's travel ban order, where the Court said it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

47. 141 S. Ct. 1868, 1874 (2021).

48. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); but see *Does 1-3 v. Mills*, No. 21A90 (U.S. Oct. 29, 2021) (denying to enjoin the vaccination mandate for those who objected on religious grounds pending a decision on the petition for certiorari).

49. *Tandon*, 141 S. Ct. at 1296.

50. *Id.* at 1297; see also *id.* at 1298 (Kagan, J., dissenting) (noting that the law does not require "that the State treat equally apples and watermelons").

51. E.g., Andrew R. Lewis, *The Supreme Court Handed Conservatives a Narrow Religious Freedom Victory in Fulton v. City of Philadelphia*, WASH. POST (June 18, 2021), <https://www.washingtonpost.com/politics/2021/06/18/supreme-court-handed-conservatives-narrow-religious-freedom-victory-fulton-v-city-philadelphia> [<https://perma.cc/89KW-4TRM>].

52. Compare *Fulton*, 141 S. Ct. 1868, with *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (emphasizing that government subsidies in the form of tax exemptions cannot support organizations that are "illegal or violate established public policy").

serve a same-sex couple as long as it referred them elsewhere, brushing aside considerations of the dignitary and stigmatic harm of being turned away (not to mention that many may well be dissuaded from seeking service at all).⁵³ The Court appears ready to indulge religious-freedom violations claims that rest on being complicit in an action far removed, often requiring other actors for realization.⁵⁴ And the Court may be quicker to see discrimination in state efforts to enforce equality principles against those objecting than in the denial of equality to those the law was meant to protect.

For the purpose of this Essay, these decisions suggest that the work the law has done to reflect and protect diverse family arrangements is at risk.

III. THE THREAT OF RELIGIOUS EXEMPTIONS TO EMERGING VISIONS OF THE FAMILY

At their core, today's religious exemption cases present fundamental questions about the family. At stake is whether our laws will regress to privileging one kind of family—the white, heterosexual, gender-differentiated family—over others. This Part argues that these religious-exemption claims should be rejected—a position seemingly advanced less often as the threat to emerging visions of the family increases.⁵⁵ This Essay offers five points in support of this argument.

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53. See *Fulton*, 141 S. Ct. at 1886 (Alito, J., concurring) (“As far as the record reflects, no same-sex couple has ever approached CSS, but if that were to occur, CSS would simply refer the couple to another agency that is happy to provide that service.”). Compare *id.* (failing to acknowledge the stigmatic harm of being denied service on account of sexual orientation), with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (recognizing the stigmatic harm of being treated as inferior by virtue of the person’s race or sex), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (noting how discrimination can be an “assertion of . . . inferiority” that “denigrates the dignity of the excluded” (citation omitted)), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (emphasizing that the denial of service undermines human dignity).
54. Compare *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) (finding a corporation’s religious freedom substantially burdened by facilitating contraception via providing insurance coverage, without regard for need for intervening action by provider and user), with *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-55 (2002) (“[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.” (emphasis omitted)).
55. Some prominent proponents of LGBTQ+ rights call for compromise on questions of exemptions. William N. Eskridge, Jr. & Robin Fretwell Wilson, *Prospects for Common Ground: Introduction*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019); see also Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L.

First, it is important to remember that the family arrangements at stake enjoy constitutional protection. As a matter of constitutional law, the Supreme Court has recognized unmarried couples as families, and rejected notions that unwed fathers are unfit to parent.⁵⁶ It has also rejected the notions that marriage is for procreation,⁵⁷ women are to mother,⁵⁸ and marriages of interracial⁵⁹ and same-sex couples⁶⁰ are illegitimate. Antidiscrimination laws codify the constitutional directives not only for the so-called public sphere, but also for the family.

The break from the *Leave It to Beaver* trope in constitutional law—a break from longstanding traditions that often aligned with dominant Christian values—is now decades old. In many cases, the recognition of these family configurations fosters profound changes in relationships outside the family as well. They further, and are furthered by, other equality norms. Drawing on its earlier decision in *Planned Parenthood v. Casey*, the Court made this point plainly in *Lawrence v. Texas*: “[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . .” These matters . . . are central to the liberty protected by the Fourteenth Amendment.”⁶¹ No vision of racial justice or gay rights, for example, can be complete if it means that the law upholds segregation in love or accords a second-class status in law to some relationships. There can be no gender justice if people have no capacity to control whether and when to parent and if family must mean a woman being with a man. Thus, advocates propose to erode constitutional protections—and their enforcement through antidiscrimination laws—with religious exemptions.

Second, religious exemptions threaten the promise, both in law and in culture, to diverse families that they will no longer be punished for who they love, whether they marry, or whether and how they have children. The protections promised in *Obergefell* and antidiscrimination laws are undercut if the law allows businesses to refuse to sell flowers to a same-sex couple for their wedding or allows government-funded agencies to turn away couples that want to foster because of who they are. Protections for women’s independence in family are undermined if employers have a right to refuse to provide insurance coverage for contraception and abortion otherwise required by law, if the law protects firings

REV. 619 (2015). Notably, to the best of my knowledge, prominent advocates for reproductive rights make no such call.

56. *Stanley v. Illinois*, 405 U.S. 645 (1972).

57. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

58. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

59. *Loving v. Virginia*, 388 U.S. 1 (1967).

60. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

61. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851).

of women who have a child while unmarried, if women can be paid less than men for reasons of religion, and if the law protects ambulances that refuse to transport people needing an abortion.⁶² Religious exemptions simply mean that the promise antidiscrimination laws hold for the family is punched through with holes.

Melissa Murray, too, sees the threat, characterizing religious exemptions as “shrink[ing] the public sphere—and the domain of state-endorsed laws and norms—while expanding the private sphere and the authority of private actors who operate outside of the state’s reach.”⁶³ In that private sphere, old norms are enforced, and deviation is punished. In other words, the issue is not an objector like Masterpiece Cakeshop being kicked out of the public sphere, but rather an objector laying claim to shrink the reach of antidiscrimination rules and thus, in Murray’s words, undermine the “public apparatus structured to vindicate the public values of liberty and equality.”⁶⁴

The threat has a particular bite because the discrimination sanctioned by religious exemptions comes with the blessing of the government. When it grants exemptions, the government is authorizing private parties to discriminate and thus continuing to privilege some families over others. As Douglas NeJaime and Reva Siegel have remarked, “A legal system that provides expansive conscience exemptions . . . will align the public order with the belief system of the objector and against the rights to which the objector objects.”⁶⁵ That comes with a great cost, as Justice Kennedy described in *Obergefell*: “[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”⁶⁶ And it is worse still when the government funds private actors—like foster care agencies—to engage in discrimination or itself engages in discrimination. In short, there is no way to understand exemptions as not posing a threat to diverse families and the promise of equality they represent.

62. *New York v. U.S. Dep’t Health & Hum. Servs.*, 414 F. Supp. 3d 475, 539 (S.D.N.Y. 2019), *appeal filed*, No. 20-31 (S.D.N.Y. Jan. 3, 2020).

63. Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 *NW. U. L. REV.* 825, 880 (2019) (emphasis omitted).

64. *Id.* at 881.

65. Douglas NeJaime & Reva Siegel, *Conscience Wars in the Americas*, 5 *LATIN AM. L. REV.* 1, 19 (2020). NeJaime and Siegel suggest limits on exemptions in an effort to ensure they do not function this way. The limits they propose—limiting exemptions to individuals who are directly involved in a service (as distinct from facilitating one)—would foreclose the exemptions discussed in this paper, as they involve claims made by institutions and facilitation. *Id.* at 20-21.

66. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

The proposals for compromise often highlight the very problems of exemptions. Alexander Dushku advances a case for what he calls “creative pluralism” or a “sustainable settlement.”⁶⁷ At the end of the day, the proposal is, broadly speaking, simply a call for religious exemptions. Even in public spaces, where he states that antidiscrimination proposals “should generally prevail,” Dushku asserts the exemptions should be “narrow and relatively rare.”⁶⁸ But he also describes *Masterpiece Cakeshop* as a case of “true religious hardship” where equality must yield. If a main-street bakery qualifies, then Dushku offers no proposal for a limiting principle – and requires us to accept the idea that “just a little discrimination” is okay.⁶⁹

The proposal that Dushku does spell out – the one specific to foster care and adoption services embodied in the Fairness for All bill – again highlights the harm of exemptions. The bill would require all states that accepted federal funding for foster-care and adoption services to permit foster-care agencies to discriminate – this is indeed what happens when an agency turns a couple away because they are same-sex – and to support that discrimination with government funds.⁷⁰ Under the proposal, federal dollars to states for foster-care services would be conditioned on the states agreeing to a voucher model, by which families would receive a certificate from the federal government to use at foster-care agency. Foster-care agencies could turn families away based on sexual orientation, gender identity, or faith, as long as they provided a “reasonable referral.”⁷¹ The state would be responsible for ensuring that there was at least one agency in the area or neighboring catchment that would accept the voucher and serve the family.⁷²

67. Dushku, *supra* note 6, at 246-48.

68. *Id.* at 261-62.

69. *Id.* at 261. A look at the cases currently pending in the courts belies the notion that objections are rare, and there is no reason to assume that the number of entities refusing to comply with an antidiscrimination rule would not increase were the Court to say that it violates free exercise to require an institution to comply with a public-accommodations law, for example.

70. *Id.* at 264. Child-welfare experts reject a core premise underlying the proposal – that a “pluralistic solution” that permits agencies that discriminate to stay in the foster-care system is in the interest of foster children. The amicus brief in *Fulton* filed by major child-welfare professional groups strongly opposed permitting discrimination in the public child-welfare system and explained that jurisdictions that have enforced nondiscrimination provisions were able to meet the needs of children in foster care. Further, they wrote, permitting discrimination can reduce the number of families available for children. See Brief for Voice for Adoption et al. as Amici Curiae Supporting Respondents at 8-19, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 18-2574).

71. Dushku, *supra* note 6, at 266.

72. *Id.*

Dushku suggests that this proposal is appropriate because foster care and adoption from foster care are “hybrid spaces,” meaning a mix of the public and the sacred.⁷³ But foster care is a government function. The government has removed children from their homes and is responsible for their care until they return to their families or are adopted. Agencies receive taxpayer dollars to fulfill that government function;⁷⁴ it is not any less a government function because many state and local governments choose to contract out this service to private agencies. Understood this way, it is hard to imagine a more direct challenge to diverse families than to sanction discrimination expressly in the government’s name.⁷⁵

It is no answer that the agency that will not serve a same-sex couple must provide a referral. There is no way for the agency to send away a couple without communicating, “We don’t serve your kind here.” Moreover, such a system would mean that some families (e.g., those headed by heterosexual Christian couples) could choose from multiple agencies, permitting them to select the agency they like best and that is well-suited for their needs, while other families (e.g., those headed by same-sex couples or members of minority faiths) would have more limited options, possibly just one. Sanctioning such unequal treatment in government programs is stigmatizing for families and could deter them from pursuing foster care or adoption, undermining efforts to find families for children.⁷⁶

There is no way around it. Exemptions undercut antidiscrimination measures; they sanction discrimination. It is not tolerance to build into our laws a right to discriminate.⁷⁷

73. *Id.* at 262.

74. In that respect, government grants to houses of worship to further security are not comparable, nor are analogies to the protection houses of worship retain in hiring clergy even if they receive public funds. *See id.* at 263.

75. Of course, that is why the proposal calls for indirect funding of the scheme—to mask what is happening and to avoid the law that could otherwise govern. An indirect scheme of this nature is a radical departure from the foster-care system as it is currently funded. In the current system, states get federal money that they pay to agencies to perform government services; prospective foster and adoptive families do not pay any money to agencies.

76. Dushku’s Essay does not tangle with the prospect that the referral requirement will surely be challenged on free-exercise grounds.

77. When talking about exemptions, Dushku and others often focus on the challenges for people with faith-based objections to LGBTQ+ rights. One question is whether those calling for exemptions in this context similarly support exemptions for those who refuse to train women employees if doing so requires them to be alone with women for some period, contrary to their religious beliefs, *see* Complaint, *Torres v. Carter*, 2021 U.S. Dist. LEXIS 30145 (E.D.N.C. Feb. 18, 2021), or who object for reasons of faith to serving Muslims, *see* Complaint, *Fatihah v. Neal*, 2017 WL 2559943 (E.D. Okla. Feb. 17, 2016).

Third, make no mistake about the ultimate aim of the push for exemptions we now see. The aim is not to create a quiet enclave to which some people may retreat to live according to religious values no longer enshrined in the law. It is to contest the very change in family norms that the laws and policies being challenged aim to advance, and ultimately undermine and overturn the gains of the last half century for diverse family formulations. As NeJaime and Siegel expound, “[A]ccommodating religious objections may . . . enable the conflict to persist in a new, revitalized form. . . . [C]omplicity-based conscience claims can function as part of a long-term effort to contest society-wide norms.”⁷⁸

In other words, the claims for religious exemptions ensure a continued challenge to the antidiscrimination rules and decisions that protect diverse family arrangements. Refusals to register marriages of same-sex couples, keep on staff those who marry a partner of the same sex, permit same-sex couples to foster, and provide goods and services to such couples are all ways of contesting the legitimacy of *Obergefell* and the protections afforded by laws barring discrimination based on sexual orientation. Refusals to provide abortion services, referrals, insurance, aftercare,⁷⁹ and even ambulance services contest the legitimacy of the line of cases—federal and state—that afford constitutional protection for abortion. They contest the control, independence, and sexual freedom for women in constituting family. Exemptions keep alive a very public debate about the legitimacy of the new norms and the morality of those they protect. That’s the aim; few say it.

Fourth, religious exemptions do not foster peace or strengthen antidiscrimination norms by quieting those now loudly objecting.⁸⁰ The history of abortions and exemptions is illustrative. In 1973, just months after the Supreme Court decided *Roe v. Wade*,⁸¹ Congress passed a law providing that neither

78. Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2563 (2015); see also Ryan T. Anderson, *The Defense of Marriage Isn’t Over*, DAILY SIGNAL (Oct. 7, 2014), <https://www.dailysignal.com/2014/10/07/defense-marriage-isnt> [<https://perma.cc/KRQ7-9VQ8>]; Bishop James Conley, *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>]; *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf [<http://perma.cc/MGW8-7WTE>].

79. See generally Settlement, *Danquah v. Univ. of Med. & Dentistry N.J.*, No. 2:11-cv-06377-JLL-MAH (D.N.J. 2011) (featuring nurses objecting on religious grounds to providing services to patients pre- and post-abortion, including checking patients in and checking patient’s vital signs).

80. I have advanced this argument previously. See Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 185 (2015).

81. 410 U.S. 113 (1973).

institutions nor individuals can, by virtue of receiving federal funds, be required to perform abortions or sterilizations if such performance is contrary to the institution's or an individual's religious beliefs.⁸² Forty-four states currently permit healthcare institutions to refuse to provide abortion services, and forty-six states permit healthcare providers to similarly refuse.⁸³ Many of these laws have been in place for decades. Since 2005, federal law has provided that federal, state, and local government agencies and programs now risk losing federal dollars if they “subject[] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”⁸⁴ While many factors contribute to the tenor of the modern debate over the abortion right, these accommodations have neither quieted the debate surrounding abortion nor resulted in a gentle change in attitude. Instead, there is litigation opposing even referrals, aftercare, and emergency services. And the demands for exemptions now extend to contraception. The storm will only quiet when there is no longer constitutional protection for abortion.

A similar pattern is emerging with LGBTQ+ rights. The complicity claims abound. There is now even a case of a funeral home refusing cremation services because the deceased was married to a man.⁸⁵ Just as the U.S. Conference of Bishops warned, the efforts to undercut and undo marriage equality threaten to be as fierce as those surrounding abortion, and it will not stop until one side is “diminished.”⁸⁶

Finally, we must return to that classic legal analytical exercise of asking, if we accept exemptions in the contexts of LGBTQ+ families and women's role in families, would we accept them in other contexts? In particular, if the courts and culture rejected the notion of exemptions in the context of race and of women's pay, why accept them in the context of the family formations discussed here? Of

82. Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (codified as amended at 42 U.S.C. § 300a-7 (2018)) (Church Amendments).

83. *Refusing to Provide Health Services*, GUTTMACHER INST. (Sept. 1, 2021), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services> [https://perma.cc/LRT6-UMAC].

84. Weldon Amendment, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 507(d)(1) (2020), 134 Stat 1182, 1622 (2020); *see also, e.g.*, 2017 Ill. Laws 099-0690 (codified as amended at Health Care Right of Conscience Act, 745 ILL. COMP. STAT. 70/1-13 (2021)) (prohibiting liability for health-care professionals who refuse “to perform, assist, counsel, suggest, recommend, refer or participate in any way” because of conscience). NeJaime and Siegel trace this expansion of refusal measures to what they refer to as complicity-based conscience claims. *See* NeJaime & Siegel, *supra* note 78, at 2516.

85. Complaint, *Zawadski & Gaspari v. Brewer Funeral Servs.*, (Cir. Ct. Pearl River Cnty. Miss. Mar. 7, 2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/012_2017-03-07_first_amended_complaint.pdf [https://perma.cc/PY84-7RFH].

86. Brief Amicus Curiae of U.S. Conf. of Cath. Bishops, *supra* note 11, at 5.

course, the history of Black people in America is not the same as that of LGBTQ+ people (and these categories are not exclusive). Nor is the history of women the same (and again these categories intersect). And the issue for this Essay is not whether the religious objections to the Civil Rights Act, to interracial marriage, to same-sex marriage, or to single women parenting, are honorable.⁸⁷ The issue is, accepting that claims to exemptions on the grounds of religious belief are sincere, on what grounds would we reason differently about LGBTQ+ families or those making decisions about family size and timing than we did about free-exercise claims for race and women's wages?⁸⁸

IV. RELIGIOUS EXEMPTIONS: THE DEBATE

This Essay may be cast as another piece that casts those of deep religious conviction as bigots, as a way of both affirming the sincerity of the beliefs addressed in this piece and directing anger at the critique of religious exemptions to increased protections for diverse family configurations. Those with sincere faith objections to marriage for same-sex couples, to women who parent without men, and to contraception and abortion surely struggle with changing norms

87. As Alexander Dushku details, the Supreme Court has recently taken care to emphasize the honorable premise of objections to marriage for same-sex couples. At the same time, others have sought to distance themselves from objections to racial integration and intermarriage on the ground those objections were racist and dishonorable. Recent work by Kyle Velte and Linda McClain show how the objections to racial integration were also sincere and mainstream. See Kyle C. Velte, *Reclaiming the Race Analogy in Fulton v. City of Philadelphia*, BALKINIZATION (Nov. 13, 2020), <https://balkin.blogspot.com/2020/11/reclaiming-race-analogy-in-fulton-v.html> [https://perma.cc/WL2C-5DS4]; Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67 (2020); LINDA C. MCCLAIN, WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (2020). The amicus briefs, *supra* note 30, detail how the courts as late as 1955 invoked religion to justify segregation.

88. Andrew Koppelman offers an answer that boils down to numerosity: So many institutions would have objected to racial integration on religious grounds that exempting objectors would have defeated the purpose of the Civil Rights Act. Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 BYU L. REV. 1 (2020). That may well be the rationale that animated Congress at the time. But the stance raises many questions if we consider its implications now. Koppelman offers nothing to explain how much discrimination in a community is acceptable such that exemptions should be denied or granted. The question remains: What coherent story can be told to argue that the interest in nondiscrimination was compelling in cases addressing interracial marriage, integration of public accommodations, and women's wages but not in cases concerning insurance coverage (which is a wage issue), access to public accommodations for same-sex couples, and access to government services for same-sex couples and people of other faiths? See *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (“[T]he State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.”).

and legal doctrines, and with charges that they are discriminating. But what is harder than change is not changing, given the stigma, violence, criminal penalties, and prejudice so long attending many of the family formations discussed in this Essay. As NeJaime has posited,

[T]hose defending views that society may soon come to condemn, but that are still debated, invoke the idea of bigotry in defense – as a way both to discredit their opponents (that their opponents unfairly brand them bigots) and to establish their own position as worthy of legal protection (that not treating them with respect and accommodating them through law is itself bigoted).⁸⁹

We need to respect the sincerity of beliefs, but not cower in defense of protections for the many families that are not gender differentiated.

This Essay does not cower in the face of Dushku’s critique, nor does it offer a point-by-point response. Rather, I offer one reflection on his remarks. Dushku credits me with honesty. I wish he had been similarly candid about his approach. His “creative pluralism” is little more than a call to accept religious exemptions, cloaked in the language of civility to sound more palatable and to mask the uncivil consequences.⁹⁰ His Essay advocates for the right of businesses that serve the public and agencies that receive government dollars to provide services to refuse to comply with antidiscrimination laws when an increasing number of such laws protect LGBTQ+ people. It is not civil for a retail store employer to deny you a health benefit guaranteed by law. It is not civil for women to be fired from religious schools if they are pregnant and unmarried when no men are fired for premarital sex. It is not civil to propose that the government create a list of those foster care agencies it funds where LGBTQ+ people can know they will not be turned away. There can be no honest debate or dialogue without greater candor about the consequences of these proposals.

CONCLUSION

“The personal is political” was a feminist cry of my youth, one that highlighted the connection between gender inequity in the family and broader

89. Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 2654-55 (reviewing McCLAIN, *supra* note 87).

90. In other writings, Dushku has been more candid, for example, urging the Supreme Court to reject constitutional protection for marriage for same-sex couples and stating that any decision recognizing the right would convey “hostility toward religion.” Brief for Major Religious Orgs. as Amici Curiae Supporting Employers, *Obergefell v. Hodges*, 135 S. Ct. 2580 (2015). *Supra* note 90 (internal quotation omitted).

political structures.⁹¹ Basic norms – men as heads of household, women as caregivers, rules of the home and workplace fostering women’s financial dependence – prevented any notion of equality in the home and outside. Today’s debate about religious exemptions and civil rights raises many of the same issues: They are about gender roles and norms in the family and the connection to broader equality norms, as well as our ability to move in the public sphere as LGBTQ+ people and women. The issue is whether we will break free, or whether religious exemptions to civil rights protections will leave us with the promise of equality yet facing metaphorical signs, “Your kind of family is not welcome here.”

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91. See Christopher J. Kelly, *The Personal Is Political*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/the-personal-is-political> [<https://perma.cc/SF8R-69F4>].