

RELIGIOUS REFUSALS TO PUBLIC ACCOMMODATIONS LAWS: FOUR REASONS TO SAY NO

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INTRODUCTION

A storm is brewing. Two fronts are colliding: advances for equality for lesbian, gay, bisexual, and transgender (LGBT) people and women on the one hand and claims of religious liberty on the other. In numerous contexts, those of faith are objecting on religious grounds to laws prohibiting discrimination. The question arises whether and when those objecting should be accommodated and thus exempted from compliance with the law. The question has arisen recently, for example, in litigation as to for-profit businesses objecting to complying with the federal rule requiring insurance coverage for contraception,¹ businesses refusing to serve LGBT people,² pharmacies re-

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¹ The U.S. Supreme Court recently resolved this question, ruling that the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1 (2014), prohibits the federal government from requiring closely held for-profit corporations to provide insurance coverage for contraception over a religious objection. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014). The question whether religious liberty can be used as a shield in other contexts remains unanswered by the Court. *See, e.g., id.* at 2783.

² *E.g.*, Initial Decision Granting Complainants' Motion for Summary Judgment and Denying Respondents' Motion for Summary Judgment at 2-3, *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 (Colo. Civil Rights Comm'n Dec. 6, 2013), *archived at* <http://perma.cc/4SL2-6653>, *aff'd*, Final Agency Order (June 2, 2014), *archived at* <http://perma.cc/RM8P-YMJ2>; Complaint for Injunctive Relief, Declaratory Relief, & Damages at 6-8, *Cervelli v. Aloha Bed & Breakfast*, No. 11-1-3103-12-ECN (Haw. Cir. Ct. Dec.

fusing to fill prescriptions for contraception,³ and religiously affiliated schools refusing to hire or retain single women who are pregnant⁴ or gay staff who get married.⁵

Much has been written and more has been said about this issue. This Article focuses on one aspect of the debate. It challenges arguments posed by some scholars supportive of LGBT rights who urge accommodation of those objecting on religious grounds to laws barring discrimination against people based on sexual orientation or gender identity.⁶ These scholars advance a number of reasons for permissive accommodations—accommodations that the Federal Constitution neither compels nor prohibits.⁷ Among

19, 2011), *archived at* <http://perma.cc/UBE7-28AJ>; Complaints, Wathen v. Beall Mansion Bed & Breakfast, Nos. 2011-SP-2486, 2011-SP-2487, 2011-SP-2488, 2011-SP-2489 (Ill. Human Rights Comm'n Nov. 1, 2011), *archived at* <http://perma.cc/U8YA-7727>, <http://perma.cc/KV2A-KEA5>, <http://perma.cc/GYG8-7AFP>, <http://perma.cc/QA58-C6E3>, *respectively*; Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 59–60, *cert. denied*, 134 S. Ct. 1787 (2014); Third Amended Complaint at 5–6, Baker v. Wildflower Inn, No. 183-7-11 (Vt. Super. Ct. Mar. 5, 2012), *archived at* <http://perma.cc/SYM-7AQE?type=pdf>; Answer, Affirmative Defenses, and Third-Party Complaint at 10–12, State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. May 14, 2013), *archived at* <http://perma.cc/D4QH-FJFK>.

³ See, e.g., Stormans, Inc. v. Selecky, 586 F.3d 1109, 1117 (9th Cir. 2009); Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160, 1164 (Ill. App. Ct. 2012).

⁴ E.g., Complaint at 4–6, James v. San Diego Christian Coll., No. 37-2013-00034751-CU-WT-CTL (Cal. Sup. Ct. Feb. 14, 2013); Dias v. Archdiocese of Cincinnati, No. 1:11-cv-00251-SJD, 2012 WL 1068165, at *1 (S.D. Ohio Mar. 29, 2012), *appeal dismissed*, No. 13-3759 (6th Cir. Aug. 30, 2013); Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1317–18 (11th Cir. May 16, 2012); see also Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-cv-00122-RLM, 2014 WL 4373617, at *1 (N.D. Ind. Sept. 3, 2014) (charging religiously affiliated school with sex discrimination for firing woman for using in vitro fertilization (IVF)); Complaint at 2–3, Maudlin v. Inside Out, Inc., No. 2:13-cv-00975 (S.D. Ohio Oct. 1, 2013) (charging religiously affiliated community center with sex discrimination for firing woman for being pregnant and unmarried).

⁵ See Adam Ragusea, *Gay Teacher Files Sex Discrimination Claim Against Georgia School*, NAT'L PUB. RADIO (July 9, 2014, 3:33 AM), <http://www.npr.org/2014/07/09/329235789/gay-teacher-files-sex-discrimination-claim-against-georgia-school>, *archived at* <http://perma.cc/QYK5-6VAW>; Complaint at 2–5, Zmuda v. Corp. of the Catholic Archbishop of Seattle, No. 14-2-07007-1 (Wash. Super. Ct. Mar. 6, 2014).

⁶ 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, 206–09 (2010); William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 714–15 (2011); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. (forthcoming 2015) (manuscript at 8–9) (on file with author); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 848–851 (2014); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Law?*, 48 B.C. L. REV. 781, 829–47 (2007).

⁷ In *Employment Division v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court all but foreclosed the notion that the Federal Constitution would require an exemption from a law so as to accommodate burdens on religious exercise. Justice Scalia, writing for the Court, stated, “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)). On the other hand, the Court has also rejected an Establishment Clause challenge to the provision of Title VII exempting religiously affiliated institutions

other reasons, these scholars argue, accommodations respect diversity and religious liberty, enable anti-discrimination laws to pass, reduce conflict, and address harms that objectors would otherwise face.⁸

This Article offers four reasons why those arguments should be questioned and indeed rejected. The first is a challenge from history: calls for similar accommodations were rejected in the context of the Civil Rights Act of 1964.⁹ No convincing justification exists to choose a different path today. Second, the premise that accommodations help to ease moments of conflict is wanting, as the debates concerning abortion and more recently contraception readily demonstrate. Third, the harm to the person of faith denied an accommodation must be counterpoised with that of the person turned away from a place of public accommodation or denied employment because of a religious accommodation. That harm, which is often given little voice in the current debates, should weigh heavily because it damages a person's sense of dignity and frustrates the promise of equality. Finally, accommodations undermine a fundamental purpose of anti-discrimination law, which is to change norms.

Any discussion of accommodations to anti-discrimination laws must begin with a question as to what kind of accommodation is at issue.¹⁰ Is the accommodation for an individual or an institution? Accommodations for institutions—be they small businesses, universities, or hospitals—often have implications for third parties.¹¹ Unless the institution hires and serves only people who share the beliefs of its owners, an accommodation will reverberate for those who patronize or work for the institution. If the accommodation is for an institution, does the institution receive government funds? If so, any accommodation and the discrimination that results will have the govern-

from Title VII's generally applicable prohibition against discrimination based on religion. *Corp. of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2870 (1987). The Federal Constitution thus provides few boundaries to frame this debate. *But see generally, e.g.*, Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014) (arguing that the Establishment Clause prohibits RFRA's application when a particular exemption would shift the costs of the accommodation to identifiable and discrete third parties); 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 (2014) (arguing that accommodations that burden third parties violate the Establishment Clause); Kara Loewentheil, *When Free Exercise is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 434 (2014) (adopting novel framework for accounting for third party harm when considering accommodations).

⁸ *E.g.*, Berg, *supra* note 6, at 226–35; Minow, *supra* note 6, at 782–83.

⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a–2000h-6 (2012)).

¹⁰ For the following set of questions and analysis, I thank Catherine Weiss and Caitlin Borgmann for the framework they developed more than a decade ago to analyze claims for religious refusals. *See generally* ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002), archived at <http://perma.cc/5LA7-5X4L> (outlining framework for analysis of claims for religious refusals of health services).

¹¹ *Id.* at 6–11.

ment's imprimatur.¹² If the accommodation is for an individual, is the person a public official? If so, different questions arise than if the person is in the private sector. To sanction discrimination by one serving in a public role is again to put the government's imprimatur on the conduct. In thinking about accommodations, these distinctions matter; not all accommodations are created equal.

This Article speaks to arguments for accommodations for institutions that operate in the public sphere and serve and hire people of different faiths. More specifically, it addresses arguments for accommodations for institutions that, for reasons of faith, seek to refuse employment and services, among other public goods, to individuals because of their sexual orientation or gender identity.

I. ACCOMMODATIONS WERE REJECTED IN OTHER ANTI-DISCRIMINATION MEASURES

As noted earlier, several scholars strongly supportive of LGBT rights urge advocates to accept calls for accommodations for individuals and institutions that object on religious grounds to complying with anti-discrimination measures.¹³ The question for those entertaining this argument is why one should accept accommodations in this context when such calls were rejected at other moments in history.

The current conflict over the propriety of exemptions rooted in religion to laws barring discrimination is not a new one. Rather, it is a conflict that is in many ways predictable. Such claims for exemptions come at critical moments of advances in civil rights where there is a call for a change in the social rules addressing discrimination.¹⁴ That is what is happening now. Protections against discrimination in employment, public accommodations, housing, and education on the basis of sexual orientation and gender identity are at last being debated and passed.¹⁵ Laws ensuring access to contraception address a lingering vestige of sex discrimination. These changes come with calls for exemptions—to preserve the status quo for at least some sectors of society and to continue to contest the change.¹⁶

¹² Where this Article concerns accommodations to laws barring discrimination based on sexual orientation or gender, any accommodation sanctions discrimination, just as an accommodation permitting a business to refuse service to an interracial couple sanctions discrimination. The question is how to weigh claims of religious freedom against the discrimination.

¹³ See Berg, *supra* note 6, at 226–35; Minow, *supra* note 6, at 782–83.

¹⁴ See Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 81–82 (2013) (noting defense of tradition as a sign of change).

¹⁵ *E.g.* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6; Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014); Md. Code Ann. State Gov't §§ 20-304, 20-602, 20-702 (West 2014).

¹⁶ I credit James Esseks, Director of the ACLU's LGBT Rights Project, with having referred to this strategy of calling for exemptions as “Plan B,” with “Plan A” being to advocate against the change in legal norms. See Rod Dreher, *Does Faith = Hate?*, AM.

Indeed, this very debate played out in the context of race and, to some degree, gender.¹⁷ Many, including those whose beliefs at that time dictated separation of the races, resisted racial equality and integration.¹⁸ Even the courts invoked these religious doctrines in upholding convictions for violations of anti-miscegenation laws,¹⁹ penalties for African-Americans who refused to sit in the “colored car,”²⁰ and fines on Berea College for integrating.²¹ The courts declared separation of the races divinely ordered, going so far as to say, “[s]uch equality does not in fact exist, and never can. The God of nature made it otherwise”²²

But as Martha Minow notes in her scholarship, times changed.²³ Arguments in favor of racial segregation lost currency and the legal norms changed, though not without resistance. That resistance included calls for accommodations predicated on religious belief. The House version of the

CONSERVATIVE (Oct. 9, 2013), *archived at* <http://perma.cc/XBA4-DTSF> (“[T]he most important goal at this stage is not to stop gay marriage entirely but to secure as much liberty as possible for dissenting religious and social conservatives while there is still time.”) (quoted in Koppelman, *supra* note 6, at 5). Professors NeJaime and Siegel show how these claims are not just about preserving a space to maintain religious views but rather are part of “a long-term effort to contest society-wide norms.” See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* (forthcoming 2015) (manuscript at 2) (on file with author).

¹⁷ See Brief Amici Curiae of Julian Bond, et al. in Support of the Government at 10–19, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 491245 at *10–19 (recounting ways in which religion was invoked to support slavery, segregation, and discrimination against women—as well as to support social change—and then to demand exemptions from laws prohibiting discrimination).

¹⁸ *Id.*

¹⁹ See, e.g., *Green v. State*, 58 Ala. 190, 195 (1877) (upholding conviction for interracial marriage, reasoning God “has made the two races distinct”); *Scott v. State*, 39 Ga. 321, 326 (1869) (upholding conviction of an African-American woman for cohabitating with a white man, holding that no law of the State could “attempt to enforce[] moral or social equality between the different races . . . The God of Nature made it otherwise”); *State v. Gibson*, 36 Ind. 389, 405 (1871) (upholding constitutionality of conviction of an African-American man who married a white woman, declaring right “to follow the law of races established by the Creator himself”) (quoting *W. Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 214 (1867)); *Kinney v. Commonwealth*, 71 Va. 858, 869 (1878) (upholding criminal conviction of an interracial couple, reasoning that the two races should be kept “distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion”).

²⁰ See, e.g., *Bowie v. Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1018–20 (Ala. 1900) (looking to reasoning from *W. Chester & Phila R.R. Co.* to affirm judgment for railroad that forcibly ejected African-American woman from the “whites only” section of rail car (citing *W. Chester & Phila R.R. Co.*, 55 Pa. at 211–15)); *W. Chester & Phila. R.R. Co.*, 55 Pa. at 213 (reversing judgment in favor of African-American woman who refused to sit in “colored” section of train car, relying in part on the fact that “the Creator” made two distinct races, which “God has made . . . dissimilar,” and “the order of Divine Providence” dictates that the races should not mix).

²¹ See *Berea Coll. v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), *aff’d*, 211 U.S. 45 (1908).

²² *Scott*, 39 Ga. at 326.

²³ Minow, *supra* note 6, at 792–801 (discussing the process through which arguments in favor of racial segregation ceased to be socially acceptable).

Civil Rights Act of 1964 as originally passed included an accommodation that wholly exempted religiously affiliated employers from its terms banning discrimination in employment.²⁴ The Act ultimately passed without the accommodation,²⁵ but the resistance did not stop. There were later efforts, albeit unsuccessful, to amend the Act to include a broad religious exemption.²⁶

The resistance to integration rooted in religion carried into the courts as well. In upholding a conviction for violation of Virginia's anti-miscegenation law, the trial court in *Loving v. Virginia* stated, "Almighty God created the races white, black, yellow, malay and red and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."²⁷ This reasoning did not hold. The Supreme Court struck down the ban, noting there was "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."²⁸

There was also resistance rooted in religion to laws barring discrimination in public accommodations and education. For example, a barbecue franchise resisted compliance with the Civil Rights Act of 1964, refusing to serve African-Americans on the ground that the Act "contravene[d] the will of God."²⁹ The court rejected the defense, stating that, while the franchise owner "has a constitutional right to espouse the religious beliefs of his own choosing . . . he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."³⁰ Most famously, Bob Jones University and its companion plaintiff, Goldsboro Christian Schools, invoked religion to resist integration in education.³¹ Goldsboro regarded "[c]ultural or biological mixing of the races . . . as a violation of God's command,"³² and sponsors of Bob Jones University maintained that "the Bible forbids interracial dating and marriage."³³ In the Supreme Court, the schools argued that the loss of their tax-exempt status because of their discriminatory policies violated their Free Exercise rights. The Supreme Court rejected the claim, reasoning that "the interests asserted by petitioners cannot be accommodated with [the] compelling governmental interest" in "eradicating racial discrimination in education—discrimination

²⁴ See *Equal Emp't Opportunity Comm'n v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276-77 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964).

²⁵ *Id.*

²⁶ *Id.* at 1277.

²⁷ Jurisdictional Statement at 42, *Loving v. Virginia*, 388 U.S. 1 (1967) (trial court opinion).

²⁸ *Loving*, 388 U.S. at 11-12.

²⁹ *Newman v. Piggie Park Enter., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

³⁰ *Newman v. Piggie Park Enter., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966).

³¹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 580-82 (1983).

³² *Id.* at 583 n.6.

³³ *Id.* at 580.

that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."³⁴

Thus, although the nation's efforts to achieve integration met with resistance based on religious beliefs, the Civil Rights Act of 1964 passed without an accommodation for those opposed to integration on religious grounds;³⁵ laws banning interracial marriage fell without measures to accommodate those of faith opposed to interracial relationships;³⁶ and the courts rejected claims rooted in faith for accommodations to laws barring discrimination in public accommodations and education.³⁷

This history forces a basic question: Why grant accommodations for religious objectors in today's anti-discrimination laws when similar calls were rejected in the context of civil rights? What principles account for a difference? Or would advocates of greater solicitude in today's debates also argue for accommodations in the debates over race if they were in play today?

Several rationales are offered to explain the difference: the move for marriage equality is new and reflects a big change; race has a unique place in American history; and laws affecting racial discrimination are subject to the highest level of scrutiny.³⁸ These conceits, however, do not answer the question. The suggestion underlying a number of these rationales—that today's questions are somehow more divisive—is not borne out by history. For example, public support for interracial marriage at the time of the *Loving* decision, twenty percent, was far lower than what it is today for marriage for same-sex couples, fifty-five percent.³⁹ Even President Harry Truman said in 1963 that racial intermarriage was counter to the teachings of the Bible.⁴⁰ And no one can suggest that integration of schools was anything less than

³⁴ *Id.* at 604.

³⁵ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000a-2000h-6 (2012)).

³⁶ *Loving*, 388 U.S. at 11-12.

³⁷ *E.g.*, *Piggie Park Enter., Inc.*, 256 F. Supp. at 945; *Bob Jones Univ.*, 461 U.S. at 574.

³⁸ *E.g.*, Berg, *supra* note 6, at 234-35; Minow, *supra* note 6, at 815-22.

³⁹ Zack Ford, *Public Support for Same-Sex Marriage Surpasses Support for Interracial Marriage in 1991*, THINKPROGRESS (May 20, 2011, 5:00 PM), <http://think-progression.org/lgbt/2011/05/20/177434/same-sex-interracial-marriage>, archived at <http://perma.cc/HG48-YXKV> ("[A] Gallup poll . . . in 1968 showed that only 20 percent of Americans supported marriage between whites and black [sic]; 73 percent opposed . . ."); Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>, archived at <http://perma.cc/4XZH-BKDJ>. This poll concerning interracial marriage reflects data a year after *Loving* but nonetheless serves the purpose for which it is cited; there is surely no suggestion that support for interracial marriage a year earlier approached fifty percent.

⁴⁰ *Truman Against Interracial Marriage; 'Lord, Too', He Quips*, CHI. DAILY DEFENDER, Sept. 12, 1963, at 8, available at ProQuest, Doc. No. 493991026 (quoting President Truman's statement that "[t]he Lord created it that way. You read your Bible and you'll find out[.]").

contentious.⁴¹ The Treasury Department ruling that racially segregated schools would not be eligible for tax-exempt status came seventeen years after *Brown v. Board of Education*⁴² to address continued segregation through private schools.⁴³ Congress tried on thirteen occasions between the issuance of the Treasury Department ruling and the *Bob Jones University* decision to overrule the Treasury Department ruling.⁴⁴ In short, the suggestion that there was no need for accommodations because the country was more ready for change in the context of race discrimination than discrimination based on sexual orientation and gender identity is not persuasive.

More compelling is the argument put forth by Andrew Koppelman that had the Civil Rights Act of 1964 included accommodations for religious objections, entire swaths of the country would have invoked them.⁴⁵ In contrast, Koppelman argues, accommodations in the LGBT context would likely be asserted in relatively small numbers, and economic factors and the pressure of rapidly changing public opinion will propel an ever smaller number of businesses to assert, and perhaps even hold, religious objections to serving or hiring LGBT individuals.⁴⁶ Koppelman's assertions may well be correct,⁴⁷ but they do not suffice to justify accommodations in today's context. While the numbers subject to discrimination may be smaller today than would have been the case were exemptions included in the civil rights laws of the 1960s, the harm to the dignity of those turned away and to the promise of equality is significant.⁴⁸ To return to the language of the Court in *Bob*

⁴¹ One need only revisit images of the National Guard protecting the nine students who integrated the Little Rock Central High School in 1957 or the conflict that attended desegregation of Boston's schools well into the 1970s to be reminded how contentious racial integration was. See, e.g., Vaughn Wallace, *Brave Hearts: Remembering the Little Rock Nine*, LIFE, <http://life.time.com/history/little-rock-nine-1957-photos/#4> (last visited Oct. 18, 2014), archived at <http://perma.cc/86KW-ME22>. See generally J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985) (recounting tumultuous history of the desegregation of Boston's public schools).

⁴² 347 U.S. 483 (1954) (declaring racially segregated public schools unconstitutional).

⁴³ Rev. Rul. 71-447, 1971-2 C.B. 230 ("The issue here is whether a private school that does not have a racially nondiscriminatory policy as to students is 'charitable' within the common law concepts found in section 501(c)(3). . . . [R]acial discrimination in education is contrary to Federal public policy.").

⁴⁴ *Bob Jones Univ.*, 461 U.S. at 600.

⁴⁵ Koppelman, *supra* note 6, at 16.

⁴⁶ See *id.* at 17-18.

⁴⁷ There may be some reason to question whether refusing service to LGBT people, particularly those seeking to celebrate a relationship, will harm business. See Mark Meredith & Will C. Holden, *Cake Shop Says Business Booming Since Refusal to Serve Gay Couple*, FOX31 DENVER (July 30, 2012, 9:03 AM), <http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple>, archived at <http://perma.cc/JJC7-9ZV6>; see also Leon Stafford, *Chick-fil-A Keeps Growing Despite Uproar*, ATLANTA J. CONST. (Jan. 29, 2013, 6:22 AM), <http://www.ajc.com/news/business/chick-fil-a-keeps-growing-despite-uproar/nT85n/>, archived at <http://perma.cc/5CV6-7R9H> (noting increase in Chick-fil-A's sales in year following president's comments about "biblical" marriage being between a man and woman).

⁴⁸ See *infra* Part III.

Jones University, the interests asserted by religious objectors “cannot be accommodated” with the compelling governmental interest “in eradicating . . . discrimination.”⁴⁹

In essence, the arguments advanced to justify accommodations in the LGBT context, where similar claims were rejected in the race context, come down to a basic proposition: that the interest in ending discrimination based on sexual orientation and gender identity is different and less important than the interest in ending race discrimination. Indeed, enshrining pockets of discrimination against LGBT people in our laws, where the law has not done so elsewhere, will create a second-class version of equality.⁵⁰ Requests to discriminate that are rooted in religion should be rejected today, just as they were fifty years ago.

II. ACCOMMODATIONS DO NOT QUIET THE STORM

Proponents of accommodations today often argue that accommodations will quiet the storm, ease resistance, and in fact advance LGBT rights.⁵¹ The argument has intuitive appeal. It is about accommodating difference, embracing pluralism, respecting religious beliefs, and, in the context this Article addresses, managing change.⁵² Change is hard. We all resist some change, and often with deep conviction. So efforts to respect both sides—by acknowledging how hard change is and how hard no change is—make sense. At their core, the calls for accommodation also often rest on a belief that gradual culture change will be better and longer lasting change than that demanded by law.⁵³ History, however, complicates this narrative.

⁴⁹ *Bob Jones Univ.*, 461 U.S. at 604.

⁵⁰ The second-class status cannot be justified by the different levels of scrutiny afforded race, gender, and sexual orientation under the Federal Constitution. Those tiers reflect a difference in judicial scrutiny given the rationales the state offers to justify differential treatment, not the value we put on the goal of ending discrimination. Stated otherwise, we would not say that a state’s interest in ending discrimination against women is not compelling, simply because sex discrimination is subject to intermediate scrutiny. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (holding that the goal of eliminating gender discrimination in public accommodations serves a compelling state interest).

⁵¹ *See, e.g., Berg, supra* note 6, at 226–35; *Minow, supra* note 6, at 823–27.

⁵² *Minow, supra* note 6, at 823–27, 843–47.

⁵³ Not all scholars advocating for accommodations appear concerned with the promise of changing attitudes of those currently objecting to LGBT rights, however. *See, e.g., Berg, supra* note 6, at 226–32 (focusing on accommodation, while contemplating that many who disapprove of same-sex relationships are unlikely to change their opinions). Others are concerned with changing attitudes but think that uncompromising legal demands will foster conflict. *See Eskridge, supra* note 6, at 716 (“As the Supreme Court has learned from its experience with *Brown* and *Roe* and the backlashes each decision generated, strongly clashing primordial sentiments are dangerous to our democracy. Judges are incompetent to resolve these issues where the nation is closely but intensely divided, but they can and ought to lower the stakes of such primordial politics.”). The narrative of backlash on which Eskridge and some others have relied is itself contested. *See, e.g., PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR &*

Consider the lessons from the reproductive rights world. In 1973, just months after *Roe v. Wade*,⁵⁴ Congress passed a significant accommodations law that provides that neither institutions nor individuals can, by virtue of receiving federal funds, be required to perform abortions or sterilizations or to make their facilities or personnel available for these procedures if such performance is contrary to the individual's or institution's religious beliefs.⁵⁵ The decades that followed have brought waves of laws permitting institutions and individuals to refuse to provide abortions. For example, forty-six states currently permit individual health-care providers to refuse to provide abortion services, and forty-four states permit health-care institutions similarly to refuse.⁵⁶ The exemptions continue to expand, going beyond performance of abortions to a right to refuse conduct that might be seen as facilitating abortion. For example, 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."⁵⁷ No one would say these accommodations have quieted the storm surrounding abortion. Nor can it be said that the space provided by these laws has resulted in a gentle change in attitude.

The more recent debates over the Affordable Care Act's rule requiring health insurance plans to cover contraception also call into question the notion that accommodations quiet the storm. Originally, the rule exempted, loosely speaking, houses of worship.⁵⁸ There was an outcry, in particular

REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1717–19 (6th ed. 2014) (reviewing scholarship that discusses significant errors that may flow from overbroad claims of backlash); *see also* Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2071–86 (2011); Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 409–24 (2007).

⁵⁴ 410 U.S. 113 (1973).

⁵⁵ Public Health Service Act, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95–96 (1973) (codified as amended at 42 U.S.C. § 300a-7 (2012)).

⁵⁶ GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (2014), *archived at* <http://perma.cc/66QB-FAVN>.

⁵⁷ Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280 (2009); *see also, e.g.*, Illinois Health Care Right of Conscience Act, 745 ILL. COMP. STAT. 70 / 4 (1998) (prohibiting liability for health-care professional who refuses to "perform, assist, counsel, suggest, recommend, refer or participate in any way" because of conscience). Douglas NeJaime and Reva Siegel refer to these expanded refusals measures as complicity-based conscience claims and argue that their distinct social and practical meaning must be considered in thinking about accommodations. *See* NeJaime & Siegel, *supra* note 15, at 2.

⁵⁸ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (proposed Aug. 3, 2011) (defining exempted religious employer as "one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization . . ."); *see also* 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, 8726 (Feb. 15, 2012).

from religiously affiliated entities, which included protest in the form of lawsuits.⁵⁹ The Obama Administration responded with an accommodation meant to ensure coverage for women, while “protect[ing] such religious organizations [with religious objections to contraceptive coverage] from having to contract, arrange, or pay for contraceptive coverage.”⁶⁰ Religiously affiliated nonprofit organizations that objected on religious grounds to providing coverage for some or all contraception could certify their objection with their insurer, which would then assume the cost and administration of contraceptive coverage for employees of those institutions.⁶¹ That accommodation did not quiet the storm. Rather, the lawsuits continued, with more than forty cases ultimately being filed by nonprofit institutions that objected to providing the certification.⁶² Most recently, in the face of a U.S. Supreme Court order temporarily enjoining enforcement of the accommodation,⁶³ the Administration further modified the rule.⁶⁴ Again, even in the face of this modification, the lawsuits continue.⁶⁵

A similar pattern is already emerging in the LGBT arena. Provisions in marriage laws stating explicitly that clergy and houses of worship cannot be required to perform or recognize marriages to which they object have not lessened the conflict. There is, rather, an increasing call for measures to ensure that those objecting on religious grounds to marriages of same-sex

⁵⁹ See, e.g., *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, U.S. CONFERENCE OF CATHOLIC BISHOPS, archived at <http://perma.cc/NSP-2CW2> (decrying contraception rule as a threat to religious liberty). See generally Complaint, Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25 (D.D.C. 2012), (No. 1:11-CV-01989), consolidated sub nom. Sebelius v. Hobby Lobby, 134 S. Ct. 2751 (challenging contraception rule); Complaint, Colo. Christian Univ. v. Sebelius, 2013 WL 93188 (D. Colo. 2013) (No. 11-CV-03350), consolidated sub nom. Hobby Lobby, 134 S. Ct. 2751; Complaint, Eternal Word Television Network, Inc. v. Sebelius, 935 F. Supp. 2d 1196 (N.D. Ala. 2013) (No. 12:12-CV-00501), consolidated sub nom. Hobby Lobby, 134 S. Ct. 2751; Complaint, Priests for Life v. Sebelius, 2013 WL 1563390 (E.D.N.Y. 2013) (No. 12-cv-00753), consolidated sub nom. Hobby Lobby, 134 S. Ct. 2751; Complaint, Louisiana Coll. v. Sebelius, 2012 WL 3061506 (W.D. La. 2012) (No. 1:12-CV-00463), consolidated sub nom. Hobby Lobby, 134 S. Ct. 2751; Complaint, Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402 (W.D. Pa. 2013) (No. 2:12-CV-00207), consolidated sub nom. Hobby Lobby, 134 S. Ct. 2751; Complaint, Ave Maria Univ. v. Sebelius, 2012 WL 3128015 (M.D. Fla. 2012) (No. 2:12-CV-00088), consolidated sub nom. Hobby Lobby, 134 S. Ct. 2751.

⁶⁰ Coverage of Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501, 16503 (proposed Mar. 21, 2012).

⁶¹ *Id.*

⁶² *Challenges to the Federal Contraceptive Coverage Rule*, AM. CIVIL LIBERTIES UNION (Sept. 8, 2014), <https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule>, archived at <http://perma.cc/KJV2-KUG9>.

⁶³ Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014) (on application for injunction).

⁶⁴ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (proposed Aug. 27, 2014).

⁶⁵ The Little Sisters of the Poor’s Brief on the Interim Final Regulations, Little Sisters of the Poor Home for the Aged v. Burwell, No. 13-1540 (10th Cir. Sept. 8, 2014); Appellees’ Brief on the Interim Final Regulations, Burwell v. Reaching Souls, Inc., No. 14-6028 (10th Cir. Sept. 8, 2014); Appellee’s Additional Supplemental Brief, S. Nazarene Univ. v. Burwell, No. 14-6026 (10th Cir. Sept. 8, 2014).

couples need not in any way facilitate or acknowledge the marriage.⁶⁶ These measures are meant to permit businesses to refuse to provide services, employers to refuse partner benefits, and landlords to refuse housing.⁶⁷ This is not surprising as some who advocate for accommodations for opponents of marriage for same-sex couples look to the laws governing abortion and religious refusals as providing a model.⁶⁸ This alone should give advocates for LGBT rights pause, as it suggests continued conflict and accommodations that persist, and even expand.⁶⁹

Finally, following the Supreme Court's decision in *Hobby Lobby*, any accommodation in an anti-discrimination law will almost surely fan, not calm, conflict. In *Hobby Lobby*, the Court looked to the accommodation for nonprofit religiously affiliated organizations as a predicate for holding that closely held for-profit corporations could not be required to provide insurance for contraception.⁷⁰ More specifically, when assessing whether the rule was narrowly tailored, the Court reasoned that if the government could accommodate nonprofit corporations with religious objections to the rule, it presumably could accommodate for-profit companies with religious objections as well.⁷¹ Looking forward then, any accommodation that is included in a statute may well give rise to litigation arguing that the accommodation must be expanded. For example, were the Employment Non-Discrimination Act⁷²—a federal bill barring discrimination in employment based on sexual orientation and gender identity—to pass with an exemption for religiously affiliated institutions, for-profit businesses would presumably look to *Hobby Lobby* to try to argue that they too should be exempt from the law's mandate against discrimination.

In short, before *Hobby Lobby*, accommodations did not quiet the storm. Post-*Hobby Lobby*, they will only intensify the conflict.⁷³

III. ACCOMMODATIONS COME AT A COST

Today's litigation, legislative debates, and academic conferences include robust discussion of the harm of not granting accommodations.⁷⁴ As

⁶⁶ See, e.g., Ballot Title No. 52, State of Oregon, "Religious belief" exceptions to anti-discrimination laws for refusing services, other, for same-sex ceremonies, "arrangements," (2014), archived at <http://perma.cc/VND3-VLJQ>.

⁶⁷ See *id.*

⁶⁸ See, e.g., Berg, *supra* note 6, at 218.

⁶⁹ This vision, of course, is not shared by all supporters of LGBT rights who advocate for accommodations. See, e.g., Koppelman, *supra* note 6, at 21–22.

⁷⁰ *Hobby Lobby*, 134 S. Ct. at 2781–83.

⁷¹ *Id.*

⁷² Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6 (as referred to S. Comm. On Educ. & the Workforce, Comms. on H. Admin., Oversight and Gov't Reform, & the Comm. on the Judiciary, Nov. 12, 2013).

⁷³ See NeJaime & Siegel, *supra* note 15, at 7–9.

⁷⁴ See, e.g., Berg, *supra* note 6, at 212–26.

they should. There is a real harm—even if not subject to legal remedy—for those required to comply with a rule that conflicts with their sincerely held beliefs. Less discussed, yet essential to the conversation, are the harms resulting from accommodations: to those denied jobs, services, and benefits by virtue of an accommodation and to the underlying anti-discrimination goals. The harms run deep to the individual and to the principle at stake.

At their core, accommodations produce a dignitary harm for the person who is turned away.⁷⁵ As the Senate Commerce Committee said in the context of the public accommodations provisions of the Civil Rights Act:

The primary purpose . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public⁷⁶

Roy Wilkins of the NAACP spoke similarly: “The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.”⁷⁷

As the U.S. Supreme Court recognizes, the harm to dignity resulting from discrimination is not limited to instances of race discrimination. When striking down gender-based preemptory challenges in jury selection, the Court stated that such discrimination can be an “assertion of . . . inferiority”⁷⁸ that “denigrates the dignity of the excluded” and “reinvokes a history of exclusion.”⁷⁹ This harm also extends to individuals denied benefits and recognition by virtue of sexual orientation and gender identity. In *United States v. Windsor*, when striking the provision of the Defense of Marriage Act denying federal recognition of same sex marriage, the Court emphasized how a state’s decision to give LGBT people the right to marry “conferred

⁷⁵ See, e.g., Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL’Y 705, 708–16 (2014) (arguing harm to dignity from accommodations in anti-discrimination laws). This Article focuses on the dignitary harm. There are, of course, other harms, including the economic harm of not being hired or of being fired because of one’s sexual orientation or gender identity. Those harms are more readily apparent and thus not addressed here.

⁷⁶ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

⁷⁷ S. REP. NO. 88-872 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2369.

⁷⁸ *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

⁷⁹ *J.E.B.*, 511 U.S. at 142; see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (“[S]tigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”).

upon them a dignity and status of immense import.”⁸⁰ The Defense of Marriage Act, in contrast, effectuated not just a denial of the economic benefits tied to marriage but also a “differentiation [that] demeans the couple.”⁸¹

These quotations speak to a real dignitary harm that will result if laws barring discrimination based on sexual orientation or gender identity embrace or tolerate accommodations. The point is encapsulated in the comment of Anthony Kapel “Van” Jones in reference to a hotly contested bill in Arizona that could have sanctioned discrimination against LGBT people, “The one great achievement of the last century, we took out of American lexicon six words: ‘We don’t serve your kind here.’”⁸²

Neither the statements of the Supreme Court nor the comment of Van Jones, however, capture the entirety of the harm. Anti-discrimination laws are fundamentally a way of according recognition, of embracing and opening the doors to those traditionally excluded. By declaring that a group has a right to access goods and services and jobs in an anti-discrimination law, the political community takes an affirmative step to accord respect and recognition to a previously excluded group. Exemptions to these laws undermine that respect and recognition and they legitimize discrimination, even if only in small pockets of society.

Such discrimination—sanctioned by law, even if exercised by few—will undermine the traditionally stigmatized group’s belief that the community will ever give them a fair shake.⁸³ An example illustrates this point. Assume the law protects against LGBT discrimination in public accommodations, with an exemption for establishments with a religious objection. Imagine being a lesbian traveling with your girlfriend. What happens when you are turned away at an inn consistent with the law’s accommodation? How do you feel as you approach the next reception desk? And the next one? Or when next you go on vacation? How long does the anxiety linger, even if only one inn turns you away?

The promise of equality is not real or robust if it means you can be turned away. It takes but one metaphorical “Heterosexuals Only” sign to make an LGBT person question whether society is in fact embracing her and her kind, so to speak.⁸⁴ It takes only one such experience, sanctioned by the

⁸⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

⁸¹ *Id.* at 2694.

⁸² *This Week with George Stephanopolous* (ABC television broadcast Mar. 2, 2014), archived at <http://perma.cc/K2Y9-VWXM>.

⁸³ See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 840 (2004) (noting that “racial stigma deprives individuals of the confidence that they are being dealt with in good faith, leaving them (quite understandably) somewhat mistrustful of even those individuals who expressly claim and perhaps even believe that they are nonracist”).

⁸⁴ Some scholars, such as Koppelman, suggest businesses should provide notice of their objection and thus avert “unpleasant surprise.” Koppelman, *supra* note 6, at 19–21. A physical “Heterosexuals Only” sign, while eliminating surprise, will hardly allay the dignity harm. One’s sense of value in society will be diminished whether he or she is rebuffed at the desk or by a sign on the door or by a notice on a website.

law, to make an LGBT person think that the promise of equality is not real. These harms cannot be discounted as lesser, as some scholars argue.⁸⁵

IV. ACCOMMODATIONS UNDERMINE THE PURPOSE OF ANTI-DISCRIMINATION LAWS

The fourth and final point relates to the function of the law. Social movements press for laws proscribing discrimination, appreciating that the law has the power to punish and the promise to lead. The law creates norms.⁸⁶

Think about what the law has done vis-à-vis race. It has not ended discrimination or voluntary segregation. It has not worked miracles. But it has established a norm, a standard that creates a baseline of expectations. We understand it is impermissible to discriminate based on race. We understand that it is impermissible, even when done in the name of religion.

Compare that to the story of gender and the norms the law has created. In that context, the law has demanded less; it has limited progress and vision. The law created a constitutional norm that discrimination based on pregnancy and abortion is not about gender.⁸⁷ And in America today, a culture exists in which resistance to birth control and abortion is not readily understood as discrimination based on gender.⁸⁸ In *Hobby Lobby*, for example, the case was viewed as posing issues of cost and religious liberty and maybe health.⁸⁹ It was not readily or widely discussed as a case about sex discrimination.⁹⁰

Relatedly, the current constitutional norm provides that the state can use its power to discourage abortion⁹¹—to discourage the exercise of a con-

⁸⁵ See Berg, *supra* note 6, at 229.

⁸⁶ See Koppelman, *supra* note 6, at 24–25 (characterizing anti-discrimination law as reshaping values and beliefs and practices).

⁸⁷ See *Geduldig v. Aiello*, 417 U.S. 484, 493–97 (1974) (holding exclusion of pregnancy from disability insurance coverage did not constitute sex discrimination as there was no identity between excluded group and gender; rather the program created two groups—pregnant women and non-pregnant persons); see also *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269–74 (1993) (to disfavor abortion is not to discriminate invidiously against women as a class).

⁸⁸ Denial of benefits for contraception is not readily understood as gender discrimination under Title VII, for example. Compare *Erickson v. Bartell Drug Co.*, 141 F. Supp.2d 1266, 1277 (W.D. Wash. 2001), with *In re Union Pacific R.R. Emp’t Practices Litig.*, 479 F.3d 936, 944–45 (8th Cir. 2007). This is true even though Title VII was amended to provide that discrimination based on pregnancy is sex discrimination for purpose of its employment protections.

⁸⁹ The Solicitor General’s brief, for example, did not argue sex discrimination as a compelling state interest served by the contraception rule. See Brief for the Petitioners, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 173486.

⁹⁰ Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 194, 208–12 (2015).

⁹¹ See, e.g., *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992) (“[M]easures designed to advance [the State’s] interest [in potential life] will not be

stitutional right. For nearly as long as the constitution has recognized abortion as a protected right, our laws have said that institutions and individuals can refuse to provide it. But abortion is not an abstract thing; it is a thing that women do. So our legal regime has said that hospitals and doctors can close their doors on women who seek not to be mothers.⁹² This norm has led to nurses even claiming a right not to provide care to women before and after their abortions—a right not to take blood pressure or to ensure a woman has a ride home.⁹³ In other words, the legal norm we have established has fostered the cultural norm of stigmatizing women who get abortions—women can be turned away and even treated as untouchable.

The examples, although not specifically about religious accommodations, pose a challenge in the current debate about accommodations: what norm should the law set? If our laws sanction accommodations, they will sanction discrimination, at least in some parts of society. And if the laws sanction discrimination, they risk perpetuating discriminatory norms, as has happened in the context of gender and reproductive rights.⁹⁴ If the law is to advance the promise of equality, the norm cannot be that it is impermissible to discriminate based on sexual orientation and gender identity, except when it is not.

CONCLUSION

The effort to end discrimination based on sexual orientation and gender identity in the law and culture is at a critical juncture. The question is, will our laws accommodate those who object on religious grounds? If the promise of equality is to be robust, this Article argues, the answer must be no. It is not a vision without cost, but neither is the alternative. The price of sanctioning, with the force of law, the message of “we don’t serve your kind here” is too great, no matter the motivation.

invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”).

⁹² 42 U.S.C. § 300a(7) (2012); see also Jill Cowan, *Hoag Hospital Can Refuse Elective Abortions, State Rules*, L.A. TIMES (Apr. 4, 2014, 3:45 PM), <http://www.latimes.com/local/lanow/la-me-ln-hoag-abortions-20140404-story.html>, archived at <http://perma.cc/JP7U-N96A>.

⁹³ Brief for Defendants in Opposition to Plaintiffs’ Application for Preliminary Injunctive Relief at 10–16, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377-JLL-MAH (D.N.J. Nov. 22, 2011).

⁹⁴ Bob Jones University apologized in 2000 for its discriminatory policy, noting it had “conformed to the culture rather than providing a clear Christian counterpoint to it.” *Statement about Race at BJU*, BOB JONES UNIV., <http://www.bju.edu/about/what-we-believe/race-statement.php> (last visited Oct. 30, 2014), archived at <http://perma.cc/7SZN-MJ37>.