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Faith-Based Emergency Powers

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FAITH-BASED EMERGENCY POWERS

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This Article explores an expanding phenomenon that it calls Faith-Based Emergency Powers. In the twenty-first century, conservatives have come to rely heavily on Faith-Based Emergency Powers as a leading legal strategy in the Culture Wars. This strategy involves carving faith-based exceptions to rights of women and LGBT people. The concept of Faith-Based Emergency Powers is developed in this Article through an analogy to the "War on Terror." In the War on Terror, conservatives typically have taken the position that judges, legislators, and the public must defer to the President and the executive branch in matters involving national security. This argument has three components: (1) rhetoric of war, emergency or catastrophe; (2) legal argument for suspension of existing human rights; and (3) designation of decision-makers who are allegedly more qualified than courts or the legislature to address the emergency.

The principal claim of this Article is that in contemporary Culture Wars in the United States, conservative politicians, lawmakers, and litigants have imported the three-step emergency powers rationale to "defend" religious liberties. In recent years, there has been a growth in claims for religious exemptions in many legal contexts, including free exercise challenges to marriage-equality and the Affordable Care Act (ACA). The desired consequence of the conservative turn to emergency powers rationales in the Culture Wars is to suspend or diminish rights of women and sexual minorities. As such, this Article argues that the Supreme Court and other lawmakers facing similar dilemmas today ought to defend the rule of law by rejecting Faith-Based Emergency Powers.

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Introduction

Lately, conservatives have advanced emergency-powers rationales, analogous to those used in the "War on Terror,"[1] in their efforts to resist liberal advancements in the so-called "Culture Wars." The term "Culture Wars" refers to the cultural and legal struggle of liberals and conservatives in the United States over gender, sexuality, and reproductive issues.[2] In the Supreme Court, from *Griswold* (1965) and *Boutilier* (1967) to *Hobby Lobby* (2014) and *Obergefell* (2015),[3] liberals and conservatives have debated the meaning of gender, reproduction, and sexuality under the law.[4] In the early Culture Wars, beginning in the 1960s, the debates involved whether traditional morality ought to shape legal rules such as anti-sodomy laws and abortion bans.[5] Conservatives argued that legal rules should govern individual morality (often through criminal prohibition), and liberals argued that

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[1] *See generally* David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 Cardozo L. Rev. 2005 (2006) (arguing that "states of emergency" are inherently outside of the realm of law); David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. Miami L. Rev. 249 (2008) (comparing the strategies used by conservatives to elect the controversial Bush Administration and the Administration's subsequent post-9/11 rights-limiting regime to historical fascist regimes, in particular Nazi Germany).

[2] *See generally* Andrew Hartman, A War For The Soul Of America (2015) (exploring historical foundations and consequences of the "Culture Wars"). Political scientist Corey Robin describes conservatism as a "felt experience of having power, seeing it threatened, and trying to win it back." Corey Robin, The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin 4 (2011).

[3] *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that law prohibiting contraception unconstitutionally infringed right to privacy); Boutilier v. Immigration & Nat. Serv., 387 U.S. 118 (1967) (holding that homosexual man could be excluded from entry into U.S. as having "psychopathic personality"); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that religious beliefs of owners could exempt closely held corporation exempt from regulation); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that same-sex couples had constitutional right to marriage).

[4] *See, e.g.*, Jed Rubenfeld, *The Right to Privacy*, 102 Harv. L. Rev. 737, 738–39 (1989) (arguing that the right to privacy is tied to sexual freedom and the Culture Wars); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* Left Legalism/Left Critique 178, 184–88 (Wendy Brown & Janet Halley eds., 2002) (discussing differing liberal and conservative ideologies regarding rights in U.S. law).

[5] *See Griswold*, 381 U.S. at 505; Roe v. Wade, 410 U.S. 113, 114 (1973); Bowers v. Hardwick, 478 U.S. 186, 191–95 (1986).

they should not.[6] In recent years, the terms of the debates have shifted. Conservatives have turned to a new strategy that involves declaring an emergency or crisis in order to carve out exceptions to legal rights.[7] This Article calls this relatively new trend in the Culture Wars, "Faith-Based Emergency Powers."[8]

The concept of Faith-Based Emergency Powers is developed in this Article by exploring the analogy to emergency powers rationales applied in relation to War on Terror policies. In the War on Terror, conservatives typically take the position that legislatures, the public, and especially courts must defer to the President and the executive branch in matters involving national security.[9] This rationale has three components: (1) a rhetoric of war, emergency, or catastrophe; (2) a legal argument for suspension of existing human rights; and (3) the designation of decision-makers who are allegedly more qualified than courts or the legislature to address the emergency.[10] Consequently, conservatives have argued that human rights ought to be suspended or abrogated to some extent in real or perceived national security emergencies.[11] The principal claim of this Article is that in contemporary Culture Wars, conservative politicians, lawmakers, and litigants have imported this three-step rationale to "defend" religious liberties.

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[6] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 590 (2013) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . . .").

[7] *See, e.g.*, Dyzenhaus, *supra* note 1, at 2038–39 (discussing attempt to suspend habeas corpus for Guantanamo detainees); Abraham, *supra* note 1, at 258–61 (comparing USA PATRIOT Act to emergency powers legislation in Nazi Germany); *see generally* Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699 (2010) [hereinafter *Legalism and Decisionism*] (exploring different attitudes towards emergency governance in United States); Noa Ben-Asher, *Legal Holes*, 5 UNBOUND HARV. J. LEGAL LEFT 1 (2009) [hereinafter *Legal Holes*] (exploring different views of "holes" that arise when the law implicitly or explicitly exempts government actors from following the law).

[8] Emergency powers rationales have also been used in international law to carve exceptions for the United States, a phenomenon referred to as "American exceptionalism." *See* Michael Ignatieff, *Introduction*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 4 (Michael Ignatieff ed., 2005) (arguing that one key variant of American exceptionalism is that the U.S. supports "agreements and regimes, but only if they permit exemptions for American citizens or U.S. practices"); *see also* Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483, 1485–87 (2003) (arguing that "double standards[ ]present[ ] the most dangerous and destructive form of American exceptionalism" because "the United States proposes that a different rule should apply to itself than applies to the rest of the world").

[9] For examples of conservative academics arguing in favor of this position, see RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 35–41 (2006); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 15–18 (2007); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1133–36 (2009); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 201–02, 205 (2006).

[10] *See, e.g.*, POSNER, *supra* note 9, at 69–71; Ku & Yoo, *supra* note 9, at 180.

[11] *See, e.g.*, POSNER, *supra* note 9, at 69–71, 82–85, 119 (laying out balancing considerations for military detention, torture, and racial profiling).

The Culture Wars of today have drawn the attention of legal scholars. Several have supported religious exemptions.[12] Douglas Laycock, for instance, has argued that "individuals or institutions [should not be made to] assist or facilitate practices they consider immoral, except . . . where the goods or services requested are not available from another reasonably convenient provider."[13] Andrew Koppelman has likewise proposed that "[b]usinesses that serve the public, such as wedding photographers, should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory."[14] Many others have objected. They have elaborated on how religious accommodations may harm third parties,[15] create an alternative legal order,[16] and become limitless.[17]

In providing a framework of Faith-Based Emergency Powers, this Article adds to the liberal critique of religious exemptions by focusing on the *form* of the current arguments for such exemptions. It argues that religious exemptions are in fact calculated attempts to limit or suspend liberal norms. The existence of an emergency puts into question the normal state of things:

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[12] *See, e.g.*, Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL L. REV. 839, 867–68 (2014); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 619–21 (2015); Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2180–81 (2012).

[13] Laycock, *supra* note 12, at 879.

[14] Koppelman, *supra* note 12, at 620. Koppelman hypothesizes that the "cost will make discrimination rare almost everywhere." *Id.*

[15] *See generally* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015) (arguing against allowing religious exemptions in anti-discrimination measures); Douglas Nejaime & Reva Siegel, *Conscience Wars: Complicity Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (arguing that religious exemptions prolong conflict instead of finding solutions); Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (arguing that religious exemptions are unconstitutional); Amy Sepinwall, *Conscience And Complicity: Assessing Pleas For Religious Exemptions After* Hobby Lobby, 82 U. CHICAGO L. REV. 1897 (2015) (arguing that religious exemptions impose a substantial burden on third parties); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 U.M.K.C. L. REV. 749 (2016) (arguing that religious exemptions "are not consistent with our tradition of religious liberty or civil rights protections").

[16] *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1237–40 (2014) (arguing that libertarian opponents will utilize First Amendment arguments against public accommodation laws, spurring the same concerns raised during the Reconstruction and Civil Rights eras).

[17] Justice Ginsburg's dissent in *Hobby Lobby* captures these three concerns. *See* Burwell v. Hobby Lobby Stores, Inc., 133 S. Ct. 2751, 2787–806 (2014) (Ginsburg, J. dissenting). Ginsburg criticized the Court for enabling corporations to "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." *Id.* at 2787. Ginsburg also criticized the Court's disregard of "the impact that [an] accommodation [of a for-profit corporation's religious beliefs] may have on third parties who do not share the corporation owners' religious faith . . . ." *Id.* Finally, Ginsburg warned against an expansion of claims for religious exemptions. *Id.* at 2797 ("[T]he Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.").

it calls for exceptionalism. This Article focuses on two areas in the Culture Wars where Faith-Based Emergency Powers have emerged: marriage equality and the so-called "Contraceptives Mandate" in the Affordable Care Act (ACA). In both contexts, conservatives have declared a crisis or an emergency to religion shortly after sexual minorities and women were granted liberal rights. In particular, the right to marry was met with the legislative response of exemptions for those who oppose same-sex marriage, and the access to reproductive healthcare enacted in the ACA was met with Religious Freedom Restoration Act (RFRA) challenges.

The First Amendment Defense Act (FADA), introduced in Congress in 2015,[18] prohibits the government from discriminating against anyone who "believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage."[19] If passed, FADA will legally condone actions against same-sex marriages.[20] Several state legislatures have enacted legislation that traces the principles of FADA (hereinafter "mini-FADAs"). A 2015 North Carolina statute for example, exempts magistrates and register of deeds employees from performing marriages if they have religious objections to same-sex marriages.[21]

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[18] *See* First Amendment Defense Act, H.R. 2802, 114th Cong. (2015); First Amendment Defense Act, S. 1598, 114th Cong. (2015). The House version of FADA is sponsored by Representative Raul Labrador of Idaho, was originally cosponsored by 57 other representatives, and currently has 172 cosponsors. *See* H.R. 2802. The Senate version of FADA is sponsored by Senator Mike Lee of Utah, was originally cosponsored by 18 other senators, and currently has 37 cosponsors. *See* S. 1598.

[19] H.R. 2802 at § 3(a); S. 1598 at § 3(a).

[20] So-called "discriminatory acts" by the federal government include alteration of tax treatment, disallowing tax deductions, denying federal grants, loans, or other similar status, denying federal benefits, or "*otherwise discriminating against a person*." *See* H.R. 2802 at § 3(b); S. 1598 at § 3(b) (emphasis added). The FADA also creates a cause of action for people who feel that they have been discriminated against and waives all administrative remedy requirements. *See* H.R. 2802 at § 4(a)–(c); S. 1598 at § 4(a)–(c). Then-Presidential candidate Donald Trump announced in fall of 2016 that he would "sign it [FADA] to protect the deeply held religious beliefs of Catholics and the beliefs of Americans of all faiths . . . ." *Issues of Importance to Catholics*, Donald Trump Campaign (Sept. 22, 2016), https://www.donaldjtrump.com/press-releases/issues-of-importance-to-catholics [https://perma.cc/R5PZ-WGMW]; *see also Religious Liberty and H.R. 2802, the First Amendment Defense Act: Hearing on H.R. 2802 Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. 44–60 (2016) [hereinafter *Statement of Katherine Franke*] (statement of Katherine Franke, Professor, Columbia Law School, arguing that some leading scholars find FADA both unnecessary and harmful).

[21] *See* S. 2, 2015 Gen. Assemb., Reg. Sess. § 51-5.5 (N.C. 2015); *see also* Beth Walton, *N.C. OKs Gay Marriage Religious Exemption*, USA Today (June 12, 2015, 1:55 AM), http://www.usatoday.com/story/news/nation/2015/06/12/nc-religious-exemption-gay-marriage-bill-now-law/71107584/ [https://perma.cc/5PP8-H7WH]. This law requires state employees who opt out of same-sex marriages to abstain from performing marriages for at least six months. This legislation was a response to a federal court ruling that struck down North Carolina's 2012 ban on same-sex marriage. In the floor debate, a sponsor of the bill criticized "some wise old judges that think they know better than us that they know more than God." Jonathan M. Katz, *North Carolina Allows Officials to Refuse to Perform Gay Marriages*, N.Y. Times (June 11, 2015), http://www.nytimes.com/

Texas legislation, introduced on the day that *Obergefell* was decided, allows clergy members to refuse to officiate marriages that violate their beliefs.[22] In 2015, a bill was proposed in Alabama that would exempt those authorized to solemnize marriages from performing same-sex marriages if it violated their religious beliefs.[23] In Oklahoma as well, similar legislation was introduced in 2015 but failed to pass.[24] In 2016, the First Amendment Defense Act of Georgia, which mirrors the federal versions, was referred to a subcommittee.[25] The common thread in this type of legislation is clear: it carves exceptions for religious or moral dissenters from a new liberal norm that allegedly threatens their religious or moral faith.

In March 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA"), a hallmark of Barack Obama's presidency.[26] In order to promote gender equality,[27] the ACA required employers to offer female employees "minimum essential [reproductive] coverage" including "preventive care" (such as birth control) and "screenings" without cost-sharing requirements like co-pays and deductibles.[28] This measure has come to be

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2015/06/12/us/north-carolina-allows-officials-to-refuse-to-perform-gay-marriages.html [https://perma.cc/567N-R9PK].

[22] *See* Lauren McGaughy, *After Indiana Backlash, Cracks Appear in Texas 'Religious Freedom' Proposals*, HOUSTON CHRONICLE (Apr. 1, 2015), http://www.houstonchronicle.com/news/politics/texas/article/After-Indiana-backlash-cracks-appear-in-Texas-6173647.php [https://perma.cc/BP6G-S72C]. Before that, several other controversial bills failed, such as a bill that would have allowed anyone to refuse to provide goods or services to any person based on a sincerely held religious belief or on conscientious grounds. *See, e.g.*, H.R. 2553, 84th Reg. Sess. (Tex. 2015).

[23] *See* H.R. 56, 2015 Reg. Sess. (Ala. 2015). The bill failed.

[24] *See* H.R 1371, 55th Leg., 1st Sess. (Okla. 2015) (exempting companies from participation "in any marriage ceremony, celebration, or other related activity or to provide items or services for such purposes against the person's religious beliefs"); *see also Amendment Would Require Oklahoma Businesses to Bring Religious Beliefs Out of the Closet*, KFOR (Mar. 11, 2015), http://kfor.com/2015/03/11/amendment-would-require-oklahoma-businesses-to-bring-religious-beliefs-out-of-the-closet [https://perma.cc/EGJ4-DJ5Q].

[25] *See* S. 284, 2015–16 Reg. Sess. (Ga. 2016); *see also* H.R. 401, 2016 Reg. Sess. (Fla. 2016) (providing immunity to people and religious organizations that refuse to provide medical or other services based on their beliefs; the bill died in subcommittee).

[26] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119, 119 (2010); *see also* Mike DeBonis, *The Political Price of Obamacare*, WASH. POST (Aug. 16, 2016), https://www.washingtonpost.com/graphics/national/obama-legacy/obamacare.html [https://perma.cc/Z2QU-R7QC] ("One word—'Obamacare'—would come to represent the promise and the pitfalls of Obama's presidency."); *see generally* Noa Ben-Asher, *Obligatory Health*, 15 YALE HUM. RTS. & DEV. L.J. 1 (2012) (arguing that a society committed to equality may need to require individuals to contribute to the greater societal good).

[27] *See Hobby Lobby*, 134 S. Ct. at 2787–806 (Ginsburg, J., dissenting).

[28] *See* Requirement to Maintain Minimum Essential Coverage, I.R.C. § 5000A(f)(2) (2012); Shared Responsibility for Employers Regarding Health Coverage, I.R.C. § 4980H(a)–(c)(2) (2012); Coverage of Preventative Health Services, 42 U.S.C. § 300gg-13(a)(4) (2012). Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to name the types of preventive care that must be covered. The HRSA promulgated the Women's Preventive Services Guidelines, which provided that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive

known as the "Contraceptives Mandate."[29] In *Hobby Lobby*, employers who sought religious exemptions from the mandate prevailed when the Supreme Court held that the Contraceptives Mandate (as applied to for-profit, closely held corporations) violated the Religious Freedom Restoration Act ("RFRA").[30] The Court reasoned that "if the owners comply with the HHS [Department of Health and Human Services] mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price."[31] Further legal challenges followed,[32] and when President Trump was elected, he quickly signed an executive order that instructed the executive branch "to vigorously enforce Federal law's robust protections for religious freedom,"[33] and "consider issuing amended regulations . . . to address conscience-based objections to the preventive-care mandate."[34] As in the context of marriage equality, the gist of the conservative position here is that a liberal rule that offends the religious faith of individuals (or corporations) should be suspended for them.

The Article proceeds in four Parts. Part I demonstrates the use of war and emergency rhetoric by conservatives in the Culture Wars, in particular, a "war on Christians and Christianity." Part II contends that the real consequence of religious exemptions is suspending or limiting the legally valid

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methods, sterilization procedures, and patient education and counseling." Updating the HRSA-Supported Women's Preventive Service Guidelines, 81 Fed. Reg. 95,148, 95,149 (Dec. 27, 2016).

[29] For a brief history of the Contraceptives Mandate, see Patricia A. Moran, *The Affordable Care Act's Contraceptive Mandate: A Loss in Massachusetts and Other Current Events*, NAT. L. REV. (Mar. 20, 2018), https://www.natlawreview.com/article/affordable-care-act-s-contraceptive-mandate-loss-massachusetts-and-other-current [https://perma.cc/JP7V-UBG7].

[30] *Hobby Lobby*, 134 S. Ct. at 2751. RFRA prohibits the "[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-3(a) (2012).

[31] *Hobby Lobby*, 134 S. Ct. at 2759. For critical analysis of the decision to recognize the religious conscience of corporations, see generally Amy Sepinwall, *Corporate Piety and Impropriety:* Hobby Lobby*'s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015) (analyzing the decision to recognize the religious conscience of corporations); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59 (2013) (providing a broader foundation to think about how and whether profit-making businesses and their owners can exercise religion); Stephen M. Bainbridge, *Critique of the Corporate Law Professors' Amicus Brief in* Hobby Lobby *and* Conestoga Wood, 100 VA. L. REV. ONLINE 1 (2014) (critiquing corporate law professors' amicus brief in *Hobby Lobby* and *Conestoga Wood*). *But see* cases cited *infra* note 32.

[32] *See, e.g.*, Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 444 (3d Cir. 2015); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1151 (10th Cir. 2015); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 449 (5th Cir. 2015); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 213 (2d Cir. 2015); Mich. Catholic Conference v. Burwell, 755 F.3d 372, 372 (6th Cir. 2014); Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, 229 (D.C. Cir. 2014). The Supreme Court vacated and remanded these decisions in Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016).

[33] Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

[34] *Id.*

rights of women and sexual minorities. Part III discusses the endgame of using emergency powers as a strategy: deference to religious dissenters. Part IV argues that, in addition to harming third parties, Faith-Based Emergency Powers pose a serious threat to the rule of law and should be resisted in two ways: (1) contesting the factual reality of the emergency (Part IV.A), and; (2) refusing to grant deference to religious dissenters (Part IV.B).

I. Rhetoric of War and Emergency

On September 11, 2001, President George W. Bush declared: "Today, our fellow citizens, *our way of life, our very freedom* came under attack in a series of deliberate and deadly terrorist acts."[35] This notion of "global attack on America" was widely accepted and adopted by many courts, policymakers, and scholars faced with legal issues concerning executive powers in the twenty-first century. In *Boumediene v. Bush*, the late Justice Scalia observed that "America is at war with radical Islamists . . . . On September 11, 2001, the enemy brought the battle to American soil . . . . It has threatened further attacks against our homeland; . . . the threat is a serious one."[36] Scholars and policymakers who have advocated for robust executive powers in the War on Terror have repeatedly emphasized that America is under attack.[37]

In the Culture Wars, conservatives have promoted a nearly identical rhetoric of injury, enmity, crisis, and emergency. This time, however, the alleged attack is not on America: it is on Christianity. "My friends," exclaimed Patrick Buchanan in the 1992 Republic National Convention, "this election is about . . . what we stand for as Americans. There is a *religious war* going on in our country for the *soul of America*. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War it-

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[35] George W. Bush, Address to the Nation on the Terrorist Attacks (Sept. 11, 2001) (emphasis added) (transcript available online by Gerhard Peters and John T. Woolley of The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=58057 [https://perma.cc/EUW7-GBB7]); *see also* George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), (transcript available online by Gerhard Peters and John T. Woolley of The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=64731&st=&st1= [https://perma.cc/P3GL-F4X6]) ("The only way to defeat terrorism as *a threat to our way of life* is to stop it, eliminate it and destroy it where it grows." (emphasis added)); U.S. Dep't of State, The Global War on Terrorism: the First 100 Days (2011), https://2001-2009.state.gov/s/ct/rls/wh/6947.htm [https://perma.cc/4RHS-SWUW] (quoting Bush as saying the attack of 9/11 "was an attack on the heart and soul of the civilized world. And the world has come together to fight a new and different war, the first, and we hope the only one, of the 21st century. A war against all those who seek to export terror, and a war against those governments that support or shelter them.").

[36] Boumediene v. Bush, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting).

[37] *See, e.g.*, Posner, *supra* note 9, at 31; Posner & Vermeule, *supra* note 9, at 15–18; Vermeule, *supra* note 9, at 1096–98 (2009); Ku & Yoo, *supra* note 9, at 205.

self."[38] This dramatic declaration followed national debates in the 1980s and 1990s about abortion, affirmative action, evolution, feminism, homosexuality, school prayer, and sex education, among others.[39] This new rhetoric alleges that liberals are attacking the "Judeo-Christian values and beliefs upon which this nation was built."[40]

Justice Scalia famously incorporated this rhetoric of war into the Supreme Court's jurisprudence when he opened his dissent in *Romer v. Evans* (1996) by condemning the majority for having "mistaken a *Kulturkampf* ["culture war"] for a fit of spite."[41] At stake in *Romer* was Amendment 2 to the Colorado Constitution, which repealed discrimination protections on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[42] The Court, in a decision by Justice Kennedy, held that this was unconstitutional because it denied homosexuals "the safeguards that others enjoy or may seek without constraint."[43] The *Romer* Court held that animus toward a political group cannot motivate state legislation[44] and that Amendment 2 "seems inexplicable by anything but animus toward the class it affects."[45] It was in response to *this* idea of animus that Justice Scalia accused the majority of mistaking *Kulturkampf* for spite. In other words, he contended that Amendment 2 was not motivated by animus but by Culture Wars: it is "rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[46] Thus, the idea and rhetoric of "Culture Wars" was introduced into Supreme Court jurisprudence by one of the most celebrated conservative justices in the history of the Court, in the first serious legal victory for gay rights.[47]

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[38] Patrick J. Buchanan, 1992 Republican National Convention Speech (Aug. 17, 2002) (emphasis added) (available online at PATRICK J. BUCHANAN – OFFICIAL WEBSITE, http://buchanan.org/blog/1992-republican-national-convention-speech-148 [https://perma.cc/S9EF-RRDF]). He continued, "[I]n that struggle for the soul of America, Clinton & Clinton are on the other side, and George Bush is on our side. And so, we have to come home, and stand beside him." *Id.*; *see also* HARTMAN, *supra* note 2, at 1.

[39] HARTMAN, *supra* note 2, at 1.

[40] Buchanan, *supra* note 38 ("George Bush is a defender of right-to-life, and lifelong champion of the Judeo-Christian values and beliefs upon which this nation was built. Mr. Clinton, however, has a different agenda.").

[41] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (explaining that the amendment was only a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws").

[42] COLO. CONST. art. II, § 30b (1992), *invalidated by Romer*, 517 U.S. at 623.

[43] *Romer*, 517 U.S. at 631.

[44] *Id.* at 632.

[45] *Id.*

[46] *Id.* at 636 (Scalia, J., dissenting).

[47] *Id.* ("In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts . . . [Bowers v. Hardwick, 478 U.S. 186 (1986)], and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias . . . . This Court has no business . . . pronouncing that 'animosity' toward homosexuality . . . is evil.").

A. Marriage Equality

The idea that Christianity is under attack by liberal politicians and lawmakers appears explicitly or implicitly in many contemporary arguments for religious exemptions from marriage equality.[48] Rick Santorum, for instance, opined in the context of same-sex marriage that "[t]he treatment of Christians is so bad we should keep in mind Nazi Germany— . . . Jews, obviously, but also Christians—being not just persecuted but put to death."[49] Ted Cruz said after *Obergefell* that "there is a *liberal fascism* that is dedicated to going after and targeting believing Christians who follow the biblical teachings on marriage."[50] Cruz also characterized the public controversy around state RFRA laws as "jihad that is being waged right now . . . going after people of faith who respect the biblical teaching that marriage is the union of one man and one woman."[51] Marco Rubio warned that "the next step [of liberals] is to argue that the teachings of the mainstream Christianity, the catechism of the Catholic Church, is hate speech and there's real and present danger."[52] Mike Huckabee also observed that "Christian convictions are under attack as never before . . . in the history of this great republic . . . .

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[48] This perception of attack on Christianity is not new. Anti-segregation was also critiqued by conservatives as an attack on Christianity. *See, e.g.*, CARLETON PUTNAM, RACE AND REASON: A YANKEE VIEW 26–28 (1961) (arguing that it would be un-Christian to desegregate because "[t]he important thing is to recognize that the grouping instinct is basic, and that race is one of the wider groups. To preach against its manifestations is not only a perversion of ideals, but a very effective way of destroying a civilization."); *see also* Loving v. Virginia, 388 U.S. 1, 3 (quoting the trial judge's opinion: "Almighty God created the races . . . and he placed them on separate continents.").

[49] Sara Fischer, *Santorum: Religious Persecution in U.S. Could Escalate as High as It Did Under Nazi Germany*, CNN POLITICS (Nov. 2, 2014), http://www.cnn.com/2014/11/02/politics/rick-santorum-religious-persecution/index.html [https://perma.cc/2JVV-BSLF].

[50] Katherine Perkins, *Cruz: "Religious Liberty Unifies Us,"* IOWA PUBLIC RADIO (May 28, 2015) (emphasis added), http://iowapublicradio.org/post/cruz-religious-liberty-unifies-us [https://perma.cc/8LXW-QRZ5].

[51] Jenny Kutner, *Ted Cruz: Gay Community is Waging a "Jihad" Against People of Faith*, SALON (Apr. 10, 2015), http://www.salon.com/2015/04/10/ted_cruz_gay_community_is_waging_a_jihad_against_people_of_faith/ [https://perma.cc/Z2B8-NWDT].

[52] Alexandra Jaffe, *Rubio: Gay Marriage Proponents Pose 'Danger' to Christianity*, CNN (May 28, 2015), http://www.cnn.com/2015/05/27/politics/rubio-gay-marriage-hate-speech/ [https://perma.cc/9AE9-XN6T]; *see also* Sarah Harvard, *Marco Rubio Adds Fuel to the Christian Persecution Complex*, SLATE (May 28, 2015), http://www.slate.com/blogs/outward/2015/05/28/marco_rubio_warns_gay_rights_will_make_christianity_hate_speech.html [https://perma.cc/36MZ-AF7V] (noting the statement of Dr. Samuel Rodrigues of the National Hispanic Christian Leadership Conference: "It's bigotry and intolerance towards those who believe the Bible and our Judeo Christian values system . . . . There is bigotry and intolerance, but it's against Christians who believe in the word of God."); Jeff Mateer, *A Ready Defense: How to Protect Your Ministry or Faith-Based Business from Legal Attack and Ruin*, FIRST LIBERTY INSTITUTE (May 14, 2015), https://firstliberty.org/newsroom/a-ready-defense-how-to-protect-your-ministry-or-faith-based-business-from-legal-attack-and-ruin/ [https://perma.cc/2H8E-LN3N] (asserting that there is "blatant hostility toward the religious liberty rights of people of faith" and that "it's now open season on people of faith").

We are moving rapidly toward the criminalization of Christianity."[53] Conservative media has likewise protested the alleged media "attack" on Kim Davis, the Kentucky clerk who refused to issue marriage licenses after *Obergefell*,[54] as "a real active, aggressive, anti-Christian sentiment."[55]

This perception of an attack on Christianity has led to a wave of "emergency" federal and state legislation. In FADA, for example, Congress finds that protecting religious freedom today is a priority of the highest order.[56] Likewise, Indiana's RFRA explicitly states that "[a]n emergency is declared for this act."[57] South Dakota's RFRA claims to be "necessary for the immediate preservation of the public peace, health, or safety [and] *an emergency is hereby declared to exist*."[58] Under Arkansas's bill "*an emergency is declared to exist*, and this act [is] immediately necessary for the preservation of the public peace, health, and safety."[59] And Kansas Governor Sam Brownback's 2015 "Preservation and Protection of Religious Freedom Executive Order" bars the state from acting against any individual clergy or religious leader who declines to participate in a same-sex ceremony or any religious group that declines to provide services for or recognize a same-sex marriage if it conflicts with their faith or moral conviction.[60] A review of this wave of lawmaking reveals a general posture of defense and crisis.

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[53] *Huckabee: 'We Are Moving Rapidly Towards the Criminalization of Christianity,'* CBS DC (Apr. 29, 2015), http://washington.cbslocal.com/2015/04/29/huckabee-we-are-moving-rapidly-towards-the-criminalization-of-christianity [https://perma.cc/4YBZ-LYBR].

[54] Paul Bremmer, *Real Reason for Attack on Kim Davis? 'Anti-Christian Sentiment'*, WORLD NET DAILY (Sept. 8, 2015), http://www.wnd.com/2015/09/real-reason-for-attack-on-kim-davis-anti-christian-sentiment/#fzzjsCWQfsvDdlqJ.99/ [https://perma.cc/W379-67BW].

[55] *Id.* (citing Michael Brown, an author and radio host described as "a scholar who writes on the 'gay'-rights movement").

[56] *See* First Amendment Defense Act, H.R. 2802, 114th Cong. § 2(4) (2015).

[57] H.R. 1632, 119th Gen. Assemb., 1st Reg. Sess. § 2 (Ind. 2015); S. 568, 119th Gen. Assemb., 1st Reg. Sess. § 2 (Ind. 2015).

[58] H.R. 1220, Legis. Assemb., 19th Sess. § 5 (S.D. 2015).

[59] S. 975, 90th Gen. Assemb., Reg Sess. § 2 (Ark. 2015) ("An act to Amend Arkansas Law Concerning the Free Exercise of Religion; To enact the religious freedom Restoration Act; [and] To Declare an Emergency . . . .").

[60] *See* Kan. Exec. Order No. 15-05 (July 7, 2015) ("WHEREAS, the recent imposition of same sex marriage by the United States Supreme Court poses potential infringements on the civil right of religious liberty."). The governor explained: "Today's executive order protects Kansas clergy and religious organizations from being forced to participate in activities that violate their sincerely and deeply held beliefs." Sean Kennedy, *Governor Sam Brownback Issues Executive Order Protecting the Religious Freedom of Kansas Clergy and Religious Organizations*, KSN (July 7, 2015), http://www.ksn.com/news/local/governor-brownback-issues-executive-order-protecting-religious-freedom-of-kansas-clergy-and-religious-organizations_20180309064224 42/1023967229 [https://perma.cc/WK8J-A9Z2].

B. The ACA

Measures and rhetoric of emergency also appeared in challenges to the Contraceptives Mandate of the ACA.[61] In *Wheaton College*, for example, the Supreme Court granted an emergency injunction to a nonprofit liberal arts college that objected to the self-certification form (a form that institutions eligible for exemption had to file with HHS to receive the exemption).[62] An emergency injunction stops a party from continuing to perform an action before a judge has issued an opinion on the dispute.[63] Justice Sotomayor's sharp dissent criticized the injunction,[64] stressing that "Wheaton's application comes nowhere near the high bar necessary to warrant an emergency injunction from this Court."[65] Such injunctions, writes Sotomayor, "are proper only where 'the legal rights at issue are indisputably clear . . . . Yet the Court today orders this extraordinary relief even though no one could credibly claim Wheaton's right to relief is indisputably clear.'"[66] Plaintiffs and supportive parties nonetheless relied on ideas of crisis and emergency in briefs submitted in *Zubik v. Burwell*.[67] One *amicus curiae* brief claimed that "HHS's *attack* on Catholic religious expression is all the more unjustifiable because it serves no compelling government interest,"[68] and that "HHS's clumsy and needless assault on Catholic religious institutes—and thus on the Catholic Church itself—'would effectively exclude [them] from full participation in the economic life of the Nation.'"[69] Another *amicus curiae* brief implied that the threat imposed by HHS could even be *life threatening* for

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[61] *See* Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2767 (2014) (stating that the government's position would have "dramatic consequences," and that individuals will be forced to "either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations").

[62] *See* Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014) (holding that Wheaton was not required to file the form as long as it notices the Secretary of HHS in writing of its exemption request).

[63] *See* FED. R. CIV. P. 65(b).

[64] *Wheaton College*, 134 S. Ct. at 2807–15 (Sotomayor, J., dissenting).

[65] *Id.* at 2809. Sotomayor adds that at stake is "a form of relief as rare as it is extreme: an interlocutory injunction under the All Writs Act . . . *blocking the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant's claims* and in which those courts have declined requests for similar injunctive relief." *Id.* at 2808 (emphasis added) (internal citations omitted).

[66] *Id.*

[67] *See, e.g.*, Brief for Carmelite Sisters of the Most Sacred Heart of Los Angeles, et al. as Amici Curiae Supporting Petitioners, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter Carmelite Sisters Brief]; Brief for United States Conference of Catholic Bishops et al. as Amici Curiae Supporting Petitioners and Supporting Reversal, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter Catholic Associations Brief]; Brief for Church of the Lukumi Babalu Aye, Inc. et al. as Amici Curiae Supporting Petitioners, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter Religious Groups Brief].

[68] *See* Carmelite Sisters Brief, *supra* note 67, at 8 (emphasis added).

[69] *See id.* at 27 (citation omitted).

religious dissenters.[70] This emphasis on the perils of submitting an exemption form to a federal agency nicely illustrates the larger strategic shift of conservatives in the Culture Wars.

The commonalities between emergency rhetoric in the War on Terror and in the Culture Wars are indisputable. In both cases, conservatives have framed historical events (small or large) in terms of injury, enmity, crisis, and emergency. Consequently, in both "wars," as we will now see, the emergency framework offers the foundation for the sought after legal consequence: suspension or limiting of human rights.[71]

II. Suspending or Limiting Human Rights

In the War on Terror, the conservative strategy has been to suspend or limit existing human rights in real or perceived emergencies.[72] President Trump's controversial "Muslim Ban" executive order illustrates this strategy. It alleges that a threat to national security, posed by Muslim terrorists, justifies the limiting and suspension of human rights of many individuals.[73] The Ban, which suspends entry into the United States of immigrants and non-immigrants from several countries with significant Muslim populations, was immediately challenged for unlawfully suspending statutory and constitutional rights, including Due Process and Equal Protection.[74] The Ban's fate is still in the hand of federal courts, but the arguments made by the govern-

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[70] *See* Catholic Associations Brief, *supra* note 67, at 2 ("History is replete with instances in which an individual went to his or her death to avoid committing an act objectionable to the individual on religious grounds, though thought by others to be innocuous."); *see also* Religious Groups Brief, *supra* note 67, at 5–6 ("If government actors have carte blanche to re-examine the veracity of religious beliefs, the rights of adherents to minority religions will be in even greater peril.").

[71] *See Legalism and Decisionism*, *supra* note 7, at 731–33.

[72] *See id.* at 733–35; *Legal Holes*, *supra* note 7, at 2 (discussing Vermeule, *supra* note 9, at 1096); *see also, e.g.*, Posner, *supra* note 9, at 3; Posner & Vermeule, *supra* note 9, at 15–18; Vermeule, *supra* note 9, at 1096–98 (2009); Ku & Yoo, *supra* note 9, at 205.

[73] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (stating that the purpose of the order is allegedly to "protect the American people from terrorist attacks by foreign nationals . . . ."), *revoked by* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (stating the same purpose as in Exec. Order. No. 13,769), *amended by* Effective Date in Exec. Order 13,780: Memorandum for the Secretary of State[,] the Attorney General[,] the Secretary of Homeland Security[, and] the Director of National Intelligence, 82 Fed. Reg. 27,965 (June 14, 2017).

[74] Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 2, Darweesh v. Trump, No. 1:17-cv-00480 (E.D.N.Y. filed Jan. 28, 2017). Acting Attorney General Sally Yates refused to defend the order and was removed from office. *See* Lydia Wheeler, *Acting Attorney General Orders DOJ Not to Defend Trump's Travel Ban*, The Hill (Jan. 30, 2017), http://thehill.com/homenews/administration/316990-justice-department-wont-defend-trump-immigration-order [https://perma.cc/Z5JJ-PKZH]; Jonathan H. Adler, *Acting Attorney General Orders Justice Department Attorneys Not to Defend Immigration Executive Order*, Wash. Post: Volokh Conspiracy (Jan. 30, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/30/acting-attorney-general-orders-justice-department-attorneys-not-to-defend-immigration-executive-order/?utm_term=.e17be1836d41 [https://perma.cc/2TVS-Y4FZ].

ment supporting it demonstrate the rationales and dangers of emergency powers in the War on Terror.[75]

Likewise, in today's Culture Wars, conservatives are using the same legal strategy in the name of defending religious liberties. Conservative lawmakers and scholars argue that rights of women and sexual minorities should be suspended or limited when the exercise of those rights implicates the conscience of religious or moral dissenters.[76] Legal challenges to religious exemptions from marriage equality and the ACA's contraceptives mandate seek to defend these existing human rights.[77]

A. Marriage Equality

Statutes such as FADA and state mini-FADAs represent the growing conservative strategy of using religious liberties as a means to suspend existing liberal antidiscrimination norms with regard to marriage equality.[78] These laws carve out exceptions to valid and generally applicable liberal norms. They effectively extend immunities to anyone who claims to object to LGBT marriage rights on religious or other moral grounds. FADA prohibits the federal government from penalizing those who refuse to recognize same-sex marriages.[79] FADA, if enacted, will be a *de facto* statutory suspension of the right to marry recognized in *Obergefell.*[80] It will enable individuals and other entities to ignore the right to marry without legal consequences under federal law.[81] State mini-FADAs and some state RFRAs do the same.[82] Their primary purpose is to suspend marriage equality and other antidiscrimination protections for LGBT individuals when there are religious or moral objections to them.[83]

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[75] The Government's initial argument alleged a lack of subject matter jurisdiction because the States did not have standing to sue. Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017). More importantly, it contended that the court does not have the authority to enjoin the enforcement of the Muslim Ban because the President has "*unreviewable* authority to suspend the admissions of any class of aliens." *Id.* at 1161 (quotations omitted) (emphasis added). The government also asserted that immigration and national security policy determinations of the executive branch were categorically unreviewable even if they violated rights and protections afforded by the Constitution. *Id.*

[76] *See* discussion *supra* Part I.

[77] *See, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (religious organizations seeking exemption to contraceptive mandate).

[78] *See* discussion *supra* Part I.

[79] First Amendment Defense Act, H.R. 2802, 114th Cong. § 3(a) (2015).

[80] *See* H.R. 2802 § 3 ("The Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage."). *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that same-sex couples had constitutional right to marriage).

[81] *See* H.R. 2802 § 3.

[82] *See* S. 975, 90th Gen. Assemb., Reg Sess. § 2 (Ark. 2015).

[83] The shift from Defense of Marriage Act (DOMA) to FADA represents an important shift in conservative law and politics from rule-making to exception-making. There is

Several state legislatures have similarly attempted to suspend or limit human rights. Mississippi's mini-FADA provides that "the state government shall not take any discriminatory action" against those who act in accordance with certain religious or moral beliefs, including that "(a) marriage is or should be recognized as the union of one man or one woman; (b) [s]exual relations are properly reserved to such a marriage; and (c) [m]ale (man) or female (woman) refer[s] to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[84] Under this statute, anyone acting or claiming to act under one of these beliefs is immune from adverse legal consequences, including penalties relating to tax, benefits, employment decisions, fines, and occupational licenses.[85] The Fifth Circuit recently dismissed a constitutional challenge to this legislation on procedural grounds, holding that the LGBT and unmarried plaintiffs did not have standing because they could not show an injury-in-fact, and stigmatic injury did not suffice.[86]

Other states have similarly provided statutory exemptions for religious dissenters who oppose LGBT rights. Indiana's RFRA (2015) permits "large corporations, if they are substantially owned by members with strong religious convictions, to claim that a ruling or mandate violates their religious faith."[87] After the law drew harsh criticism,[88] the legislature amended it to

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an important jurisprudential difference between the DOMA and FADA. In 1996, when DOMA was signed into law, it defined marriage for all federal purposes as a "union between one man and one woman." Defense of Marriage Act, 1 U.S.C. § 7 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2675–76 (2013). DOMA created a rule that, as evident from its title —"defense of marriage" —sought to preserve traditional marriage by defining marriage to exclude same-sex couples. Two decades later, conservatives are utilizing a different tactic in the era of marriage equality: carving exceptions. *See* H.R. 2802 § 3.

[84] H.R. 1523, Reg. Sess. § 2 (Miss. 2016).

[85] *Id.* § 4. The statute also creates a private right of action for those who are harmed by such "discriminatory" state action and authorizes its use as a defense in private lawsuits regarding conduct covered by the statute. *Id.* § 5.

[86] *See* Barber v. Bryant, 860 F.3d 345, 352 (5th Cir. 2017) (holding that LGBT plaintiffs do not have standing to challenge the statute, and reversing the injunction issued in their favor).

[87] S. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015). *See also* Campbell Robertson and Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. Times (Mar. 31, 2015), https://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html [https://perma.cc/L9KL-E7JC].

[88] Major Indiana employers worried that the law would "encourage discrimination and hurt Indiana's reputation as a welcoming state." Tony Cook, *Indiana House OK's Controversial Religious Freedom Bill*, USA Today (Mar. 23, 2015), https://www.usatoday.com/story/news/politics/2015/03/23/indiana-house-oks-controversial-religious-freedom-bill/70361050/ [https://perma.cc/GX5X-TE69]. N.C.A.A. president Mark Emmert said the law "strikes at the core values of what higher education in America is all about"; business executives at companies like Apple and Yelp spoke out against the law; Angie's List canceled plans to expand its facilities to Indianapolis; entertainers canceled tour dates in Indiana; a convention considered relocating; and several state governors banned state-funded travel to Indiana. *See* Robertson & Pérez-Peña, *supra* note 87. The law was, however, supported by Republican presidential contenders, Jeb Bush, Ted Cruz, and Marco Rubio. *See* Eric Bradner, *Republican 2016 Hopefuls Back Indiana's 'Relig-*

prohibit discrimination based on sexual orientation or gender identity.[89] Similar Arkansas legislation was approved[90] but the governor urged lawmakers to repeal it and pass a statute that mirrors the federal RFRA.[91] Virginia,[92] North Dakota,[93] and Michigan[94] have enacted laws to enable private adoption agencies to exclude individuals if serving such individuals would violate moral or religious beliefs. Under the Michigan law, for example, child-placing agencies do not have to provide services in conflict with their "sincerely held" religious beliefs.[95] They can decline a referral for foster-care management or adoption services without fear of an adverse legal action.[96] By denying same-sex couples the access to fostering or adopting children, such laws significantly narrow the scope of marriage equality, at least for those couples who wish to raise children.

At the same time, public and private actors have been suspending or limiting the right to marriage equality through individual disobedience. In June of 2015, shortly after the Supreme Court published its decision in *Obergefell*,[97] a same-sex couple applied for a marriage license in Kentucky. The county clerk, Kim Davis, refused to grant the license, claiming that it

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ious Freedom' Law, CNN (Mar. 30, 2015), https://www.cnn.com/2015/03/30/politics/republican-2016-candidates-back-indiana-law/ [https://perma.cc/M93Z-JM2N].

[89] On April 2, 2015, just over a week after the Indiana's RFRA was signed into law, Governor Pence signed an amendment to the Act that clarifies that the Act does not "authorize a provider to refuse to offer or provide services . . . to any member of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service." Cook, *supra* note 88.

[90] *See* Robertson & Pérez-Peña, *supra* note 87 ("The state, according to the Arkansas bill, must show that a law or requirement that someone is challenging is 'essential' to the furtherance of a compelling governmental interest, a word that is absent from the federal law and those in other states, including Indiana.").

[91] *See* Religious Freedom Restoration Act, ARK. CODE ANN. § 16-123-401 (2015); *see also* Zuzanna Sitek and Curt Lanning, *Amended Religion Bill, Now SB 229 and SB 975, Pass Senate, Head to House*, 5 NEWS: KFSM (Apr. 1, 2015), http://5newsonline.com/2015/04/01/amended-religion-bill-passes-senate-committee/ [https://perma.cc/9F8A-F66Y]; Monica Davey, Campbell Robertson, & Richard Pérez-Peña, *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (April 2, 2015), http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html?_r=0 [https://perma.cc/T6X9-P2V7] ("The uproar had spread to Arkansas on Tuesday, when lawmakers approved a bill similar to Indiana's legislation. Walmart, the state's biggest corporation, urged the governor to use his veto, and a host of civic groups and other businesses condemned the legislation.").

[92] *See* VA. CODE ANN. § 63.2-1709.3 (2012).

[93] *See* N.D. CENT. CODE § 50-12-07.1 (2003).

[94] *See* Act 53, H.R. 4188, 98th Legis., Reg. Sess. (Mich. 2015); Act 54, H.R. 4189, 98th Legis., Reg. Sess. (Mich. 2015); Act 55, H.R. 4190, 98th Legis., Reg. Sess. (Mich. 2015).

[95] *See* bills cited *supra* note 94.

[96] Margot Cleveland, *Michigan Tolerates Faith-Based Adoption Agencies, the ACLU Sues*, NAT. REV. (Sept. 21, 2017), https://www.nationalreview.com/2017/09/american-civil-liberties-union-michigan-law-adoption-agencies-same-sex-couples-religious-beliefs/, [https://perma.cc/HH4L-LWC8] ("Michigan's law . . . allows child-placement agencies to offer foster and adoption services consistent with the organizations' deeply held religious beliefs.").

[97] Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).

would violate her religious beliefs.[98] Davis persisted even after a Kentucky District Court ordered her to issue the marriage licenses[99] and was jailed for contempt of court.[100] Davis became a popular figure among GOP candidates in the 2016 election primary season and was even honored by the Pope.[101] Other public officials and judges have followed in Davis's footsteps.[102]

Private individuals and businesses have also publicly resisted marriage-equality. In several well-publicized incidents throughout the past few years, private businesses have refused to bake cakes, rent out venues, or provide photography for same-sex weddings.[103] As in *Hobby Lobby*, these businesses typically argue that participating in a same-sex wedding violates their relig-

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[98] *See* Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. Times (Sept. 1, 2015) https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?smid=pl-share [https://perma.cc/NJW9-32FA]; Ed Payne, *Who is Kentucky Clerk Kim Davis?*, CNN (Sept. 4, 2015), http://www.cnn.com/2015/09/04/us/kentucky-clerk-kim-davis/index.html [https://perma.cc/5FDS-9DMQ] ("To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to that certificate, would violate my conscience. It is not a light issue for me. It is a heaven or hell decision.").

[99] *See* Miller v. Davis, 123 F. Supp. 3d 924, 925 (E.D. Ky. 2015). On appeal, the Sixth Circuit refused to extend the stay and held that "[i]t cannot be defensibly argued that the holder of the Rowan County clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." Ermold v. Davis, 855 F.3d 715, 717 (6th Cir. 2017).

[100] *See, e.g.*, Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. Times (Sept. 3, 2016), https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [https://perma.cc/E3GL-V4P6].

[101] Francis X. Clines, *The Pope Sought Out Kim Davis for a Blessing*, N.Y. Times (Sept. 30, 2015), https://takingnote.blogs.nytimes.com/2015/09/30/the-pope-sought-out-kim-davis-for-a-blessing/ [https://perma.cc/W4WP-NATR].

[102] *See, e.g.*, Matt Ökarmus, *Judge Ends Courthouse Weddings after Same-Sex Ruling*, USA Today (Feb. 6, 2015), http://www.usatoday.com/story/news/nation/2015/02/06/ala-judge-ends-courthouse-weddings-after-same-sex-ruling/23018941 [https://perma.cc/NL67-ZVU4]; Jay Reeves, *Some Alabama Judges Not Issuing Any Marriage Licenses*, U.S. News & World Rep. (Oct. 3, 2015), http://www.usnews.com/news/us/articles/2015/10/03/alabama-judges-use-segregation-era-law-to-avoid-gay-marriage [https://perma.cc/B6LT-DVQQ]; Seam Moody, *Group Rallies Behind Whitley Clerk's Decision Not to Grant Same-sex Marriage Licenses*, WKYT (July 8, 2015), http://www.wkyt.com/home/headlines/Group-rallies-behind-Whitley-clerks-decision-not-to-grant-same-sex-marriage-licenses-312653641.html [https://perma.cc/L6UR-MN6U]; Alastair Jamieson, *Kentucky Clerk Casey Davis Ordered to Comply With Law on Gay Marriage*, NBC News (July 10, 2015), http://www.nbcnews.com/news/us-news/kentucky-clerk-casey-davis-ordered-comply-law-gay-marriage-n389851 [https://perma.cc/FK4Q-GARB].

[103] *See, e.g.,* Sarah Larimer, *Colorado Court Sides Against Baker who Cited Religious Beliefs, Refused Same-Sex Marriage Cake Order*, Wash. Post (Aug. 13, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/13/colorado-court-sides-against-baker-who-cited-religious-beliefs-refused-same-sex-couple/?utm_term=.fbf1505d3ab7 [https://perma.cc/XHA2-CQXK]; Bradford Richardson, *Sweet Cakes by Melissa Files Appeal in Oregon Gay Wedding Cake Case*, Wash. Times (Apr. 26, 2016), http://www.washingtontimes.com/news/2016/apr/26/sweet-cakes-melissa-files-appeal-oregon-gay-weddin/ [https://perma.cc/KK8S-2GQ4]; Valerie Richardson, *New York Farm Owners Give Up Legal Fight After Being Fined $13,000 for Refusing to Host Gay Wedding*, Wash. Times (Feb 23, 2016), http://www.washingtontimes.com/news/2016/feb/23/robert-cynthia-giffords-give-legal-fight-over-same/ [https://perma.cc/SC3G-7NVP].

ious faith and makes them accomplices in sin.[104] So far, private businesses have been relatively unsuccessful at resisting state antidiscrimination laws when it comes to marriage rights.[105] However, the Supreme Court recently heard the case of a Denver baker who refused to sell a wedding cake to a same-sex couple in *Masterpiece Cakeshop v. Colorado Civil Rights Commission.*[106] The question before the Court is whether "applying Colorado's public accommodations law to compel [baker] to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment."[107] This is a significant case for the future of marriage equality and LGBT rights.

B. The ACA

Faith-based challenges to the Contraceptives Mandate in the ACA have successfully suspended legal reproductive rights in the Culture Wars.[108] In *Hobby Lobby*, the Supreme Court effectively suspended the Contraceptives Mandate (as applied to the plaintiffs) when it held that compliance with the

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[104] Victoria Childress, owner of an Iowa-based bakery, stated that the decision had "to do with [him] and [his] walk with God and what [he] answer Him for." *Oregon Bakery Owner Aaron Klein Denies Lesbian Couple a Wedding Cake*, HUFF. POST: QUEER VOICES (Feb 4, 2013), http://www.huffingtonpost.com/2013/02/04/aaron-klein-oregon-bakery-owner-lesbian-wedding-cake_n_2615563.html [https://perma.cc/3ULN-XZR8]. Jack Phillips, who also refused to bake a wedding cake for a same-sex couple, stated that he "honors God through his creative work by declining to use his artistic talents to design and create cakes that violate his religious beliefs." Jordan Steffen, *Baker Who Won't Make Gay Wedding Cake Appeals to Colorado Supreme Court*, DENVER POST: BUS. (Oct. 23, 2015), http://www.denverpost.com/2015/10/23/baker-who-wont-make-gay-wedding-cake-appeals-to-colorado-supreme-court/ [https://perma.cc/M3BQ-2K3L].

[105] *See, e.g.*, Elaine Photography, LLC v. Willock, 309 P.3d 53, 62 (N.M. 2013) (holding that the application of Public Accommodations Law to wedding photography company does not violate First Amendment speech protections); Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 280–81 (Colo. App. 2015) (holding that a cake shop owner's refusal to bake a wedding cake for a same-sex couple based on religious beliefs violated Colorado's Anti-Discrimination Act); Gifford v. McCarthy, 137 A.D.3d 30, 37 (N.Y. 2016) (holding that refusal to allow a same-sex couple to host a wedding ceremony at venue violated New York human rights law); State v. Arlene's Flowers, Inc., 389 P.3d 543, 552–53 (Wash. 2017) (holding that flower shop owner's refusal to provide flowers for a same-sex wedding violated the State of Washington anti-discrimination law).

[106] *See generally* Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017) (holding that cake shop owner's refusal to create cake for a same-sex couple violated Colorado's public accommodation law).

[107] *See* Adam Liptak, *Justices to Hear Case on Religious Objections to Same-Sex Marriage*, N.Y. TIMES (June 26, 2017), https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html [https://perma.cc/8TKH-UUWM]; *see also* Robert Barnes, *Supreme Court to Take Case on Baker Who Refused to Sell Wedding Cake to Gay Couple*, WASH. POST (June 26, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-take-case-on-baker-who-refused-to-sell-wedding-cake-to-gay-couple/2017/06/26/0c2f8606-0cde-11e7-9d5a-a83e627dc120_story.html?utm_term=.099705d5dac3 [https://perma.cc/9JQ9-9LXB].

[108] *See* discussion *supra* Part I.

ACA would violate RFRA.[109] In *Zubik*, the challenge to the exemption form was another attempt to suspend the Contraceptives Mandate because if exemption forms in-and-of-themselves violate RFRA, HHS would have a hard time administering the Mandate.[110] As several scholars have observed, these religious exemptions harm the legally recognized rights of third parties.[111] Through the use of religious exemptions, the access of many female employees to reproductive care is limited.[112] President Trump's executive order regarding the ACA effectively suspended the rights embodied in the statute by instructing HHS to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose a fiscal burden on any State . . . ."[113]

The strategy of suspending or limiting existing legal rights (Step II), which relies on rhetoric of enmity, catastrophe, and emergency (Step I), is a key component of conservative law and politics both in the War on Terror

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[109] *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that religious beliefs of owners could exempt closely-held corporation exempt from regulation).

[110] Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (arguing [by petitioners] that the form exempting corporations from the contraceptive mandate would "substantially burden[ ] the exercise of their religion, in violation of [RFRA]").

[111] *See generally* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015) (arguing against allowing religious exemptions in anti-discrimination measures); Douglas Nejaime & Reva Siegel, *Conscience Wars: Complicity Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (arguing that religious exemptions prolong conflict instead of finding solutions); Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (arguing that religious exemptions are unconstitutional); Amy Sepinwall, *Conscience And Complicity*, *supra* note 15, (arguing that religious exemptions impose a substantial burden on third parties); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UKMC L. REV. 749 (2016) (arguing that religious exemptions "are not consistent with our tradition of religious liberty or civil rights protections").

[112] *See generally* MARY ANNE CASE, A PATCHWORK ARRAY OF THEOCRATIC FIEFDOMS? RFRA CLAIMS AGAINST THE ACA'S CONTRACEPTION MANDATE AS EXAMPLES OF THE NEW FEUDALISM, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES (Holly Fernandez Lynch, I. Cohen & Elizabeth Sepper eds., 2017) (discussing a case of a father who opted out of reproductive health coverage for his daughters).

[113] Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017). According to Section 1 of the order, Trump's administration seeks "the prompt repeal of the [ACA] . . . . [P]ending such repeal, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market." *Id.* Since President Trump was elected in 2016, among the first professed tasks of Congress has been to repeal the ACA. *See* Susan Cornwell & David Morgan, *Republicans Lay out Plans for Obamacare Repeal*, REUTERS (Jan 26, 2017), http://www.reuters.com/article/us-usa-congress-republicans-idUSKBN159174 [https://perma.cc/84XF-PM5G]; Kelsey Snell & Mike DeBonis, *Republicans Set Aggressive Agenda on Health Care, Regulations and Tax Reform*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/25/republicans-set-aggressive-agenda-on-health-care-regulations-and-tax-reform/?utm_term=.d1c8d046a749 [https://perma.cc/RAG9-YU3K].

and in the Culture Wars. Suspending or limiting human rights sets the stage for the endgame of conservative politics, in which the designated authority—the President in the War on Terror and the religious or moral dissenter in the Culture Wars—can make decisions *outside* existing legal norms.

III. Claiming Deference to Religious Dissenters

It is well-known that whoever obtains judicial deference on a given legal matter will usually become the actual decider of that dispute.[114] Thus, the third and final step in Faith-Based Emergency Powers framework is the claim that lawmakers and courts must defer to religious dissenters in matters relating to the intersection between liberal rights and religious convictions. In the War on Terror, conservatives have argued that the executive branch is the proper decision-maker in emergencies and that other branches of government and the public should defer to it.[115] In the Culture Wars, conservatives argue for judicial deference to *individual religious dissenters*. In both of these contexts, conservatives argue for legal deference to a decision-maker who can properly respond to the perceived emergency.

As this Part shows, such claims for deference in the Culture Wars have been successful in some areas, and less so in others. Nonetheless, conservatives continue to seek deference to religious dissenters across the board with the explicit goal of placing greater decision-making power in the hands of Christian religious dissenters and lesser decision-making power in the hands of liberal antidiscrimination laws and lawmakers. What follows is an examination of the claim to judicial deference to religious dissenters in two contexts: (1) marriage equality; and (2) the ACA.

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[114] *See* Vermeule, *supra* note 9, at 1096. *See generally* Carl Schmitt, Political Theology (George Schwab ed. and trans., Univ. of Chicago Press Books 2005) (1985) (arguing that in national security emergencies, the President and the executive branch should get full deference from the rest of the political system, and that this is a sign of true sovereignty).

[115] *See generally* David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 Cardozo L. Rev. 2005 (2006) (arguing that states of emergency are inside the legal order and must be governed by the rule of law); David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. Miami L. Rev. 249 (2008) (examining the sacrifice of legal norms in the name of the War on Terror under the Bush Administration). This same claim was made by the state department on February 3, 2017, when a federal court in Washington issued a Temporary Restraining Order on the executive order that instated an Immigration Ban on immigrants from seven predominantly Muslim Countries. *See Homeland Security Suspends Actions Associated with Trump's Travel Ban; 'Standard Policy' Now in Effect*, CNBC (Feb. 3, 2017), http://www.cnbc.com/2017/02/03/seattle-federal-judge-grants-temporary-restraining-order-on-immigration-ban-on-nationwide-basis.html [https://perma.cc/4KF9-VXT9].

A. Marriage Equality

Securing deference to religious dissenters who oppose marriage equality and other LGBT rights has been a priority for conservative politicians and lawmakers.[116] Codifying deference to religious dissenters is goal of FADA and the various state legislation that appeared after *Obergefell*.[117] However, courts have proven to be a difficult barrier for these religious dissenters to overcome. For example, a Kentucky court ruled that under the Kentucky Religious Freedom Act, country clerk Kim Davis was not substantially burdened by issuing marriage licenses because she was not asked "to condone same-sex unions on moral or religious grounds, nor [did] [the state] restrict[ ] her from engaging in a variety of religious activities."[118] The court did not defer to Davis on what constitutes "substantial burden" on religion: it found that "her religious convictions [did not] excuse her from performing the duties that she took an oath to perform . . . ."[119]

Several state courts have likewise declined to defer to private businesses who refused to provide services related to same-sex marriages. When a cake shop in Denver refused to sell a wedding cake to a same-sex couple by claiming that it violated the owner's religious beliefs, a Colorado court held that the bakery must comply with the state's public accommodations law.[120] A Washington court also declined to defer to a florist who violated the state's anti-discrimination law by denying service to a same-sex wedding.[121] A New York court determined that petitioners who owned and operated a farm used as a wedding venue unlawfully discriminated against a

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[116] Legislation has proven to be an oft-used avenue for these attempts. *See, e.g.*, First Amendment Defense Act, H.R. 2802, 114th Cong. (2015); *see also* S. 2, 2015 Gen. Assemb., Reg. Sess. § 51-5.5 (N.C. 2015) (providing state employees who opt out of same-sex marriages to abstain from performing marriages for at least six months.); H.R 1371, 55th Leg., 1st Sess. (Okla. 2015) (exempting companies from participation "in any marriage ceremony, celebration, or other related activity or to provide items or services for such purposes against the person's religious beliefs"); S. 284, 2015–16 Reg. Sess. (Ga. 2016); H.R. 401, 2016 Reg. Sess. (Fla. 2016) (providing immunity to people and religious organizations that refuse to provide medical or other services based on their beliefs; the bill died in subcommittee).

[117] *See* legislation cited *supra* note 116.

[118] Miller v. Davis, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015). On appeal, the Sixth Circuit held that "[i]t cannot be defensibly argued that the holder of the Rowan County clerk's office . . . may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." Ermold v. Davis, 855 F.3d 715, 717 (6th Cir. 2017).

[119] *Id.*

[120] *See generally* Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017) (holding that cake shop owner's refusal to create cake for a same-sex couple violated Colorado's public accommodation law). In this case, Defendants relied on the Free Exercise clause of the First Amendment as well as Article II § 7 of the Colorado Constitution. *See id.* at 288.

[121] *See* State v. Arlene's Flowers, Inc., 389 P.3d 534, 567 (Wash. 2017) (holding that plaintiff's refusal to sell flowers to the couple violates Washington's Law against Discrimination and the Consumer Protection Act).

same-sex couple by denying them services.[122] Finally, a Massachusetts court held that a Catholic school that rescinded an offer of employment to a gay candidate who was married violated the state's employment antidiscrimination laws.[123] In these cases, challengers asked courts to defer to their religious faith when it allegedly conflicted with state anti-discrimination laws, and the courts refused.[124]

The Supreme Court, however, has recently held oral arguments in *Masterpiece Cakeshop*, the case of the Denver baker who refused to sell a wedding cake to a same-sex couple.[125] This case turns on deference to religious dissenters who wish to override state anti-discrimination laws.[126] If the Court offers the kind of deference to religious dissenters that it offered the plaintiffs in *Hobby Lobby,* religious law could trump secular law in matters of discrimination against LGBT individuals in the United States. That is pre-

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[122] *See* Gifford v. McCarthy, 137 A.D.3d 30, 43 (N.Y. 2016) (sustaining $1,500 in compensatory damages to each respondent and sustaining the imposition of a $10,000 fine on petitioners). Here, the court found that the State Division of Human Rights' determination that petitioners illegally discriminated against respondents did not violate petitioners' rights under the Free Exercise Clause or their free speech rights under the Federal and State Constitutions. *Id.* at 40–43. The court justified this decision by determining that the legislation did "not require [petitioners] to participate in the marriage of a same-sex couple," and that the state's substantial interest in eradicating discrimination outweighed the burden on petitioners' right to freely exercise their religion. *Id.* at 40.

[123] Barrett v. Fontbonne Academy, 33 Mass. L. Rptr. 287, *2 (Super. Ct. 2015). Fontbonne Academy defended against the employment discrimination charge by claiming an exemption under the Free Exercise Clause as well as the right to expressive association under the First Amendment. Defendants also cited an expectation that "its employees [would] model its values, including the Catholic Church's opposition to same-sex marriage." *Id.* at *2. The court held that plaintiff's employment as Food Services Director did not sufficiently burden the school's expression. *Id.* at *18. Defendants' Free Exercise Clause defense, which rested on the "ministerial" exception to employment discrimination laws that allow religious organizations additional leeway over their hiring decisions, was also rejected. *Id.* at *19–20.

[124] *See generally, e.g.*, Welch v. Brown, 58 F. Supp. 3d 1079 (E.D. Cal. 2014) (denying California mental health professionals declaratory judgment that a law that prohibits them from providing "conversion therapy" violates their rights under the Free Exercise and Establishment Clauses, reasoning that that petitioners were unlikely to succeed on the merits of their Free Exercise and Establishment challenges).

[125] *See generally* Masterpiece Cakeshop Ltd. v. Colo. Civ. Rights Comm'n, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017) (holding that cake shop owner's refusal to create cake for a same-sex couple violated Colorado's public accommodation law).

[126] At oral argument, Kristen K. Waggoner, on behalf of Masterpiece Cakeshop, Inc., challenged the Colorado Civil Rights Commission's order forcing Masterpiece's baker to decorate cakes that celebrate a view of marriage "in violation of [the baker's] religious convictions." Transcript of Oral Argument at 4, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n (No. 16-111)*, SUP. CT. OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [https://perma.cc/4LES-A6J5] (pending before the Court). Waggoner analogized the effects of the Commission's order to compelled speech. *Id.* at 5. She argued that if the purpose for which the cake is to be made is not consistent with the baker's personal views, then the Commission cannot force the baker to use his own "artistic expression" to create the cake. *Id.* at 6–8. This is because, as Waggoner claimed, "artistic expression doesn't need to include words and symbols to express a message or to be protected speech." *Id.* at 8.

cisely the desired outcome of conservative lawmakers pursuing Faith-Based Emergency Powers.

B. The ACA

Hobby Lobby has rightly been viewed as a turning point in the quest for deference to religious dissenters.[127] RFRA was enacted after the Supreme Court denied the free exercise claims of members of a Native American Church who were dismissed from their jobs and denied unemployment benefits for ingesting peyote at a religious ceremony in violation of Oregon law.[128] Justice Scalia reasoned in his majority opinion that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[129] "To permit this," he wrote, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[130] Congress responded by passing RFRA, which requires strict scrutiny when a neutral law of general applicability "substantially burden[s] a person's exercise of religion . . . ."[131] RFRA's legislative purposes were to "restore" the test that any legislation that infringes on First Amendment Rights must be justified by a compelling state interest[132] and "to guarantee its application in all cases where free exercise of religion is substantially burdened."[133]

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[127] *See* Sepinwall, *Corporate Piety and Impropriety*, *supra* note 31, at 175 (describing *Hobby Lobby*'s expansion of corporate rights as "unprecedented"); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) ("There is an overriding interest, I believe, in keeping the courts 'out of the business of evaluating the relative merits of differing religious claims . . . . The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA.") (citations omitted).

[128] *See* Emp't Div., Dep't. of Human Res. of Ore. v. Smith, 494 U.S. 872, 872 (1990); *see also* Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 9–10 (2015); Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, *supra* note 111, at 469.

[129] *Smith*, 494 U.S. at 878–79.

[130] *Id.* at 879.

[131] 42 U.S.C. § 2000bb(b)(1) (1993).

[132] *See id.* at § 2000bb(b); *see also, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (rejecting the argument that the State's "system of compulsory education is so compelling that the established religious practices of the Amish must give way").

[133] In *City of Boerne v. Flores*, 521 U.S. 507, 533–534 (1997), the Court held RFRA unconstitutional as applied to the states because Congress had overstepped its Section 5 authority. Consequently, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), enacted under Congress's Commerce and Spending Clause powers, which imposes the same general test as RFRA but on a more limited category of governmental actions. *See* 42 U.S.C. § 2000cc(a). Since then, many states have enacted state versions of RFRA. *See, e.g.*, R.I. GEN. LAWS 1956, §42-80.1-3 (1993); FLA. STAT. ANN. § 761.03 (West 1998); IDAHO CODE ANN. § 73-402 (West 2000); CONN. GEN. STAT. § 52-571b (2001). Other states have tried but failed to enact their own RFRA legislation. *See, e.g.*, Montana Religious Freedom Restoration Act, H.R. 615, 64th Legis., 2015 Sess. (Mont. 2015); Nevada Protection of Religious Freedom Act, S. 272, 2015

In RFRA's first two decades, courts deferred heavily to the government regarding what constitutes a "substantial burden" to the free exercise of religion. Since the government was generally against religious exemptions, case law leaned against deference to private actors. For example, in 1994, anti-abortionists challenged the Freedom of Access to Clinic Entrances Act (FACE), which made it a federal crime to commit violence against or obstruct the operation of abortion clinics, in the federal courts.[134] The Fourth Circuit held that even if FACE substantially burdened plaintiffs' religious exercise, it did not violate RFRA because it "serves sufficiently compelling government interests by the least restrictive means available."[135] In a different case, the Fourth Circuit also denied a church's RFRA-based claim that children receiving vocational training were not entitled to the protections of the Fair Labor Standards Act (FLSA) because the church members "hold a religious belief that their children should receive meaningful vocational training."[136] In those years, federal courts applying RFRA also regularly dismissed prisoners' challenges to prison policies,[137] reasoning that (1) a policy did not "substantially burden" religious faith or was not a "central tenet" of the prisoner's faith,[138] or (2) the governmental interest was compelling or implemented through least restrictive means.[139] For instance, when prison

Legis., 78th Reg. Sess. (Nev. 2015); North Carolina Religious Restoration Act, S. 550, 2015 Gen. Assemb., 2015 Sess. (N.C. 2015).

[134] *See generally* Am. Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995) (holding that: (1) Act is within power of Congress; (2) Act does not violate First Amendment's free speech clause; (3) Act is neither overbroad nor vague; (4) Act's liquidated damages provision withstands First Amendment challenge; and (5) Act does not violate the First Amendment's free exercise clause or RFRA).

[135] *Id.* at 656 ("After all, the Act protects public health by promoting unobstructed access to reproductive health facilities. It also protects public safety by proscribing all violent, threatening or obstructive conduct specifically aimed at patients and providers of reproductive health services.").

[136] Reich v. Shiloh True Light Church of Christ, No. 95-2765, 1996 WL 228802, at *1 (4th Cir. May 7, 1996).

[137] *See generally, e.g.*, Diaz v. Collins, 114 F.3d 69 (5th Cir. 1997) (dismissing Native American inmate's challenge that prison restrictions placed on his possession of sacred religious items and length of hair violated RFRA); Johnson v. Baker, No. 93-01016, 1995 WL 570913 (6th Cir. Sept. 27, 1995) (dismissing prisoner's assertion that the state violated RFRA by denying him the time he requested for Nation of Islam Muslims to meet). In some exceptional cases, prisoners prevailed in their RFRA challenges. *See generally, e.g.*, Garner v. Kennedy, 713 F.3d 237 (5th Cir. 2013) (holding in favor of a Muslim prisoner's challenge against a policy prohibiting prisoners from wearing beards for religious reasons because it was not the "least restrictive means" to accomplish its governmental interest); Washington v. Klem, 497 F.3d 272 (3d Cir. 2007) (holding in favor of prisoner, the founder and practitioner of the Children of the Sun Church, a pan-Afrikan religion, who claimed that a policy limiting inmates to ten books in their cell violated RFRA because his religion required reading four different Afro-centric books daily).

[138] *See, e.g.*, Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 492 (6th Cir. 1995) (dismissing prisoner's challenge that prison work policies violated his First Amendment and RFRA rights when they interfered with his ability to attend religious services).

[139] *See, e.g.*, McRae v. Johnson, 261 F. App'x 554, 560 (4th Cir. 2008) (dismissing a challenge from Muslims and Rastafarians who argued that the prison's hair-length and facial hair policies burdened their free exercise of religion).

officials discarded the national identity card of a prisoner who was a member of the Moorish Science Temple of America, the Sixth Circuit found that prison officials did not impose a substantial burden on the free exercise of plaintiff's religion.[140]

Early RFRA challenges also failed in several other contexts. In 1995, the Fourth Circuit rejected a claim by parents that a county's refusal to provide a cued speech translator to their child in a private religious school imposed a substantial burden on their free exercise of religion.[141] In 1999, the Third Circuit rejected a devout Quaker's claim that paying taxes to fund the military violates her religious beliefs.[142] The Second Circuit also dismissed a Quaker plaintiff's challenge to the IRS's penalty for withholding taxes proportional to the spending of the Department of Defense,[143] and a secularist challenge to the "In God We Trust" language on dollar bills.[144] Likewise, the

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[140] Miller-Bey v. Schultz, No. 94-1583, 1996 WL 67941, at *4 (6th Cir. Feb. 15, 1996) ("Although members of the Moorish Science Temple of America are instructed to keep their nationality cards with them at all times, members who lose their cards are not prohibited from praying, reading the Koran, or attending religious services. In fact, membership in the Moorish Science Temple of America is not in any way dependent on the possession of a nationality card, and members who lose their cards may order replacement cards."); *cf.* Adkins v. Kaspar, 393 F.3d 559, 572 (5th Cir. 2004) (holding that no substantial burden was established when prisoner, a member of the Yahweh Evangelical Assembly, alleged that prison impeded his right to observe and assemble for worship on the Sabbath and to observe the holy rest day); Flick v. Leonard, No. 95-1559, 1996 WL 153914, at *1 (6th Cir. Apr. 2, 1996) (dismissing a prisoner's allegation that prison officials placed a substantial burden on the exercise of his religion by requiring him to declare his religious preference when applying for a prison meal program that accommodates religious dietary restrictions). Even when courts found that an inmate's religious faith was substantially burdened by a prison policy, they often upheld the government interest as compelling. *See, e.g.*, *Diaz*, 114 F.3d at 71 (holding that length of hair restrictions substantially burdened the religious practice of Native American inmate, but long hair constitutes a prison security risk such that the state has a compelling interest in maintaining its policy); Besh v. Campbell, No. 96-5781, 1997 WL 420501, at *1–2 (6th Cir. July 8, 1997) (holding that refusing to let Native American inmates possess prayer blankets, sacred herbs, pray more than once a week, and participate in sweat lodges constitute a substantial burden to free exercise of religion but the state has compelling interest in prison security, uniformity of prison procedures, and conservation of scarce prison resources).

[141] *See* Goodall v. Stafford Cty. Sch., 60 F.3d 168, 170 (4th Cir. 1995) ("The only burden claimed by the Goodalls is a financial one, and the sole question at issue is whether the County is constitutionally or statutorily required to provide the cued speech services at Matthew's Christian school, relieving the Goodalls of their financial burden . . . we find that the economic burden borne by the Goodalls does not substantially impinge on their free exercise rights under RFRA.").

[142] *See* Adams v. Commissioner, 170 F.3d 173, 182 (3d Cir. 1999) (holding that the tax system used the least restrictive means to achieve its purposes).

[143] *See* Browne v. United States, 176 F.3d 25, 26 (2d Cir. 1999) ("Voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system."); *see also* Jenkins v. Commissioner, 483 F.3d 90, 93 (2d Cir. 2007) (dismissing the RFRA challenge of a taxpayer who withheld taxes that would fund military operations to which he religiously opposed based on "compelling governmental interest").

[144] *See* Newdow v. Peterson, 753 F.3d 105, 109 (2d Cir. 2014) (holding that plaintiffs did not establish a "substantial burden" because "the carrying of currency, which is

Third Circuit rejected the claim of Jewish daughters of a Rabbi who refused to testify against their father in a criminal trial.[145] Free exercise claims regularly failed in RFRA's first two decades mostly because courts refused to defer to religious plaintiffs regarding what constitutes "substantial burden" of religious practice.

This changed after *Hobby Lobby* and *Wheaton College*. As Amy Sepinwall has persuasively argued, both cases began "an era of unstinting deference to religious belief, often based on fantastical conceptions of complicity exercised at the expense of third parties who incur a burden in light of an accommodation obtained by the religious adherent."[146] Now, in the post-*Hobby Lobby* era, religious law has the potential of becoming the supreme law of the land.[147]

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fungible and not publicly displayed, does not implicate concerns that its bearer will be forced to proclaim a viewpoint contrary to his own").

[145] The daughters claimed that testifying would violate the biblical commandment to "honor thy father and mother." *In re* The Grand Jury Empaneling of the Special Grand Jury, 171 F.3d 826, 836–37 (3d Cir. 1999) (holding that the government had a compelling interest in investigating and punishing crime, and that the least restrictive means were used because the daughters were uniquely situated to provide the sought information).

[146] *See* Sepinwall, *Conscience and Complicity*, *supra* note 15, at 1901; *see generally* Wheaton College v. Burwell, 134 S. Ct. 2806 (2014) (holding that Wheaton was not required to file the form excusing it from the contraceptive mandate as long as it notified the Secretary of HHS in writing of its exemption request).

[147] *See id.* at 1902. In reality, federal courts after *Hobby Lobby* have split on the issue of deference. Several courts refused to defer to plaintiffs. *See, e.g.*, *Wheaton College*, 791 F.3d at 800 ("Wheaton further argues that requiring it to ask for an exemption and to provide the government with the name of its insurer violates its First Amendment rights by compelling it to say something that it does not want to say. That would be the equivalent of entitling a tax protester to refuse on First Amendment grounds to fill out a 1099 form and mail it to the Internal Revenue Service. Wheaton remains free to voice its opposition to the use of emergency contraceptives."); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir. 2015) ("Although the plaintiffs have identified several acts that offend their religious beliefs, the acts they are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise."); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1173 (10th Cir. 2015) ("Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these de minimis administrative tasks do not substantially burden religious exercise for the purposes of RFRA."); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 220 (2d Cir. 2015) ("[V]iewed objectively, completing a form stating that one has a religious objection is not a substantial burden . . . . As other courts have concluded, a religious objector's submission of the form or letter does not, as a legal matter, trigger or facilitate the provision of contraceptive coverage."); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 807 F.3d 738, 741 (6th Cir. 2015) ("We join our sister circuits in holding (1) that the accommodation provision does not violate RFRA and (2) that nothing in *Hobby Lobby* changes this conclusion."); Univ. of Notre Dame v. Burwell, 786 F.3d 606, 614 (7th Cir. 2015) ("The delivery of a copy of the form to [the insurance issuer] reminds it of an obligation that the law, not the university, imposes on it—the obligation to pick up the ball if Notre Dame decides, as is its right, to drop it."). The Eighth Circuit, however, reached the opposite conclusion on the question of deference. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., 801 F.3d 927,

IV. Resisting Faith-Based Emergency Powers

Faith-Based Emergency Powers constitute a serious threat to the rule of law because they enable individual decision-makers to violate legally recognized rights whenever they are (or claimed to be) inconsistent with religious values or moral faith. This Article offers two principal ways to resist this threat. First, lawmakers, the media, and the public must critically assess the reality of the claimed crisis or emergency. Specifically, the idea that Christianity is under attack should be subject to close and critical scrutiny. Second, lawmakers should not defer to religious dissenters regarding what constitutes a "substantial burden" on religious practice because such deference would, as Justice Scalia warned, "in effect . . . permit every citizen to become a law unto himself."[148]

A. Contesting the Reality of Crisis

Perhaps the most important step in resisting Faith-Based Emergency Powers involves rejecting the allegation that a crisis or an emergency exists. As Part II demonstrates, in both the War on Terror and the Culture Wars, the success of conservative arguments depends on declaring wars and states of emergency. In the War on Terror, the alleged crisis involves national security; in the Culture Wars, Christianity and Christians are allegedly under attack. In the War on Terror, the government typically advances factual allegations of a national-security emergency to support robust security measures such as wiretapping, ongoing detention, or immigration bans.[149] In the Culture Wars, individuals, businesses, and public officials typically advance factual allegations of a religious emergency to support exemptions from established laws. The desired effects are similar: an emergency calls for exceptionalism.

The role of the Judiciary in questioning assessments of the political branches regarding the existence of an emergency is well-established[150] and

941 (8th Cir. 2015) ("[I]f one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear.").

[148] Emp't Div., Dep't. of Human Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

[149] *See Legalism and Decisionism*, *supra* note 7, at 704–06.

[150] *See, e.g.*, Chastleton Corp. v. Sinclair, 264 U.S. 543, 546 (1924) (finding that the emergency that justified interference with the ordinarily existing private rights in 1919 had come to an end in 1922 and were no longer consistent with the Fifth Amendment); Korematsu v. United States, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting) ("No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose."); Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 658 (9th Cir. 2008), *rev'd*, 555 U.S. 7 (2008) (affirming District Court opinion that the Navy's argument that emergency circumstances prevented normal compliance with National Environmental Policy Act of 1969 raised a serious question of

was reaffirmed in Bush-era War on Terror litigation.[151] In situations involving national security, the Government, usually the Executive, typically justifies taking measures that impinge on the rights of citizens or non-citizens by characterizing a given situation as a crisis or an emergency.[152] When human rights are at stake, this judicial responsibility becomes of paramount importance.

The litigation that has stemmed from President Donald Trump's Muslim Ban is an excellent illustration of popular and judicial resistance to the existence of an alleged national-security emergency.[153] Citing the attacks of September 11, 2001, the Executive Order declared that "the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles"[154] and that "[d]eteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States."[155] Two States immediately challenged the Ban on constitutional and statutory grounds, and a federal district court temporarily enjoined its enforcement.[156] The Ninth Circuit rejected the government's position that *an actual emergency exits*, emphasizing that "[t]he Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States."[157] The three-judge panel on the Ninth Circuit took the first step proposed in this Article: challenging the factual existence of an emergency.

This same type of critical analysis of emergency claims is called for in today's Culture Wars. The reproductive rights of women and sexual minorities are *not*—and are wrongly portrayed as—an attack on Christians or Christianity. Case-by-case, lawmakers, jurists, the media, and the public must challenge framing reproductive and LGBT rights as an emergency or a war on religion. From Pat Buchanan's 1992 declaration of "a religious war"

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whether that interpretation was lawful, and questioned whether there was a true emergency).

[151] *See e.g.*, Boumediene v. Bush, 553 U.S. 723, 733 (2008) (holding that the Military Commissions Act of 2006 was an unconstitutional suspension of *habeas corpus*); Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that due process required that United States citizen being held as enemy combatant be given meaningful opportunity to contest factual basis for his detention); Hamdan v. Rumsfeld, 548 U.S. 557, 576 (2006) (holding that Detainee Treatment Act did not deprive Supreme Court of jurisdiction).

[152] *See Boumediene*, 553 U.S. at 733.

[153] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

[154] *Id.*

[155] *Id.*

[156] *See* Washington v. Trump, No. C17-0141-JLR, 2017 WL 462040, at *2–3 (W.D. Wash. Feb. 3, 2017).

[157] Washington v. Trump, 847 F.3d 1151, 1168–69 (9th Cir. 2017) ("By contrast, the States have offered ample evidence that if the Executive Order were reinstated even temporarily, it would substantially injure the States and multiple 'other parties interested in the proceeding.").

over the "soul of America"[158] to Justice Scalia's 1996 endorsement of this theme of war through the use of the term "*Kulturkampf*,"[159] conservatives have successfully depicted the ongoing quest for equal rights for women and minorities in the United States as a war against Christians. This violent rhetoric, as Part II demonstrates, has continued to be endorsed in recent responses to marriage equality rights and challenges to the contraceptives mandate.[160] Marriage equality in particular has seen state legislatures declaring states of emergency[161] and politicians invoking "Nazi Germany,"[162] "liberal fascism,"[163] and "jihad" in regards to Christians who now face the reality of same-sex marriage.[164]

Rejection of the rhetoric of war and emergency takes place across legal, political and public debates. This is what Justice Sotomayor offered in *Wheaton College*[165] when she argued that "[e]ven if one accepts Wheaton's view that the self-certification procedure violates RFRA,"[166] the Court's *emergency injunction* should be "rare" and "extreme."[167] Similarly, while testifying in Congressional deliberation regarding FADA, Katherine Franke emphasized that religious freedoms in the United States *are not under attack*[168] and that, instead, what conservatives really seek in this alleged crisis is an unconstitutional establishment of Christianity as the main religion in the United States.[169] Sotomayor and Franke embody one of this Article's proposed courses of action: contesting the reality of a crisis or emergency to Christianity in the Culture Wars.[170]

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[158] *See* Buchanan, *supra* note 38 ("In that struggle for the soul of America, Clinton & Clinton are on the other side, and George Bush is on our side. And so, we have to come home, and stand beside him."); *see also* HARTMAN, *supra* note 2, at 1.

[159] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

[160] *See* discussion *supra* Part II.A.

[161] *See, e.g.*, H.R. 1632, 119th Gen. Assemb., 1st Reg. Sess. § 2 (Ind. 2015); S. 568, 119th Gen. Assemb., 1st Reg. Sess. § 2 (Ind. 2015). H.R. 1220, Legis. Assemb., 19th Sess. § 5 (S.D. 2015). S. 975, 90th Gen. Assemb., Reg Sess. § 2 (Ark. 2015).

[162] *See, e.g.*, David Badash, *Head of Christian Group Warns Same-Sex Marriage Just Like 'Unthinkable' Atrocities of Nazi Germany*, THE NEW CIVIL RIGHTS MOVEMENT (May 31, 2016), http://www.thenewcivilrightsmovement.com/davidbadash/head_of_christian_group_warns_same_sex_marriage_just_like_unthinkable_atrocities_of_nazi_germany [https://perma.cc/XY9N-VDUY].

[163] *See, e.g.*, Scott Eric Kaufman, *Ted Cruz's Repugnant Anti-gay Screed: Marriage Equality is "Liberal Fascism" against Christians*, SLATE (Apr. 27, 2015), http://www.salon.com/2015/04/27/ted_cruzs_repugnant_anti_gay_screed_marriage_equality_is_liberal_fascism_against_christians/ [https://perma.cc/X3TE-9HT9].

[164] *See, e.g.*, John Wright, *Ted Cruz Warns Of Gay-Rights 'Jihad,' Continues Holy War Against Same-Sex Marriage*, TOWLEROAD (Apr. 10, 2015), http://www.towleroad.com/2015/04/ted-cruz-says-gays-are-waging-jihad-on-religious-freedom-but-hes-the-real-suicide-bomber/ [https://perma.cc/N4WK-7KHD].

[165] *See* Wheaton College v. Burwell, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting).

[166] *Id.* at 2808.

[167] *See id.*

[168] *See Statement of Katherine Franke, supra* note 20, at 43.

[169] *See id.* at 44–45, 59–60.

[170] The media is also an important institution that can resist the rhetoric of crisis to Christianity. *See, e.g.*, *The Daily Show with Jon Stewart: World War C - Happy Holidays*

The goal of the quest for equal rights, from reproductive autonomy to marriage equality, was never to wage war on Christianity. Two people of the same sex wishing to marry and spend their lives together and a woman's reproductive autonomy are not acts of war and hostility. Promisingly, many religious denominations have accepted that these, and many others, are acts of love, not hate.[171] While conservatives have been successful at invoking a Christian crisis, it is critical that challengers emphasize the purpose and intent of antidiscrimination legislation, which is not religious attacks but greater human freedom.

B. Refusing Deference to Religious Dissenters

In both the War on Terror and in the Culture Wars, the end game of emergency powers rationales has been to promote deference to a decision-maker who represents the conservative position. Specifically, in both wars, conservatives have promoted decision-makers who would restore the lost power of an allegedly wounded entity: the President in the War on Terror and religious dissenters in the Culture Wars.[172]

In RFRA and RFRA-like challenges to antidiscrimination laws, courts should insist that "substantial burden" is a legal question for them to decide and not a factual question for the religious dissenter. Similarly, lawmakers should resist the conservative claim for deference to religious dissenters on

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(Comedy Central television broadcast Dec. 3, 2013), http://www.cc.com/video-clips/sgi6nx/the-daily-show-with-jon-stewart-world-war-c--happy-holidays [https://perma.cc/M55C-MEZX] ("The sense of persecution is always at its worst right around this time of the year . . . the war on Christmas . . . who will save Christmas?"). Here, Stewart responds to conservative figures who regularly allege that Christmas is under attack. *See, e.g.*, Petula Dvorak, *The Phony 'War on Christmas' is Back, Fueled by Those Alleged Jesus Haters at Starbucks*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/local/the-phony-war-on-christmas-is-back-fueled-by-those-alleged-jesus-haters-at-starbucks/2015/11/09/ed8471de-86f7-11e5-9a07-453018f9a0ec_story.html?utm_term=.89915a956f17 [https://perma.cc/3XCD-Y834]; Liam Stack, *How the 'War on Christmas' Controversy Was Created*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/us/war-on-christmas-controversy.html?_r=0 [https://perma.cc/T3TM-6E9U]; Dan Cassino, *How Fox News Created the War on Christmas*, HARV. BUS. REV. (Dec. 9, 2016), https://hbr.org/2016/12/how-fox-news-created-the-war-on-christmas [https://perma.cc/AY35-ZYLN].

[171] *See, e.g.*, *Conservative Jews Approve Gay Wedding Guidelines,* FOX NEWS (June 1, 2012) http://www.foxnews.com/us/2012/06/01/conservative-jews-approve-gay-wedding-guidelines.html [https://perma.cc/XD9H-YC44]; *Dalai Lama Supports Gay Marriage*, THE TELEGRAPH (Mar. 7, 2014) https://www.telegraph.co.uk/news/worldnews/asia/tibet/10682492/Dalai-Lama-supports-gay-marriage.html [https://perma.cc/3YNU-KXLX] ("If two people–a couple–really feel that way is more practical, more sort of satisfaction, both sides fully agree, then OK."); *Lesbian, Gay, Bisexual, Transgender, and Queer Justice*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/lgbtq [https://perma.cc/R9LP-T4K9] ("As Unitarian Universalists, we not only open our doors to people of all sexual orientations and gender identities, we value diversity of sexuality and gender and see it as a spiritual gift. We create inclusive religious communities and work for LGBTQ justice and equity as a core part of who we are.").

[172] Political scientist Corey Robin describes conservatism as a "felt experience of having power, seeing it threatened, and trying to win it back." ROBIN, *supra* note 2, at 4.

what constitutes a "substantial burden." Just as the President cannot simply claim an immigration law crisis without convincing federal courts that an emergency indeed exists,[173] individual dissenters should not be able to assert that legally established rights substantially burden their religious exercise without convincing a court that it truly does.

The main goal of Faith-Based Emergency Powers today is to continue to carve out exemptions for religious and moral dissenters from legally recognized marriage and reproductive rights. This involves seeking legislative and judicial deference to individual religious dissenters who seek to discriminate against women and sexual minorities.[174] Lawmakers and the public must refuse to grant such deference. This is necessary if secular law—not religious law—is to remain sovereign in the United States.

Conclusion

In the twenty-first century, we are allegedly in the midst of at least two wars: a War on Terror and the Culture Wars. In both, conservatives have promoted a rhetoric of crisis and emergency to support a position that calls for limiting or suspending the human rights of those on the "other side." This strategy is not new. Since at least the 1930s, conservative jurists in Europe and in the United States had theorized that crisis-based exceptionalism, when successfully invoked, is the marker of true sovereignty.[175] In other words, they have insisted that the ability to suspend human rights, even temporarily, is a sign of true political power. Thus, since September 11, 2011 in the War on Terror, conservatives have attempted to place that political power in the hands of the President and the executive branch. In today's Culture Wars, they have attempted to place it in the hands of religious and moral dissenters. In both contexts, the consequences can be grave for those whose civil rights are stripped away.

The War on Terror and the Culture Wars both involve complicated and often painful ethical, moral, and legal dilemmas. A lot is at stake. In the War on Terror, the value of national security may come into direct tension with the value of human rights such as freedom, privacy, and Due Process. In the Culture Wars, religious or moral faith, often authentic and deeply felt by individuals or groups, may come into tension with human rights of sexual minorities and women such as the right to marry and reproductive freedom. In both contexts, there are many honest and decent people on both sides of

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[173] *See generally* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

[174] *See, e.g.*, cases cited *supra* note 105.

[175] *See generally, e.g.*, Schmitt, *supra* note 114 (arguing that in national security emergencies, the president and the executive branch should get full deference from the rest of the political system, and that this is a sign of true sovereignty); Vermeule, *supra* note 9 (arguing that legislatures, the public, and especially courts must defer to the President and the executive branch in matters involving national security).

the conservative/liberal divide who simply wish to thrive within the state with freedom and dignity.

This Article does not seek to belittle the concerns of conservatives in the War on Terror or in the Cultures Wars. Rather, it is a critique of one conservative *strategy* that strips decision-making power in some of the hardest dilemmas that society encounters today from where that power belongs: the courts. I have elsewhere called this conservative strategy "Decisionism,"[176] which essentially refers to the concept that whoever gets to "decide" what human rights mean and when they can be suspended is the real sovereign in nation-states.[177] A true commitment to the rule of law involves faith that the Constitution and its designated interpreters—the courts—are the ultimate decision-makers in the American legal system. It is for them to decide how to reconcile those hard questions of conflicting values in a pluralistic society. To deprive courts from that decision-making responsibility would "in effect . . . permit every citizen to become a law unto himself."[178]

[176] *See Legalism and Decisionism*, *supra* note 7; *Legal Holes*, *supra* note 7.

[177] *See* articles cited *supra* note 176.

[178] Emp't Div., Dep't. of Human Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).