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Faith-Based Emergency Powers

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FAITH-BASED EMERGENCY POWERS

NOA BEN-ASHER*

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,” 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. In the Supreme Court, from Griswold (1965) and Boutilier (1967) to Hobby Lobby (2014) and Obergefell (2015), liberals and conservatives have debated the meaning of gender, reproduction, and sexuality under the law. 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. Conservatives argued that legal rules should govern individual morality (often through criminal prohibition), and liberals argued that

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they should not. 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. This Article calls this relatively new trend in the Culture Wars, “Faith-Based Emergency Powers.”

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. 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. Consequently, conservatives have argued that human rights ought to be suspended or abrogated to some extent in real or perceived national security emergencies. 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.

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 Lift 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”).


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. 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.” 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.” Many others have objected. They have elaborated on how religious accommodations may harm third parties, create an alternative legal order, and become limitless.

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:


Laycock, supra note 12, at 879.


Justice Ginsburg’s dissent in Hobby Lobby captures these three concerns. See Burwell v. Hobby Lobby Stores, Inc., 133 S. Ct. 2751, 2787–86 (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—involves 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, 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.” If passed, FADA will legally condone actions against same-sex marriages. 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.  

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-President 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/SPP8-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. 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. In Oklahoma as well, similar legislation was introduced in 2015 but failed to pass. In 2016, the First Amendment Defense Act of Georgia, which mirrors the federal versions, was referred to a subcommittee. 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. In order to promote gender equality, 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. This measure has come to be
known as the “Contraceptives Mandate.” 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”). 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.” Further legal challenges followed, 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,” and “consider issuing amended regulations . . . to address conscience-based objections to the preventive-care mandate.” 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 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).


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.” 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.” Scholars and policymakers who have advocated for robust executive powers in the War on Terror have repeatedly emphasized that America is under attack.

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-

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.”).


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.
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. 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 legislation44 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

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, "[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." 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. at 636 (Scalia, J., dissenting).

46 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. 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.” 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.” 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.” 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.” Mike Huckabee also observed that “Christian convictions are under attack as never before . . . in the history of this great republic . . . .

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.”).
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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.

55 Id. (citing Michael Brown, an author and radio host described as “a scholar who writes on the ‘gay’-rights movement”).
B. The ACA

Measures and rhetoric of emergency also appeared in challenges to the Contraceptives Mandate of the ACA. 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). An emergency injunction stops a party from continuing to perform an action before a judge has issued an opinion on the dispute. Justice Sotomayor’s sharp dissent criticized the injunction, stressing that “Wheaton’s application comes nowhere near the high bar necessary to warrant an emergency injunction from this Court.” 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.’” Plaintiffs and supportive parties nonetheless relied on ideas of crisis and emergency in briefs submitted in Zubik v. Burwell. 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,” 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.” 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.


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

69 See id. at 27 (citation omitted).
religious dissenters.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{74} The Ban’s fate is still in the hand of federal courts, but the arguments made by the govern-

\textsuperscript{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.”).

\textsuperscript{71} See Legalism and Decisionism, supra note 7, at 731–33.

\textsuperscript{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.


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.
78 See discussion supra Part I.
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.
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.” 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. 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.

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.” Major Indiana employers worried that the law would “encourage discrimination and hurt Indiana’s reputation as a welcoming state.” 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;钉 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.
prohibit discrimination based on sexual orientation or gender identity. Similar Arkansas legislation was approved but the governor urged lawmakers to repeal it and pass a statute that mirrors the federal RFRA. Virginia, North Dakota, and Michigan 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. They can decline a referral for foster-care management or adoption services without fear of an adverse legal action. 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, a same-sex couple applied for a marriage license in Kentucky. The county clerk, Kim Davis, refused to grant the license, claiming that it...
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-


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).


ious faith and makes them accomplices in sin.\textsuperscript{104} So far, private businesses have been relatively unsuccessful at resisting state antidiscrimination laws when it comes to marriage rights.\textsuperscript{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 \textit{Masterpiece Cakeshop v. Colorado Civil Rights Commission}.\textsuperscript{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.”\textsuperscript{107} This is a significant case for the future of marriage equality and LGBT rights.

\textbf{B. The ACA}

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


\textsuperscript{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).


\textsuperscript{108} See discussion supra Part I.
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ACA would violate RFRA. 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. As several scholars have observed, these religious exemptions harm the legally recognized rights of third parties. Through the use of religious exemptions, the access of many female employees to reproductive care is limited. 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 . . . .”

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

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]”).
112 See generally Mary Anne Case, A Patchwork Array of Theocratic Freedoms? 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=.d1ce8d046a749 [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. 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. 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).

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.\footnote{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).} Codifying deference to religious dissenters is goal of FADA and the various state legislation that appeared after Obergefell.\footnote{See legislation cited supra note 116.} 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.”\footnote{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).

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 . . . .”\footnote{Id.} 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.\footnote{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.} 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.\footnote{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).} A New York court determined that petitioners who owned and operated a farm used as a wedding venue unlawfully discriminated against a
same-sex couple by denying them services. 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. 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.

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. This case turns on deference to religious dissenters who wish to override state anti-discrimination laws. 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-

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).


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.
ciscely 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.\footnote{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).} 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.\footnote{Smith, 494 U.S. at 878–79.} 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.”\footnote{Id. at 879.} “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.”\footnote{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”).} 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 . . . .”\footnote{42 U.S.C. § 2000bb(b)(1) (1993).} 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\footnote{See id. at § 2000bb(b); see also, 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} and “to guarantee its application in all cases where free exercise of religion is substantially burdened.”\footnote{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, §42-80-3 (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
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

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. 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.” Now, in the post-*Hobby Lobby* era, religious law has the potential of becoming the supreme law of the land.

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.”).
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.”

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. 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 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.”).


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. 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. 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. 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” 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.” Two States immediately challenged the Ban on constitutional and statutory grounds, and a federal district court temporarily enjoined its enforcement. 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.” 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” whether that interpretation was lawful, and questioned whether there was a true emergency).


See Boumediene, 553 U.S. at 733.


Id.

Id.


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”\textsuperscript{158} to Justice Scalia’s 1996 endorsement of this theme of war through the use of the term “Kulturkampf.”\textsuperscript{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.\textsuperscript{160} Marriage equality in particular has seen state legislatures declaring states of emergency\textsuperscript{161} and politicians invoking “Nazi Germany,”\textsuperscript{162} “liberal fascism,”\textsuperscript{163} and “jihad” in regards to Christians who now face the reality of same-sex marriage.\textsuperscript{164}

Rejection of the rhetoric of war and emergency takes place across legal, political and public debates. This is what Justice Sotomayor offered in \textit{Wheaton College}\textsuperscript{165} when she argued that “[e]ven if one accepts Wheaton’s view that the self-certification procedure violates RFRA,”\textsuperscript{166} the Court’s emergency injunction should be “rare” and “extreme.”\textsuperscript{167} Similarly, while testifying in Congressional deliberation regarding FADA, Katherine Franke emphasized that religious freedoms in the United States are not under attack\textsuperscript{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.\textsuperscript{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.\textsuperscript{170}

\textsuperscript{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.


\textsuperscript{160} See discussion supra Part II.A.


\textsuperscript{166} Id. at 2808.

\textsuperscript{167} See id.

\textsuperscript{168} See Statement of Katherine Franke, supra note 20, at 43.

\textsuperscript{169} See id. at 44-45, 59-60.

\textsuperscript{170} The media is also an important institution that can resist the rhetoric of crisis to Christianity. See, e.g., \textit{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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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, 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. 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. 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 the line.

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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.