

TABLE OF CONTENTS

I. About the Project	3
II. List of Interviews	3
III. Expert Opinions	4
1. Defining and Protecting Conscience.....	4
2. James Madison’s Intentions	5
3. Non-Religious Moral Claims	6
4. Religion’s Special Consideration.....	8
5. Assessing Sincerity.....	9
6. Ameliorating the Expansion of Civil Marriage.....	10
7. Undermining Equality.....	11
8. Convenience and Hardship.....	12
9. Competing Conscience Claims.....	13
10. The Same-Sex Marriage Debate	15
11. Evaluating Recent Legislation’s Effects.....	16
12. Employees of the State.....	16
IV. About the Students	18

About the Berkley Center for Religion, Peace & World Affairs

The Berkley Center for Religion, Peace, and World Affairs at Georgetown University, created within the Office of the President in 2006, is dedicated to the interdisciplinary study of religion, ethics, and public life. Through research, teaching, and service, the Center explores global challenges of democracy and human rights; economic and social development; international diplomacy; and inter-religious understanding. Two premises guide the Center’s work: that a deep examination of faith and values is critical to address these challenges, and that the open engagement of religious and cultural traditions with one another can promote peace.

About the Doyle Program

The Doyle Engaging Difference Program is a campus-wide collaboration between the Berkley Center for Religion, Peace, and World Affairs, the Center for New Designs in Learning and Scholarship (CNDLS) and Georgetown College, designed to deepen the university’s own commitment to tolerance and diversity and enhance global awareness of the challenges and opportunities of an era of increasing interconnectedness. The Doyle Program is made possible by a generous gift from alumnus and Board of Directors member, William J. Doyle (C’72).

About the Doyle Seminars

The Doyle Seminars support students pursuing research around issues of difference at the intersection of religion, culture, society, and politics. Students enrolled in the seminars engage in enhanced research and writing projects guided by faculty, discuss their research with guest experts visiting the classes, and produce a report documenting their research projects.

Acknowledgements

We are deeply appreciative of the time and expertise of the legal scholars and advocates who offered thoughtful and engaged responses to our questions. We thank them for their enthusiasm to participate in our research project and we learned from their expertise. This report would not have been possible without the support of the Doyle Engaging Difference Program and the Berkley Center faculty and staff, and we consequently thank those responsible for supporting our study and research.

About the Project

Should a health care professional be able to refuse to deliver services or medicines they deem to be immoral, such as abortion or birth control pills? Should laws permitting same-sex unions include accommodations for businesses and government officials to be able to refuse to participate in the union? Often labeled “rights of conscience,” these protections allow persons with moral and religious objections to particular policies to exempt themselves from participation. Conscience rights are an important frontier in many debates about the free exercise of religion and the scope of legal regulation about important social policies and practices.

This report was produced by undergraduate students in a Georgetown University class examining the theoretical arguments about the role of conscience in recent political theory, moral theory, theological ethics, and legal theory. The class explored many legal cases and proposed legislative schemes involving issues such as conscientious objector status, medical services (abortion, pharmaceutical sales, sterilization, fertility, removal of life support), and same sex marriage. Critical questions explored in the class, through an examination of the existing literature on philosophical and theological ethics, political theory, and law, included:

- What are the moral, political, and religious bases of “conscience?”
- What is the history and scope of conscience protection through law?
- How do modern theories about conscience expand or alter the Constitutional protection of “free exercise” of religion?
- How should legislatures treat the claims to conscience protection and the need for exemptions?
- How are these conscience protections applied in various areas, such as health care, marriage and family, reproductive rights and abortion, education, etc.?

In producing this report, the students collaborated on a research project focused on a series of interviews with legal scholars and advocates. After refining a set of questions, students reached out to leading scholars who provided answers to a range of questions about the nature of conscience, whether the state should defer to conscience claims in some instances through exemptions from generally applicable laws, and when and how those exemptions should be crafted. Portions of those answers appear in this report.

List of Interviews

Ian C. Bartrum
*Associate Professor of Law,
University of Nevada, Las Vegas*

Thomas C. Berg
*James L. Oberstar Professor of
Law and Public Policy,
University of Saint Thomas*

Alan Brownstein
*Professor of Law and Boochever
& Bird Chair for the Study and
Teaching of Freedom and Equality,
University of California at Davis*

Caroline Mala Corbin
*Associate Professor of Law,
University of Miami*

Marc O. DeGirolami
*Assistant Professor of Law,
St. John's University*

Thomas F. Farr
*Visiting Associate Professor of
Religion and World Affairs,
Georgetown University*

Richard W. Garnett
*Professor of Law and Concur-
rent Professor of Political Science,
University of Notre Dame*

M. Cathleen Kaveny
*John P. Murphy Foundation
Professor of Law and Professor
of Theology,
University of Notre Dame*

Douglas Laycock
*Armistead M. Dobie Professor
of Law, Horace W. Goldsmith
Research Professor of Law and
Professor of Religious Studies,
University of Virginia*

Ira “Chip” Lupu
*F. Elwood and Eleanor Davis
Professor of Law,
The George Washington University*

Richard S. Meyers
*Professor of Law,
Ave Maria School of Law*

Steven D. Smith
*Warren Distinguished Professor of
Law, University of San Diego*

Nelson Tebbe
*Professor of Law,
Brooklyn Law School*

Robert Vischer,
*Professor and Associate Dean
for Academic Affairs,
University of Saint Thomas*

Mark R. Wicclair
*Professor of Philosophy,
West Virginia University*



INTERVIEWS AND EXPERT OPINIONS

1) What is conscience, and what elements of conscience deserve protection from a legal perspective?

I've written quite a lot on this question, trying to figure out what 'conscience' means and whether and why it deserves legal protection. If I had to respond in a couple of sentences, I guess I'd say something very conventional sounding: Conscience is a person's considered and sincere judgment about right and wrong, and an enlightened constitutional regime would try to protect it from regulation.

Steven D. Smith

'Conscience' is sometimes talked about as if it were just a 'feeling,' or 'sense,' about what a person thinks is important, or wants to do. I don't think this is quite right. 'Conscience' is an intellectual faculty, a kind of capacity, to identify what ought to be done (because it is good) or what should not be done (because it is wrong). 'Conscience' is not a personal power to define or determine what is right and wrong, but is instead the capacity to appreciate, to realize, what is actually right and wrong.

Richard W. Garnett

Conscience is the dimension of the intellect that guides an individual to choose truth over falsehood, right over wrong, good over evil. So long as it is understood as an aspect of human choice that is ordered to objective truth—i.e., as more than the modern understanding of conscience, which is too often "doing what I

want to do because I really want to do it"—conscience deserves the protections provided in the Bill of Rights. Because of the First Amendment, the American constitution privileges protection of the religious conscience over other forms. If that is to change, it should be done via democratic means, not by judicial fiat.

Thomas F. Farr

Conscience is a difficult term to define for legal purposes, making it an equally complicated affair to know what does and does not deserve protection. At the very least, we might say that a person who acts from conscience acts on the basis of some deeply held moral conviction. 'Morality' seems especially important here—the basis for the behavior must be ethically motivated in order to be described as conscience-based. If it is based in pragmatic judgment, then it is not conscience-based.

The trouble with this description is exactly that it makes our understanding of what morality is the touchstone of what conscience is. And then there is the issue of describing the reason that a state ought to defer in some circumstances—which ones?—to individual claims of conscience.

The first problem is one of meta-ethics—how would one describe the nature of a 'moral' objection to, say, mandatory conscription in the army? How we describe the nature of that objection, and what we feel counts as a conscience objection, is very difficult. The second problem relates to political philosophy—the issue is why a state should care about conscience objections. And one might give pragmatic as well as principles reasons that a state might care.

Marc O. DeGirolami

A person's conscience can be thought of as an internal moral guide. To say that someone has a conscience is to say that:

- The person has deeply held moral beliefs.
- The person's decisions and actions generally are consistent with her deeply held moral beliefs.
- If a decision or action is not consistent with the person's deeply held moral beliefs, she feels guilt, remorse, shame, and the like.

The free exercise of conscience (i.e., the ability to act in accordance with one's deeply held moral convictions) is essential to preserving one's moral integrity. Hence, the free exercise of conscience is a value worth protecting. However, there are limits to legal protections of conscience. For example, laws may restrict parents' exercise of conscience in order to protect children from neglect or abuse. Similarly, the special obligations of professionals may place limits on justified legal protections of conscience.

Mark R. Wicclair

I think Eisgruber and Sager's formulation works well: deeply held moral convictions. To the extent that protecting conscience does not unduly burden others, the law may protect it. It burdens no one to let someone wear a yarmulke to work. It starts to burden coworkers if Sabbath observers are allowed to avoid the Sunday shift. It most definitely burdens others if certain religious beliefs (no contraception, no same-sex marriage) become law.

Caroline Mala Corbin

Conscience is a judgment that a particular act is morally prohibited, permitted, or required, either in all cases or in a particular case. In a society such as the United States, the freedom to express one's moral judgment—one's conscience—and the grounds for it should always be protected. The freedom to act in accordance with one's conscience is something else again. Those responsible for the common good need to balance a number of factors, including the importance of the law imposing a general prohibition or requirement, the value it represents or preserves, the harm the exception will do to both purpose and rationale of the law, the importance of the exception to the conscientious claim-maker, and the principle the exemption enacts. There is no value neutral way to assess these claims; an American legislature is going to be more likely to respect, even if it disagrees, with a fundamental refusal to kill than a fundamental refusal to serve women or minorities.

M. Cathleen Kaveny

My own personal view is that conscience is the name we give to our innate ability to feel and give weight to the moral emotions. It is the "common sense" at the heart of common sense moral philosophy. As such, it is an essential part of being a human being and realizing our individual human potentials. And, in legal terms, it is at the very core of any meaningful effort to recognize and provide for self-governance. We have to leave room for people to truly govern

themselves if we expect them to participate meaningfully in democratic institutions . . . Without a space for conscience, I think the entire democratic structure breaks down.

Ian C. Bartrum

2) James Madison's first draft of the First Amendment read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." If this version of the Amendment had ultimately been approved, would the conscience rights of Americans be better protected today?

Yes. This language would have given a freestanding right of conscience without needing to resort to freedom of religion.

Robert Vischer

Perhaps. The language concerning conscience rights is more explicit than the "free exercise of religion" language that was ultimately adopted. The more general constitutional language is, the more freedom judges will feel to interpret it as they see fit, and perhaps override it. On the other hand, "free exercise" does have the advantage of strongly suggesting that the right extends beyond mere belief to include conduct.

Thomas Berg

If Madison's draft had been accepted instead of rejected, that would have helped, especially on the battle to protect secular conscience. But it is way too optimistic to say the rights of conscience would be better protected. The Court could construe this language away just as it has construed the Free Exercise Clause away. It is very difficult to make a judge do something he doesn't want to do.

Douglas Laycock

I don't think so. I think Madison meant religious conscience only—I suspect the notion of secular moral conscience would not have resonated with those of his time and place—and I think he meant the right to believe and worship as you choose, not to act on your conscientious convictions contrary to public peace and order.

Ira Lupu

The religious conscience rights of Americans—clearly what Madison had in mind—are under assault because of an impoverished understanding of free exercise and non-establishment. Those clauses of the First Amendment were intended to privilege the exercise of religion as an exercise of conscience. Perhaps the original wording would provide better protections today, although it is supremely ironic that the problems

of conscience did not arise in any virulent form until very recently.
Thomas F. Farr

From a structural point of view, the conscience clause seems to be connected to the ‘religious’ clauses, so perhaps the court would have been confronted more squarely with defining religion for constitutional purposes than it has actually been. It might well be that we would have had a more well-developed ‘conscience’ jurisprudence, but what the shape of it might have taken is difficult to tell.

Marc O. DeGirolami

I don’t think Madison believed the final wording of the Amendment was much different in substance from his original wording, and I doubt that different wording would have made much difference in the country’s later history.

Steven D. Smith

No matter what the text of the Amendment had been, it would have been necessary, and difficult, to decide when laws have to apply uniformly (even to those who strongly object, perhaps because of their judgments of ‘conscience’) and when conscientious objectors can and should be accommodated.

Richard W. Garnett

I think there would certainly be better textual and historical claims for the protection of conscience had Madison’s first draft survived. There are other modalities of constitutional argument, however, that I think would still cut against strong conscience protections, particularly prudential concerns about the need to enforce generally applicable laws across the board.

Ian C. Bartrum

Insofar as Madison’s draft provides absolute (unqualified) protection of conscience rights, it might have provided stronger, but not necessarily better, protection of them. Depending on how “conscience rights” are specified, his draft may not allow the current standard of “reasonable accommodation” of conscience. To require more than a reasonable accommodation would fail to give sufficient weight to other important values and interests.

Mark R. Wickclair

Maybe. The language is arguably still vague enough that you could probably derive most of today’s doctrine based on it. Would the Equal Rights Amendment have accomplished anything that heightened scrutiny under the Equal Protection Clause had not? Maybe. But if it did, would it be because of the language of the amendment, or because its passage reflected a greater commitment to women’s equality in the first place? Then again, law influences people’s commitments, so we are back to the ambiguity of the language.

Caroline Mala Corbin

I think it would just shift the debate to what “the full and equal

rights of conscience” means. On the level of thought, and worship, it works. Once it gets to the level of actions that affect third parties who don’t share the conscientious belief, we have the same problem we have today.

M. Cathleen Kaveny

3) Should conscience-based protections be based only on religious grounds, or is there room for non-religious moral claims (as there is in conscientious objection)? Can the conscience-based moral claims of atheists be protected under a scheme of religious-based conscience exemptions?

I believe the non-religious content of conscience deserves protection, so long as it is ordered to the truth about man and society, which is to say that conscience drives action that accords with natural reason.

Thomas F. Farr

Atheists, certainly, are protected by the Religion Clauses, in the sense that everyone (including atheists) enjoys the right to free exercise of religion (which includes the right not to embrace or practice a religion), and in the sense that the no-establishment rule helps to limit government in a way that benefits atheists and believers alike. That said, the “exercise” of atheism is not the “exercise of religion,” and the law can and should distinguish between religion-based requests for accommodations and exemptions, on the one hand, and requests grounded in strong, but non-religious, convictions.

Richard W. Garnett

When you say that there is ‘room’ for non-religious conscientious objection, I am curious about what you mean. The Supreme Court interpreted a specific statute in the 1960s in that way (in *Seeger and Welsh*), but I don’t think the religion clauses have ever been interpreted to protect non-religious conscientious objection. Historically, exemptions for religious conscience have been part of the American constitutional tradition, though there is dispute about this too. Some people think that there never was, as an original matter, any constitutionally-required exemption on grounds of religious conscience (see Philip Hamburger); others think that their constitutionally-compelled religious exemptions were part of the original understanding (see Michael McConnell). If one is talking about the constitution, I do not think that ‘conscience’ is something which can be constitutionally protected in any kind of general way. Of course, if one is talking about wise public policy, or legislative discretion, I fully support the power of legislatures to create exemptions of various kinds in appropriate cases.

Marc O. DeGirolami

The Constitution protects religiously-based objections under the Free Exercise Clause, and there are reasons to treat religious objections as a distinct category. That doesn't mean, however, that other sources of conscience don't deserve protection in particular contexts: just that the Constitution doesn't guarantee it. To the extent that an atheist belief can be tied to a particular moral norm of conduct—for example, refusal to take an oath, or refusal to serve in the military and kill on the ground that “this life is all there is and shouldn't be ended”—it should be counted as a religion-based conscience exemption. We would very likely treat government establishment of atheism as an establishment of religion—of a particular explicit position on a religious question—and correspondingly we should treat atheism-based claims as religiously based.

Thomas Berg

Of course there is room in the 21st century to protect moral conscience, divorced from religion. If the “scheme” is religion-based, it won't protect atheists per se, because the conscience of atheists does not arise from atheism (atheism is a belief in the non-existence of God; how can that, by itself, ground moral beliefs?) The conscience of an atheist derives from some other source of knowledge or intuition about right and wrong.

Ira Lupu

The question asks about “religious grounds,” but my sense is that you're asking not about justifications for protection but rather about what should be protected. I think that the core protection is for “religious conscience,” if I can call it that, and that the best justifications for protecting conscience are probably religious in nature. But I've argued that there is a persuasive case for protecting non-religious manifestations of conscience as well.

Steven D. Smith

The language of the Constitution we have says free exercise of “religion.” Some claim that means that secular conscience is necessarily unprotected. The effect of that is to shrink protections for religious conscience as well, because judges worry about discriminating.

I think that “religion” must be interpreted in light of the evolution of beliefs about religion since 1789. The Religion Clauses exist to mediate conflict over religion, and the fundamental line of religious conflict in the United States today is between essentially religious and essentially secular worldviews. The Constitution cannot mediate that conflict if only one side is protected. So the Religion Clauses should protect freedom of belief about religion, not just beliefs in religion. When nonbelievers do things that are analogous to religious exercise, they should be protected. This includes acting on their deeply held claims of conscience.

Douglas Laycock

Religious exemptions are one type of conscience protection. I agree

that liberty of conscience should not be limited to religious believers, though it gets tricky carving out exemptions to every conceivable form of belief that could conflict with the law's dictates. That's why I favor having the law resist the temptation to legislate on contested moral issues when possible, rather than assume that religious liberty can be adequately defended through a framework of exemptions.

Robert Vischer

The exercise of conscience is worth protecting whether or not the person's core moral beliefs are religion-based. Moral integrity is no less important to conscientious atheists than it is to conscientious believers. The Supreme Court rightly rejected a religious belief requirement (a belief in a “Supreme Being”) to qualify for conscientious objector status in relation to military service in *U.S. v. Seeger* and *Welch v. U.S.*

Mark R. Wickclair

Limiting them to religious grounds would be unfair in a country where not everyone is a believer. Perhaps at a time when everyone was religious, and everyone could potentially benefit from a religious exemption, such exemptions did not appear to favor religion over nonreligion. That is no longer the case.

Caroline Mala Corbin

This question really raises four distinct, but related questions.

First, does the Free Exercise Clause of the First Amendment provide conscience-based protection only on religious grounds or is there room for protecting non-religious moral claims as well? As currently interpreted, under the holding of *Employment Division v. Smith*, the Free Exercise Clause provides virtually no protection to the conscience claims of religious individuals against neutral laws of general applicability. I believe the *Smith* decision is bad law and have argued that religious liberty deserves greater protection than the *Smith* decision provides.

Second, does the Establishment Clause of the First Amendment require that, in certain circumstances, if the conscience claims of religious individuals are protected, than non-religious conscience claims must receive equivalent protection? I think there are Establishment Clause limits to the extent that conscience-based protection can be limited exclusively to religious individuals. In some cases the material benefits associated with a conscience claim or the resulting harm to non-beneficiaries are too high to justify the privileging of religious conscience alone.

Third, are there situations in which statutory accommodations of conscience should be extended to include non-religious moral claims? There is no constitutional constraint against adopting legislation that protects conscience claims more broadly than religious liberty concerns require. The practical question, however, is how government can efficiently limit the scope

of such claims to avoid undermining the rule of law and the efficient administration of legal rules.

Fourth, do other provisions of the Constitution protect conscience claims in addition to the religion clauses of the First Amendment? Other constitutional provisions protect dignitary interests and personal autonomy. In some circumstances, these interests include what we might describe as rights of conscience. For example, the right not be compelled to speak protects the right not to communicate state mandated messages that the speaker rejects as immoral or inauthentic. Freedom of association can protect the right to associate with persons the larger society has shunned.

Alan Brownstein

I think there has to be room for conscientious objections based on non-religious grounds in a pluralistic society.

M. Cathleen Kaveny

4) Many proponents of conscience-based exemptions accept that the state can legitimately impose upon certain kinds of refusals of service (e.g. a public accommodation cannot refuse services on the basis of race, religion, or ethnicity). Why should religious-based refusals gain special consideration?

Religion-based requests for exemptions should be treated differently because (for better or worse) our Constitution singles out 'religion' for special protection.

Richard W. Garnett

I think an important distinction here is that claims for conscience (or refusals, as critics of conscience like to say) are typically to an act (being forced to perform or assist in the performance of an abortion) and not to the characteristic of the person who is seeking the service (the race or religion or ethnicity of the person seeking the service). So a nurse who doesn't want to assist in the performance of an abortion is not objecting to the person (they are not saying—I won't assist in the performance of an abortion for a person in a disfavored racial or ethnic group), they are objecting to the act (the abortion) that the nurse regards as immoral.

Richard S. Meyers

There are historical reasons for giving religious conscience special regard ... Religious reasons have, again, historically, been among the most powerful sorts of reasons that people have for acting or not acting in certain ways. We might believe that we have progressed beyond giving religion special consideration, because we are post-religious, or because we are consumed by claims of equality. But if we are attentive to our historical traditions, we will be at least cautious

about abandoning the special protection for religious conscience too readily. It is also given special constitutional protection (setting aside the disagreement noted above), so we would have to twist the language pretty severely to derive a general conscience exemption.

Marc O. DeGirolami

Our constitutional tradition has long recognized religious freedom as a distinctive right, for several reasons. One is that by giving room to religious claims, the state acknowledges potential limits on its authority that may come from a source higher than human laws—a point of great theoretical and practical importance in limiting the power of government (as religious resistance to totalitarian governments this century has shown). Another cluster of reasons is that, as a category, impositions on religion have historically caused especially great suffering to individuals—in part because of their sense of violating a higher calling or duty—and have also caused especially intense conflict. Of course, these do not mean that religious conscience is unlimited. Nor does it mean that nonreligious claims of conscience should be ignored. But there are good reasons to protect religion distinctively.

Thomas Berg

Frequently, there is no reason why religion-based refusals should be given any special consideration. Occasionally, there is such a reason. Again, context is everything.

Ira Lupu

I'm afraid there's no "sound bite" answer to this one. But the summary would be that, historically, the freedom of conscience is a corollary to the classical "freedom of the church," and that both the church and the "inner church" of conscience were viewed as in some sense jurisdictions independent of the state's jurisdiction. An imperfect analogy would be to a foreign embassy: we don't impose our labor laws on a foreign embassy because, quite simply, we don't have jurisdiction there. The classical view has largely been forgotten, of course, but it hasn't been improved on.

Steven D. Smith

Freedom to exercise one's religion can be overridden for sufficiently compelling government interests, and whether nondiscrimination laws present such an interest is a fairly debatable question. Often yes, especially in commercial contexts and where the religious saliency of the class or behavior is low; clearly no, in my view, inside religious organizations. And I think no in contexts where religious salience is high, such as marriage. But plainly, people disagree about these questions.

Douglas Laycock

The first good and easy answer is that there is explicit, express protection of religious freedom in the Constitution. So religion is special for just that reason. I do, however, think that difficult questions arise when religion comes into conflict with other

constitutionally protected values—like Equal Protection. I think in those cases the competing claims of religion and EP have to be evaluated on a case-by-case basis. I have a short piece that is just about to come out at Northwestern, which argues that racial equality is an important enough value that it should trump religious liberty.

Ian C. Bartrum

I think the state has already overreached on some of these issues. I do think that religious commitment tends to produce a different level of conscientious objection than many non-religious objections because of both the depth and (perceived) objectivity of the underlying belief. I don't think that's always true, though. An even more obvious distinction, though, emanates from the First Amendment. A state that requires the Catholic Church to hire women as priests has blatantly violated the Free Exercise Clause. A state that requires the Jaycees to admit women has also infringed on their associational rights, but the constitutional violation is not as clear (though I would argue that it's still there, even if the Supreme Court disagrees).

Robert Vischer

I don't think religiously based refusals should be exempted from basic norms of how we deal with one another—particularly institutions. So I would not support a religious hospital's refusal to serve the adherents of another religion. Refusing service to people on a discriminatory basis is, however, different from refusing to provide a particular service to everyone. If a Catholic hospital let white women have abortions but not black women, or vice versa, I would not accept that claim.

M. Cathleen Kaveny

5) Is there a practical way to legitimately differentiate between sincere and insincere claims to religious basis of conscience exemptions? Who should make this determination (E.g., Courts? Regulators?)

This differentiation has to happen, but there is no neat-and-tidy way to do it, and no one right answer to the “who decides?” question. In this matter, we just have to do the best we can.

Richard W. Garnett

There is a sincerity requirement when persons make free exercise arguments, but the courts typically assume that the claim is sincere, I think, because they recognize that examining sincerity is a perilous enterprise. The courts, and I am assuming that courts would be making these judgments, should probably only reserve this inquiry for extreme/obvious cases.

Richard S. Meyers

My own view is that courts are in the best position to do this, but there is no question that it is a difficult issue. Courts are dealing with specific, particular cases, and are therefore focused on the sincerity of a single claimant. That's at least a more plausible way to understand a sincerity inquiry than for a regulator or a legislator simply to declare an entire class of conscience claimants insincere. As for practicalities, one could inquire about the nature of the beliefs by comparison with the body of beliefs held by the religious organization of which the claimant says he is part. One could inquire about the centrality of the belief to the tradition, and so on. Of course, there are entanglement concerns here, but I do not see a good alternative. A court faced with a conscience claim must do a certain amount of asking; otherwise the whole thing collapses.

Marc O. DeGirolami

Context and administrative convenience matter here as well. The decision-maker must be unbiased and impartial. But, no matter what the process, the best test of sincerity is consistency of behavior with professed belief. People with a long criminal record of violent crime are not credible when they claim to be pacifists.

Ira Lupu

It can be a hard question, but not necessarily any harder than comparable questions that courts and regulators address all the time.

Steven D. Smith

Sincerity is difficult to adjudicate, and probably insincerity can be found only in relatively clear cases. The decision has to be made by courts in individual adjudications. In contexts where the risk of insincere claims is high (typically because claims of conscience align with secular self-interest), this can become a compelling reason for refusing exemptions to sincere and insincere alike.

Douglas Laycock

I think it's very difficult (see, e.g., the courts trying to navigate these lines in the military draft cases). That's another reason to avoid legislating on these issues in the first place whenever possible. In some cases, of course, we have to legislate on a contested moral issue (e.g., the military draft), in which case I believe that legislators have the responsibility to establish criteria for determining the sincerity of the belief, and courts/agencies have the responsibility to apply those criteria.

Robert Vischer

Tests of sincerity are subject to bias. Hence, generally, I do not favor such tests. Due to the enormous risks and burdens associated with wartime military service, a sincerity test may be appropriate in this special case. However, such tests generally are not appropriate when determining whether to accommodate members of professions with who claim to have conscience-based objections to providing a good or service.

Mark R. Wicclair

I think there are practical ways to do so, but they are very expensive and require resources in litigation.

M. Cathleen Kaveny

6) Is the expansion of civil marriage to include same-sex couples a hindrance to religious liberty? If so, do religious-based conscience exemptions mitigate the harm?

The expansion of civil marriage to include same-sex couples is not, by itself, a burden on religious liberty, but this expansion will almost certainly come with other regulatory and legal changes that could threaten religious freedom. These threats could, I think, be mitigated by reasonable accommodations for religion-based objections to same-sex marriage.

Richard W. Garnett

It might be a hindrance to religious liberty. Although everyone seems to agree that no clergy member or church can be forced to perform or recognize a marriage, there are other situations in which religious organizations and individuals would be hampered in their ability to follow their beliefs in the world by having to facilitate directly marriages they believe are wrong. The adoption agency directly performing adoptions with same-sex couples, the religious college having to open its married student housing to a same-sex couple, etc.

I believe it's quite possible to mitigate these harms with religious-conscience exemptions, and that this is the way to make room for both sides to live out their fundamental identities in society. There is actually quite a bit in common between the claims of same-sex couples and religious objectors. To tell same-sex couples that they can have an orientation but can't live a life of full, intimate commitment to another, acknowledged by society, consistent with that orientation, is to tell them to stay in the closet. But to tell religious objectors that they can have a belief but can't act consistently with that belief when they go into the world providing education or other services is likewise to tell them to go into the closet.

Thomas Berg

The expansion of marriage is only a hindrance to religious liberty if faith communities or clergy are forced to extend sacraments/blessings to marriages which they think are undeserving of the sacraments. (That could be for any reason—e.g., interfaith marriages as much as same-sex marriages.) Other than for faith communities and clergy, I

don't think any such exemptions should exist.

Ira Lupu

The legal recognition of same-sex marriage potentially poses a serious threat to religious liberty; how great the threat is would depend upon other things, such as application of antidiscrimination laws, possible withdrawal of tax exempt status, etc. In principle, exemptions can mitigate the harm.

Steven D. Smith

The expansion of legal marriage to include same-sex couples is not in itself a hindrance to religious liberty. It becomes a threat to religious liberty when combined with laws against discrimination on the basis of sexual orientation or marital status and the widespread failure on both sides to distinguish religious marriage from legal marriage. Religious exemptions can indeed mitigate the harm.

Douglas Laycock

I don't think so. I think the idea that same-sex marriage hurts religion is based on the failure to adequately separate the institutions of civil and religious marriage. They are two different things, and I think that the claim that just the use of the generic term "marriage" to refer to homosexual relationships somehow harms the religious version of the institution doesn't quite succeed.

Ian C. Bartrum

The principle of religious liberty does not justify imposing legal restrictions based on a particular religion that limit the freedom of people from other religious backgrounds or non-believers. For example, the religious liberty of Catholics does not justify restricting the freedom of non-Catholics by limiting them to Catholic-approved marriages. Moreover, legally prohibiting same sex marriage exclusively on religious grounds would violate the Establishment Clause.

Mark R. Wicclair

No. If your religion opposes same-sex marriage, then marry someone of a different sex. Likewise, if your religion opposes contraception, then don't use it. What reproductive or marriage choices I make do not affect your religious liberty.

Caroline Mala Corbin

Many civil rights laws, including the expansion of civil marriage to include same-sex couples, will have some impact on the religious liberty of some individuals and institutions. Religious-based conscience exemptions can mitigate this harm considerably. Determining how religious liberty interests can be reconciled with the liberty and equality interests of same-sex couples requires a careful analysis.

Alan Brownstein

7) Can equal rights be considered truly equal if individuals are allowed to undermine them by refusing services or the acknowledgment of them? For example, does the state granting the right to gay marriage make any difference if individuals refuse (lawfully) to recognize it? Do religious/conscientious rights or civil rights get preference when they necessarily conflict?

Perhaps not perfectly equal. But that would show, for starters, a problem with equality as a social norm: it tends not to be amenable to balancing tests that can take into account other important values. As your questions suggest, many people on the gay rights side claim that equality allows no exceptions because being a little bit equal is like being a little bit pregnant. By contrast, it would be possible to approach the conflicts between marriage recognition and religious liberty by looking at the comparative hardships on each side and setting rules to balance them appropriately—for example, accommodating religious objectors when it would be easy for couples to find alternative service providers. That would give both sides considerable protection from the concrete harms of (i) having trouble finding services and, on the other side, (ii) being forced by the state either to violate one's beliefs or to exit a profession or area of service. But as your question suggests, this balance will not be possible if we define the interest on the couple's side as equal treatment in every situation. That interest, by definition, admits of no exceptions. (By the way, both sides in the dispute invoke "civil rights"!)

Thomas Berg

The state must treat persons with equal respect. So the state should recognize same-sex marriage (it has no legitimate secular reason not to do so). But other citizens are entitled to their own views of which marriages deserve respect—perhaps people who divorce and remarry many times forfeit that respect for that marriage.

There is no a priori rule for resolving conflicts between civil rights and religious rights. One always needs to more about the respective rights and the reasons for conflict.

Ira Lupu

I guess I'd say it's important to take a broad perspective on this. Don't privilege one side of the argument—equal rights v. religious liberty. Take a careful look at what is at stake. Do "refusals" really undermine equal rights? If a nurse is not forced to assist with an abortion will that interfere with access to an abortion if there is another nurse available. And remember that "rights" (constitutional rights at least) are typically against the government. To say someone has a right to an abortion typically only means

that the state can't prevent that choice it doesn't mean that that person has the "right" to force private actors to perform or assist with the act or to force people to pay for the exercise of that choice.

Richard S. Meyers

The state should not be in the business of compelling anybody to think or believe anything. If you are asking whether agents of the state can refuse to perform functions that the state recognizes to be legitimate, my answer is no. For example, a justice of the peace should not be permitted to refuse to perform gay marriages in a state where such marriages are recognized. More difficult questions involve the ability of state licensees to object on conscientious grounds, or private businesses.

Marc O. DeGirolami

Of course rights matter, and are equal, even when the rights of conscientious objectors are also recognized ... it matters enormously, for all sorts of legal purposes, whether a couple is married or not married, and those consequences are unaffected by whether the church on the corner also recognizes the marriage.

Constitutional rights are generally protected against the state, not against other individuals. And when rights are protected by sub-constitutional law against other individuals, then the rights of all individuals have to be considered. A well ordered society does not override deeply held claims of conscience without extraordinary reason, because it inflicts substantial emotional suffering when it does so (and sometimes economic or physical suffering as well, if the objector adheres to conscience and abandons his business or suffers the penalties that the law inflicts). A couple's right to be married can be fully effectuated, and make an enormous improvement in their lives, without threatening this kind of suffering to every one of their neighbors who has a different view of marriage.

If the number of objectors is so large that the effectual right to be married is threatened in fact, then the balance of interests changes. But mostly this fight is about symbolic values, and the desire of each side to impose its values on the other. American constitutional liberty is based on live and let live, and tolerance of difference. Both sides in the same-sex marriage battle need to respect that. Right now, neither side does.

Douglas Laycock

I think it depends who is refusing to recognize the rights. If state actors (like town clerks) are refusing to recognize same-sex marriages (for example) then I do think the right is undermined. I'm not sure it's quite as clear when private actors do this.

Ian C. Bartrum

It depends whether so many providers refuse to offer the services that the individual lacks access to the service. "Equal rights" should, in a morally pluralistic society, primarily refer to the

rights we hold vis-à-vis the government, not vis-à-vis other private individuals and organizations. If the government recognizes the right to same-sex marriage, the government can legitimately require its agents to provide the service to everyone—i.e., I don't favor rights of conscience for justices of the peace. That does not mean that a church needs to be coerced into providing the same service in order for the right to marry to be "equal" in any sense that should matter in a free and diverse society.

Robert Vischer

Claims of conscience based on invidious discrimination should not be accommodated. In this respect, civil rights trump rights of conscience.

Mark R. Wickclair

I think that the clergy of various denominations should be able to insist that they will marry only those people who follow the tenets of their faith. But if they are employers, or offering public accommodations, or especially if they are public servants, then civil rights should generally trump.

Caroline Mala Corbin

It is hard to summarize my position, but let me make two basic points:

I think that religious liberty and the right of same-sex couples to marry share a common constitutional and normative foundation: a commitment to personal autonomy, authenticity in conduct, and relational responsibilities. Thus, in some sense, these two rights can mutually reinforce each other.

Second, I think the most persuasive and useful model for determining when religious accommodation claims relating to same-sex marriage should be granted is the model we use to determine when religious individuals and institutions should be permitted to discriminate against people of different religions or people who are not religious. That is, the starting place for evaluating any proposed religious exemption from civil rights laws protecting same-sex couples from discrimination would be to ask whether a similar exemption would be granted to a religious individual or institution seeking the right to discriminate on the basis of religion in providing benefits, goods, or services to others.

Alan Brownstein

Religious freedom is a basic and foundational human right, and so it should only be burdened by governments if it is absolutely necessary to do so, in the service of a compelling state interest. "Equal protection of the laws" is a constraint on government, but a commitment to "equal protection of the laws" does not entail a belief that individuals should not be able to form and act on the basis of moral and religious judgments. In the "refusing services" cases, the answer is probably "it depends." There is no

need to require, say, a wedding photographer who objects, for religious reasons, to same-sex marriage to nevertheless agree to photograph a same-sex wedding ceremony. On the other hand, a clerk or official working for the government in a state that has legalized same-sex marriage could not refuse to do his or her job—say, by filling out relevant paperwork—on the grounds that he or she opposes same-sex marriage.

Richard W. Garnett

I think there can be some accommodation in smaller households and settings. I think the strongest harm comes when government agents (i.e., those who work in state marriage license bureaus) refuse to represent the state.

M. Cathleen Kaveny

I think it's a mistake to suppose—as most everyone does—that anything is gained or resolved in these contexts by invoking the idea of equality. Everyone should read (several times, if necessary) Peter Westen's famous article, "The Empty Idea of Equality." I would think it might make a huge difference for many purposes if the state recognizes same-sex marriage, even though some individuals might decline to recognize this.

Steven D. Smith

8) When the practical burdens on an individual who are denied certain services are minor it is often seen as a more permissible ground for such conscience objections. How much of a factor should convenience and hardship be in determining permissibility? Should we consider the burden on the denied individual's sense of themselves as an equal citizen and moral being?

I think hardship ought to matter. A person who has access to many wedding cake makers in a large metropolis does not have a particularly powerful claim, in my view; other kinds of service-seekers do. If we are to consider people's "sense of themselves as an equal citizen and moral being," we should consider the religious objector's feelings as well.

Marc O. DeGirolami

I don't think this ought to play a big role. Consider, for example, a family owned pharmacy that doesn't want to offer certain drugs. If they are allowed that choice, it may mean that a person seeking the drug would have to drive a mile more to another pharmacy. I don't think that burden ought to weigh heavily in the analysis. The person seeking the drug might have the "burden" of knowing that the family pharmacy believes that there is something wrong with the use of the drug. In many of these cases, I think that's what is at issue. The person seeking the

drug or an abortion (in the case of the nurses who don't want to be forced to assist the abortion) wants their choice validated or legitimized. I don't think that that desire (to have others approve of their conduct) ought to override the exercise of conscience.

Richard S. Meyers

“Convenience and hardship” offer a way to balance the competing claims. If the burden on “the denied individual's sense of themselves as an equal citizen and moral being” is enough to override a religious objection and force the objector to facilitate a marriage directly, then it allows for no compromise between the two sides. It ignores that religious objectors who bring their fundamental beliefs/identity into public life make claims similar in many ways to those of same-sex couples.

Thomas Berg

Denial of services may be a denial of dignity as well as a practical burden. How can we tell when or whether a denial of dignity is worse than a violation of religious conscience? Perhaps we should care how avoidable the injury is, but that's true on both sides of all these conflicts (e.g., same sex partners could find a sympathetic photographer, and photographers could stop working at weddings).

Ira Lupu

Well, when interests or “rights” conflict and come in for “balancing,” it's platitudinous that the significance of the relative burdens becomes relevant. And I would be very loath to limit people's liberty, including their religious liberty, in order to protect other individuals' “sense of themselves”

Steven D. Smith

Modest inconveniences cannot reasonably trump a deeply held right of conscience. And people in same-sex relationships cannot be sheltered from the knowledge that some Americans deeply disapprove of what they are doing. Of course, the people in these relationships think that those who disapprove are fundamentally wrong; they deeply disapprove of the disapprovers. Both sides argue that their rights are not really respected unless the other side's rights are suppressed. Each sides' position is equally fallacious at this point.

Douglas Laycock

... To the extent you are asking whether its ok to allow conscientious objectors to refuse some services if the same service is available next door, I do think that this has some bearing as a prudential matter. If it is easier to recognize conscience rights and fulfill someone's need for service—why not do it? I do think that the denied person's autonomy etc. is a consideration, but I'm not convinced that is a concern that trumps the religious rights recognized in the Constitution.

Ian C. Bartrum

Yes. Equal Protection is about equal opportunity, equal

citizenship, and equal dignity. To focus on the first only overlooks the other values at the core of Equal Protection.

Caroline Mala Corbin

I think there are two sets of factors: 1) dignitarian concerns; and 2) convenience/expense concerns. If a town clerk refuses to certify a wedding, you might have a problem with one, but not the other.

M. Cathleen Kaveny

9) Consider this claim from an amicus brief in *Perry v. Schwarzenegger* (CA Faith for Equality et. al.): “by adopting sectarian religious doctrine to restrict marriage, Proposition 8 actually impinges upon the religious liberty of Californians whose faith traditions, congregations and clergy have welcomed same-sex couples to enter legal marriages in religious ceremonies.” To what degree does making a claim of conscience in a pluralistic society involve a reciprocal obligation to respect others' consciences on the same issue?

This amicus brief is an example of the distortion of conscience as license to do what I want merely because my conscience tells me to do it. If conscience is to mean anything within our jurisprudence, it must have some objective referent—some measure of my behavior other than my strong desire to do something.

Thomas F. Farr

This claim is not, in my view, a plausible one. First, it assumes that Proposition 8 “adopt[ed] sectarian religious doctrine.” The fact that many religious people oppose same-sex marriage does not mean that Prop. 8 “adopted sectarian religious doctrine,” nor would the fact that many people supported Prop. 8 for religious reasons. Second, the government's refusal to expand marriage to cover same-sex unions does not burden the religious liberty of anyone (any more than a move to same-sex marriage, by itself, burdens the religious freedom of those who object). Certainly, to believe in freedom of conscience is to believe in freedom of conscience for all. But, this point is not relevant, in my view, to the particular question whether the state may or should expand civil marriage to include same-sex unions.

Richard W. Garnett

Note that the brief is trying to delegitimize the moral position reflected in the law by calling it religious or sectarian; the same move is made with regard to abortion—people in favor

of abortion rights argue that laws restricting abortion are only based on religious ideas; the courts have typically rejected that sort of argument in the context of abortion, and they should so here as well.

Sometimes you can't do both; in some contexts, the government needs to make a decision one way or the other. That's true with abortion, for example. The government needs to make a choice one way or the other whether to protect the unborn; it can't respect the conscientious choices of people who want to protect the unborn and people who don't. Think of this in other contexts—e.g., slavery in the first half of the 19th century. We couldn't respect both the views of those who thought slaves ought to have legal rights and those who didn't; at some point choice doesn't solve every contested issue; we can't leave this to the conscience of every slave owner because that will mean that we have already decided that the slaves don't have rights.

Richard S. Meyers

There is little doubt that the whole conscience discussion can devolve into a 'my belief is better than your belief' competition. If Judge Walker's statement is taken at face value, then there is little point in talking about religious exemptions or accommodations at all, let alone any that might be constitutionally required.

Marc O. DeGirolami

What does it mean to "respect others' consciences"? No one is demanding that faiths that oppose same-sex marriage extend their sacraments to such marriages. Isn't that all the respect that faith communities deserve—to be able to decide for themselves who shall receive blessings and sacraments within their own community? Why should any faith community be free to use the power of the state to impose a sectarian doctrine on other communities? A claim of conscience to be free to make your own choices is quite different from a claim that is designed to preclude the choices of others.

Ira Lupu

It is true, or simply truistic, that where religious views on an issue like this conflict, whatever position the law takes will probably conflict with some religious beliefs. I don't see any way around that fact. I don't think invocations of "reciprocity" advance our thinking at all in such situations, for much the same reason that invocations of "equality" don't really help.

Steven D. Smith

This claim is also fallacious. But it is a natural outgrowth of our fundamental failure as a society to distinguish religious marriage from legal marriage. The church should be able to join whoever it wants in a religious relationship of marriage. But neither liberal nor conservative churches have any

power or right to define legal marriage; that is a question of law. To turn it over to churches would be an establishment of religion.

The voters can define legal marriage as they choose, subject to constitutional requirements of equal protection of the laws and the right to autonomy in intimate matters (the right that has unfortunately come to be thought of as substantive due process). The constitutional challenge to legal restrictions on same-sex marriage is based in the Fourteenth Amendment, not in the Religion Clauses.

Douglas Laycock

I think this raises a lot of the questions that John Rawls got going in his discussion of public and nonpublic reasons in *Political Liberalism*. In particular, it raises some of the questions Kent Greenawalt explored about the problem of "imposition" kinds of nonpublic reasons—that is, when we vote for nonpublic reasons that actually end up imposing burdens on others' ability to participate, etc. equally in society.

To my mind, this is the thrust of the (modern) Establishment Clause. While we have to protect free exercise rights, we also have to be sure that we don't establish certain imposition reasons as part of the law. It is inevitable, I think, that people will hold religious beliefs that are intolerant of others free exercise, which is fine, as long as those beliefs don't get the weight of law behind them.

That's true to a certain point, but I believe that there is a difference between being forced to do something that violates your conscience and being forbidden from doing something that is permissible according to your conscience. The difference will begin to blur as the "may do" becomes a "must do" according to your conscience, but a church being forced to perform a same-sex marriage is a lot different than a church being prevented from having its understanding of marriage reflected in state law.

Robert Vischer

I don't think the quote is correct—or at least, it's hard to prove. Prop. 8 was a referendum, and it's difficult to tell why people voted for it. Many may have had nonreligious reasons, despite the campaign in favor of it by the Mormon Church and other religious actors.

Nelson Tebbe

I think this is an important concern. I think too often, those who make conscience protections are tacitly doing so on the basis that their position is right—not that they hold it conscientiously.

M. Cathleen Kaveny

10) Many critics of legislation that defines marriage as exclusively between a male and female end up asserting that the underlying (and sometimes only) foundation of this position is animus, hostility, or moral opprobrium towards homosexuals and homosexual activity. Many proponents of such legislation assert that this is a fundamental misapprehension of their position and that the role and function of marriage has a deep-seated moral tradition that is natural and rational (and thus part of the state's legitimate interests). Whether in litigation or in public discourse, how might these arguments be sharpened?

I'm not sure. I do not believe that opposition to the expansion of civil marriage, by courts or by legislatures, to include same-sex unions necessarily, or even usually, involves animus or hostility to gay people. But, that is how this opposition is perceived by many sincere people, and this makes dialogue and compromise difficult.

Richard W. Garnett

I really dislike the use of the word "natural" to describe social norms. Natural does not mean frequent or typical. Crime is as natural as loving behavior, but we have social norms that condemn the former and commend the latter. If natural is just a surrogate for "as God inspired or intended," then it's a cheat word, being used to smuggle religious ideas into a debate about the secular good. Of course, not all opposition to homosexuality is prejudice or hostility. But all of it is irreducibly religion-based. I have yet to hear a plausible, fully secular moral argument against same-sex intimacy (as I suggest, arguments from what is "natural" are not honest secular arguments; they are religiously normative, but masquerading as something else.)

Ira Lupu

There are reasons why a great deal of contemporary argumentation takes the form of accusing one's opponents of animus, hatred, or bigotry. The Supreme Court itself has powerfully contributed to, and in a sense even required, this sort of rhetoric of demonization. I think this is a highly unfortunate and destructive feature of contemporary discourse, but I don't expect it to go away any time soon because, once again, current conditions virtually demand such rhetoric. Nonetheless, it would be good if advocates would try to avoid it.

Steven D. Smith

They could be sharpened most obviously by clearly distinguishing

legal marriage from religious marriage. Legal marriage is about a set of legal rights: about mutual duties of support, social insurance, inheritance, joint tax returns, joint bankruptcy filings, evidentiary privileges, employee fringe benefits, suits for wrongful death and personal injury. These legal rights are tied to a human relationship that involves a long-term mutual commitment, but they are not tied to any religious understanding of marriage. And whether or not the religious understanding is fairly characterized as simple bigotry, a religious understanding is not a compelling governmental interest; it is not a basis for overriding constitutional rights.

Douglas Laycock

The claim that a prohibition of same sex marriage is based on "a deep-seated moral tradition that is natural and rational (and thus part of the state's legitimate interests)" simply begs the question. One might have advanced the same claim, not too long ago, to defend prohibitions of interracial marriage, not to mention integrated schools and public accommodations.

Mark R. Wicclair

The only basis for opposition to same-sex marriage is religious. For the state to deny some people fundamental rights in order to codify other people's religious views violates both the Equal Protection Clause and the Establishment Clause.

Caroline Mala Corbin

I think the non-religious secular arguments for limiting marriage to a man and a woman are extremely weak and unpersuasive. In my judgment, the primary arguments for denying same-sex couples the right to marry are religious in nature. This raises a practical conundrum. Opponents of same-sex marriage feel compelled to offer secular arguments in litigation, but these arguments often seem like makeweight substitutes for the real basis for their position—which is grounded on religious beliefs.

I think we confront a related problem in evaluating the argument that opposition to same-sex marriage is based on animus or hostility toward homosexuals or homosexual activity. How do we tell whether religious opposition to an activity or a class should be characterized as bigotry? If a person sincerely believes according to his interpretation of scripture that G-d intended the races to live separately, is that person a bigot? Are sincere, theologically-based negative attitudes toward Jews, Catholics, or Muslims a form of bigotry? The same question can be asked with regard to religiously based opposition to same-sex marriage.

Alan Brownstein

... I think this is a question of contested social meaning. I don't think there's any question that Prop. 8 devalues same-sex marriage, but it may do so only incidentally, as a side effect of "preserving" different-sex civil marriage. Courts determine social meaning all the time, particularly in the context of religious endorsements

and in the context of equal protection. To my mind, the social meaning of same-sex marriage exclusions clearly does denigrate same-sex marriage (and maybe those who participate in it) but this is contested, as the question notes.

Nelson Tebbe

11) Has recent legislation or Supreme Court rulings expanded or contracted one's access to religious freedom? Do you believe that the rights of practitioners of minority religions have earned increased protection? How does this trajectory impact future protections of religious freedom through conscience-based exemptions?

I think that the best protections for conscience have come through legislative exemptions and not through the courts enforcing constitutional provisions. I think the situation is mixed and in flux. In some areas the protection for conscience is secure and in others it's not.

Richard S. Meyers

Legislation like RFRA and RLUIPA, and decisions like *Zelman v. Simmons-Harris*, have improved legal protections for religious freedom. On the other hand, proposals to require Catholic hospitals to provide abortions, and court decisions (e.g., *Locke v. Davey*) allowing discrimination against religion in the context of scholarship programs have been setbacks. It's a mixed bag. At present, the most important indicator will be the Court's decision in *Hosanna-Tabor*, regarding the "ministerial exception."

Richard W. Garnett

American law is quite friendly to religious freedom, because it's quite friendly to freedom in general, and because religion is frequently expressed through speech and assembly, which—religion-based or not—are vigorously protected by the First Amendment. But of course, religious freedom is not perfectly protected—in a pluralistic society, there will always be conflicts between majority views and some religious practices, and the religious freedom claims can't always win.

Ira Lupu

Supreme Court decisions of the last thirty years have clearly shrunk constitutional protection for religious liberty, under both the Free Exercise and Establishment Clauses. Legislation and judicial interpretation of state constitutions have attempted to fill the gap, but enforcement has been limited. Political polarization, the mutual intolerance of the religious right and the secular left, and the emergence of a community of nonbelievers have resulted in a climate in which religious liberty is very difficult to protect.

The courts are to some extent withdrawing from the battle, leaving each side free to mistreat in jurisdictions where it has the votes.

Douglas Laycock

I think recent Free Exercise decisions (Smith in particular) have dramatically reduced the protection of conscience. I do think, however, that we have seen—and will continue to see—a slow retreat from Smith in the future. I think the "hybrid rights" analysis in there will expand, for example.

Ian C. Bartrum

Employment Division v. Smith poses a significant threat to religious liberty because it puts most of the burden on the legislature to defend religious liberty. We have a strong political commitment to religious liberty, though that might be changing, especially in areas pertaining to reproductive rights, where we are beginning to see less deference toward religious liberty than we have in the past. E.g., the HHS mandate on contraceptive coverage.

Robert Vischer

Employment Division v. Smith contracted religious freedom by allowing majorities simply to make generally applicable rules.

M. Cathleen Kaveny

The trajectory of recent Supreme Court decisions is to limit the scope of both the Free Exercise Clause and the Establishment Clause so that most church-state issues will be resolved through political deliberation with little recourse to constitutional adjudication. This trajectory will undermine the religious liberty and equality interests of many religious minorities. I also fear that these decisions will accelerate the fragmentation of the public life of our society along religious lines.

Alan Brownstein

Constitutional exemptions have been contracted, but statutory ones expanded. On the establishment clause side, there is complexity even within the broad categories of expression and funding. So it's hard to generalize.

Nelson Tebbe

12) What are the challenges ahead, as you see them, for effectively implementing conscience-based exemptions from state-regulated jobs (e.g. pharmacists, clerks who administer marriage licenses, etc.)? Is there a difference in the scope of accommodations for government employees rather than state-regulated employees?

I think there is a difference, though it will not always be a sharp one. Still, I do think it is important to distinguish

between how the government itself acts and treats people, and how private people who are licensed by the government to do certain things act and treat people. The government should not be able to dramatically curtail the “private” sphere simply by declaring that this or that activity (now) requires a license. For example, it is not necessary to say that private adoption agencies (which are licensed) should have to act precisely like government-run adoption agencies.

Richard W. Garnett

Yes, government itself owes a duty to all whom it serves, and government serves through its agents (employees), so accommodations for government employees should be very rare if the accommodations involve denials of service. The interests may balance differently in the private sector, but I would always need to know more to suggest a proper balance in a particular case.

The challenges to implementing exemptions are one part practical (avoiding service denials or indignities to those who seek service), and three parts attitudinal (why should government employees not be expected to serve all with equal respect?)

Ira Lupu

There are people like Doug Laycock and Alan Alan Brownstein who are actively working for balanced accommodations, but they report that hardly anyone on either side of the “culture war” issues seems especially interested. But I would think that if we can make progress in this area, yes, there would be a difference in the accommodations sensibly granted to government employees as opposed to private, state-regulated employees: I would think that the latter should receive considerably more accommodation than the former. For example, although I don’t favor legal recognition of same-sex marriage, if a state does adopt that position I’m not especially sympathetic to, say, clerks in government offices who don’t want to stamp marriage licenses. In the private sector, I believe more accommodation would be warranted.

Steven D. Smith

The challenge is to protect the conscience of the pharmacists and clerks while still protecting access for those who need their services. And the challenge to that is each side’s view that it is entitled to absolute protection and that all costs and compromises must fall on the other side. Clerks and pharmacists who occupy blocking positions—who are the only source of a service or a license within a reasonable distance, or in a genuine emergency—are going to have to move to a more densely populated and served location or compromise with conscience on occasion. And some customers may have to change pharmacies, or come in on a different shift, incurring minor inconvenience to avoid a serious and unnecessary intrusion on conscience.

And yes, there is a difference between public and private

employment. Government employees, in my view, get very limited conscience protections; they can inflict no more than a moment’s inconvenience on members of the public. They need an office ready to immediately provide an alternative clerk, without requiring the couple to wait in a different line And in the apparently dominant political view, government clerks are entitled to no accommodation at all. I think that’s wrong, but that’s the current way of the world.

Coda: Nearly all these questions come down to mutual respect for the deeply held interests of the other side. And that is what is totally lacking. Both the gay rights lobby and the conservative religious lobby view the other side’s most deeply held commitments as evil and unworthy of respect or legal protection.

Douglas Laycock

[There are] lots of challenges—same-sex marriage is a big one, and it presents difficulties not only for clerks and providers of public accommodations, but also for public school teachers, students and parents, and for a host of other people. Health care changes will matter too—should hospital workers have to assist in procedures they find objectionable? How about health insurance and the employers who buy it? It’s a complex field!

Nelson Tebbe

The challenge will be to maintain public support for conscience even when the underlying issue is not morally problematic in the view of the majority of the public. E.g., I expect conscience protection for abortion will continue, but conscience protection for contraception may not. And yes, government employees can legitimately be required to perform the service defined by the government, just as private sector employees can legitimately be required to perform the service defined by their employers. The problem is when the government intrudes into the private sector to tell individuals what they can and cannot do in the context of their jobs. (Subject to some limitations, as described in my book.) A professional license does not make that individual a stage agent; the license is an assurance of competence, not an assurance of compliance with certain contested moral norms.

Robert Vischer

The primary challenge is to strike a reasonable balance between protecting the exercise of conscience and ensuring access to goods and services, such as abortion, emergency contraception, fertility services, palliative sedation to unconsciousness, and so forth. The health care provider conscience clause (HHS Final Rule) promulgated by the Bush administration and revoked by the Obama administration is an example of a failure to strike a reasonable balance. It provided too much protection of conscience and too little protection of patients and health care organizations.

Mark R. Wicclair



BIOGRAPHIES

Ana Cenaj is a senior at Georgetown, majoring in Government and minoring in History. Originally from Tirana, Albania, she is committed to studying conflict resolution, law and peacekeeping. Upon graduation, Ana will be teaching secondary mathematics in the Rio Grande Valley, Texas through Teach for America.

Mary Denman, from Mendham, NJ, graduated from the College in 2011. She majored in Government and minored in English and Art, and she hopes to teach English as a foreign language (TEFL) next year.

Scott Garosshen is a member of Georgetown University's Class of 2012, graduating from the College with a double major in Classics and Government and a minor in Spanish. He has an abiding faith in the human race and hopes to do his part to justify it.

Charly Jaffe is a junior in the School of Foreign Service, majoring in International Politics and Security Studies. She has been involved with the Berkley Center throughout her time at Georgetown, and is currently participating in the Junior Year Abroad Network while studying in Shanghai for the semester.

Silky Kadakia is a senior in the College studying Government with a minor in Studio Art. Her coursework has primarily involved international and American law. She is especially interested in the intersection of religion and law. Silky also serves on the boards of the Senior Class Committee and the South Asian Society.

Lindsay Kolowich is a junior in the College, majoring in Government and minoring in Arabic with a focus on law, religion, and American foreign policy. Along with her studies, she is an EMT-B and ambulance driver for Georgetown EMS, she works at Georgetown Hospital, and she plays for Georgetown Women's Squash.

Greg Patterson is a senior in the College, majoring in Government with minors in Economics and English. He is a captain on Georgetown's club soccer team and is a member of the Georgetown

Collegiate Investors. After graduation, Greg plans on returning to Chicago, his hometown, to pursue a career in finance.

Graham Robertson is a senior in the College, majoring in Government and double minoring in French and English. Graham is a citizen of Canada and the United Kingdom.

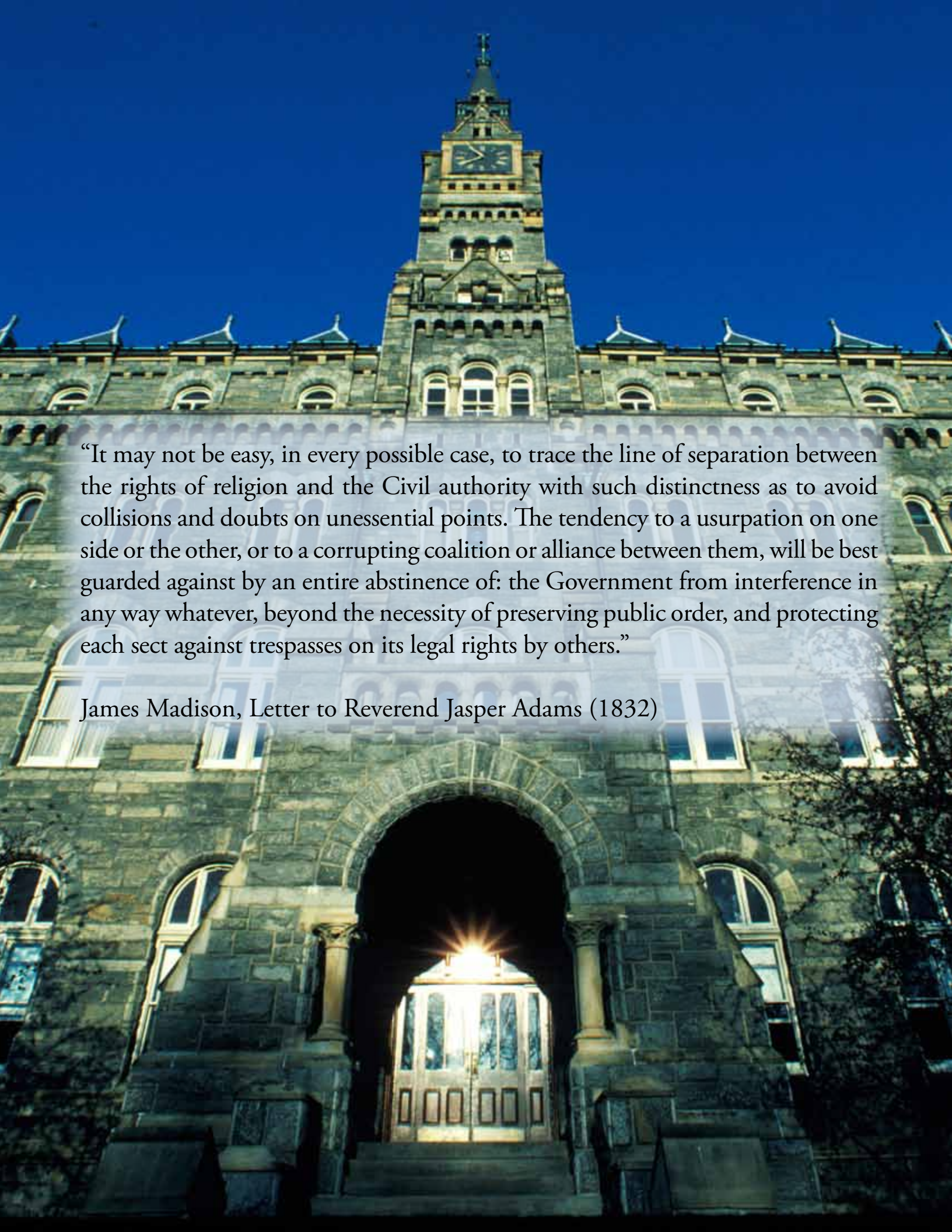
Patrick Ryan, a senior in the College, will graduate with a Government major and a Theology minor. He is a 3 year letter winner in football for the Hoyas, and he hails from Saint Ignatius High School in Cleveland, Ohio.

Chris Szurgot is a senior in the College majoring in Government, with a minor in History. He hails from Chicago and embodies every Midwestern virtue you can think of, including humility. Academically, Chris has focused on the interplay between Latin American historical developments and the current political geography of the region. At Georgetown, he is the General Manager of Vital Vittles, the completely student-run grocery service that is part of the Students of Georgetown Inc., as well as a tutor for the D.C. Schools Program.

Brooks Walker is a senior Government major with an Economics minor. She is a member of the Georgetown University Sailing Team.

Amanda Wynter is from Tampa, Florida. She is a sophomore in the College studying Government and Philosophy. The intersection of political philosophy and theology has continued to weave its way into her narrative at Georgetown and she hopes to utilize the textual knowledge gained from her time at the Berkley Center throughout the remainder of her academic career. In her free time she serves on the Office Corps of the Philodemic Society, and she is also a member of The Hoyas' Board of Directors.

Daniel Yang is from California's Silicon Valley and is a senior in the College at Georgetown University. He is government major with a minor in history.



“It may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions and doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of: the Government from interference in any way whatever, beyond the necessity of preserving public order, and protecting each sect against trespasses on its legal rights by others.”

James Madison, Letter to Reverend Jasper Adams (1832)



BERKLEY CENTER

for Religion, Peace & World Affairs

GEORGETOWN UNIVERSITY

3307 M Street NW, Suite 200

Washington, D.C. 20007

berkeleycenter@georgetown.edu

202.687.5119

<http://berkeleycenter.georgetown.edu>

A Berkley Center publication,
designed by Kathleen Soriano-Taylor

