

RELIGIOUS ACCOMMODATION, RELIGIOUS TRADITION,  
AND POLITICAL POLARIZATION

by  
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*A religious accommodation is an exemption from compliance with the law for some but not for others. One might therefore suppose that before granting an accommodation, courts would inquire about whether a legal interference with religious belief or practice is truly significant, if only to evaluate whether the risk of political polarization that attends accommodation is worth hazarding. But that is not the case: any assessment of the significance of a religious belief or practice within a claimant's belief system is strictly forbidden.*

*Two arguments are pressed in support of this view: (1) courts have institutional reasons for acquiescing on the burden question; and (2) courts have anti-establishment reasons for doing so. Courts, it is said, do not decide about the quality of religious burdens. Claimants do that. Courts defer so as to reduce the political polarization that might result if some should perceive that their religious beliefs and practices are comparatively powerless to obtain exemptions. Deference on the burden question preserves the religious neutrality of courts and mitigates the politically polarizing dangers of accommodation.*

*This Essay contests that view. It argues that this approach to religious accommodation has generated considerable difficulties of its own that have aggravated the political polarization they were intended to reduce. Political polarization is now a pervasive feature of religious accommodation, but this Essay focuses on only some explanations for this unfortunate state of affairs—those that relate to the antagonistic relationship between religious accommodation and established religious groups and traditions.*

*First, hyper-deference as to the burden on religion systematically undermines the view that religions are institutional phenomena with established, stable, and longstanding traditions. In doing so, it damages the*

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*argument that courts are institutionally incompetent to evaluate religious ideas. Claims about the institutional incompetence of the judiciary to inquire into religious burdens proceed on the assumption that there is something unique—and intelligibly unique—about religious beliefs and practices that make them different from, say, individual foibles, fraudulent schemes, flights of fancy, or private predilections. Arguments about the judiciary’s institutional incompetence as to religious questions contemplate the existence of other institutions that are competent as to those questions. Lacking such other institutions, the institutional competence of courts to evaluate religious claims is greatly strengthened. Courts are perfectly competent to evaluate fraud, idiosyncrasy, gibberish, and personal preference. Yet when courts are disabled from evaluating some varieties of idiosyncratic eccentricity (denominated “religious”) but not others (not so denominated), then “religion,” and therefore religious accommodation, is bound to be politically polarizing. The category of religion, having been stripped of its institutional character for legal purposes, designates nothing coherent at all. And people begin to suspect with some justice that decisions about accommodation are being made on the basis of other reasons altogether.*

*Second, the hyper-deferential approach to religious accommodation assumes and promotes a particular and decidedly non-neutral view of religion as irrational and utterly incomprehensible to anybody other than an individual believer. Accommodation is not for established religious groups or traditions—groups that are organized, enduring, and that might offer substantial resistance to prevailing political and cultural orthodoxies. Accommodation is for the exotic, the personal, the unthreatening, and the peculiar. That view is part of the heritage of the highly individualized, subjective approach to religion steadily constitutionalized by the Supreme Court since the mid-twentieth century, and that now seems to be the foundation of one powerful strain of the contemporary cultural understanding of religion in America. It is a view whose promotion in law has profoundly entangled the state with religion. The refusal of courts to make any serious inquiry into the nature of the asserted religious burden has encouraged increasingly aggressive, self-indulgent, and ephemeral assertions of religious freedom. It will—and indeed, it already has—promoted unserious religion. Small wonder that religion as a legal category is in such disreputable odor. Small wonder that religious accommodation is increasingly perceived in politically partisan terms.*

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## INTRODUCTION

The United States has inherited a long legal and political tradition of accommodating people from laws that impose burdens on religion. At some points, that tradition has enjoyed federal constitutional status.<sup>1</sup> At present, it does not.<sup>2</sup> Religious accommodation is instead generally required (when it is required) either by sundry federal and state statutes or by state constitutional law.<sup>3</sup> And in still other cases, religious accommodation has simply been seen as a beneficently tolerant policy or the wisest practical course under the particular circumstances of religious pluralism in this country.

Yet in all cases of religious accommodation, the threshold question concerns the nature of the imposition on religious exercise. That is because in the absence of countervailing factors, the law should apply with equal force and to everybody.<sup>4</sup> When it applies selectively, the law's authority is compromised in at least two ways. First, the law's unequal application gives rise to the perception that the people who have to obey the law occupy a less favored position than the people who do not. That perceived unfairness in the law may damage its authority. Second, the law's own moral and political message may be diluted or perhaps even cheapened inasmuch as its authority extends only as far as the non-accommodated. Both of these consequences relate to the partiality of religious accommodation. Both can contribute to the perception that religious accommodation is one of the spoils of political influence. Both can therefore lead to political polarization, which here refers broadly to the increasing sense that decisions about religious accommodation depend on the perceived political, cultural, or ideological leanings of those requesting them.

One might in consequence expect that, before granting a religious accommodation, it would logically and rather obviously be necessary to inquire about precisely how the law interferes with a claimant's system of religious belief and practice. That interference ought to be ample indeed to hazard the risk of political polarization that attends accommodation;

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<sup>1</sup> *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

<sup>2</sup> *See Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>3</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012), Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012), the sundry state RFRAs, and state constitutional law. In general, references to "RFRA" in this Essay are to the 1993 federal act rather than to any state law patterned, in whole or in part, after the federal act.

<sup>4</sup> I view accommodations as exceptions from the law rather than a part of the law itself, recognizing that some may contest that description and believe that accommodations are themselves part of the law. At any rate, if the law applies with full force to some and only partial (or no) force to others, it does not apply equally to everyone.

claimants ought to be able clearly to show and explain the interference. And yet one of the most vexed issues in the law of religious accommodation concerns not merely the nature of a “substantial burden” on religious exercise but even the propriety of any legal inquiry about religious burdens at all. Any assessment of the importance or centrality of a religious belief or practice within the claimant’s belief system is strictly forbidden:

It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is “central” to his personal faith? . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.<sup>5</sup>

Two arguments are generally pressed in support of this view, both of which reflect courts’ interests in maintaining neutrality as to religion, or at least its veneer:

- Courts have “institutional” reasons for acquiescing in religious claimants’ understandings of the nature of a law’s burden;
- Courts have anti-establishment reasons for doing so.

The two arguments are connected inasmuch as the more deeply a court burrows into the quality of the imposition, the more probably it will breach epistemological substrata out of its depth, and the less likely that it can avoid entangling itself with religious affairs. Courts, it is said, do not decide about the quality of religious burdens; they do not opine on religious questions at all. Claimants do that. Both arguments thus serve the function of deflecting suspicion that decisions about religious accommodation are ultimately non-neutral or a matter of political influence or preference.

Courts, in sum, defer on the question of the burden. They defer to the individual claimant. They defer at least in part to reduce the political polarization that might result if some groups or individuals—particularly religious minorities or members thereof—should perceive that their religious beliefs and practices are comparatively powerless to obtain exemptions.<sup>6</sup> Deference on the burden question has been the preferred strategy to preserve the neutrality of courts when it comes to religion and to mitigate the politically polarizing dangers of religious accommodation. Deference reconciles religious accommodation and religious pluralism.

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<sup>5</sup> *Smith*, 494 U.S. at 886–87.

<sup>6</sup> *See infra* Part I.

This Essay will contest that view. It will argue that this approach to religious accommodation has generated considerable difficulties of its own that unfortunately have aggravated the political polarization they were intended to reduce. For a variety of reasons, political polarization is now a pervasive feature of religious accommodation. This Essay focuses on only some of those reasons—those that relate to the antagonistic relationship between religious accommodation (and specifically the hyper-deference accorded to claimants on the burden question) and established religious groups and traditions.

First, hyper-deference as to the burden on religion systematically undermines the view that religions are institutional phenomena with established, stable, and longstanding traditions. In doing so, it damages the argument that courts are institutionally incompetent to evaluate religious ideas. Claims about the institutional incompetence of the judiciary to inquire into religious burdens proceed on the assumption that there is something unique—and intelligibly unique—about religious beliefs and practices that make them different from, say, individual foibles, fraudulent schemes, flights of fancy, or private predilections. Arguments about the judiciary's institutional incompetence as to religious questions contemplate the existence of other institutions that *are* competent as to those questions. Lacking such other institutions, the institutional competence of courts to evaluate religious claims is greatly strengthened. Courts are perfectly competent to evaluate fraud, idiosyncrasy, gibberish, and personal preference. Yet when courts are disabled from evaluating some varieties of idiosyncratic eccentricity (denominated “religious”) but not others (not so denominated), then “religion,” and therefore religious accommodation, is bound to be politically polarizing. The category of religion, having been stripped of its institutional character for legal purposes, designates nothing uniform at all. And people begin to suspect with some justice that decisions about whether to accommodate or not are being made on the basis of other, unstated reasons altogether.

Second, the hyper-deferential approach to religious accommodation assumes and promotes a particular and decidedly non-neutral view of religion as irrational and utterly incomprehensible to anybody other than an individual believer. Accommodation is not for established religious groups or traditions—groups that are organized, enduring, and that might offer substantial resistance to prevailing political and cultural orthodoxies. Accommodation is for the exotic, the personal, the peculiar, and (especially) the unthreatening. That view is part of the heritage of the highly individualized, subjective approach to religion<sup>7</sup> that was given

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<sup>7</sup> Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1504 (2016).

perhaps its most eloquent exposition in the writing of William James,<sup>8</sup> was subsequently constitutionalized in mid-twentieth-century Supreme Court case law,<sup>9</sup> and now seems to be the foundation of at least one powerful strain of the contemporary cultural understanding of religion in America.<sup>10</sup> It is reflected in what my colleague, Mark Movsesian, has described as the “rise of the Nones”<sup>11</sup> and what Ross Douthat has characterized more polemically as “Bad Religion.”<sup>12</sup> It is a view whose promotion in law has profoundly entangled the state with religion inasmuch as it has contributed to one prominent and currently fashionable understanding of religion’s nature or essence. The refusal of courts to make any serious inquiry into the nature of the asserted religious burden has encouraged increasingly bizarre, aggressive, self-indulgent, ephemeral, and scatter-shot assertions of religious freedom. It will—and, indeed, it already has—promoted unserious religion. Small wonder that religion as a legal category is in such disreputable odor.<sup>13</sup> Small wonder that religious accommodation is increasingly perceived in politically partisan terms.

This Essay argues that the two most common justifications for deference—institutional incompetence and excessive religious entanglement—are subverted when a court categorically refuses to inquire about the nature of the burden on religious exercise. Much of the recent academic skepticism concerning religious accommodation has come from those who are either indifferent or hostile to religion as a category meriting special legal protection. Yet, increasingly, criticism of religious accommodation—and, indeed, of an overreliance by religious people on arguments for religious accommodation—has come from those who are sympathetic to religion or are perhaps even religious believers themselves. The Essay concludes by exploring some of those arguments, in which skepticism about religious accommodation—and in particular the increasing sense that accommodation is reserved for individualistic, balkanized, politically and culturally unthreatening religion that is dissociated from any enduring tradition or community—has been aggravated by

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<sup>8</sup> WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 166 (University Books, Inc. 1963) (1902) (discussion of the “twice-born”).

<sup>9</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 718–19 (1981); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

<sup>10</sup> See *infra* Part III.

<sup>11</sup> Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* 1 (Robert Schuman Ctr. for Advanced Stud., EUI Working Paper No. RSCAS 2014/19, 2014).

<sup>12</sup> ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* 3 (2012).

<sup>13</sup> There are multiple causes for religion’s increasingly problematic status as a special legally protected category, of course. This Essay focuses only on a small group of those causes, without in any way denying that others exist.

courts' total evaluative detachment on the question of the religious burden.

### I. DEFERENCE ON THE BURDEN QUESTION

If a legal regime provides no accommodations for religion, it need not be overly concerned with whether its laws have the incidental effect of burdening religion. But regimes that are open to accommodating religion invariably need to know something about the burden imposed by their laws. Legislators, administrators, and judges must then inquire about the quality of the burden and evaluate the justification for accommodation against other social interests. At the very least, as Kent Greenawalt has argued, the alleged burden must be “nontrivial.”<sup>14</sup> But several contemporary formulations appear to require a good deal more in providing that the burden must be “substantial.”<sup>15</sup> The Religious Freedom Restoration Act is fairly representative: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” with exceptions for laws that serve compelling government interests that are achieved by the “least restrictive means.”<sup>16</sup> The term “substantial” is rarely defined with any precision statutorily or in case law,<sup>17</sup> and yet a rapid glance at any dictionary plainly suggests that the burden on religion must somehow be important, essential, or considerable.<sup>18</sup>

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<sup>14</sup> 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 202 (2006).

<sup>15</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2012); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(1) (2012). As Angela Carmella has noted, several state constitutions have been interpreted to require claimants to show a “substantial burden” on their religious beliefs or practices. Angela C. Carmella, *State Constitutional Protections of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, 275–76 (1993). Not all states that protect religious freedom through religious accommodation require a “substantial” burden. See, for example, Missouri and Rhode Island’s RFRAs, which provide that a law may not “restrict” religious exercise. MO. ANN. STAT. § 1.302 (West 2013); R.I. GEN. LAWS § 42-80.1 (2006). New Mexico and Texas statutes speak of an “act or refusal to act” that is “motivated” by a “sincere religious belief . . .” New Mexico adds the requirement that the motivation be “substantia[1].” N.M. STAT. ANN. § 28-22-2 (2013); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (West 2011). Connecticut uses the language of “burden” in its state RFRA without “substantial.” CONN. GEN. STAT. ANN. § 52-571b (West 2013).

<sup>16</sup> 42 U.S.C. § 2000bb-1(a)–(b).

<sup>17</sup> Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996) (“Neither the text nor the legislative history of RFRA provides any clear indication of how courts ought to determine whether an incidental burden on religion is in fact substantial.”). A few lower court formulations are considered *infra*.

<sup>18</sup> See, e.g., 17 THE OXFORD ENGLISH DICTIONARY 66–67 (2d ed. 1989) (substantial is synonymous with “ample” or “considerable”). There are other ways to

Notwithstanding this seemingly high threshold, however, judicial inquiries into the importance or status of the religious exercise being burdened are absolutely forbidden.<sup>19</sup> The Religious Land Use and Institutionalized Persons Act follows the spirit of the *Smith* decision in stating that “religious exercise” includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>20</sup> It is an oddity of the statutory language (and perhaps even a suggestion of internal incoherence), however, that the assumption even in this statute, which purports to disavow inquiries about centrality, seems to be that the claimant should not come to court at all without a “system of religious belief,” a component of which has been burdened.<sup>21</sup>

Likewise, after the Supreme Court fundamentally altered the framework for accommodation claims in 1963 to require an assessment of a law’s “substantial burden” on religious exercise, questions quickly arose about exactly what a court should consider.<sup>22</sup> Almost no criterion has been thought sufficiently hands-off or deferential.<sup>23</sup> Requirements of a religious system of beliefs, internal consistency, and even rough alignment of beliefs with others within the religious community or group of which the claimant says he is a member all have been held out of order.<sup>24</sup> Courts have repeatedly held that an individual’s beliefs need not correspond at all with—indeed, may run directly contrary to—the beliefs of the religious group, community, or tradition with which the individual claims to be associated.<sup>25</sup> True, the Court has also suggested in dicta (usually buried deep in footnotes) that extreme or “bizarre” deviations from the beliefs and practices of the claimant’s alleged religious community might be problematic.<sup>26</sup> But these little asides have never posed any real obstacle. The standard by which religiousness is measured is the individual believer alone.<sup>27</sup>

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interpret “substantial”—as relating to substance, for example, or as being real or true rather than illusory—but these interpretations seem rather peculiar in this context.

<sup>19</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

<sup>20</sup> 42 U.S.C. § 2000cc–5(7)(A).

<sup>21</sup> For further discussion, see *infra* Part II.

<sup>22</sup> *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963).

<sup>23</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

<sup>24</sup> *E.g., id.* at 716.

<sup>25</sup> *See, e.g., id.* (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *Jackson v. Mann*, 196 F.3d 316, 320–21 (2d Cir. 1999) (emphasizing autonomy interests in religious self-identification notwithstanding a religious community’s judgment to the contrary).

<sup>26</sup> *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 n.2 (1989); *Thomas*, 450 U.S. at 715.

<sup>27</sup> *Thomas*, 450 U.S. at 715–16; *Jackson*, 196 F.3d at 320–21.



One comparatively uncontroversial premise has been that the claimant should at least be “sincere.” Whether the issue is drug use, withdrawal of children from school, conscientious objection to military service (on religious grounds or otherwise) or to other government-imposed mandates, or others, in order to satisfy the requirement of substantial burden, the claimant must, at a minimum, be telling the truth about his beliefs. Excepting cases of incontestable and practically self-confessed fraud,<sup>28</sup> however, courts and administrators have shown great reluctance to inquire into the authenticity of a claimant’s sincerity.<sup>29</sup> The claimant’s say-so both about what he believes and how important his beliefs may be are generally sufficient, for the state is not in any position to question the authenticity of what he says he believes. If sincerity is all that is left of the substantial burden inquiry, not much actually remains.

Even that may be disappearing. Some scholars have criticized inquiries into sincerity as altogether misguided.<sup>30</sup> It is said that evaluations of sincerity interfere with highly personal and perpetually shifting interests in self-definition.<sup>31</sup> Professor Winnifred Fallers Sullivan, for example, tells the story of a prison administrator charged with determining whether a prisoner who desired a Seder dinner was authentically Jewish.<sup>32</sup> Though the administrator believed the prisoner was lying about his religious commitments, he allowed the dinner because religiosity implicates matters of murky or evanescent personal identity.<sup>33</sup> Professor Mark Tushnet likewise is skeptical about “the capacity of institutional decision makers, such as arbitrators or administrators of public benefits programs, to determine sincerity.”<sup>34</sup> “[T]he government rarely contests sincerity[,]” writes Professor Fred Gedicks, “and courts rarely adjudicate it.”<sup>35</sup> For these scholars, even sincerity about religion either eludes judicial evaluation or is essentially meaningless.

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<sup>28</sup> Parodies meant to mock existing legal or political arrangements also seem not to qualify as sincere, as Nathan Chapman argues in a fine draft article, *Adjudicating Religious Sincerity* (on file with author).

<sup>29</sup> See, e.g., *United States v. Meyers*, 906 F. Supp. 1494, 1508–09 (D. Wyo. 1995) (holding that the “Church of Marijuana” was not a bona fide religion, but refraining from stating that the individual claimant was lying). This pattern of reticence can be traced to *United States v. Ballard*, 322 U.S. 78, 87–88 (1944), in which the Court held that juries ought neither to determine questions of falsity nor sincerity as to religious beliefs because those two are bound up together.

<sup>30</sup> Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. (forthcoming Jan. 2017) (manuscript at 7), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2657733](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657733).

<sup>31</sup> Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 453 (1998).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Mark Tushnet, Accommodation of Religion *Thirty Years On*, 38 HARV. J. L. & GENDER 1, 10 (2015).

<sup>35</sup> Gedicks, *supra* note 30 (manuscript at 7).

Notwithstanding what appears a generous test, religious claimants often have lost under it in court, but the reasons far more frequently involve solicitude for government interests that clash with a substantial burden than with skepticism about the claimant's assertion of a substantial burden.<sup>36</sup> Indeed, the Supreme Court has held that an asserted burden on religion did not rise to the requisite level of substantiality in only two cases about religious accommodation—*Jimmy Swaggart Ministries v. California Board of Equalization*<sup>37</sup> and *Bowen v. Roy*.<sup>38</sup> In *Swaggart*, the Court ruled unanimously that a generally applicable sales and use tax did not violate the Free Exercise Clause when it was applied to the sale of religious literature because “[t]here is no evidence in this case that collection and payment of the tax violates appellant’s sincere religious beliefs.”<sup>39</sup> Having less money to spend on religious activities than would have been the case without the sales tax was not a “constitutionally significant” burden.<sup>40</sup>

In *Bowen*, a majority of the Court concluded that the government could use internally and for its own purposes the Social Security number assigned to the daughter of Native American parents, notwithstanding the parents’ claim that use of the number would “rob the spirit” of their daughter.<sup>41</sup> But a majority also believed that the parents should not have to supply the number.<sup>42</sup> The Court’s assumption seems to have been that the objection to the number was sufficiently religiously powerful or important to exempt the claimants from this sort of compliance.

In another case not involving religious accommodation, *Lyng v. Northwest Indian Cemetery Protective Association*, the Court found that the federal government’s plan to build a road straight through a Native American burial ground did not impose a substantial burden on Native American religious exercise because the law had “no tendency to coerce individuals into acting contrary to their religious beliefs . . . .”<sup>43</sup> Even though the Court admitted that the road might “virtually destroy the . . . Indians’ ability to practice their religion,”<sup>44</sup> this was of no moment be-

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<sup>36</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 257–58 (1982); see also GREENAWALT, *supra* note 14, at 214 (“[T]he compelling interest test in [religious] exemption cases has never been quite what it seems.”).

<sup>37</sup> 493 U.S. 378, 392 (1990).

<sup>38</sup> 476 U.S. 693, 712 (1986).

<sup>39</sup> *Swaggart*, 493 U.S. at 391.

<sup>40</sup> *Id.*

<sup>41</sup> *Bowen*, 476 U.S. at 696, 701.

<sup>42</sup> *Id.* at 714–15 (Blackmun, J., concurring in part); *id.* at 728 (O’Connor, J., concurring in part).

<sup>43</sup> 485 U.S. 439, 450 (1988).

<sup>44</sup> *Id.* at 451–52 (quoting *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986)) (alteration in original).

cause the road did not compel the Native Americans to do anything, or not to do anything, in violation of their religious commitments.<sup>45</sup>

The Court's substantial burden jurisprudence has, in sum, been extremely meager. It has found the standard satisfied in virtually every other religious accommodation case.<sup>46</sup> Indeed, its standard practice is essentially to assume that a belief about the nature of the burden is sincere and "move on to the next steps of the analysis."<sup>47</sup> Likewise, though federal appellate courts are slightly more likely than the Supreme Court to find the substantial burden requirement unsatisfied, they too, generally defer. Setting aside the colossal and complicated ACA contraception mandate litigation (of which more below), over the past five years these courts have found the substantial burden inquiry satisfied at a rate of more than two to one.<sup>48</sup> Yet in the ongoing nonprofit contraception

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<sup>45</sup> For criticism, see MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 168–71 (2013).

<sup>46</sup> In *United States v. Lee*, 455 U.S. 252, 257 (1982), the Court held against an Amish farm and carpentry shop's religious objection to paying Social Security taxes, but the Court actually found that the requirement imposed a substantial burden on religion.

<sup>47</sup> Tushnet, *supra* note 34, at 10 n.59 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014)) ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS . . . in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.").

<sup>48</sup> From 2011 to 2015, the federal appellate courts found the substantial burden requirement satisfied in reported cases including: *Knight v. Thompson*, 797 F.3d 934, 944 (11th Cir. 2015) (substantial burden was stipulated); *Jehovah v. Clarke*, 798 F.3d 169, 180 (4th Cir. 2015); *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015); *Schlemm*, 784 F.3d at 365 (finding genuine issue of material fact as to burden); *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015); *Haight v. Thompson*, 763 F.3d 554, 566–67 (6th Cir. 2014); *Holland v. Goord*, 758 F.3d 215, 221 (2d Cir. 2014); *Native American Council of Tribes v. Weber*, 750 F.3d 742, 750 (8th Cir. 2014); *Wall v. Wade*, 741 F.3d 492, 499 (4th Cir. 2014) (substantial burden was stipulated); *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014); *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 412 (5th Cir. 2013); (substantial burden was stipulated); *Garner v. Kennedy*, 713 F.3d 237, 244 (5th Cir. 2013); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 559 (4th Cir. 2013) (finding genuine issue of material fact as to burden); *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 795 (5th Cir. 2012); *Fortress Bible Church v. Feiner*, 694 F.3d 208, 218 (2d Cir. 2012); *United States v. Ali*, 682 F.3d 705, 711 (8th Cir. 2012); *Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir. 2012); *United States v. Lafley*, 656 F.3d 936, 940 (9th Cir. 2011) (assuming substantial burden); *Maddox v. Love*, 655 F.3d 709, 720 (7th Cir. 2011) (finding genuine issue of material fact as to burden); *United States v. Wilgus*, 638 F.3d 1274, 1284 (10th Cir. 2011); *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1061 (9th Cir. 2011) (finding genuine issue of material fact as to burden). Those that find it unsatisfied include: *Andon, LLC v. City of Newport News*, 813 F.3d 510, 512 (4th Cir. 2016); *Incumaa v. Stirling*, 791 F.3d 517, 525 (4th Cir. 2015); *Newdow v. Peterson*, 753 F.3d 105, 107 (2d Cir. 2014) (holding that "In God We Trust" on the currency did not

mandate litigation, nearly every Court of Appeals to address the issue has held that the claimants were not substantially burdened<sup>49</sup>—a remarkable *volte-face*, in light of the purportedly hyper-deferential inquiry, that is difficult to explain without resorting to factors quite extraneous to legal doctrine and yet eminently germane to the political polarization of religious accommodation.<sup>50</sup>

There are two principal arguments for deference as to the nature of the burden, both of which are meant to address, at least in part, the problem of religious accommodation's association with political polarization. First, courts simply are not competent institutions to evaluate religious beliefs and practices. As the Supreme Court put it in *United States v. Lee* and *Thomas v. Review Board*: "It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'"<sup>51</sup> The argument from incompetence suggests precisely that courts are poor judges of what religion may require. The focus is on the proper function or role of courts: religion is the sort of thing that the judiciary, as an institution, is not well suited to understand. Courts are not skilled in such matters: they "lack the tools to engage in line drawing when it comes to determining and calibrating the degree of theological impact a particular law imposes on religion."<sup>52</sup> Removing courts from the sphere of competence as to religion is thought to have the effect of shielding them from making judgments about religious affairs and, in this sense, preserving their neutrality as to religion.

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substantially burden atheists' beliefs); *Mutawakkil v. Huibregtse*, 735 F.3d 524, 528 (7th Cir. 2013); *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 100 (1st Cir. 2013); *Hartmann v. Ca. Dep't of Corr.*, 707 F.3d 1114, 1125 (9th Cir. 2013); *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012); *McFaul v. Valenzuela*, 684 F.3d 564, 577 (5th Cir. 2012); *Mahoney v Doe*, 642 F.3d 1112, 1121-22 (D.C. Cir. 2011); *DeMoss v. Crain*, 636 F.3d 145, 153 (5th Cir. 2011).

<sup>49</sup> See, e.g., *Eternal Word Television Network, Inc. v. U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1129 (11th Cir. 2016); *Grace Sch. v. Burwell*, 801 F.3d 788, 791 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir. 2015), *vacated*, 136 S. Ct. 1557, 1559 (2016); *Mich. Catholic Conference v. Burwell*, 807 F.3d 738, 746 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 210 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 452 (5th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 618 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Geneva Coll. v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 427 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Priests for Life v. U.S. Dept. of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014), *vacated*, 136 F.3d 1557 (2016).

<sup>50</sup> For further discussion, see Part IV *infra*.

<sup>51</sup> *Lee*, 455 U.S. at 257 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

<sup>52</sup> Michael A. Helfand, *Identifying Substantial Burdens* 18 (Pepperdine Univ. Sch. Law, Paper No. 2016/3, 2016).

Second, courts ought to defer to a claimant's understanding of the burden's quality not merely because they are poor judges of religion or because they are likely to make mistakes, but because even if they were good judges of religion they would risk excessively entangling church and state with too searching an inquiry. That is, their inquiries might trigger anti-establishment concerns. Thus, the Court has said that "the First Amendment forbids civil courts from" interpreting "particular church doctrines" or opining on the "importance of those doctrines to the religion."<sup>53</sup> The Court's understandable reticence to tell Hobby Lobby that it was wrong about its own beliefs, or that its beliefs were "flawed," suggests exactly a reluctance to deal with issues that might entangle it in "religious and philosophical question[s]"<sup>54</sup> or draw it "into impermissible questions of theology."<sup>55</sup> To like effect is the Establishment-Clause leg of the ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, where the Court held that the clause prohibits "government involvement in such ecclesiastical decisions."<sup>56</sup> For a court to declare what is and is not important in the religious life of a claimant risks this type of inappropriate establishmentarian "involvement." Once again, the effect is said to be to separate the civil and religious realms, mitigating the risk of political polarization if courts were more deeply involved in making judgments about burdens on religious exercise.

Both arguments at least indirectly address and aim to deflect the objection that religious accommodation is one of the spoils of political influence. The first does so by separating religious and civil concerns as a matter of expertise and competence. The second does so by preventing courts from making the sorts of judgments about religion that might be perceived as non-neutral and a violation of the Establishment Clause. In the following sections, this Essay explores these two arguments and questions whether they are successful in dissociating religious accommodation and political polarization.

## II. THE ARGUMENT FROM INSTITUTIONAL INCOMPETENCE

The argument from institutional incompetence supposes that civil decision makers are poor arbiters when it comes to religion. Drawing in part from John Locke's views, the claim is that the arguments and tools available to the civil authority (force, in particular) are ineffectual means of evaluation and suasion when it comes to religion.<sup>57</sup> James Madison's

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<sup>53</sup> *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969).

<sup>54</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

<sup>55</sup> Helfand, *supra* note 52, at 22.

<sup>56</sup> 565 U.S. 171, 188–89 (2012).

<sup>57</sup> See JOHN LOCKE, A LETTER CONCERNING TOLERATION 162 (Wilson, Spence & Mawman eds., 1788) (1689).

position was to like effect: civil authorities are incompetent judges when it comes to religious truth.<sup>58</sup> The spheres of religious and civil authority are distinct. Advocates of this type of institutional separation are skeptical that religious knowledge is available to the civil authority and vice versa.

Yet when one considers some of Madison's own reasons for civil incompetence as to religion, the claim of civil incompetence appears in a more complicated and qualified light. To support his view that the spheres of religious and civil authority are distinct, Madison relies heavily on the example of Christianity. To say that an establishment is necessary to support Christianity:

[I]s a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.<sup>59</sup>

Underlying Madison's argument of civil incompetence to evaluate religion are several assumptions about the nature of religion, which Madison extrapolates from Christianity's history (or at least the Christian history he offers). First, the reason for the civil authority's incompetence as to religion is that religion is an ancient phenomenon with an extremely long history—one comprising many "pages" that predates the civil authority and that has survived over time in spite of it.<sup>60</sup> Indeed, one might say that Christianity has proved itself to be its own establishment, its own independent institution that has developed over time and under the tending of generations of practicing Christians, which therefore cannot be co-opted by the state. Christianity's doctrines, its tradition "left to its own evidence," developed and flourished over many years during which its durability was perpetually tested by the civil authority. It is for this reason that it would be perverse, "a contradiction in terms[.]" to believe that civil institutions could have anything decisive to say about the institution of Christianity, and by extension of the institution of religion.<sup>61</sup>

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<sup>58</sup> JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in JAMES MADISON: WRITINGS 29, 32 (Jack N. Rakove ed., 1999).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Second, civil intermeddling with religion might “weaken” the “pious confidence” of the community or group of people committed to it and strengthen the suspicion of its skeptics.<sup>62</sup> Again, the institutional, communal quality of Madison’s argument is critical: the civil authority’s establishment of religion might threaten or subvert the institutional competence of the community of the truly devout.<sup>63</sup> The assumption is that *there is* such an institutional community—with its own authority, competency, history, and collection of beliefs and practices—which has sustained Christianity, which exists alongside but independent from the civil authority, and whose intelligibly distinctive competency could be injured by the intrusion of the state. To be sure, Madison also refers several times in the *Memorial and Remonstrance* to the “conscience of every man” as inviolable.<sup>64</sup> But here, when he specifically considers the matter of institutional competence, Madison’s argument is addressed to the preservation of the distinct institution and tradition of religious authority.

Madison’s key insight in this portion of the *Memorial and Remonstrance* is that arguments about the institutional incompetence of the civil authority and related claims of institutional deference by judges assume the existence of other institutions in civil society that are competent as to the matter at issue. In a recent essay, Professor Phillip Muñoz suggests that what the founding generation meant by “religion” was fairly tightly restricted to matters of communal “worship,” and he cites to Madison’s own official presidential proclamation calling for a day of “public humiliation and prayer”:

If the public homage of a people can ever be worthy [of] the favorable regard of the Holy and Omniscient Being to whom it is addressed, it must be that, in which those who join in it are guided only by their free choice, by the impulse of their hearts and the dictates of their consciences . . . .<sup>65</sup>

What is of interest in this passage is not that religious belief must be free and “uncoerced” (as he later puts it), though that is certainly important. It is instead the assumption that communal “worship” is a distinctive substantive element of the category “religion” and that “worship” is engaged in by a group of believers (the “public homage of a people”) affirming

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<sup>62</sup> *Id.*

<sup>63</sup> See KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* 124 (2015) (“Government involvement in religious matters also harms the institutions whose role it is to help identify and teach this truth and to nurture faith.”).

<sup>64</sup> MADISON, *supra* note 58, at 30.

<sup>65</sup> Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369, 370–71 (2016) (quoting James Madison, Proclamation on Day of Public Humiliation and Prayer (July 23, 1813), <http://millercenter.org/president/madison/speeches/speech-3622>).

the same set of beliefs. It is the group-like, communal, institutional quality of religion assumed by Madison to define religion and to justify the state's non-intrusion.

Indeed, judicial deference in other contexts frequently depends upon evaluations of the comparative expertise of other institutions of civil society. As Professor Paul Horwitz has observed, "courts defer to other institutions when they believe that those institutions *know more* than the courts do about some set of issues, such that it makes sense to allow the views of the knowledgeable authority to substitute for the courts' own judgment."<sup>66</sup> As comparative advantages in institutional knowledge or expertise diminish, so does the justification for epistemic deference by courts.

While Horwitz lists several public institutions—administrative agencies, the military, prisons, and public universities<sup>67</sup>—to which courts regularly defer, deference to private institutions and associations may be epistemically warranted as well. Consider in this respect an example that may seem far afield but is in some ways analogous: the business judgment rule.<sup>68</sup> Courts presume that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."<sup>69</sup> As Judge Winter once explained, while:

[A]n automobile driver who makes a mistake in judgment as to speed or distance injuring a pedestrian will likely be called upon to respond in damages, a corporate officer who makes a mistake in judgment as to economic conditions, consumer tastes or production line efficiency will rarely, if ever, be found liable for damages suffered by the corporation.<sup>70</sup>

One crucial reason is that courts and businesses operate in different domains—different spheres of expertise—so that "after-the-fact litigation is a most imperfect device to evaluate corporate business decisions."<sup>71</sup> The rule prescribes "abstention" on the part of courts because they lack

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<sup>66</sup> Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1085 (2008).

<sup>67</sup> *Id.* at 1087–89.

<sup>68</sup> Whether contractual relationships such as businesses are subsets of private associations or the other way round is debatable. *See, e.g.*, Marc O. DeGirolami, *Classical Liberalism: Teaching Its Own Undoing*, LIBR. L. & LIBERTY (Jan. 6, 2016), <http://www.libertylawsite.org/liberty-forum/classical-liberalism-teaching-its-own-undoing/>; Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, LIBR. L. & LIBERTY (Jan. 2, 2016), <http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/>.

<sup>69</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

<sup>70</sup> *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982).

<sup>71</sup> *Id.* at 886.



the expertise to assess business decisions.<sup>72</sup> Yet this deference has limits: where the decision lacks a business purpose or where it is not made in “good faith” and with “honest belief” in its soundness, and certainly when it is fraudulent, the presumption may be overcome.<sup>73</sup>

There are several common assumptions when courts defer to religious claimants who seek accommodations: just as courts acquiesce in “good faith” decisions by the directors of corporations, so too, do they defer to “sincere” religious claimants, because in both cases courts are not in an epistemically advantageous position to evaluate the judgment of the private institution. They are likely in both cases to lack the requisite competencies. Indeed, one might well rename the parallel set of presumptions pressed by Madison and many others the “religious judgment rule.”

Yet just as the business judgment rule assumes the existence of established institutions with comparative advantages in expertise when it comes to making business decisions, the religious judgment rule also depends upon a similar assumption. Epistemic deference, in either context, would not otherwise be warranted. Without any baseline understanding of what constitutes “religious judgments” and which institutions are competent to make them, the presumption of deference is greatly destabilized. For courts are just as competent to detect and evaluate fraud, bad faith, dishonesty, delusion, and frivolousness in the business context as in the religious context.

True, as to religion, the issue is complicated by larger disagreements about the primacy of institutional or individual religious freedom in American law. If the individual, or the individual conscience, is the locus of religious authority, then he or she (or it) is the “institution” to which courts must defer. Some recent scholarship contends that group, corporate, or truly institutional religious freedom is the primary right (or at least a co-equal right with individual religious freedom), while other scholars resist this view.<sup>74</sup> Some argue that individual religious freedom is

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<sup>72</sup> Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 119 (2004).

<sup>73</sup> *Id.* at 100; see also D. Gordon Smith, *The Modern Business Judgment Rule* (BYU Law Research Paper Series, Paper No. 15-09, 2015).

<sup>74</sup> See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 82 (2013); STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 37 (2014); Richard W. Garnett, “*The Freedom of the Church*”: (*Towards an Exposition, Translation, and Defense*), 21 J. CONTEMP. LEGAL ISSUES 33, 46 (2013); Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 231, 231 (Schwartzman et al. eds., 2016); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 919 (2013).

derivative of or parasitic on institutional religious freedom while others argue for the reverse.<sup>75</sup>

While it is not necessary to resolve this debate conclusively, it is helpful to see the argument from epistemic deference on a continuum. Epistemic deference becomes more and more sensible where courts are confronted by claims of religious burdens that are part of a larger set of interconnected beliefs and practices. The comparative advantages in institutional knowledge increase for religion, and decrease for courts, as the religious tradition becomes more complex, intricate, group-like, and enduring. It stands to reason that, in the main, the more developed and mature the religious tradition—the more “pages” of history and experience it comprises and the more it has been sustained and cultivated over time by groups of believers<sup>76</sup>—the more compelling the justification for epistemic deference becomes. Conversely, the institutional competence of courts increases as the institutional expertise of religion decreases. As the claim for accommodation becomes disconnected from a religious tradition—as it becomes deracinated from any larger body of durable beliefs and practices within which it is integrated and handed down intergenerationally—there is less and less specifically religious institutional knowledge to which courts must defer.

Precisely the contrary assumption underlies the hyper-deference accorded to individual beliefs and practices under the prevailing doctrine. The individual believer’s sincerity about what he believes is often sufficient to satisfy the standard, even when (perhaps even especially when) his beliefs and practices run contrary to the institution or religious tradition of which he claims to be a member. Religion thus becomes synonymous with autonomous conviction. Yet that approach has undermined the very argument for deference that it was meant to justify: that courts are incompetent institutions to make judgments about religion. And it has also deprived the legal category of “religion” of everything except the name—a name that the shrewd claimant is well advised to attach to whatever autonomous conviction he happens to hold.

### III. THE ARGUMENT FROM EXCESSIVE ENTANGLEMENT

What of the second justification for rigorous deference on the question of religious burden—the danger of excessive entanglement between the civil and religious authority? Against my suggestion that religious traditions and groups suffer under the current regime, I can report that

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<sup>75</sup> Compare SMITH, *supra* note 74, at 37, with Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 93–94 (2014), and Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1987 (2007).

<sup>76</sup> MADISON, *supra* note 58, at 33.

most reactions emphasize the individuality of religious belief: what of the solitary claimant who seeks a draft exemption because he believes that God or moral “goodness” forbids him from killing people?<sup>77</sup> Or the lone seeker who cannot point to any existing system of religious belief for her sincere view that abiding by a zoning ordinance disrupts her spiritual “inner flow”?<sup>78</sup> Unlike the argument from institutional incompetence, concerns about excessive state entanglement in religion are motivated by the view that it is inappropriate or wrong for the state to control religion or to steer it in any particular direction. The state must be neutral as to religion,<sup>79</sup> and courts must not improperly favor or promote organized religious traditions with comparatively stable and long histories while disfavoring new or emerging religious phenomena. Psychic Sophie<sup>80</sup> or Robert Bellah’s Sheila,<sup>81</sup> who follow their “own little voice[,]”<sup>82</sup> are at least as much religions as Roman Catholicism or Judaism.

Indeed, perhaps they are even more so. I am skeptical about how “neutrality” is deployed in this set of reactions. It is telling that in the minds of many of my interlocutors, religion is immediately associated with the ineffably subjective, inarticulable experiences, desires, and personal commitments of individual claimants. That perception of religion—as a changeable set of fragmented and idiosyncratic views mirroring the self’s then-existing needs—is also reflected in the single-most rapidly growing religious constituency in the United States (particularly among millennials), the unaffiliated “Nones.”<sup>83</sup> The Nones hold a broad range of convictions, but the abiding dislike of institutional religion and the lack of importance<sup>84</sup> they attach to religion are constants. In a fairly recent survey of the Pew Forum on Religion and Public Life, a quarter of the Nones reported they believe in astrology; a quarter of them believe in reincarnation; 30% of them say they believe in the spiritual energy of crystals, trees, or mountains.<sup>85</sup> But few take any of these views seriously or

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<sup>77</sup> See, e.g., *United States v. Seeger*, 380 U.S. 163, 186 (1965) (noting with approval that the court of appeals “found little distinction between Jakobson’s devotion to a mystical force of ‘Godness’ and Seeger’s compulsion to ‘goodness’”).

<sup>78</sup> See *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 571 (4th Cir. 2013).

<sup>79</sup> See generally ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

<sup>80</sup> *Moore-King*, 708 F.3d at 564. The Fourth Circuit held that Psychic Sophie’s beliefs did not constitute a religion, though there are reasons to wonder why. *Id.* at 571. For discussion, see Movsesian, *supra* note 11 (manuscript at 3–5).

<sup>81</sup> ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 221 (1985).

<sup>82</sup> *Id.*

<sup>83</sup> See Movsesian, *supra* note 11 (manuscript at 1); see also PEW RESEARCH CTR., “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION (2012), <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf>.

<sup>84</sup> PEW RESEARCH CTR., *supra* note 83, at 24–25.

<sup>85</sup> *Id.* at 24.

attach much importance to them; in fact, this is one of the few attributes that binds them together as a group.<sup>86</sup> To be religious in this conception is to invent and reinvent one's own spirituality at need, often in ways that celebrate and reaffirm the ego.<sup>87</sup> It is to be "spiritual, but not religious"<sup>88</sup> because of discomfort with any God other than the God within, "the divinity that resides inside your very self and soul."<sup>89</sup> It is to satisfy the changeable yearnings and longings of the individual spirit.<sup>90</sup>

This type of individualistic and subjective understanding of religion is not new in America; nineteenth century Transcendentalism is one forebear, and there are probably several others. But, as my colleague, Mark Movsesian, writes:

Unlike earlier idiosyncratic believers, today's Nones cannot be dismissed as "a small group of 'kooks' who just don't fit into respectable American society." Nones comprise perhaps one-fifth of the adult population and are perhaps the third largest religious group in the country. To quote Charles Taylor, the "ethic of authenticity" and "expressive individualism" that fascinated Romantic elites like the Transcendentalists has gone mainstream.<sup>91</sup>

The growing solipsism, "do-it-yourself"-ism, and consumer-oriented spirituality<sup>92</sup> of American religion is transforming the American religious landscape profoundly as traditional religious orthodoxies of various kinds that do not conform to the Nones' model are increasingly rejected as aberrant and extreme.<sup>93</sup>

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<sup>86</sup> See *Religious Landscape Study: Importance of Religion in One's Life*, PEW RESEARCH CTR., <http://www.pewforum.org/religious-landscape-study/importance-of-religion-in-ones-life/> (last visited Dec. 19, 2016) (reporting that 66% of Nones say that religion is "not at all important" or "not too important" in their lives, while only 13% say that it is "very important").

<sup>87</sup> See ROBERT C. FULLER, *SPIRITUAL, BUT NOT RELIGIOUS: UNDERSTANDING UNCHURCHED AMERICA* 5 (2001).

<sup>88</sup> *Id.*

<sup>89</sup> DOUTHAT, *supra* note 12, at 216.

<sup>90</sup> See, e.g., KATHRYN LOFTON, *OPRAH: THE GOSPEL OF AN ICON* 209 (2011); CORINNA NICOLAOU, *A NONE'S STORY: SEARCHING FOR MEANING INSIDE CHRISTIANITY, JUDAISM, BUDDHISM, & ISLAM at XII-XIII* (2016) (describing the author's exploration of these religions as "a personal quest to acquaint [herself] with religion").

<sup>91</sup> Movsesian, *supra* note 11 (manuscript at 8) (footnotes and citations omitted) (quoting FULLER, *supra* note 87, at 154).

<sup>92</sup> DOUTHAT, *supra* note 12, at 62.

<sup>93</sup> A fairly recent study by the Barna Research Group finds that 50–79% of respondents believe that the following are examples of "very" or "somewhat" "extreme" religion: "[d]emonstrat[ing] outside an organization they consider immoral"; "[p]reach[ing] a religious message in a public place"; "[a]ttempt[ing] to convert others to their faith"; and "[p]ray[ing] out loud in public for a stranger," among others. See *Five Ways Christianity Is Increasingly Viewed as Extremist*, BARNAL GRP.

Law has played its part as well, modest though it may be. It has both reflected and reaffirmed these larger cultural trends. The predominant conception of religion in American law bears a close resemblance to the consumerist model of religion described by sociologist Grace Davie as the “marketplace” approach.<sup>94</sup> Religious groups splinter and diversify—the better to suit the felt desires of existing and prospective adherents. They compete with one another as service providers or private firms would, with the consumer selecting the religion that best corresponds to his present circumstances. The consumer changes his associational affiliations accordingly.<sup>95</sup> What is “true” in this model is, as William James once had it, what most closely accords with “genuine happiness”: “If a creed makes a man feel happy, he almost inevitably adopts it. Such a belief ought to be true; therefore it is true . . . .”<sup>96</sup> The Jamesian view of religion and its relationship to truth has had a powerful influence on the Supreme Court; indeed, it has been explicitly cited by at least one Supreme Court justice for the proposition that a jury cannot distinguish sincerity of religious belief from religious truth.<sup>97</sup> Religious freedom thus assumes a highly voluntarist character.<sup>98</sup> The untrammelled freedom of individual choice-making and choice-changing is the primary object of legal protection because what is “true” depends not on the achievement and retention of a superior religious insight (an insight that the government would, in any case, be prevented from embracing by the Establishment Clause) but on the process of choice-making and changing in response to ever-altering circumstances and desires.

The law of religious accommodation incorporates many of these assumptions. Concerns that the free-exercise balancing test authorized a kind of over-pluralized, autonomized anarchy motivated the Court to change course in *Employment Division v. Smith*, where it returned to the pre-*Sherbert* exemption regime.<sup>99</sup> But the passage of RFRA (unanimous in the House—a more lopsided vote than the Declaration of War following

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(Feb. 23, 2016), <https://www.barna.com/research/five-ways-christianity-is-increasingly-viewed-as-extremist/>.

<sup>94</sup> GRACE DAVIE, *THE SOCIOLOGY OF RELIGION* 73 (2007).

<sup>95</sup> *Id.* at 12.

<sup>96</sup> JAMES, *supra* note 8, at 78–79.

<sup>97</sup> *United States v. Ballard*, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting) (“I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience.”).

<sup>98</sup> Some of the most eloquent defenses of religious freedom in the United States begin from explicitly voluntarist premises. *See, e.g.*, Thomas C. Berg, *Religious Displays and the Voluntary Approach to Church and State*, 63 OKLA. L. REV. 47, 48 (2010); Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 65 (2007); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAS*, S.D. L. REV. 466, 467 (2010).

<sup>99</sup> 494 U.S. 872, 890 (1990).

Pearl Harbor received) and RLUIPA, together with sundry state versions of RFRA, restored the autonomized approach as the primary test against which religious exemption claims are evaluated. As already noted, these laws generally instruct courts to avoid inquiries into the centrality of a belief; indeed, *Smith* itself said so.<sup>100</sup> Subjective perceptions of burdens may not be questioned because religious exercise is primarily understood as a matter of autonomous, individual choice—a choice that must be honored because it is personally “fulfilling”<sup>101</sup> and that marks off one’s distinctive human “identity.”<sup>102</sup>

This is hardly a neutral approach to religion. It is one that fosters a very particular conception of religion, one that a critic might perceive as debased, ephemeral, shallow, and unserious. Yet however perceived, if the objection to judicial evaluations of religious burden in accommodation cases is that courts would thereby be excessively entangling the state and religion, it seems to neglect that courts and the state are already entangled neck-deep in religion. The tests for religious accommodation—including the conventional gloss on the substantial burden inquiry—champion and systematically promote a specific and highly contestable understanding of religion, one that happens, perhaps not coincidentally, to align neatly with the premises of some of the most culturally powerful religious trends in America.

For years, prominent scholars have made arguments trading on the Madisonian idea that establishment corrupts religion and that long-standing civic traditions such as legislative prayer render religion an unserious affair.<sup>103</sup> But these are not the only possible state-promoted corrupting and unserious influences on religion. Professor Mark Tushnet has recently argued that accommodationist decisions like *Hobby Lobby* “lower the cost of faith.”<sup>104</sup> They weaken religion because they cheapen belief.<sup>105</sup> It is rather late in the day, however, for such complaints. If the American law of religious accommodation has promoted unserious religion, the root of the problem runs deeper than a decision issued three

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<sup>100</sup> *Id.* at 886–87; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012).

<sup>101</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

<sup>102</sup> *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1853 (2014) (Kagan, J., dissenting) (“A person’s response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world.”).

<sup>103</sup> *See, e.g., Perry Dane, Prayer Is Serious Business: Reflections on Town of Greece*, 15 *RUTGERS J.L. & RELIGION* 611, 616–17, 616 n.2 (2014); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 *WM. & MARY L. REV.* 1831, 1873–74 (2009).

<sup>104</sup> *See, e.g., Tushnet, supra* note 34, at 26; *see also* Mark Tushnet, *In Praise of Martyrdom*, 87 *CALIF. L. REV.* 1117, 1119 (1999).

<sup>105</sup> Tushnet, *supra* note 34, at 26.

years ago. It is implicated in the very conception of religion that American law has steadfastly championed over decades.

#### IV. ACCOMMODATION SKEPTICISM AND POLITICAL POLARIZATION

In recent years, skepticism about religious accommodation from those who are either indifferent or hostile to religion has become an altogether banal staple of the academic literature.<sup>106</sup> That skepticism has been spurred on by the sense that religious accommodation challenges what Tushnet has described as the “equality agenda.”<sup>107</sup> It is manifest in the effluvium of accommodation-critical commentary motivated by perceived threats to sundry interests in sexual liberty and equality of increasingly recondite varieties.<sup>108</sup> And it is closely connected to another growing cache of scholarship that questions whether religion as a category merits any special legal treatment at all.<sup>109</sup>

Yet skepticism about religious accommodation is also coming from less expected quarters—from those who are sympathetic to religion or perhaps even religious believers themselves.<sup>110</sup> This literature has attracted almost no notice. The standard view continues to be that those who are sympathetic to religion are always disposed favorably toward accommodation.<sup>111</sup> While that has largely been true over the last few decades,<sup>112</sup> it may be changing. And the changes are in part attributable to the political polarization resulting from the accommodation strategy.

In a recent essay, for example, Professor Maimon Schwarzschild plausibly suggests that one of the principal effects of the accommodation strategy over the last century has been to balkanize religion—to fragment it into ever-smaller constituencies.<sup>113</sup> When religious accommodations were first constitutionalized, their effect was to incentivize the creation of sects, since it was such sects, and not more established religious institutions and traditions, that would be in a political position to need court-

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<sup>106</sup> Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 108 (2016).

<sup>107</sup> Tushnet, *supra* note 34, at 19.

<sup>108</sup> For citation to and discussion of this literature, see DeGirolami, *supra* note 106, at 108, and Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 159–60 (2014).

<sup>109</sup> See, e.g., Laycock, *supra* note 74, at 232; Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1, 25 (2008).

<sup>110</sup> Maimon Schwarzschild, *Do Religious Exemptions Save?*, 53 SAN DIEGO L. REV. 185, 187 (2016).

<sup>111</sup> *Id.* at 185.

<sup>112</sup> For some of the early standard bearers, see, for example, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3 (1985).

<sup>113</sup> Schwarzschild, *supra* note 110, at 194.

sanctioned accommodation.<sup>114</sup> Constitutionalized religious accommodation was, moreover, a kind of ersatz legal compensation for the expungement of traditional institutional religion from civic life advocated by legal scholars with secular commitments and steadily mandated by the Supreme Court in the twentieth century.<sup>115</sup> Just at the moment when the Court was disallowing religious symbols and exercises in the public square (in public schools and on civil property, for example), it also began to offer religious accommodations as a matter of constitutional right and subsequently legislative grace.<sup>116</sup>

“Yet the tradeoff[,]” writes Schwarzschild, “of religious interests lost and gained is not really symmetrical or balanced.”<sup>117</sup> Its effect was to punish established religious traditions such as Mainline Protestantism and to promote, at first, religions including Seventh-Day Adventism and the Amish, which, though far from the Mainline, had distinctive histories of their own.<sup>118</sup> Yet with time, and particularly after the fall of the federal RFRA and the rise of RLUIPA, which specifically protects religion in prison, the promotion of religious balkanization and sectification through the accommodation strategy increased dramatically.<sup>119</sup> Of course, the prison population is not a representative cross-section of American society. And, naturally, there are many other causes for the decline of Mainline Protestantism and other established religious traditions in America.<sup>120</sup>

Nevertheless, law has contributed to these developments. The fact that federal law categorically elevates prisoners as special subjects of religious accommodation is suggestive of larger trends and makes a powerful symbolic statement.<sup>121</sup> When the law:

[S]eems to offer exemptions and accommodation to any sect or cult that seeks it and that claims to be a religion[,] [it] must tend at least to some degree to legitimate such sectarianism in the public

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 194–95.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 195.

<sup>118</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972); *Sherbert v. Verner*, 374 U.S. 398, 399, 399 n.1 (1963).

<sup>119</sup> US COMM’N ON CIVIL RIGHTS, ENFORCING RELIGIOUS FREEDOM IN PRISON 87 (2008) (indicating that of the 250 RLUIPA claims filed in federal courts from 2001 through 2006, more than half were brought by claimants designated as “Pagans,” “Unknown/Unspecified,” “Native Americans,” and “Muslims”).

<sup>120</sup> On some of these causes, see JOSEPH BOTTUM, AN ANXIOUS AGE: THE POST-PROTESTANT ETHIC AND THE SPIRIT OF AMERICA 104–05 (2013).

<sup>121</sup> Already the Supreme Court’s favorable decision for the prisoner in *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015), has induced lower court judges to apply more rigorous standards to prisoner RLUIPA claims. See, e.g., *Muhammad v. Wheeler*, No. 5:15-CV-130, 2016 WL 1117448, at \*5 (E.D. Ark. Mar. 22, 2016).



eye and to erode the distinction between faiths with substantial history—and with the intellectual, spiritual, and aesthetic resources that grow with historic development—and sects and cults without such resources.<sup>122</sup>

The hyper-deferential approach to the question of substantial burden on religious exercise is part of the self-same legacy. It, too, has contributed to the weakening of organized, traditional religion and to its reduced and increasingly supplicant position toward the state. These effects are exacerbated when set alongside an aggressive interpretation of the Establishment Clause that increasingly forbids the civil authority from any symbolic contact or connection with those religious institutions that have been historically and culturally central in the American political experience, Christianity most prominent among them. All of this is not neutral in the least as to religion, unless “neutrality” is understood as the promotion of certain conceptions of religion and the demotion of others.

Another new line of accommodation skepticism cautions that too single-minded a focus on religious accommodation can divert a religious community’s attention away from the difficult work of internal fortification and external social and political transformation, and toward the more defensive work of carving out space for individual belief and practice sheltered from the reach of the civil authority.<sup>123</sup> There are both potential inward and outward dangers here.

The inward danger is that in the process of seeking accommodations, religious communities may adopt the locutions and distinctive argot of the law in thinking about the nature of their own religious traditions and commitments. And they may be corrupted by it. Yuval Levin, for example, argues that:

As a practical matter these days, religious liberty is essential not so much because it protects people’s ability to believe and say certain things but because it protects people’s ability to live in a certain way. That way of living—shaped by memory, bounded by tradition, directed to the future, formed to meet obligations both sacred and profane, and ultimately answerable to permanent truths—cannot be embodied in the practice of lone individuals, because at its essence it is *about* relational commitments . . . . This understanding of the practical meaning of our first freedom makes it easier to see why the practice it protects so easily outgrows the narrow bounds of the exercise of religion as envisioned by our legal system.<sup>124</sup>

The primary risk of religious accommodation, Levin argues, is that the struggle for exemptions from civil authority for the freedom to espouse religious commitments might be so intense, hard-fought, and all-

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<sup>122</sup> Schwarzschild, *supra* note 110, at 198.

<sup>123</sup> Yuval Levin, *The Perils of Religious Liberty*, FIRST THINGS, Feb. 2016, at 29, 35.

<sup>124</sup> *Id.* at 34.

consuming as eventually to be mistaken by those inside the religious community for the religious commitments themselves.<sup>125</sup> The damage will be especially severe for exactly those religious groups whose commitments are informed and “bounded by tradition.”

The corresponding outward danger of pursuing the accommodation strategy is that it will deflect energy and resources from the vital enterprise of resisting the growth and expanding power of government.<sup>126</sup> Indeed, an exclusive focus on seeking and obtaining accommodations may ultimately obscure the reason for the increasing need for those very accommodations: the progressive intrusion of the government into areas of civil life that it had never before touched.<sup>127</sup> As the government assumes an increasingly large role in the life of the citizenry, the territory over which religion and the state conflict can only increase. The pursuit of religious accommodation concedes that territory. It gives it up for lost. And the religious communities likely to suffer most through the accommodation strategy are those that have stood longest and hardest as institutional competitors to the state’s own authority—and, indeed, that historically have posed the most substantial challenges to the growth of state power.<sup>128</sup> Religion that is unserious, fragmented, feckless, self-absorbed, and ephemeral is more likely to be accommodated, precisely because it does not threaten prevailing political and cultural orthodoxies. Religion that is serious, integrated, historically stable, enduring, and that presents a system of moral commitments in direct competition with those espoused by the state is more likely not to be accommodated, precisely because it does threaten prevailing political and cultural orthodoxies.

Religious accommodation may be, moreover, an unsustainable strategy in the long run: “In an ever-more-minutely regulated polity, you cannot keep demanding exemptions; and they will not be granted . . . . Religious

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<sup>125</sup> *Id.* at 35.

<sup>126</sup> For discussion, see DeGirolami, *supra* note 106, at 118.

<sup>127</sup> See Laycock, *supra* note 74, at 232 (“Never before in our history had we attempted to require people to violate a core religious teaching of our largest religions.”).

<sup>128</sup> The locus classicus for the importance of religious institutions and the associations of civil society more broadly as vital competitors to the state and as a safeguard against tyranny is 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 310–11 (Henry Reeve trans., The Colonial Press rev. ed. 1900) (1835) (“Religion in America takes no direct part in the government of society, but it must nevertheless be regarded as the foremost of the political institutions of that country; for if it does not impart a taste for freedom, it facilitates the use of free institutions . . . . I do not know whether all the Americans have a sincere faith in their religion, for who can search the human heart? But I am certain that they hold it to be indispensable to the maintenance of republican institutions . . . . The Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other . . . .”).

Americans need not retreat from robust political action, merely to plead for special indulgence. It will not avail them, or not for long, if they do.”<sup>129</sup>

Admittedly, the prospects of reducing the size of government do not seem particularly favorable. Perhaps the exemption strategy is all that remains to religious communities as the ambit of state authority expands, and the ways in which people may be negatively affected, or “harmed,” by a state-sanctioned religious accommodation likewise expand. Religious accommodations are now said, for example, to implicate injuries to the “dignity” of those who oppose them, the implication of which is that the state’s authority includes the power to confer human dignity as a self-standing civic good. People want to be dignified by the state,<sup>130</sup> their self-worth to be accorded official validation, and they perceive accommodation meant for the protection of religious freedom as a state-sanctioned indignity demanding state remediation. Yet offenses to dignity are only the most extreme example of the overall expansion of government interests.<sup>131</sup> These are not hopeful developments for the future of religious accommodation.

This may be an opportune moment to note that, in past work, I have supported religious accommodations.<sup>132</sup> I continue to admire and respect the work of scholars and policy makers who pursue *modus vivendi* arrangements that will foster the free exercise of religious communities and traditions within a larger secular polity that is increasingly dubious about established, institutional religion. But the claims of the new accommodation skeptics are powerful, and I have begun to doubt that ac-

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<sup>129</sup> Schwartzchild, *supra* note 110, at 199–200; *see also* Steven D. Smith, *The Tortuous Course of Religious Freedom*, 91 NOTRE DAME L. REV. 1553, 1557 (2016) (“As government has expanded the scope of its ambitions and activities, and as legal requirements and regulations accordingly proliferate, the occasions of conflict between law and religion multiply.”).

<sup>130</sup> For acute analysis of the dignitarian turn in the gay rights context, *see* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 263 (2014) (“*Windsor* is a pivotal moment in the metamorphosis of the legal homosexual. The legal homosexual, at least in states where same-sex marriage is legally recognized, is portrayed as a *morally dignified person*.”).

<sup>131</sup> A well-argued, but similarly sweeping, expansion of the ambit of the state’s interests holds that the government can regulate expression that violates norms of “full and equal citizenship” and results in associated harm. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013). As a corollary to his argument that the government is prohibited from endorsing any view that “abridges full and equal citizenship in a free society,” Professor Tebbe writes: “Translated into political morality, government nonendorsement would mean that the limits identified in this Article should function as the *only* restrictions on government’s power to endorse ideas. Within those limits, government should be free to favor or disfavor a wide range of views, even if they are comprehensive.” *Id.* at 650, 699–700. Needless to say, there are numerous religious doctrines and beliefs that are likely to violate a categorical norm of political liberalism of this type.

<sup>132</sup> *See* DEGIROLAMI, *supra* note 45, at 147–88.

commodation is a viable long-term approach. The new skeptics are persuasive that the seeking of religious accommodation has damaged, and may further damage, those religious traditions that have stood longest and hardest, steadily depriving them of vital sources of strength, and rendering them fragmented, ephemeral, and perhaps even ultimately unserious affairs.

Might the answer then be to encourage courts to inquire more deeply into the nature of the burden on religion when adjudicating accommodation cases? Unfortunately, that is extremely unlikely to cure what now ails religious accommodation. Indeed, it is a sign of just how polarized the religious accommodation question has become that no tinkering with the applicable test is likely to help.

Consider, for example, the recent and ongoing nonprofit litigation against the federal government's contraception mandate. Under the existing, abjectly deferential standard for assessing the quality of the burden, the vast majority of courts to address the issue found that the contraception mandate did not impose a substantial burden on the several nonprofits' religious exercise.<sup>133</sup> The question of the burden on the nonprofits, however, is not difficult when evaluated under a standard that would require the claimants to explain how their religious objection fits within an established religious tradition and system of belief and practice. They have explained, over and over again, their view that a legally binding designation to provide contraceptive products and services implicates them in sinful behavior, the theological sources of their beliefs, and the importance of those beliefs within their own religious system and tradition of belief.<sup>134</sup> The claimants may yet lose, but if they do it should not be because courts reject or refuse to defer to their explanation of the government's interference with their religious exercise.

Yet they did lose on that very issue, before nearly every court of appeals to consider it and according to a standard that is said to be extremely deferential to their beliefs.<sup>135</sup> That remarkable losing streak, when compared against the ostensible deference that courts purport to apply and generally have applied in most other contexts, strongly suggests that the standard may be a secondary consideration altogether. Courts defer when the nature of the political and cultural challenge represented by the religious exemption is unthreatening—when they don't take the religion seriously anyway. Accommodation, as I have said, is for unserious religion. When it is threatening, and the challenge is substan-

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<sup>133</sup> See *HHS Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral#tab2> (last updated June 15, 2016) (collecting cases). The Supreme Court's non-resolution of the burden issue is likely to result in future decisions by the lower courts against the claimants.

<sup>134</sup> See, e.g., Brief for Petitioners at 48, *E. Tex. Baptist Univ. v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), at \*48.

<sup>135</sup> BECKET FUND FOR RELIGIOUS LIBERTY, *supra* note 133.

tial, they do not defer. We accommodate when we don't really care as a political or cultural matter, and we find reasons not to accommodate when we do. Perhaps this also suggests that political polarization is to some extent inevitable when some religious beliefs and exercises are accommodated and some are not, and that, as in so many other contexts implicating the religion clauses, the aspiration to neutrality is a fantasy. An alternative possibility is that adopting a more stringent inquiry may be unwise and possibly counterproductive, since religious accommodation and religious liberty more broadly, particularly when it is felt to threaten or even to stand athwart vital gains in sexual liberty and equality, is at present so controversial.<sup>136</sup> A tighter standard will not restore religion as a coherent legal category. It will more plausibly be used to defeat coherent religious claims of substantial burden.

### CONCLUSION

The relationship of religious accommodation and political polarization is a perennial problem for any society that strives to balance interests in the rule of law and the toleration of religious groups. The prevailing strategy to balance those interests in twentieth century American law—represented by the compelling interest test and its substantial burden requirement, created in the 1960s as constitutional doctrine and reintroduced by statute in the 1990s—has been thought successful because of two principal features: (1) its solicitude for a conception of religion that is highly individualistic, claimant-centric, and anti-institutional; and (2) its simultaneous pretensions to neutrality as to religious questions.

Yet there has always been, to put it mildly, a tension between these components of the religious accommodation strategy, as well as the associated potential for religious accommodation to become more politically polarized than ever. The accommodation strategy, in tandem with an extremely aggressive interpretation of the Establishment Clause's coverage, has had the effect of valuing religion that is weak and unthreatening to prevailing political and cultural mores, and devaluing powerful, organized, and institutionally stable religion that offers substantial moral and cultural challenges to the existing politico-cultural mores. Religious accommodation has been a needed, and welcome, approach to the problem of religious pluralism in America. But it has come with serious costs—costs that have been borne over decades primarily by established and longstanding religious traditions. Those costs show no signs of decreasing; to the contrary, they are likely to increase, and to result in further damage to religious accommodation, and to religious freedom more broadly, in the years to come.

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<sup>136</sup> DeGirolami, *supra* note 106, at 108.