



4-2016

# The Unconscionable War on Moral Conscience

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## Recommended Citation

91 Notre Dame L. Rev. 1167 (2016)

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## BOOK REVIEW

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### THE UNCONSCIONABLE WAR ON MORAL CONSCIENCE

ROBERT P. GEORGE, *CONSCIENCE AND ITS ENEMIES:  
CONFRONTING THE DOGMAS OF LIBERAL SECULARISM.*  
By Robert P. George. Wilmington: ISI Books. 2013.

*Michael Stokes Paulsen\**

#### I. THE MAN, THE BOOK, THE THEME, AND A PROPOSITION

Robert George is fearless and relentless. He is arguably the leading conservative academic public intellectual writing today. George, who holds the prestigious McCormick Chair in Jurisprudence at Princeton University and is an occasional visiting professor at Harvard Law School, is no one to be trifled with: he is dauntingly smart and a formidable debater, in print (as demonstrated powerfully by the book that is the subject of this review) or in person. (I have participated in public events in which George participated as a

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\* Distinguished University Chair & Professor of Law, The University of St. Thomas (Minneapolis, Minnesota). My thanks to the members of the *Notre Dame Law Review* for the invitation to publish this review, for their patience with my slowness in completing it, and for their skill in editing and checking it. I am grateful for the helpful comments of John Nagle, Rick Garnett, Kevin Walsh, and Sam Barr on earlier drafts. (All errors are my fault, of course.)

The reader should be aware that Professor Robert George is a longtime professional acquaintance and friend of mine. We frequently (though not invariably) find ourselves on the same side of public and legal interpretive controversies and have even written together as coauthors. *E.g.*, Robert P. George & Michael Stokes Paulsen, *Authorize Force Now*, *NAT'L REV.* (Feb. 26, 2014), <http://www.nationalreview.com/article/371512/authorize-force-now-robert-p-george-michael-stokes-paulsen>; Michael Stokes Paulsen & Robert P. George, *President Obama's Dishonest and Unconstitutional De-Authorization*, *PUB. DISCOURSE* (Mar. 2, 2015), <http://www.thepublicdiscourse.com/2015/03/14560/>. For some, this might tend to discredit a largely sympathetic review. That is a risk I have no choice but to accept. All I can offer by way of assurance to the skeptical is that the nature of our friendship is such that I would gladly—cheerfully, even gleefully!—attack Robert George in print if and for whatever reason I felt he deserved it. And George would cheerfully, even gleefully, encourage it, and give back as good as he gets. (“Bring it on, Brother Paulsen,” I hear him saying in my head.)

speaker or panelist.) He is astonishingly well versed in law, philosophy, history, religion, and public affairs. He writes with charm, grace, and wit. And he pulls no punches: George is widely known for his unreserved and unashamed defense of traditional moral values, religious conviction and religious freedom, marriage as the union of husband and wife, and the right to life of the unborn. He is a cheerful and genteel—but uncompromising—intellectual controversialist.

Professor George's *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism*, is a broad-ranging defense of natural law, moral reasoning, traditional values, and religious liberty and a no-holds-barred attack on those who would assault these cherished things. The book is in part a collection of previously published essays on a wide variety of philosophical topics, contemporary public controversies, and notable public personalities ranging the spectrum from Harry Blackmun to G.E.M. Anscombe. Unlike so many "collection" books that strain to squeeze disparate essays under a contrived umbrella theme—we have all encountered such volumes, and sometimes labored to read them—Professor George succeeds in shaping a variety of specific topics into an overall unity of vision and purpose.

This is a book, fundamentally, about *irreducible conflict and fundamental choices*. As its title suggests, the book focuses on the dual themes of *conscience*—what forms it, what values it should embrace, the relationship of conscience to true religious conviction—and, in George's arresting choice of terms, its *enemies*. A short review cannot possibly do justice to the full range of the book's twenty-eight chapters, each of which works well as a standalone essay. Much of what George has to say—about education,<sup>1</sup> about the good life,<sup>2</sup> about formation of moral values,<sup>3</sup> about contemporary policy debates over issues implicating fundamental values of rights and wrong<sup>4</sup>—I will leave more or less untouched. But not unappreciated: on all of these topics, and others, the book's essays are remarkably good.<sup>5</sup>

Instead, in this short review I will evaluate the book's global themes of conscience and conflict through the lens of three paradigmatic illustrations—cases of conflict specifically between *religious* conscience and the *authority* of the state. In each instance, the claim of conscience consists of the claimed right of individuals (or groups) to resist the authority of the state

1 See ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES 27–41 (2013).

2 See, e.g., *id.* at 118.

3 See *id.* at 3–13, 23–26.

4 See *id.* at 126–208.

5 The short personal biographical reviews and tributes—eulogies, sometimes—of prominent and a few less-well-known persons, which comprise Part IV of the book, entitled "Good Guys . . . and Not So Good Guys," see *id.* at 207–60, are truly wonderful. These personal tributes (and tear-downs) are charming and thoughtful, uncommonly readable, and charitable and respectful even to the "not-so-good" guys as persons. Other highlights: Chapter 9 ("Why Moral Truths Matter"), *id.* at 91–105, Chapter 10 ("Two Concepts of Liberty . . . and Conscience"), *id.* at 106–14, and Chapter 11 ("Religious Liberty: A Fundamental Human Right"), *id.* at 115–25, are each extraordinary. Each stands on its own as a distinguished essay on its topic.

over their faith-driven conduct. In each instance, the claim involves a refusal, on grounds of religious conviction, to engage in conduct that the religious adherent considers either morally wrong in itself or that would constitute—in the religious adherent’s scheme of things—participating in, assisting, endorsing, facilitating, or being the vehicle for the commission of a morally wrongful act by another.

But in each instance, something a bit more seems to be present as well. In each instance I will discuss, the claim of conscience also might be thought partly “symbolic”—a claimed conscientious objection precisely to the state’s claim of authority to override religious conscience. It is conscientious resistance (at least in part) *for the sake of vindicating the right of conscientious resistance itself*—that is, for the sake of protecting the right actually to exercise the right of conscientious refusal in a specific situation. It is an act of standing on principle for the sake of standing on principle. It is, to coin a phrase, an assertion of “meta-conscience.”

Similarly, on the other side of the conflict, in each case the claim of authority on behalf of the state is *in part* about the underlying substantive social policy that the state is seeking to command or enforce and which the conscientious resister seeks to avoid. But in each case there is actually something more going on: the claim of authority frequently reduces to the state’s “symbolic” interest precisely in vindicating its own authority as against the claimed right to defy such authority. That is, it is a claim of state authority to prevail over claims of conscience largely for the sake either of authority itself or for the sake of (what amounts to the same thing) coercing compliance with, cooperation in, and assent to the state’s ideology. It is a claimed power to compel conformity and assent, *even where the state could accomplish its policy purposes without imposing such compulsions to act in violation of conscience*. It is, to coin another phrase, an assertion of “meta-authority.”

In short, the controversies on which I will focus are those in which there is a direct conflict as a matter of principle between the authority of the state to command and the freedom of the citizen to resist such a command as a matter of principle—head-to-head conflicts between abstract “conscience” and its “enemies.” There is usually more to the conflict than that, of course. In each case, there is an underlying substantive issue that triggers the dispute between the claimants of conscience and the avatars of authority. But in each of the instances I will discuss, the dispute distills to conscience, for its own sake, versus authority, for its.

My thesis in this review builds on and is inspired in part by George’s book: Where, or to the extent that, a conflict between conscience and authority reduces to a pure stand on principle by each side—sincere conscience for its sake versus authority for its—in a free society conscience should almost always win. The *only* time that claims of government authority should triumph over genuine claims of religious conscience is when religiously motivated conduct would produce essentially intolerable harm to others—harm of a kind and degree that would lead one to conclude (in effect, not literally) that it is inconceivable that a just and good God, rightly

understood, possibly could have commanded such conduct, and that it is necessary for the state to reject the religious claim in order to prevent such intolerable harm to others.<sup>6</sup> That should be a highly unusual case. In most instances of claimed religious conduct, the stakes are not nearly so high. Frequently, they involve not much more than a claim of state authority to suppress the exercise of religious conscience simply because the state finds threatening in principle the idea of conscientious resistance to its commands. Where that is the case, I submit, there is only one possible answer. Sincere religious conscience should *always* prevail over claims of government authority that reduce to the asserted need to vindicate government authority *for its own sake*.

## II. THE FLAG SALUTE CASES: *GOBITIS* AND *BARNETTE*

The perfect illustration of this proposition comes from the Jehovah's Witness "flag salute" cases of the 1940s. *Minersville School District v. Gobitis*,<sup>7</sup> decided in 1940, is arguably the worst Supreme Court majority opinion in a

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6 This is a strict standard that I have defended in other writing. See Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1206–1216 (2013) [hereinafter Paulsen, *The Priority of God*]. Professor George defends something very much like it in *Conscience and Its Enemies*, in a chapter entitled "Religious Freedom: A Fundamental Human Right." See GEORGE, *supra* note 1, at 115–25. George grounds religious freedom—and thus also its limits—in the *good of religion* itself and the *dignity of all human persons*. *Id.* at 124–25. It thus follows that "[g]ross evil—even grave injustice" (as judged by absolute moral standards of right and wrong derived ultimately from God's law and from natural law), committed in the name of religion against other persons, simply cannot be protected without contradicting the premises justifying religious freedom: "To suppose otherwise is to back oneself into the awkward position of supposing that violations of religious freedom (and other injustices of equal gravity) must be respected for the sake of religious freedom." *Id.* at 124–25; see also *id.* at 71–90 (chapter entitled "Natural Law, God, and Human Dignity").

While Professor George adopts a broad understanding of the scope of religious freedom *as a fundamental human right*, in other writing he has made clear that he does *not* believe that the language of the U.S. Constitution's Free Exercise Clause embraces such an understanding *as a constitutional right*. Rather, he has embraced the view that the Constitution's ban on laws "prohibiting the free exercise" of religion does not provide the individual religious adherent (or group) a right to exemption from facially religion-neutral laws of general applicability—the same position that the U.S. Supreme Court embraced in *Employment Division v. Smith*, 494 U.S. 872, 876–90 (1990). See Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 32 (1998).

The two positions are not in conflict. One can believe in a broad, natural human right to religious freedom as a matter of natural law and sound public policy without believing that a specific legal text embraces that understanding to its fullest. For reasons I have explained elsewhere, however, I believe that the text of the Free Exercise Clause—and the very fact of its presence in the Constitution—makes little sense except on the premise that it adopts the natural-rights understanding of religious freedom as a right prior to and superior in obligation to the usual commands of the state. See Paulsen, *The Priority of God*, *supra*, at 1160–62; 1181–89.

7 310 U.S. 586 (1940).

First Amendment case, ever. *West Virginia State Board of Education v. Barnette*,<sup>8</sup> decided in 1943 and repudiating *Gobitis* in substantial respects, is almost universally regarded as one of the very best First Amendment opinions ever produced by the Supreme Court. For framing the issue of conscience versus authority there is no better pairing of cases.<sup>9</sup>

In *Gobitis*, the Court upheld the expulsion from public school of a twelve-year-old girl, Lillian Gobitas,<sup>10</sup> and her ten-year-old brother, William, for refusing to make an affirmation of political faith that violated their family's Jehovah's Witness religious faith—saluting the flag and reciting the Pledge of Allegiance.<sup>11</sup> The Gobitis family's religious beliefs viewed such acts of affirmation and salute to be idolatrous—the compelled worship of another god rather than God, forbidden by the family's understanding of the Second Commandment of the Decalogue.<sup>12</sup> The Gobitises argued that compelling their children's participation in the flag salute violated both the Free Exercise of Religion and the Free Speech Clauses of the First Amendment.

Justice Felix Frankfurter's majority opinion—his first major constitutional opinion as a Justice<sup>13</sup>—rejected both arguments. His opinion starts this way, adopting a tone of solemnity tinged with a presumption of state power:

A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test.<sup>14</sup>

For Frankfurter, the case presented a question not of immutable constitutional principle but one of *balancing*—of reconciling competing claims: “Our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other.”<sup>15</sup>

8 319 U.S. 624 (1943).

9 For a fuller discussion of these cases, see MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 185–217 (2015) (discussing *Gobitis* and *Barnette* as paradigmatic First Amendment controversies of the mid-twentieth century Supreme Court).

10 The family's name is misspelled in the court records. For convenience, I will follow the Court's misspelling of “Gobitis.”

11 *Gobitis*, 310 U.S. at 591–92, 600.

12 *Id.* at 590, 592 & n.1.

13 DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY* 1888–1986, at 267 (1990).

14 *Gobitis*, 310 U.S. at 591.

15 *Id.* at 594. The “balancing” approach to constitutional adjudication is intellectually lazy and, typically, analytically sloppy. A few constitutional provisions are phrased as *standards* rather than *rules* and may well admit of “balancing”-type judgments. See, e.g., U.S. CONST. amend IV (“unreasonable” search and seizures); *id.* amend. VIII (“cruel and unusual” punishments). But that does not warrant such an approach all the time, for every provision of the Constitution. Instead, interpreters must do the (harder) work of ascertaining a provision's meaning, scope, and boundaries rather than engaging in unfocused

On one side of this constitutional teeter-totter was religious liberty and conscience. But on the other side was, for Frankfurter, the true heavyweight: state authority. And not just any authority, but the government's authority to safeguard "the nation's *fellowship*," a characterization (somewhat ironically) heavy with quasi-religious overtones of its own. The balance to be struck almost seems to be between competing *gods*: the God of religious conviction versus the state's authority to command adherence to the political faith of the community.

The opening words of *Gobitis* strike a posture of judicial handwringing over the profound difficulty of resolving such a conflict. Yet reduced to its essentials, Frankfurter's position was that wherever there exists a conflict between religious conscience and the ultimate authority of the state, religious conscience necessarily must yield: "*The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.*"<sup>16</sup> This sentence is the lynchpin of the entire opinion, and it is a bad one in two respects. First, it unfairly diminishes the conscience side of the balance. Second, it practically assumes that any and all commands of state authority necessarily prevail over religious conscience.

Whether intentionally or not, Frankfurter's formulation strikes a dismissive stance toward religious conscience. It declines to take seriously on its own terms the primacy of religious convictions for the committed religious believer. Instead, Frankfurter treats religious convictions as, essentially, a species of mere personal preference. They are "mere" personal beliefs, entitled to no particular special treatment. This stacks the deck against religious conscience in Frankfurter's balancing project. After all, isn't subordination of mere personal preferences to the common good, as understood by political society, kind of what *law* is all about? Subordinating individual preferences—including religious convictions—to the agreed interests of society is simply the price of citizenship.

Frankfurter's perspective on religious conviction is that of the quintessential modern secular liberal: There is no such thing as religious truth. Indeed, there are no objectively right answers at all to moral, religious, or philosophical questions, and thus no proper basis for moral absolutism. Just a few paragraphs later, for example, Frankfurter writes that "no single principle can answer all of life's complexities."<sup>17</sup> (Except, presumably, that one.)

This skeptical relativist stance colors Frankfurter's account of the reason for protecting religious liberty. The idea of freedom of religion, Frankfurter writes, "is itself the denial of an absolute."<sup>18</sup> We protect religious freedom, Frankfurter suggests, *not* for the sake of the intrinsic importance of protect-

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policy balancing. Rights and powers have limits, but in a written constitution, those limits are determined by the meaning of the words of the text containing them, not by ad hoc judicial weighing and balancing.

16 *Gobitis*, 310 U.S. at 594–95 (emphasis added).

17 *Id.* at 594.

18 *Id.*

ing the free pursuit of religious truth, but precisely because there is *no such thing as religious truth*. Religious freedom does not exist because of the importance of true religious faith and the freedom to pursue it without government interference. Religious freedom is recognition not just of religious *pluralism* (the unavoidable fact of human disagreement over religious truth) but of religious *relativism* (the supposed inherent subjectivity of religious faith and the absence of religious “truth”).<sup>19</sup>

Frankfurter’s view of religion as subjective personal belief and of religious freedom as premised on the absence of religious truth naturally affected (some might say *infected*) his view of religious conscience, as it would for anyone holding such views. To the committed secularist, religious belief is irreducibly a matter of personal choice and preference (and perhaps a quaint, anti-intellectual one at that). To privilege such a person’s “conception of religious duty” over “the secular interests of his fellow-men” would push toleration of religion too far.<sup>20</sup> The *Gobitis* children and parents were free to believe whatever they liked (and “liked” seems an apt word). That much was and remains standard modern liberalism. But it was not as if their desire to refrain from pledging allegiance and saluting the flag was something more than a *purely personal choice*—“mere” conscience, in Frankfurter’s term.<sup>21</sup> In the world of *Gobitis*, conscience is a malleable byproduct of individual autonomy, not an immutable command of moral duty.

This is a fundamentally mistaken starting point. This is *not* what conscience is about, as Professor George makes clear. While not writing specifi-

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19 This is a peculiarly modern (and historically anachronistic) perspective on the reason for the Constitution’s protection of religious liberty. Those who adopted the First Amendment do not appear, in the main, to have embraced religious liberty out of a conviction that there is no such thing as religious truth. Though there were indeed some who so believed, for most men and women of the time the value of religious freedom flowed from the conviction that there *is* such a thing as religious truth and that the freedom to pursue that truth—guided only by one’s own conscience, convictions, and reason, whether individual or shaped by religious communities—was one of the most fundamental and valuable liberties of all. Religious freedom was an *inalienable* private right. It was a right preceding the social compact of government, not capable of being assigned into the hands of government, and over which government could never rightfully assert any authority whatever. This was not due to some great and abiding skepticism over the possibility of religious truth—that is a modern and post-modern condition (or pathology)—but because government was understood to have no right to determine, prescribe or dictate what the truth is. I have developed these ideas in other writing. See Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1609–25 (1997) [hereinafter Paulsen, *God Is Great, Garvey Is Good*] (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996)); Paulsen, *The Priority of God*, *supra* note 6, at 183–84.

20 *Gobitis*, 310 U.S. at 593. I have discussed and criticized this view of religion, and the corresponding view of religious freedom. See generally Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043 (2014) (reviewing BRIAN LETTER, *WHY TOLERATE RELIGION?* (2013)).

21 *Gobitis*, 310 U.S. at 594–95 (“The *mere* possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.” (emphasis added)).



cally about Frankfurter or the flag salute cases, George explains that true *conscience* is practically the *opposite* of subjective individual autonomy.<sup>22</sup> Conscience is not, George maintains, a function of individual “‘autonomy’ in the modern liberal sense.” It is “not a writer of permission slips.”<sup>23</sup> It is “the very opposite” of a projection of the will of the individual. Rather, conscience is

one’s last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action. Conscience identifies one’s *duties* under the moral law. It speaks of what one must do and what one must not do. Understood in this way, conscience is indeed what [Cardinal] Newman said it is: a stern monitor.<sup>24</sup>

Such an understanding contrasts markedly with the modern, “counterfeit” conception of conscience as “self-will,” which is “concerned not so much with identifying what one has a duty to do or not do, one’s feelings and desires to the contrary notwithstanding, but rather with sorting out one’s feelings.”<sup>25</sup>

Conscience, properly understood, is about irreducible, unavoidable moral duties flowing from commands coming from outside one’s own will. Conscience is not about what the individual subjectively decides for himself or herself—the modern, secular understanding. But given the *Gobitis* Court’s misunderstanding of conscience, its conclusion that conscience must yield to authority is entirely unsurprising: When the free exercise of faith “collides with the felt necessities of society”—that is, whenever religious faith commands of its adherent conduct not in accord with what “society thinks necessary for the promotion of some great common end”<sup>26</sup>—the claim of religious conscience always loses.

So too with any claim to refuse to make an affirmation premised on the freedom of speech, Frankfurter concludes for the Court: The right to disagree must be subordinated to the right of government to force submission to its authority, for the sake of society as a whole. It is here where the *Gobitis* opinion is at its very worst.

“The ultimate foundation of a free society is the binding tie of cohesive sentiment,” Frankfurter writes.<sup>27</sup> “National unity is the basis of national security” and, thus, the flag salute ceremony served an interest “inferior to none in the hierarchy of legal values.”<sup>28</sup> It followed that the state could instill “cohesive sentiment” by coercing children to submit, by public affirmation, to the state’s authority.<sup>29</sup> It was important to instill such sentiment while children were still at an age when “their minds are supposedly receptive” to “assimilation” of such values, and to deploy the “compulsions which

22 GEORGE, *supra* note 1, at 112–13.

23 *Id.* at 112.

24 *Id.*

25 *Id.*

26 *Gobitis*, 310 U.S. at 593.

27 *Id.* at 596.

28 *Id.* at 595.

29 *Id.* at 596.

necessarily pervade so much of the educational process” for the purposes of “inculcating” the right values and overcoming religious values taught at home—to “awaken in the child’s mind” views “contrary to those implanted by the parent.”<sup>30</sup>

According to *Gobitis*, the state’s interest in vindicating its authority over claims of conscience is paramount, precisely for the sake of vindicating such authority and promoting cohesive sentiment in support of the state. On such a view, religious conscience is almost literally the enemy of the state! Overpowering the resistance of religious conscience to state authority is thus one of the most vital functions of state education.

To call this a disturbing set of propositions is an understatement. As my coauthor, Luke Paulsen, and I have written elsewhere of *Gobitis*:

It would be difficult to find a judicial opinion more thoroughly contrary to the values of the First Amendment. The toxic idea that government must possess power to suppress religious differences and compel individuals to express the state’s preferred ideology practically screams out its own refutation. The utterly pernicious idea that the state may use the compulsion of young children—“its children,” the Court called them—as a way to manufacture the “cohesive” society the state prefers is eerily authoritarian, even Hitlerian, in its statist implications. It is, in its own way, totalitarian and un-American—contrary to the very values the Court thought the Pledge of Allegiance would instill.<sup>31</sup>

The attitude of *Gobitis* toward religious conscience stands in stark contrast to that in *West Virginia State Board of Education v. Barnette*,<sup>32</sup> which overruled *Gobitis* (on the Free Speech Clause issue) just three years later. Justice Robert Jackson’s opinion for the Court addresses head-on the reasoning of *Gobitis*, and rejects it point by point. In particular, Jackson’s opinion repudiates the authoritarian argument for overriding conscience in no uncertain terms.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>33</sup>

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30 *Id.* at 598–600.

31 PAULSEN & PAULSEN, *supra* note 9, at 231.

32 319 U.S. 624 (1943).

33 *Id.* at 640–41.

No wonder Felix Frankfurter dissented—vigorously and at great length.<sup>34</sup> Those who would eliminate dissent by coercion end up “exterminating dissenters”!<sup>35</sup> Compulsory unification of opinion achieves only “the unanimity of the graveyard”!<sup>36</sup> These are strong words. Jackson did not—quite—call Frankfurter a crypto-Nazi. But he came rather close, in equating the premises of the *Gobitis* opinion with those of our “totalitarian enemies.”<sup>37</sup>

The flag-salute situation might seem difficult, Jackson continued, “not because the principles of its decision are obscure but because the flag involved is our own.”<sup>38</sup> But, he concluded, the “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”<sup>39</sup> And then the words that are justly famous: “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”<sup>40</sup>

Jackson framed the issue in *Barnette* as one of conflict between conscience and, almost literally, its *enemies*. To be sure, Jackson was referring specifically to the regimes with which the United States was then at war. Not all who oppose claims of conscience are totalitarian monsters. (Jackson notes that many such efforts have been promulgated by “many good as well as by evil men.”<sup>41</sup>) But the comparison to Nazis was deliberately made, and presumably not lightly so. The characterization of those who would suppress dissent in the name of unity as “enemies” of conscience remains the conclusion: for Jackson (and for the Court in *Barnette*), the paradigmatic enemies of conscience are state authorities who would, for its own sake, seek conformity to the state’s ideological commitments and who would impose such a mandate against the fundamental moral commitments of dissenting citizens.

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*Gobitis* and *Barnette* comprise a powerful parable about the constitutional law of conscience. I submit that together they teach enduring truths applicable to today’s controversies. One can discern at least three broad lessons from this paradigmatic pair of cases.

First, government must take claims of religious conscience on their own terms, and treat them with respect. Conscience, grounded in a claim of moral duty outside oneself, not personal preference, is of fundamental

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34 Frankfurter’s dissent runs some twenty-six pages of the U.S. Reports. See *id.* at 646–71 (Frankfurter, J., dissenting).

35 *Id.* at 641 (majority opinion).

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 642.

40 *Id.*

41 *Id.* at 640.

importance. It is not for government to deny or disparage sincere religious conscience, whether by treating it as something “mere,” or insubstantial, or by refusing to take seriously on their own terms the moral premises and reasoning of the claimants. Religious conscience is not mere personal preference or self-will; it is reasoned moral duty grounded in convictions one discerns, but does not invent, for oneself. Government may never simply dismiss claims of religious conscience on the ground that they are, under government’s ideology, not proper beliefs to hold or (less arrogantly but more condescendingly) that people do not properly understand their own faith.<sup>42</sup>

Second, government has no proper interest in coercing conduct in violation of conscience—and especially not expressive conduct—simply for the purpose of requiring individuals to affirm, embrace, or endorse the state’s ideology. That is the simple and important lesson of *Barnette*. There may be times where government’s interests in protecting others, or in the public good, should prevail over claims of religious conscience.<sup>43</sup> But the state has *no* legitimate interest in overriding private conscience *simply for the sake of symbolically vindicating the state’s authority over private conscience*. The state may not coerce acts of submission or obeisance to state dogma for their own sake. A close corollary of this proposition is that if compulsion of acts in violation of private conscience is not necessary to accomplish even legitimate policy goals—if the state’s imposition on private conscience is, in effect, gratuitous—such compulsion is likewise improper. In such a case, the state’s justification for overriding conscience again reduces to the claim of authority to compel submission to the state’s prescribed orthodoxy for its own sake, and not for any other necessary reason.

Third, in evaluating conflicts between private conscience and public authority, government’s justifications for overriding conscience must be both extraordinarily important and specific. Breezy generalizations do not cut it; nor should government be able to get away with formulating its interests in an unrealistic, abstract fashion. The relevant interest in *Gobitis* and *Barnette*,

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42 As I discuss below with respect to the modern controversy over conscientious resistance to the Obama Administration’s mandate that employer health plans cover contraception, sterilization, and abortion-inducing drugs, this flawed argument is one of the principal ones advanced for rejecting the claims of religious conscience: that the beliefs in question do not make sense *to the government*. See *infra* Part III.

43 Defining the outer bounds of constitutional religious liberty is no simple task. The text of the Free Exercise Clause is written in seemingly absolute terms, yet one can readily imagine the existence of circumstances when a religious claim is so implausible, or so intolerable in its consequences, that it simply must yield to society’s rules. The problem of identifying principled limits to religious freedom is a perennial one. Indeed, it is fair to say that it is *the* central conceptual problem of religious liberty law. There are textual and practical problems of differing magnitude with almost any answer one might propose. For an imperfect solution, see Paulsen, *The Priority of God*, *supra* note 6, at 1206–16 (discussing this problem at length and proposing a theory of when claims of constitutional religious liberty might properly be rejected, consistent with the premises that justify religious liberty in the first place). See also PAULSEN & PAULSEN, *supra* note 9, at 295–99 (examining controversial free exercise cases).

for example, was *not* safeguarding “national security”<sup>44</sup> or protecting “[t]he ultimate foundation of a free society.”<sup>45</sup> It was, rather, the *ideological* interest in instilling patriotism in young school children by requiring them to salute and pledge allegiance to the U.S. flag, notwithstanding their family’s conscientious religious objection to doing so. And *that* interest was fundamentally at odds with the premises of First Amendment freedom under the Constitution.

Nor may government override private conscience even for many seemingly *good* reasons. The freedom to differ, *Barnette* affirms, “is not limited to things that do not matter much.”<sup>46</sup> It includes things “that touch the heart of the existing order.”<sup>47</sup> It follows that government generally ought not to be able to coerce actions in violation of citizens’ sincere claims of *conscience*—moral duty, not mere personal preference—outside the most truly exceptional circumstances of grave, almost unthinkable harm to others or to society as a whole.<sup>48</sup> Mere administrative convenience, mere governmental preference, and certainly the mere interest in vindicating government’s authority and the citizen’s submission, clearly do not suffice.

If there is room for debate over these broad principles, there is not much room. Nearly everyone today would see the flag salute cases as paradigmatic illustrations of conflict between conscience and authority, and nearly everyone today would (or should) agree on which side should win and why. *Gobitis* is an anti-canonical First Amendment case and *Barnette* is its canonical refutation. No one today would embrace the full-on anti-conscience stance of *Gobitis*.<sup>49</sup> No one would insist on subordination of conscience to government authority merely for authority’s own sake. No one would insist on coercing private conscience in service of government’s ends, when doing so is utterly unnecessary to achievement of government’s ordinary policy objectives. No one would defend *Gobitis*’s denigration of religious conscience, or the propriety of exaggerating the importance of government’s policy interests in overriding such conscience. No one would insist on coercing acts of affirmation or support for government policy, contrary to conscience, for

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44 *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940).

45 *Id.* at 596.

46 *Barnette*, 319 U.S. at 642.

47 *Id.*

48 Paulsen, *The Priority of God*, *supra* note 6, at 1206–16; Paulsen, *God Is Great, Garvey Is Good*, *supra* note 19, at 1625 (arguing that if a claimant “demonstrates that the law operates so as to prohibit his exercise of religion in some nontrivial relevant respect, and if accommodation of the claim neither imposes substantial burdens on the private rights of others nor impairs some other interest of paramount importance to the existence of the state, the religious claimant should win”).

49 Even *Employment Division. v. Smith*, 494 U.S. 872 (1990), which cites *Gobitis* with approval for its holding that the Free Exercise Clause does not generally require exemption from neutral laws of general applicability, *see id.* at 879, does not embrace the *result* in *Gobitis* as correct. *See id.* at 890.

their own sake, or for the symbolism such actions would entail. No one today would adopt the stance of an *enemy* of private conscience.

Would they?

### III. CONSCIENCE AND ITS ADVERSARIES TODAY

*Conscience and Its Enemies* is devoted in part to the large moral controversies of today and the conflicts between conscience and authority framed by those controversies. The upshot of Professor George's positions—the thesis that emerges from this ensemble of essays, taken as a whole—is that the most ruthless “enemies” of conscience today are those devotees of the secular hard-left who would insist on overriding private religious conscience to serve state ends, whether necessary to the state's ends or not, *precisely in order to subordinate conscience and vindicate government's authority to eliminate religious moral dissent from government ideology and social orthodoxy.*

In this Part, I briefly take up two present-day conflicts between conscience and authority—both involving issues prominent in Professor George's book: first, the Obama Administration's contraception-abortion insurance coverage mandate, and, second, the threat that same-sex marriage and attendant antidiscrimination laws pose to the religious liberty of those who do not wish to support, sponsor, endorse, or participate in such arrangements.

#### A. *Conscience and Its “Healthcare Insurance Coverage” Enemies*

Consider first the issue of forcing religious organizations (or commercial businesses owned by religious persons and groups) to *provide*, to *assist* or cooperate in providing, or to *serve as the vehicle* for providing health insurance coverage for abortion-inducing drugs, sterilization, or contraception to their students or employees, where facilitating such coverage is contrary to the religious group's or business owners' religious conscience. “One of the dubious achievements of the Obama administration,” George writes, “has been to put the issue of religious freedom and the rights of conscience back on the agenda in American politics” by imposing such a mandate “upon private employers, including religious people and even religious institutions” when “the employer cannot, as a matter of conscience, comply.”<sup>50</sup>

While the regulatory regime is more complex, the issue of conscience posed by the insurance-coverage mandate is virtually an exact replay of the *Gobitis-Barnette* situation: religious persons and groups wish not to engage in conduct affirming, supporting, or endorsing that which they think morally wrong on the basis of profound religious conviction. Government (sometimes including the courts) disparages or denigrates the claim of conscience. And, further, government asserts authority to compel such conduct and override claims of conscience, even where doing so is not necessary to achieve any ordinary policy objective that could not be accomplished by means other than coercion of conduct contrary to conscience. Thus, government's justifi-

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50 GEORGE, *supra* note 1, at 106.

cation in the end amounts to little more than a desire to vindicate authority for authority's sake.

The coverage-mandate question arises in several variations. Each variation, however, flows from administrative interpretation and implementation of the Affordable Care Act (ACA), colloquially referred to as “Obamacare.”<sup>51</sup> To simplify drastically, but not unfairly: the Affordable Care Act requires private employers’ health insurance plans to cover “preventive services.”<sup>52</sup> Not all employers’ health plans are covered by the ACA’s requirements, however: many plans are “grandfathered” exceptions excluded from the ACA’s requirements;<sup>53</sup> plans of employers with fewer than 50 employees are exempt;<sup>54</sup> and *certain* religious organizations—specifically, churches, synagogues, mosques, and other houses of worship—are also exempt.<sup>55</sup> Together, the exceptions exclude tens of millions of employees,<sup>56</sup> a notable fact relevant to the question of how essential it really is to compel the inclusion of objecting religious employers.

The Obama Administration by regulation interpreted “preventive services” to require coverage of contraception—including within that term certain forms of “morning after” or “week after” drugs that likely do not *prevent conception* but that instead kill a conceived embryo (or may do so).<sup>57</sup> The

51 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S.C.); *see also, e.g.*, Peter Baker, *Democrats Embrace Once Pejorative ‘Obamacare’ Tag*, N.Y. TIMES (Aug. 3, 2012), <http://www.nytimes.com/2012/08/04/health/policy/democrats-embrace-once-pejorative-obamacare-tag.html>.

52 *See, e.g.*, Patient Protection and Affordable Care Act, § 2713, 42 U.S.C. § 300gg-13 (2012).

53 *See id.* § 5000a, 26 U.S.C. § 5000A (2012); 45 C.F.R. § 147.140 (2015) (grandfathered health plan exemption).

54 *See* Patient Protection and Affordable Care Act §§ 1304(b), 1513, 42 U.S.C. § 18024, 26 U.S.C. § 4980.

55 *See* 45 C.F.R. § 147.131 (establishing an exemption for “religious employers”).

56 *See* THE WHITE HOUSE, HEALTH REFORM FOR SMALL BUSINESSES I, [https://www.whitehouse.gov/files/documents/health\\_reform\\_for\\_small\\_businesses.pdf](https://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf) [hereinafter HEALTH REFORM FOR SMALL BUSINESSES] (“The law specifically exempts all firms that have fewer than 50 employees—96 percent of all firms in the United States or 5.8 million out of 6 million total firms—from any employer responsibility requirements. These 5.8 million firms employ nearly 34 million workers.”).

57 *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762–63 (2014) (“Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.”); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (“[T]he HRSA Guidelines require coverage . . . for ‘[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods . . . .’ (third and fourth alterations in original)).

Administration also interpreted “preventive services” to require coverage of sterilization procedures.<sup>58</sup>

These requirements often collide with religious beliefs. Many religious persons and groups strongly object on moral grounds to committing, supporting, facilitating, sponsoring, or encouraging abortion (including the use of what are believed to be abortion-inducing drugs).<sup>59</sup> Many more persons and groups object to supporting, facilitating, sponsoring, or encouraging artificial contraception.<sup>60</sup> For persons and groups holding such beliefs, it is (or may be) improper for the religious believer or group to engage in conduct, taking any of a number of forms, that would constitute assisting or facilitating what they regard, on religious principle, to be a serious moral wrong.<sup>61</sup> To be forced to engage in such conduct, contrary to religious conviction, would, for many, be a grave violation of religious conscience.<sup>62</sup>

Different religious persons and groups might draw their lines in different places concerning what types of conduct constitute improper acts of assistance to, or complicity with, moral wrongdoing. That is neither surprising nor in any way suspicious. It is simply another way of saying that different people hold different religious convictions. In particular, different people hold different religious views concerning what is or is not an act of complicity in, or facilitation of, moral wrongdoing. First Amendment law has long recognized that differences in religious beliefs are common, even within the same faith tradition, and that the right to the freedom of religious conscience can never properly depend on a government official’s evaluation of the consistency, logic, or sensibility of the religious judgments made in good faith (so to speak) by those holding them.<sup>63</sup>

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58 See *Hobby Lobby*, 134 S. Ct. at 2789 (“[T]he HRSA adopted guidelines recommending coverage of ‘[a]ll [FDA-] approved contraceptive methods, sterilization procedures . . . .’” (second and third alterations in original)); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8725 (“[T]he HRSA Guidelines require coverage . . . for ‘[a]ll Food and Drug Administration [(FDA)] approved . . . sterilization procedures . . . .’”).

59 See, e.g., Brief for Respondents at 9–10, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (“Respondents believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion. Hobby Lobby’s health plan therefore excludes drugs that can terminate a pregnancy.”).

60 See, e.g., Brief for Petitioners, *Little Sisters of the Poor Home for the Aged v. Burwell*, Nos. 15-35, 15-105, 15-119, 15-191 (U.S. Jan. 4, 2016).

61 See, e.g., Brief for Respondents, *supra* note 59, at 10 (“Respondents’ religious beliefs will not allow them to do precisely what the contraceptive-coverage mandate demands—namely, provide in Hobby Lobby’s health plan the four objectionable contraceptive methods.”).

62 See, e.g., *Hobby Lobby*, 134 S. Ct. at 2783 (“The owners of many closely held corporations could not in good conscience provide such coverage . . . .”).

63 See *Thomas v. Review Bd.*, 450 U.S. 707, 715–16 (1981) (noting that intrafaith differences are common, that courts “are not arbiters of scriptural interpretation,” and that it is not open to courts to judge whether an adherent has “correctly perceived the commands”



Indeed, with respect to essentially this exact question—the need to respect the lines drawn by religious adherents, as a matter of sincere conviction, with respect to the degree of participation, support, or acquiescence in the coverage-mandate arrangement sufficient to violate religious principles—the Supreme Court’s recent decision in *Hobby Lobby* was clear:

By requiring the [owners] to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

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... The [owners] believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.<sup>64</sup>

Completing the picture of statutes, regulations, and administrative actions framing this issue of conscience: As noted, the ACA and regulations do not require all types of religious groups to comply with the contraception-sterilization-abortion-drugs mandate. Religious *congregations*—churches and other types of “houses of worship”—are simply not covered.<sup>65</sup> With respect to for-profit *commercial businesses* owned by religious persons, the ACA and regulations initially mandated coverage directly in employers’ plans, but the Supreme Court held in *Hobby Lobby* that the federal Religious Freedom Restoration Act provided a separate exemption from the mandate for persons (and entities) holding religious conscientious objections to being compelled to provide such coverage.<sup>66</sup>

Finally, located somewhere between the situations of churches and for-profit commercial businesses, the Obama Administration adopted a series of (changing) “accommodations” for non-church religious organizations like religiously affiliated colleges and universities, hospitals, and freestanding religious social service ministry organizations.<sup>67</sup> These “accommodations” do

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of his faith); *id.* at 714 (noting that religious beliefs need not be judged “logical [or] consistent” by courts to merit protection); *id.* at 715 (“We see, therefore, that Thomas drew a line” and “it is not for us to say that the line he drew was an unreasonable one.”).

64 *Hobby Lobby*, 134 S. Ct. at 2775, 2778 (footnote omitted).

65 Health Insurance Reform Requirements for the Group and Individual Health Insurance Markets, 45 C.F.R. § 147.131 (2015).

66 *Hobby Lobby*, 134 S. Ct. at 2759–60 (holding that the mandate’s application to a closely held, for-profit business violated its owners’ religious freedom under the Religious Freedom Restoration Act of 1993).

67 *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39874–88 (July 2, 2013).

not actually exempt such religious institutions from the mandate. Rather, they provide that the mandate is satisfied by an alternative means of compelled compliance: the religious group is required to complete a form directing its insurance provider to “separately” provide coverage to the religious organization’s employees covered under its insurance plan.<sup>68</sup> The religious group would not itself be required to provide the coverage violating its convictions, nor would it be required to pay for such coverage.<sup>69</sup> However, the religious group nonetheless would remain required to *direct* or *trigger* the provision of such coverage by a third party, through its own actions, and the religious organization’s health insurance plan for its employees would become the *vehicle* for the third party’s mandated provision of coverage contrary to the religious organization’s religious beliefs.<sup>70</sup> For some (but not all) such organizations, compliance with the “accommodation” is equally a violation of the organization’s religious convictions.<sup>71</sup> Put simply, as noted above, different organizations draw their lines at different points, in terms of what actions constitute forbidden complicity in or furtherance of moral wrong.

The issue is thus joined. On the one side is a claimed right, anchored in religious conscience, not to cooperate with or acquiesce to the authority of the state with respect to one’s own conduct on matters that one believes are controlled by a contrary religious moral imperative. And on the other side is the claimed authority of the state to compel such cooperation, overriding competing claims to conscience as either (1) unworthy or insubstantial, or (2) simply outweighed in importance by the government’s policy.

The Obama Administration has advanced two principal arguments against recognizing such claims of religious conscience: First, the Administration regularly has maintained that there is no genuine violation of religious conscience (or, in the terms used by the Religious Freedom Restoration Act, no “substantial[ ] burden” on religious exercise<sup>72</sup>) because the degree of connection—the link—between what the law mandates and any violation of religious conscience is, in the Administration’s view, too attenuated to be credited as reasonable and valid.<sup>73</sup> Often, such a view is expressed in such terms as “all that is being asked” is to fill out a form to claim a religious

68 *See id.*

69 *See id.*

70 *See id.* at 39875; 26 C.F.R. § 54.9816-2713A (2015).

71 *See, e.g.*, Complaint at 17–18, *Univ. of Notre Dame v. Burwell*, 988 F. Supp. 2d 912 (N.D. Ind. 2013) (No. 3:13-cv-1276) (“This so-called ‘accommodation’, which exists solely to avoid entities like Notre Dame’s rightful *exemption* from the Mandate, by definition binds Notre Dame to the process of providing the objectionable products and services and thereby fails to address Notre Dame’s sincerely held religious beliefs.”).

72 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(3) (2012).

73 *See, e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 684 (7th Cir. 2013) (“[T]he government also insists that any burden on the plaintiffs’ religious exercise is too ‘attenuated’ to count as ‘substantial’ because the provision of contraception coverage is several steps removed from an employee’s independent decision to use contraception.”).

accommodation.<sup>74</sup> (Sometimes, the argument shades into the suggestion that the religious group's religious convictions are simply wrong, mistaken, or unreasonable.<sup>75</sup>) Second, the Administration regularly has maintained that the claim of religious conscience must be rejected because of the importance of the mandate—and of the inclusion of the religious group's employees within the government's mandated coverage—to accomplishment of the government's policy purposes of providing preventative care in the form of insurance coverage for contraception, sterilization, and abortion drugs.<sup>76</sup>

Ultimately, however, the coverage-mandate controversy—very much like the flag salute mandate in *Gobitis* and *Barnette*—reduces to a simple, head-to-head conflict between conscience as a matter of principle and government's interest in vindicating its authority for its own sake. There is (or should be) no doubt that the claims of conscience raised in the coverage-mandate controversy are genuine matters of deeply held religious conviction. The Obama Administration's first argument—that the claim of conscience is not a substantial one, that the degree of connection between the action compelled and the wrong claimed to result is too attenuated to constitute a valid claim of religious conscience, and that its claimants misunderstand their own faith—is legally almost frivolous.<sup>77</sup> It is an argument that for whatever reason either fails to understand or simply refuses to credit the sincere religious convictions actually possessed by many religious persons and groups. In this respect, as noted, it directly contradicts *Hobby Lobby* (as well as several other earlier cases).<sup>78</sup> It is an embarrassing echo of Felix Frankfurter's dispar-

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74 See, e.g., *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014) (“Signing the form and mailing it . . . could have taken no more than five minutes.”), *vacated and remanded*, 135 S. Ct. 1528 (2015).

75 See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (“HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed.”).

76 See, e.g., *id.* at 2779–80 (noting but not embracing the government's assertion that “the contraceptive mandate serves a variety of important interests”).

77 *Id.* at 2777–78 (categorically rejecting these arguments).

78 See *id.*; see also *Thomas v. Review Bd.*, 450 U.S. 707, 715–16 (1981). Nonetheless, this argument has received a rather surprising amount of acceptance in lower court decisions, even after *Hobby Lobby*. It is hard to explain such a flagrant error. With all due respect, what appears to be driving those decisions is either an embarrassing inability of many federal judges to recognize and credit religious, conscientious beliefs that draw lines differently from where the judge would draw his or her own lines, or a naked disdain for religious beliefs with which the judge disagrees or finds unpalatable. The most notorious and arrogant judicial offender on this score is probably Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. See, e.g., *Wheaton Coll. v. Burwell*, 791 F.3d 792, 799 (7th Cir. 2015) (“No one is asking Wheaton to violate its religious beliefs.”); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir. 2015) (“[I]t is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs.”). Posner may be the most brazenly incompetent federal appellate judge in this regard, but he is hardly alone. See, e.g., *Geneva Coll. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (deciding that courts must “objectively assess” whether the claimed violation of conscience posed by “the self-certification proce-

agement of the “mere” conscience of the Jehovah’s Witness believers in *Gobitis*.<sup>79</sup>

If the claim of conscience is therefore a legitimate one, what is the government’s purported justification for overriding it? It is here that the conflict reveals itself most clearly to be one with a claim of government authority for its own sake. The Obama Administration’s second argument—that its ACA policy interests override any claim to conscience—is simply not credible in this context for the simple reason that the government could always provide the contraception-sterilization-abortion benefit *directly*, if it wished, to those the government desired to have that benefit. There is no need to require participation, in any form, by persons and groups who object to doing so on religious grounds. There is, strictly speaking, no need for government to involve religious persons and groups, to require such persons or groups to sign forms directing coverage against conscience, or to conscript such organizations’ employee healthcare plans as the conduit or vehicle for providing the coverage in question. To the objection that doing so is a useful and convenient way of identifying and providing the contraception coverage to the religious groups’ employees specifically, there are two obvious responses. First, that is part of the religious group’s objection—to facilitating or serving as the vehicle for what it finds morally objectionable. While a religious organization could not keep government from providing such a service

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dure does, in fact . . . make [the claimant] complicit” in the moral wrong they wish not to support).

For a concise refutation of this position, see the dissent from denial of rehearing en banc in the Tenth Circuit, in *Little Sisters of the Poor v. Burwell*:

The opinion of the panel majority is clearly and gravely wrong . . . . When a law demands that a person something the person considers sinful, and the penalty for refusal is a large financial penalty, then the law imposes a substantial burden on that person’s free exercise of religion. All the plaintiffs in this case sincerely believe that they will be violating God’s law if they execute the documents required by the government. And the penalty for refusal to execute the documents may be in the millions of dollars. How can it be any clearer that the law substantially burdens the plaintiffs’ free exercise of religion?

Yet the panel majority holds otherwise. Where did it go wrong? It does not doubt the sincerity of the plaintiffs’ religious belief. But it does not accept their statements of what that belief is. . . . Rather, it reframes their belief.

799 F.3d 1316, 1316–17 (10th Cir. 2015) (Hartz, J., dissenting).

On November 6, 2015, the U.S. Supreme Court granted certiorari to review the decisions in *seven* cases presenting challenges to the N.H.S. contraception-abortion coverage mandate. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 136 S. Ct. 446 (2015), *granting cert. to* 794 F.3d 1151 (10th Cir. 2015); *Priests for Life v. Dep’t of Health & Hum. Servs.*, 136 S. Ct. 446 (2015), *granting cert. to* 772 F.3d 229 (D.C. Cir. 2014); *S. Nazarene Univ. v. Burwell*, 136 S. Ct. 445 (2015), *granting cert. to* 794 F.3d 1151 (10th Cir. 2015); *Geneva Coll. v. Burwell*, 136 S. Ct. 445 (2015), *granting cert. to* 778 F.3d 422 (3d Cir. 2015); *Roman Catholic Archbishop of Wash. v. Burwell*, 136 S. Ct. 444 (2015), *granting cert. to* 772 F.3d 229 (D.C. Cir. 2014); *E. Tex. Baptist Univ. v. Burwell*, 136 S. Ct. 444 (2015), *granting cert. to* 793 F.3d 449 (5th Cir. 2015); *Zubik v. Burwell*, 136 S. Ct. 444 (2015), *granting cert. to* 778 F.3d 422 (3d Cir. 2015).

<sup>79</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940).

directly to a third party, without the religious organization's involvement,<sup>80</sup> it cannot properly be required to act as the government's agent in this regard. The fact that it might be more administratively convenient for the government to use the religious organization's health coverage plan in such fashion surely does not rise to the level of a compelling interest. It is a mere bureaucratic interest. Second, it borders on the comical for the government to claim that it has an overriding interest in covering *these specific employees*—the employees of a religious entity—given that the contraception-coverage excludes tens of millions of persons in any event.<sup>81</sup> As noted, the statute and regulations exempt churches and other houses of worship entirely,<sup>82</sup> as well as “grandfathered” plans<sup>83</sup> and plans by employers with fewer than 50 employees.<sup>84</sup>

What's left? Simply this: the government's interest in requiring religious groups to cooperate with or facilitate the provision of healthcare coverage to its employees or students—members of its own ministry or religious community—ultimately reduces to an interest in the symbolic vindication of its authority over what it regards as unjustified claims of conscience. It is authority for authority's sake.

### B. *Conscience and Its Same-Sex Marriage Enemies*

No review of *Conscience and Its Enemies* would be complete without discussion of the issue of same-sex marriage and the conflicts it poses for religious conscience. Robert George is among the nation's most prominent public intellectual defenders of traditional marriage between a husband and wife and a vigorous but respectful opponent of same-sex marriage. He sets forth his case for traditional marriage—a case he has made at greater length elsewhere—in telescoped form in this book.<sup>85</sup> Some will find his arguments con-

80 See *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (“Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.”).

81 See HEALTH REFORM FOR SMALL BUSINESSES, *supra* note 56 (specifying that the ACA exempts all firms that have fewer than 50 employees).

82 See 45 C.F.R. § 147.131 (2015) (religious employer exemption).

83 See *id.* § 147.140 (grandfathered health plan exemption).

84 See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1304(b), 1513, 124 Stat. 119, 172, 253–56 (2010) (codified as amended in scattered titles of the U.S.C.) (small employer exemption).

85 His arguments on this issue are set forth chiefly in a portion of Chapter Nine (“*Why Moral Truths Matter*”) under the subheading “*What is Marriage?*”, GEORGE, *supra* note 1, at 96–104, and in Chapters Twelve (“*What Marriage Is—and What It Isn't*”), *id.* at 126–41, and Thirteen (“*The Myth of a ‘Grand Bargain’ on Marriage*”), *id.* at 142–46. Professor George is co-author of a prominent book defending exclusively traditional marriage. SHERIF

vincing; others will not. But whether or not one is persuaded by George's arguments for the exclusivity of traditional marriage as *the* single, proper social arrangement, it is hard to deny George's point that the movement for same-sex marriage in America has created and will continue to create—especially in the aftermath of the Supreme Court's landmark 2015 decision in *Obergefell v. Hodges* recognizing a substantive due process constitutional right to same-sex marriage<sup>86</sup>—serious, seemingly inherent, and very nearly intractable conflicts between religious conscience and new secular and legal norms.

Religious views on the propriety of same-sex marriage differ, but the short of it is this: orthodox or traditional adherents of the three great Abrahamic faiths, Judaism, Christianity, and Islam, generally oppose homosexual sexual relationships and conduct as seriously inconsistent with the divinely ordained order—a moral wrong. The recent trend of modern secular norms, including legal norms, has been decidedly in the opposite direction. Put most simply, the positions of religious conscience and new social norms are in direct conflict.

More than that, among those who have staked out definite positions one way or another on same-sex marriage, such positions tend to be unusually resistant to arguments coming from the other side, largely because the contending positions proceed from fundamentally different worldviews and first premises. That is part of what makes the issue one of intense conflict between religious conscience and current (or emerging) secular norms.

The claims of religious conscience in this area are straightforward and easy to understand. For many persons of faith, the problem—as in the contraception-abortion mandate cases, and as in the flag salute cases of the 1940s—is one of *participation*. The question of conscience concerns whether the believer must, in his or her own conduct, refrain from expressing or implying support for or endorsement of, or giving assistance to, behavior in conflict with the moral commands of his or her religious faith. Thus, the central concern of conscience for many traditional religious adherents is that they wish not to make an *affirmation* in some form—whether express or implied, by word or by deed—of what they regard as moral wrong. They wish not to affirm, by their own words or actions, the moral equivalence or propriety of homosexual relationships (and in particular marriage, which many religious persons regard as sacred and having a special status), for the reason that they believe doing so would be an act of disloyalty or disobedience to God's commands. To so act contrary to God's law would, in the view of many, be to betray their religious principles and fundamental faith commitments. For many persons of faith, this is a genuine and very serious religious conflict.<sup>87</sup>

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GERGIS, RYAN T. ANDERSON, & ROBERT GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012).

<sup>86</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

<sup>87</sup> For many religious believers, the question of where the moral lines are properly drawn is a difficult and uncomfortable one. Sometimes competing religious principles are

The claim of authority on the other side is also fairly easy to understand, but nonetheless requires some untangling of its discrete strands. The government's interest is cast, reasonably enough, in terms of protecting persons from *discrimination* on the basis of sexual orientation or same-sex union in the provision of goods and services in the commercial marketplace. But this general interest in banning discrimination straddles two sub-interests: the interest in assuring that (certain) commercial goods and services are *available* to an individual or couple, irrespective of sexual orientation, conduct, or union; and a somewhat distinct interest in *enforcing the social norm of nondiscrimination itself*, whether or not a person's discriminatory conduct actually affects the availability of goods and services to someone in the protected class. This sub-interest is, in form, an interest in prohibiting "discrimination." In substance, however, it sometimes amounts to a claim of authority to compel precisely the kind of affirmation-by-conduct that the religious adherent wishes to withhold, and to do so for the sake of enforcing social conformity. In the context of same-sex marriage specifically, the objective may be (and often is) to *punish* as a violation of law—and thereby ultimately to delegitimize, stigmatize, and eliminate—social opposition to the equal moral status for same-sex sexual relationships and marriages, including opposition flowing from religious conviction. This objective may exist as an independent goal of the non-discrimination law, and might be advanced irrespective of whether access to goods or services has been impaired or not.

These two sub-interests are present in all types of nondiscrimination laws. Part of such a law's purpose is practical and part of it is ideological. The two interests are not always carefully distinguished from one another, and sometimes converge in application. Analytically, however, they are two different types of justification for antidiscrimination laws, with potentially different implications for government's claimed authority to override private religious conscience. The concrete, practical justification for antidiscrimination laws is to achieve access: they are for the direct benefit of specific persons or groups. The ideological justification is to change society and attitudes: antidiscrimination laws in part seek to punish discriminatory conduct, irrespective of any concrete harm to any person or group (other than, perhaps, symbolic or stigmatic harm), simply for the sake of overcoming opposition to the social norm of nondiscrimination in question.<sup>88</sup> That is often a good thing: often, antidiscrimination laws seek to vindicate a princi-

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at work; men and women of good faith may reconcile those principles differently, and individuals may be conflicted as to how to apply them in a given situation. Probably for most such religious believers, it is not a case of hostility to homosexuals as persons. Very often the reverse is the case: a religious ethic of empathetic love is the dominant sentiment and the difficulty lies in how to reconcile that instinct with the seemingly contrary, clear moral commands of one's faith. As with any other issue of religious conscience, therefore, different persons and groups will draw their lines in different places; that does not render any of such conscientious views any the less worthy of respect and legal protection from compulsion to act contrary to conscience.

88 This is not to deny that stigmatic harms can be real and important; it is merely to note that they are distinctive injuries of a different nature and character from other inju-

ple, purely for the sake of that principle. In much the same way, claims of conscience often seek to adhere to principle purely for the sake of that principle.

The problem occurs when fundamental principles collide. In the case of same-sex marriage and attendant nondiscrimination laws, the operative nondiscrimination interest is, often, precisely such an interest in vindicating a new social norm and overriding social opposition to that norm. The interest at work is not—at least not always—one of assuring the ability of such persons actually to obtain access to a service not otherwise available except by means of coercing persons with an objection based on religious conscience. Typically, in the cases that have made their ways into courts or administrative hearing, the service sought—a wedding photographer, cake designer, flower arranger, marriage concierge or coordinator, or adoption agency—has been available from another provider who does not have a conscientious objection to any affirmation implicit in provision of such services.<sup>89</sup> In some cases, the party complaining of discrimination is in reality a “tester,” without genuine interest in receiving the service from the religious person or entity being tested but only an interest in enforcing the nondiscrimination norm. The *object* of legal actions brought against persons declining to perform such services because of moral objections to doing so is to coerce by force of law conduct contrary to religious conscience, or to drive dissenters from the marketplace, precisely because the stance of religious conscience is itself thought morally intolerable by the person bringing the discrimination complaint, and by the state.

In such cases, conflict is inevitable and accommodation of conscience difficult. As Robert George observes:

Thus, advocates of redefinition [of marriage] are increasingly open in saying that they do not see disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality, on one side, and those of ignorance, bigotry, and discrimination, on the other. The “excluders” are to be treated just as racists are treated—since they are the equivalent of racists.

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ries. See, e.g., *Allen v. Wright*, 468 U.S. 737, 752–61 (1984) (distinguishing the types of injury alleged to result from racial discrimination).

89 See *Stormans, Inc. v. Selecky*, 586 F. 3d 1109, 1140 (9th Cir. 2009) (challenging the constitutionality of rules that could allow pharmacists to refuse to provide medication for reasons that include conscience); *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Colo. App. Aug. 13, 2015); *Catholic Charities v. State*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011) (order denying stay); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *McCarthy v. Liberty Ridge Farm, LLC*, Nos. 10157952, 10157963 (N.Y. Div. Hum. Rts. July 2, 2014), [http://www.capitalnewyork.com/sites/default/files/140808\\_DHR\\_LRF\\_Ruling.pdf](http://www.capitalnewyork.com/sites/default/files/140808_DHR_LRF_Ruling.pdf) (ordering that farmers must host same-sex weddings); *Manya A. Brachear, 3 Dioceses Drop Foster Care Lawsuit*, CHI. TRIB. (Nov. 15, 2011), [http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115\\_1\\_civil-unions-act-catholic-charities-religious-freedom-protection](http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115_1_civil-unions-act-catholic-charities-religious-freedom-protection).



There is, in my opinion, no chance—*no chance*—of persuading champions of sexual liberation . . . that they should respect, or permit the law to respect, the conscience rights of those with whom they disagree. Look at it from their point of view: Why should we permit “full equality” to be trumped by bigotry? Why should we respect religions and religious institutions that are “incubators of homophobia”? Bigotry, religiously based or not, must be smashed and eradicated. The law should not give it recognition or lend it any standing or dignity.<sup>90</sup>

More so even than in the healthcare contraception-abortion drug coverage context, the debate here is between conscience and the *avowed enemies* of its invocation in this situation. How should the conflict between conscience and authority be resolved, in this context—one that is virtually certain to be a prime battleground over the next several years? Robert George is surely right in his diagnosis: on the premises of same-sex-marriage (or “marriage equality”) proponents, it is no more tolerable to tolerate religious conscience, in opposition to this new social norm, than it would be to tolerate similar discrimination on the basis of race. But is George right in his prescription—that the only solution for traditional religious adherents is to defeat the movement for same-sex marriage (and nondiscrimination) itself—that “there is no alternative to winning the battle in the public square over the legal definition of marriage”?<sup>91</sup>

If so, then this war between private conscience and state authority was decided by the Supreme Court’s holding in *Obergefell* in June 2015, creating a constitutional right to same sex-marriage.<sup>92</sup> *Obergefell* purported to reserve these issues of conscience.<sup>93</sup> If Robert George is right, however, this battle will occur after the war is really over. In a passage addressing the issue of religious conscience, Justice Anthony Kennedy’s majority opinion in *Obergefell* says this:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>94</sup>

Stripped of rhetorical flourish and fluff, this passage does not concede much ground to conscientious *conduct*, based on one’s religious conviction, in opposition to the new (constitutional) social norm of same-sex marriage. People who disagree with the new institution may continue to “advocate”

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90 GEORGE, *supra* note 1, at 144–45.

91 *Id.* at 145.

92 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

93 *See id.* at 2642 (Alito, J., dissenting) (“[T]he majority attempts . . . to reassure those who oppose same-sex marriage that their rights of conscience will be protected.”).

94 *Id.* at 2607 (majority opinion).

what they believe. And religious organizations are given “proper” protection (only?) as they “teach” what they believe.

The narrowness of these meager words of reassurance was not lost on the *Obergefell* dissenters. Chief Justice Roberts noted that the Court’s decision “creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.”<sup>95</sup> Roberts sarcastically observed that Kennedy’s majority opinion “graciously suggests” a freedom to “advocate” and “teach”—a freedom that no one could reasonably dispute—but says not a word about the true issues of conflict with religious conscience: “the freedom to ‘exercise’ religion.”<sup>96</sup> Will religious organizations adhering to traditional views on sexual conduct and marriage find their tax-exempt status challenged? Will a religious college be required to include same-sex couples in its married-student housing opportunities? “There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.”<sup>97</sup> Justice Clarence Thomas similarly bemoaned the Court’s “weak gesture toward religious liberty” and argued that religious freedom must include “freedom of action” in matters of religion, not just freedom to advocate or teach.<sup>98</sup> Justice Samuel Alito expressed deep skepticism over the majority’s assurances to “those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true,” he wrote.<sup>99</sup> Justice Antonin Scalia joined each of these three other dissents.<sup>100</sup>

There is reason to be concerned about the fate of religious conscience in the face of *Obergefell*. The movement for same-sex marriage is, at the time of this writing, a social tidal wave—and traditional religious adherents are standing on the beaches, defying the waters. There is every reason to believe, given historical experience, that the claims of authority to compel conformity will overwhelm and drown the claims of conscience, in such a social and legal context as this.

Predictions aside, what is the *correct* answer to the problem of conscience-versus-authority in the same-sex marriage context? Though specific

95 *Id.* at 2625 (Roberts, C.J., dissenting).

96 *Id.*

97 *Id.* at 2626.

98 *Id.* at 2638 (Thomas, J., dissenting).

99 *Id.* at 2642 (Alito, J., dissenting).

100 *See id.* at 2611, 2631, 2640. For a discussion of *Obergefell* and its dangerous implications for liberty of religious conscience, see Michael Stokes Paulsen, *The Wreckage of Obergefell*, FIRST THINGS, Oct. 2015, <http://www.firstthings.com/article/2015/10/the-wreckage-of-obergefell>. On the need to reexamine the Court’s reading of the Free Exercise Clause, see Michael Stokes Paulsen, *Justice Scalia’s Worst Opinion*, PUB. DISCOURSE (Apr. 17, 2015), <http://www.thepublicdiscourse.com/2015/04/14844/>, and Michael Stokes Paulsen, *The Stakes of Free Exercise*, PUB. DISCOURSE (Aug. 13, 2015), <http://www.thepublicdiscourse.com/2015/08/15439/>.

applications may be difficult, I submit that the correct general principles are as follows—and are exactly as described above with respect to the flag salute cases.

First, government must take claims of religious conscience on their own terms, and treat them with respect.<sup>101</sup> It will not do simply to dismiss or disparage religious conscientious objection to endorsing or supporting same-sex marriage or homosexual relationships as nothing more substantial than discrimination for its own sake or (in the language of earlier gay-rights cases) a “bare . . . desire to harm” others.<sup>102</sup> The claim of religious conscience, made in good faith (so to speak) and not as a pretense, should be entitled to a presumption of validity. Government may not simply dismiss such claims as improper ones for a believer to hold, or refuse to credit them because the lines that various believers will draw in this regard may vary from one another, and may even appear (to government) as not consistent or principled.<sup>103</sup> Moreover, given *Hobby Lobby*, it must be recognized that genuine claims of religious conscience legitimately can arise even in the context of commercial business enterprises. Claims of conscience in such context cannot be disparaged simply because the organization in question is not a church or a specifically religious enterprise.

Second, exactly as noted with respect to flag salute cases, government has no proper interest in coercing conduct in violation of conscience—and especially not expressive conduct—simply for the purpose of requiring individuals to affirm, embrace, or endorse the state’s ideology.<sup>104</sup> There may be times where government’s interests in protecting others, or the public good, should prevail over claims of religious conscience, but the state has no proper interest in overriding private conscience simply for the sake of symbolically vindicating the state’s authority over religious conscience. This principle has special salience in the nondiscrimination law context where, as just noted, there are intertwined but distinct sub-interests at work, including both an interest in access to goods and services and an interest in vindicating the nondiscrimination norm for its own sake. To the extent the interests can be separated from each other, only the former should ever constitute a justification for overriding conscience. Where government’s interest in enforcing a nondiscrimination norm reduces to a symbolic interest in vindicating government’s authority to subordinate religious conscience and conduct to government’s conception of the right, true, and good—put differently, where government’s interest is purely one of requiring religious conscience to bow to secular authority, as in the flag salute cases—the nondiscrimination norm should yield to religious conscience.

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101 See *supra* notes 42–48 and accompanying text.

102 *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Moreno*, 413 U.S. at 534).

103 See, e.g., *supra* note 79 and accompanying text.

104 See *supra* Part II (discussing *Gobitis* and *Barnette*).

To recall the Court's words in *Barnette*: “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”<sup>105</sup> To the extent nondiscrimination norms with respect to same-sex marriage are sought to be enforced against sincere religious conscience, solely to vindicate the nondiscrimination norm, such an assertion of authority should be rejected.<sup>106</sup>

Third, in evaluating conflicts between religious conscience and secular authority to impose nondiscrimination requirements for the sake of assuring access to services, the government's interest must be both extraordinarily important and specific to the situation, not a blanket generalization. The claimed injury resulting from conscientious conduct must truly be one that is so intolerable in its effects on third parties as to make it essentially inconceivable that it actually could be a true religious command—or, in Robert George's terms, a “[g]ross evil” or “grave injustice” as judged by absolute standards of natural law.<sup>107</sup> Different people may well reach different conclusions in different situations under this standard. But I believe that it at least poses the right question.

#### CONCLUSION: THE PRIORITY OF CONSCIENCE

In a set of pivotal chapters on conscience, smack dab in the middle of the book, Robert George says this:

Let me conclude with a few words about the centrality and one might even say *priority* of religious freedom among the basic civil liberties. Observed from a certain perspective, any basic liberty might be assigned a kind of priority: free speech, for example, which is so essential to the enterprise of republican government (and, in truth, good government of any kind); or freedom of association and assembly; or the right of self-defense and defense of one's family and community. The collapse of any of these rights would place all the others in jeopardy.

Still, there is a special sense in which freedom of religion has priority or at least a sort of pride of place . . . because it protects an aspect of our flourishing as human persons that is architectonic to the way we lead our lives.<sup>108</sup>

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105 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

106 On this principle, the Supreme Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), upholding the withdrawal of tax-exempt status from a private religious school because of the school's (concededly) religiously based policies forbidding interracial dating and marriage among members of its community of faith, was wrongly decided. I have argued that *Bob Jones University* was wrongly decided in other writing, including the first law review article I ever wrote, for the *Notre Dame Law Review*. See Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 362–68 (1986).

107 See GEORGE, *supra* note 1, at 124.

108 *Id.* at 113.

Religion, George continues, is “not the only basic human good.” Nor are all other basic human goods merely means to the ends of religion. “But religion *is* an intrinsic and constitutive aspect of our integral flourishing as human persons and also a good that shapes and integrates all the other intrinsic and constitutive aspects of human well-being and fulfillment.”<sup>109</sup>

It follows, George contends, that

respect for a person’s well-being, or more simply respect for the person, demands respect for his or her flourishing as a seeker of religious truth and as a man or woman who lives in line with his or her best judgments of what is true in spiritual matters. And that, in turn, requires respect for his or her liberty in the religious quest—the quest to understand religious truth and order one’s life in line with it.<sup>110</sup>

This is a powerful and important insight. And it is one that is, to some extent, lost in our contemporary society. Religion is of fundamental importance to human flourishing, George correctly insists. But at the same time, the importance of religion is vehemently denied today—by many persons, by our dominant secular institutions, and often by our governments. Religious freedom is vital to the flourishing of religion, George correctly reasons. But at the same time, that freedom is refused, compromised, disparaged. Respect for religious freedom has faded as appreciation of the fundamental importance of religion to human flourishing has waned.

Today’s wars over claims of religious conscience are the tangible, legal manifestations of society’s broader wars over the value of religion itself. There are those who would—to put it bluntly and perhaps a bit uncharitably—*kill* religion, if they could. For such persons, no claim of religious liberty should ever prevail over society’s laws or against societal values arrayed against religious conviction. The idea that religious conviction is foundational to flourishing and that religious freedom should have priority among basic human rights, is, for them, anathema. For such persons, quite the reverse is true: religious conviction is fundamentally harmful, and religious freedom should not have priority but should be subordinated to every other value.<sup>111</sup>

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109 *Id.* In the essay that follows this one in the book, George picks up the same theme, setting forth a marvelously rich understanding of what religion *is*:

In its fullest and most robust sense, religion is the human person’s being in right relation to the divine—the more than merely human source or sources, if there be such, of meaning and value. . . . [I]n the ideal of perfect religion, the person would understand as comprehensively and deeply as possible the body of truths about spiritual things and would fully order his or her life, and share in the life of a community of faith that is ordered, in line with those truths. In the perfect realization of the good of religion, one would achieve the relationship that the divine—say God himself, assuming for a moment the truth of monotheism—wishes us to have with Him.

*Id.* at 118.

110 *Id.* at 119.

111 For an example of such a position (and a critical review of it), see Paulsen, *supra* note 20.

There are, in short, true *enemies* of religious conscience.

Against the modern march of such enemies of conscience, Robert George stands as an impressive one-man battalion of resistance, championing the value of religion and asserting the indispensability of its protection. “Religion can,” he concludes one essay, “contribute to both the theory and practice of resistance,” where religion provides healthy prophetic witness: “This is one more reason to cherish religious freedom and to push back hard against forces that threaten to erode or diminish it—especially when the threats come from overreaching governments.”<sup>112</sup>

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112 GEORGE, *supra* note 1, at 114.

