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PARTLY ACCULTURATED RELIGIOUS ACTIVITY:  
A CASE FOR ACCOMMODATING  
RELIGIOUS NONPROFITS

*Thomas C. Berg\**

INTRODUCTION

Many of today's most vexing problems concerning the accommodation of religious conscience involve religious groups and activities that straddle the perceived boundary of the public versus private. For example, in disputes over same-sex marriage and religious liberty, it is generally agreed that churches and clergy should be able to refuse to host or perform marriages, because these entities fall within the private sphere.<sup>1</sup> But religious entities that reach out to provide services to the broader public provoke much more controversy. Think, for example, of Catholic Charities adoption agencies that decline to place children with same-sex couples.<sup>2</sup> Or think of the intense controversy over religious nonprofit institutions—social service and

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1 See Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 *Geo. J. Gender & L.* 485, 511 (2014) (noting that “[c]onsistent with the demands of the First Amendment, every state provides religious liberty protections to the clergy,” but also criticizing this protection alone as “hollow” and inadequate).

2 See, e.g., Patricia Wen, *Calif. Charity Ends Full Adoptions*, *BOS. GLOBE* (Aug. 3, 2006), [http://www.boston.com/news/local/articles/2006/08/03/calif\\_charity\\_ends\\_full\\_adoptions/](http://www.boston.com/news/local/articles/2006/08/03/calif_charity_ends_full_adoptions/); Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, *BOS. GLOBE* (Mar. 11, 2006), [http://www.boston.com/news/local/articles/2006/03/11/catholic\\_charities\\_stuns\\_state\\_ends\\_adoptions](http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions).

educational institutions, primarily—that are seeking a full exemption from the mandate to cover contraception in employees’ health insurance.<sup>3</sup>

To many critics, it is plainly improper to make any accommodation for religious freedom in such cases. They say that when a religious organization hires people outside of the narrow confines of its faith, or becomes a significant social-service provider, it should not be allowed to continue to act on norms that the government has determined are unjust. Once an organization reaches out to others, it must follow whatever rules the state sets, no matter what burden these rules place on religion. That tendency lay behind the original, very narrow exemption from the contraceptive mandate—an exemption that gave no relief to anyone except churches and denominations.<sup>4</sup> And opponents of exemptions from the mandate argue that exemptions are forbidden—in the words of Fred Gedicks and Rebecca Van Tassell—whenever a religious nonprofit “hire[s] from the general pool of applicants, rather than exclusively from a specific religious group,” because such a group employs “nonadherents or adherents who understand the requirements of the affiliated religion differently.”<sup>5</sup> Similarly, Caroline Corbin argued, in the early stages of debate over the mandate, that any exemption for religious nonprofit employers would improperly “foist[] the Catholic Bishops’ religious views onto employees, whether or not they are Catholic.”<sup>6</sup> On the other side, of course, critics of the mandate believe that exemptions for nonprofits are essential to preserve religious freedom.

This Article explores the idea that such problems involve cases of “partly acculturated” religious activity. This kind of activity falls somewhere between two poles. One pole is “unacculturated” religion: the activity of the small sect

3 See, e.g., *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY (Nov. 2, 2015), <http://www.becketfund.org/hhsinformationcentral> (tabulating 56 lawsuits brought against the contraceptive mandate by 140 “religious ministry” plaintiffs, including 37 universities and 40 religious charities); *Zubik v. Burwell*, SCOTUSBLOG (Jan. 29, 2016), <http://www.scotusblog.com/case-files/cases/zubik-v-burwell/> (noting grant of certiorari in consolidated cases involving challenges by, among others, the Little Sisters of the Poor Home for the Aged and several religious universities).

4 See *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, 8726 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590 & 45 C.F.R. pt. 147) (providing that to be exempt from the mandate, a religious organization must, among other things, “primarily” serve its own adherents and also must primarily “inculcat[e] . . . religious values”). As I note later, the government eventually added an “accommodation” for religious nonprofits that are not legally part of a congregation or denomination. For discussion of the effect of the accommodation, see *infra* notes 44–46 and accompanying text.

5 Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 381 (2014). Gedicks and Van Tassell focused on exemptions of for-profit businesses, but their language and logic also applied to “material” burdens on non-adherent employees of religious nonprofits.

6 Caroline Maia Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1482 (2013).

or minority faith whose doctrines are strange to the American majority or whose adherents are mostly ethnic minorities or immigrants. Think of Muslims, Sikhs, Amish, or Jehovah's Witnesses. The other pole is "acculturated" religion, usually engaged in by a larger faith, and defined primarily by the harmony between its doctrines or practices and mainstream secular norms. Acculturated groups tend to think that current secular morality helps realize the true meaning of their faith, and they tend to be deeply involved in the world. Think of mainline Protestant denominations and non-Orthodox Jewish bodies.

But as Part I of this Article discusses, many religious activities and groups have features from both poles. They are "acculturated" in that they seek to reach out to the broader society and provide services that people of all beliefs value: education, health care, social services of all kinds, from homeless shelters to adoption to job training. Their approach to these services overlaps significantly, although to a varying degree, with the approach of other providers of these services. And yet these religious providers are "unacculturated" in that some of their doctrines and practices sharply clash with the dominant secular values in their relevant sphere. These groups make a claim to be able to continue to provide services while continuing to follow their countercultural doctrines and practices, which often reflect the core values that inspire their service in the first place. Their activities are partly acculturated, and they argue that the law should respect their ability to remain so.

This Article argues that we should make real efforts to protect religious freedom for partly acculturated religious activities and organizations. We should not reject their claims broadly or per se and thereby exclude them from the efforts at accommodation that other groups receive. The law should not force all religious organizations and activities into one of the two polar categories, acculturated or unacculturated. Part II of this Article presents several reasons why there is a strong interest in protecting the freedom to engage in partly acculturated religious activity.

Accommodating partially acculturated religious activity does present distinctive challenges. In the very act of reaching out to people outside the faith—as clients or employees—can't those organizations cause harm, for example by demanding standards of conduct from those people?<sup>2</sup> Because of these complications, protection for partly acculturated religious activity cannot be absolute. But in Part III of this Article, I examine how we can address those complications—and draw sensible lines concerning accommodation—by relying on two concepts. The clients and employees affected by such organizations should have (1) notice of the organization's religious identity or (2) alternative sources of receiving the services or opportunities in question.

## I. PARTIAL ACCULTURATION

We can understand the problem posed by organizations such as Catholic Charities, or a religiously affiliated college, through the lens of "acculturation." This important and longstanding typology of religious activity distinguishes between groups (usually large) whose views harmonize with the

general culture and other groups (usually small) who depart, and often withdraw, from the culture. Theologian Ernst Troeltsch, chronicling the relation of Christian denominations toward state and society, drew a famous distinction between “church” and “sect.”<sup>7</sup> The church seeks to be “universal,” and, to achieve mass membership, it “to a certain extent accepts the secular order, . . . utilizes the State and the ruling classes, and weaves these elements into her own life.”<sup>8</sup> Sects, by contrast, “are comparatively small groups [that] aspire after personal inward perfection, and . . . a direct personal fellowship between the members” and accordingly “renounce the idea of dominating the world” and adopt an “indifferent” or even “hostile” attitude toward state and society.<sup>9</sup> The prototypical “church” was the Roman Catholic Church or the established Protestant bodies of northern Europe; the prototypical sects were the medieval monastic movements or the Anabaptists of the Reformation.

Later, theologian H. Richard Niebuhr refined Troeltsch’s two categories into five, including the alternatives of “Christ of culture”—groups that harmonize Christian ideals with the broader culture—and “Christ against culture”—groups that withdraw from culture because it is unredeemable.<sup>10</sup> Sociologists of religion agree “that marginal religious groups or sects are characterized by: 1) an emphasis on doctrinal purity; 2) hostility to or disassociation from the prevailing culture; and 3) a strict code of behavior.”<sup>11</sup> Whatever the precise framework, we can speak of religious groups as relatively “acculturated,” aligned with the dominant culture, or “unacculturated,” antagonistic to or withdrawn from the culture.<sup>12</sup>

A group may be “unacculturated” in another sense relevant to conflicts with the law. Whatever its theological relationship to secular culture in the abstract, the group may simply be small enough in a particular locality, or in America in general, that it operates as an unacculturated sect. For example, Islam and Hinduism in general seek to affect other aspects of the culture and

7 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 331 (Olive Wyon trans., 1960).

8 *Id.*

9 *Id.*

10 See H. RICHARD NIEBUHR, *CHRIST AND CULTURE* 45–115 (1951).

11 Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652, 654 (1983) (citing NICHOLAS JAY DEMERATH & PHILLIP E. HAMMOND, *RELIGION IN SOCIAL CONTEXT: TRADITION AND TRANSITION* 69–77 (1969)).

12 For applications of Niebuhr’s categories (adjusted in various ways) to Religion Clause issues, see Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 959–62 (2004); Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 21, 29–37 (James E. Wood, Jr. & Derek Davis eds., 1993) (applying to free exercise cases, drawing from source provided by Berg, *supra*, for some of the analysis); Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992) (applying to variety of Religion Clause issues); Way & Burt, *supra* note 11, at 665 (application to free exercise cases).

society around them, and in the Middle East and India they are the dominant faiths; but in America they are minority groups whose social services and educational institutions do not (yet) play significant roles in the broader society.

The polar cases—religions that are truly unacculturated or truly acculturated—tend not to present the most difficult free exercise questions. Small faiths mostly operate in their houses of worship and in the lives of individual believers who seek to live consistently with their faith in society. But we have a reasonably broad legal consensus that these groups and claims should be protected: and not just that they should be free from discrimination, but that their practices should enjoy some claim to accommodation when they conflict with generally applicable laws.<sup>13</sup> To take just one example, the Supreme Court was unanimous in holding in *Holt v. Hobbs*<sup>14</sup> that a Muslim prisoner, Gregory Holt, should be able to wear a beard for religious reasons even though a state prison regulation forbade it. Groups from across the political and religious spectrum also filed briefs in support of Holt’s claim.<sup>15</sup> On the other end of the spectrum, acculturated religions raise relatively few free exercise exemption issues in the first place. They seldom stray very far, either left or right, from mainstream norms: to the extent they do, they are what I will call “partly acculturated.”

A map of religions based on their degree of acculturation is helpful for analysis of church-state legal questions,<sup>16</sup> but it also poses a number of complications. “[T]he sect-church typology is a continuum”; some faiths fall in the middle (as, for example, with Jews who observe many Jewish laws but are non-Orthodox),” and “any”—perhaps most—“religious groups harmonize with the broader culture on some clusters of issues and conflict with it on others.”<sup>17</sup>

In particular, some of the most important religious groups and activities in America today are what are best described as “partly acculturated.” They are acculturated in that, as I have noted, they provide services of secular value from which people of all beliefs may benefit—education, social services, or health care—using the same methods, or largely the same methods, that other providers use. But they are unacculturated in that some of their doc-

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13 See Berg, *supra* note 12, at 959–60 (“Unacculturated faiths are the outsiders, alienated from dominant values, whom courts should be particularly concerned to protect. Unacculturated faiths also tend to be numerical minorities” often “because they maintain a demanding purity in doctrine and behavior rather than seeking mass membership.”).

14 135 S. Ct. 853, 867 (2015).

15 Amici supporting the prisoner’s claim included the Alliance Defending Freedom, the American Civil Liberties Union (filing on behalf of former prison officials supportive of his claim), Americans United for Separation of Church and State, the Anti-Defamation League of B’nai B’rith, the International Mission Board of the Southern Baptist Convention (joined by the U.S. Conference of Catholic Bishops and several Protestant denominations both liberal and conservative). *Holt v. Hobbs*, SCOTUSBLOG (Feb. 27, 2015), <http://www.scotusblog.com/case-files/cases/holt-v-hobbs/>.

16 See sources cited *supra* note 12.

17 Berg, *supra* note 12, at 960 (quoting Way & Burt, *supra* note 11, at 652).

trines and practices clash with the dominant secular values in their relevant sphere. They make a claim to be able to continue to provide acculturated services while continuing to follow their countercultural doctrines and practices.

For example, evangelical and Catholic nonprofit organizations—from various colleges to the Little Sisters of the Poor Home for the Aged—have asserted claims against the contraceptive mandate, arguing that they ought to be able to continue to serve and employ others without facilitating the provision of contraceptives (which in some cases, they assert, are likely to act as abortifacients).<sup>18</sup> Catholic adoption agencies have asserted that they should continue to be licensed to place children in families without placing them with same-sex couples, which in the agencies' view would facilitate conduct that the Church opposes on religious grounds.<sup>19</sup> Catholic relief agencies have claimed an interest in being able to cooperate with government in serving victims of human trafficking, including non-Catholics, without having to provide, or give referrals for, abortion or contraception services.<sup>20</sup> Some of these disputes involve an organization's claim to continue to receive government funding. But others involve (and probably more in the future will involve) an organization's defense against liability, fines, or licensure withdrawals: government actions that threaten its ability to operate in the first place.

Catholics and evangelical Protestants are the most obvious examples of partly acculturated religions today. As the examples provided suggest, these two large groups have also raised the most controversial free exercise issues in recent years. Catholic and evangelical organizations are deeply involved in American culture, providing extensive educational and social services to the broader public, but they are also at odds with increasingly dominant values on issues of sexual morality and justice. It is no accident that they are involved in many of the most contentious free exercise questions.

But it is important to emphasize that there are situations of partial acculturation in other faiths. Even highly acculturated groups may dissent on a

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18 For listings and summaries of the nonprofit challenges to the mandate, see for example *supra* note 3. With respect to abortion, the nonprofit challengers, like the for-profit businesses and owners suing in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), believe that because a protected human life begins “from the moment of conception,” they would be facilitating abortion if they facilitated the provision of “four [contraceptive] drugs and devices . . . that can prevent implantation of a fertilized egg.” Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191, at 8, *Zubik v. Burwell*, No. 14-1418 (U.S. Jan. 4, 2016), <http://www.scotusblog.com/wp-content/uploads/2016/01/Little-Sisters-Merits-Brief.pdf>; see also *Hobby Lobby*, 134 S. Ct. at 2766.

I believe that the nonprofit plaintiffs' claims should fail—but not because they serve and employ, and may affect, non-adherents. See *infra* notes 44–46 and accompanying text.

19 See *supra* note 2.

20 See *Am. Civil Liberties Union v. Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012) (striking down an accommodation by which federal government contracted with Catholic organizations to provide trafficking-related services but without including abortion or contraception).

few aspects of culture, and of course whether a posture is dissenting or not depends on the dominant culture, which varies greatly around the nation. The “mainline,” generally highly acculturated, Protestant bodies are often left of the mainstream in red states, and this sometimes results in legal conflicts. Liberal churches and religious organizations have sued to challenge laws preventing them from sheltering or otherwise assisting illegal immigrants,<sup>21</sup> from serving the homeless in the church’s neighborhood,<sup>22</sup> and from barring guns on their premises.<sup>23</sup> Acculturation, then, is a matter of degree; and, I will argue, whatever groups are partly acculturated should have a serious claim to accommodation in cases where their practices and identity clash with the law.

Partly acculturated religions pose some of the most controversial and challenging free exercise questions in courts and legislatures today. Some of the reasons are not necessarily inherent in the idea of “partly acculturated” religion. It happens that the most prominent partly acculturated groups, Catholics and evangelicals, are seen as intolerant of others’ rights, especially because they have promoted laws to bar abortion and same-sex marriage.<sup>24</sup> That is not a reason for them to lose their free exercise rights.<sup>25</sup> But not surprisingly, it predisposes many people to have very little sympathy for them.

But there is an inherent challenge in accommodating partly acculturated religions, because they reach out to the world at the same time as they assert certain values increasingly alien to it. This shows up in the policies of

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21 See Iulia Filip, *Bishops Say Alabama’s Harsh Immigration Law Would Criminalize Religious Sacraments*, COURTHOUSE NEWS (Aug. 4, 2011), <http://www.courthousenews.com/2011/08/04/38714.htm>.

22 See *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12-3159, 2012 WL 3235317, at \*27 (E.D. Pa. Aug. 9, 2012) (applying Pennsylvania’s Religious Freedom Restoration Act (RFRA) against city regulations that prevented religious organizations from feeding homeless in public park); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 547 (D.D.C. 1994) (applying federal RFRA against zoning regulations that prevented church from feeding homeless on its premises).

23 See *Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 213 (Minn. Ct. App. 2008) (ruling for church based on religion-protective standard under Minnesota Constitution).

24 See, e.g., Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2543, 2578 (2015) (noting that these objectors “invoke complicity-based conscience claims when they cannot entrench traditional morality through laws of general application,” and arguing that such dynamics make accommodation of such claims problematic because they “intensify the stigmatization that [such] accommodation . . . can produce”).

25 Neither religious principles nor the protection of religious liberty can be a sufficient ground for government to deny same-sex marriage rights. See, e.g., Brief of Douglas Laycock et al. as Amici Curiae in Support of Petitioners at 11–12, 20–24, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 3 (2013). But conversely, the fact that a religious group wrongly seeks to write its opposition to same-sex marriage into law does not mean it loses the right to act consistently with that opposition in other ways.



religious nonprofit organizations regarding employment and service provision. As the arguments above show, critics of accommodation argue that once an organization reaches out to—and thereby affects—others, it must follow every government rule no matter how great a burden the rule imposes on religion.

Partly acculturated religions do raise real complications. But I will argue that they should have protection too. We should make real efforts to accommodate them, like other faiths; we should not reject their claims broadly or per se. The law should not force all religious organizations and activities into one of the two polar categories, acculturated and unacculturated.

## II. REASONS TO PROTECT PARTLY ACCULTURATED RELIGIOUS ACTIVITY

This Part presents three arguments why we should make efforts to accommodate partly acculturated religious organizations when they serve and employ non-adherents but still seek to maintain their distinctive religious standards. While protection for such activities cannot be absolute, these arguments show that there is a significant interest in protecting them, an interest that should weigh strongly in the balance.

### A. *Equality Among Religious Denominations*

First, making efforts to accommodate partly acculturated religious organizations serves the First Amendment goal of equality among religious groups. It is a legitimate way of being religious to serve and employ individuals in the broader society and still maintain one's distinctive religious standards. If we are going to accommodate religious exercise—and we should—we should be aware of the conflicts and give thought to the actual situations of religious institutions. We should not be happy if the law forces all organizations into two rigid categories of unacculturated or acculturated. As the former president of Catholic Charities USA has put it, a religious nonprofit entity should not be “penalize[d] . . . for being—[for] working as a community organization.”<sup>26</sup>

As the Court stated in *Larson v. Valente*,<sup>27</sup> “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>28</sup> The same passage stated that “[the] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause” as well.<sup>29</sup> Both religion clauses indicate that explicit distinctions among religious organizations should be reviewed carefully: the state should not draw lines based on unex-

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26 Larry Snyder, President, Catholic Charities USA, Remarks at the Brookings Institute: Reflections on the Past, Present, and Future of Government Partnerships with Faith-Based and Neighborhood Organizations 172 (Feb. 18, 2010), [http://www.brookings.edu/~media/events/2010/2/18-community-partnerships/20100218\\_faith\\_based.pdf](http://www.brookings.edu/~media/events/2010/2/18-community-partnerships/20100218_faith_based.pdf).

27 456 U.S. 228 (1982).

28 *Id.* at 244.

29 *Id.* at 245.

amined assumptions about the categories into which religious organizations should fit. This principle applies to different religions' decisions about how to relate to the broader culture, as Michael McConnell has shown in an article discussing the relevance of H. Richard Niebuhr's categories for church-state questions.<sup>30</sup> Niebuhr's insight, McConnell says, "is that there is no single Christian answer to the relationship of Christ and culture, and that the question must be left to 'the free decisions of individual believers and responsible communities'" because the question is debated and involves "profound theological content."<sup>31</sup> Accordingly, McConnell argues, "for the state to seek to impose one model of church participation in public affairs would be a serious mistake."<sup>32</sup>

The provision struck down in *Larson* is instructive. Minnesota had applied its laws regulating nonprofit solicitation to religious organizations that received more than fifty percent of their contributions from non-members, but it exempted those that did not.<sup>33</sup> The Court held that this regulation "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents" and thus was subject to, and flunked, strict constitutional scrutiny.<sup>34</sup> The majority rejected the state's argument that the distinction was "simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations."<sup>35</sup> "On the contrary," the Court said, the statute "makes explicit and deliberate distinctions between different religious organizations."<sup>36</sup> The Minnesota law per se excluded organizations from protection if they solicited non-members; if that was denominational discrimination, then so it would seem is a law that per se excludes organizations from protection if they serve or employ non-members.

It is overly strong medication to apply *Larson*, and the strictest form of constitutional scrutiny, to every instance of a statutory exemption whose explicit terms cover some religious organizations and not others. Such distinctions can reflect legitimate attempts to balance the strength of the religious interest in accommodation against the societal interests in the underlying regulation. And if all such distinctions are invalid, the states might react by giving no exemptions in the first place.<sup>37</sup>

Nevertheless, it is important to try to avoid inequalities among religions, at the very least those that result from thoughtless or hasty judgments about which categories of organizations have strong religious interests. This sug-

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30 See McConnell, *supra* note 12, at 193.

31 *Id.* at 220 (quoting NIEBUHR, *supra* note 10, at 233).

32 *Id.*

33 *Larson*, 456 U.S. at 230.

34 *Id.* at 246–47.

35 *Id.* at 246–47 n.23.

36 *Id.*

37 This concern is emphasized in the Brief of Baptist Joint Committee for Religious Liberty as Amicus Curiae in Support of Respondents at 28–38, *Zubik v. Burwell*, No. 14-1418 (U.S. Feb. 16, 2016) [hereinafter Brief of Baptist Joint Committee], <http://www.scotusblog.com/wp-content/uploads/2016/02/Zubik-BJC-Amicus-Final.pdf>.

gests that the government ought to give a good reason for explicitly excluding such organizations from protection.<sup>38</sup> More importantly, when the government imposes a substantial burden on a religious organization, it may be subject to a religious-freedom statute, federal or state, that requires it to justify the imposition of the burden as the least restrictive means of serving a compelling interest.<sup>39</sup> Under this stringent test, the fact that the government has accommodated another religious group will undercut the government's asserted compelling need to regulate this group, at least if the two groups are at all analogous. On that basis, the Supreme Court forbade prosecution of a sect that ingested a hallucinogenic tea at its worship service, in large part because the government had already permitted sacramental peyote use by Native Americans that involved similar asserted harms.<sup>40</sup>

In evaluating the contraceptive mandate, the easiest case is presented by the mandate's original form, which denied protection altogether not only if an organization employed significant numbers of people from outside its faith, but also if it (1) served significant numbers outside the faith or (2) engaged primarily in service rather than the "inculcation of religious values," that is, teaching or proselytization.<sup>41</sup> Any one of these features would be enough to withhold exemption and subject the organization to large penalties for not covering contraception. The Department of Health and Human Services (HHS) never explained—it could not explain—why a regulation ostensibly designed to protect non-member *employees* should be applied to an organization that employs *its own members* but does so in order to *serve* others.<sup>42</sup> To regulate organizations based on their service activities was

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38 An example can be seen in *Gillette v. United States*, 401 U.S. 437 (1971), where the Court upheld Congress's decision, in the military-draft statutes, to exempt persons who objected to all war but not those who objected to a particular war as unjust. The latter objections, the Court found, would be far more difficult to administer. *Id.* at 455–60. Although the Court rejected the selective objector's claim, it did so only after engaging in extensive analysis showing that they presented "substantial difficulties of real concern to a responsible legislative body." *Id.* at 456. While this is not strict scrutiny, it is far more than deferential rationality review.

39 See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012).

40 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434–37 (2006).

41 Specifically, the original provision covered any organization unless it met all of the following criteria: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 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, 8726 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590 & 45 C.F.R. pt. 147) (citing 26 U.S.C. § 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii) (2012)).

42 There are many examples, especially among evangelical agencies such as World Vision and World Relief, which provide relief to all persons in need but hire only professed Christians. See *Christian Commitment*, WORLD RELIEF, <http://static1.squarespace.com/static/569ed9b3a976af229c5ff3cd/t/56d76b10b09f951a53f87e35/1456958224712/Chris>

utterly disconnected from the mandate's employee-protection goals. For that reason, if the original, full-bore mandate to cover contraception had been challenged by an organization that served non-adherents but employed only adherents, it very likely would have been struck down as unconstitutional under *Larson*.

It is more defensible to apply an employee-protective rule to organizations that employ, rather than simply serve, non-members. But even in that case, a flat rule denying accommodation to all such organizations implicates the policy against explicit differential treatment of religious organizations. Just as engaging in acts of service is a legitimate, familiar way of exercising religion, so is engaging in acts of service carried out by persons who do not believe all of the religion's tenets but are sympathetic to its service mission. When it is possible to accommodate the latter sort of organization, the principle of denominational equality cuts against excluding it flatly from accommodation. Whether or not a court would invalidate such a selective denial of accommodation on the strength of *Larson*, the principle of denominational equality favors extending accommodation, unless doing so would unavoidably contradict strong state interests.

It is no answer to assert that partly acculturated organizations are not disqualified from religious freedom protection altogether—that they still enjoy the right to resolve purely “internal” matters such as choosing their clergy and other leaders, determining their doctrines, and so forth, without government interference.<sup>43</sup> If accommodation is denied per se whenever it would affect a non-adherent, then organizations lose protection for the very thing that makes them partly acculturated: their decision to reach out and employ or serve non-adherents while still maintaining countercultural rules of conduct throughout their activities. If protection covers only purely internal matters, it will stop at the very point where the organization needs protection in order to preserve its identity of partial acculturation.

In the case of the contraceptive mandate itself, the Obama Administration ultimately recognized that religious nonprofits could employ or serve others and still deserve religious freedom protection. It created the so-called “accommodation,” under which objecting religious nonprofits would not have to pay for contraception coverage or include it in their plan and their insurer or a third-party administrator would cover the employee directly.<sup>44</sup> In my view, the accommodation probably sufficed to remove the substantial

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tian\_Commitment\_World\_Relief.pdf (last visited Apr. 11, 2016) (“All World Relief employees must accept and acknowledge the Statement of Faith . . . as a condition of employment.”); *Job Opportunities*, WORLD VISION, <http://www.worldvision.org/about-us/job-opportunities/who-we-are> (last visited Apr. 11, 2016) (requiring that employees “agree wholeheartedly with our Statement of Faith or the Apostles’ Creed,” because “[a]s the foundation for all we do, our Christian faith is a uniting factor among staff”).

43 See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (reaffirming protection of the right to choose clergy as part of the right to control “the internal governance of the church”).

44 45 C.F.R. § 147.131 (2014).

burden that the mandate otherwise would have imposed on these profits.<sup>45</sup> It therefore made inapplicable the stringent equal-treatment requirement demanded by the compelling-interest test of the Religious Freedom Restoration Act.<sup>46</sup> But had the government not made the accommodation—had it continued to exclude any religious nonprofit that employed or served others—the mandate would have faced a serious challenge under RFRA.

### B. *The Distinctive Contributions of Partially Acculturated Organizations*

A second reason to accommodate partly acculturated organizations is that they tend to create large social capital and contribute significantly to society through education and social services. It will be a real loss if a significant number of them are driven from their work because their tenets conflict with legal rules. As I will explain shortly, this argument is not simply one of policy. It resonates in our constitutional tradition, which has valued freedom for religious organizations in part for the contributions they make to civil society: the ways in which they promote civic virtue.<sup>47</sup> (To be clear: I mean here to defend giving these organizations religious freedom, not favoritism. And the argument here is not that partly acculturated religious activities should be protected more than others—only that they too should be accommodated, like other religious activities, when they do not involve serious harm to society or other persons).

This Section first presents evidence concerning the distinctive contributions of partly acculturated organizations. It then explores the relevance of those contributions to religious freedom.

#### 1. Distinctive Contributions

To examine the distinctive contributions of partly acculturated religious activity, we can begin with a few suggestive data points. They concern the three groups that most obviously qualify as partly acculturated: Catholics, white evangelicals, and African-American evangelicals.<sup>48</sup> John DiIulio writes

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45 For a detailed argument to this effect, see Brief of Baptist Joint Committee, *supra* note 37.

46 42 U.S.C. § 2000bb-1 (2012).

47 See *infra* subsection II.A.2.

48 African-American churches and their affiliated entities tend to combine engagement in social service programs with unacculturated elements such as a greater role for conversion and proselytism in the programs. For example, in Pew Research Center surveys, “[n]early four-in-ten African-Americans (39%) and 35% of Hispanics say that religious groups that encourage conversion should be eligible to apply for funding to provide social services, compared with just 25% of non-Hispanic whites.” *Faith-Based Programs Still Popular, Less Visible*, PEW RES. CTR. (Nov. 16, 2009), <http://www.pewforum.org/2009/11/16/faith-based-programs-still-popular-less-visible/> (describing results from 2009 and 2001 surveys). Black church members, while liberal on many political issues, also adhere to some traditionalist standards of sexuality and morality. See, e.g., *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (July 29, 2015), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/> (noting that as of 2015, “[s]upport for

that these are “the three religious communities that figure most prominently in serving members and nonmembers alike”; each group “showers volunteer hours and money on nonmembers who tend to be unlike members in terms of race, socioeconomic status, or religion.”<sup>49</sup> Political scientist Steven Monsma has collected statistics and case studies showing that “religious congregations and other faith-based organizations [as a whole] constitute a large portion of the American human services safety net”<sup>50</sup>—and he gives examples specifically from organizations that maintain “unacculturated” elements in their activity.

For example, in some important areas such as prisoner reentry initiatives, faith-based groups that include explicit religious messages in their programs “tap [in]to” those messages “to motivate and encourage” beneficiaries.<sup>51</sup> For example, a report on a Michigan reentry program concludes that explicitly faith-based institutions can “affect returning prisoners in ways that other programs do not,” because they “can help create the conditions for personal transformation, provide inspiration, and motivate individuals to achieve individual goals.”<sup>52</sup> In the international relief area, some of the largest and most vital nonprofit agencies fall into the partly acculturated category, serving others widely while maintaining religious standards for their employees. These agencies include World Vision, which has 40,000 staff members in more than 100 countries: more staff, as *New York Times* columnist Nick Kristof has pointed out, “than CARE, Save the Children and the worldwide operations of the United States Agency for International Development . . . combined.”<sup>53</sup> Finally, the distinctive success of Catholic schools in educating the poor—mostly because of the social capital the schools create—has

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same-sex marriage among black Protestants and white evangelical Protestants remains lower” (34 and 24 percent respectively) “than among other religious groups” (62 percent for white mainline Protestants, 57 percent for Catholics)).

49 JOHN J. DI IULIO, JR., *GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA’S FAITH-BASED FUTURE* 158 (2007).

50 STEPHEN V. MONSMA, *PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY* 18 (2012) (quoting study by nonprofit experts that estimated that one-fifth, at the very least, of all nonprofit organizations providing human services are faith-based in nature); see *id.* at 18–22 (summarizing multiple studies showing similar significant percentages of overall providers). I review this evidence at greater length in Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom*, 21 J. CONTEMP. LEGAL ISSUES 279, 309–13 (2013). See also generally STEPHEN V. MONSMA & STANLEY W. CARLSON-THIES, *FREE TO SERVE: PROTECTING THE RELIGIOUS FREEDOM OF FAITH-BASED ORGANIZATIONS* (2015).

51 MONSMA, *supra* note 50, at 42.

52 *Id.* at 39 (quoting MICH. PRISONER REENTRY INITIATIVE, *ISSUES OF FAITH, JUSTICE AND FORGIVENESS: WORKING WITH FAITH BASED ORGANIZATIONS TO FOSTER DIVERSITY OF MISSION* 6 (Sept. 2008) (emphasis omitted)).

53 MONSMA, *supra* note 50, at 21 (quoting Nicholas Kristof, *Learning from the Sins of Sodom*, N.Y. TIMES (Feb. 27, 2010), [http://www.nytimes.com/2010/02/28/opinion/28kristof.html?\\_r=0](http://www.nytimes.com/2010/02/28/opinion/28kristof.html?_r=0)).

been documented by many scholars, most recently Nicole Garnett and Margaret Brinig.<sup>54</sup>

Statements from these agencies give a sense of how religious beliefs are intertwined with the energy and commitment that make the entities vigorous. The Catholic Health Association objected to the original form of the HHS mandate, which gave little or no religious freedom protections to anyone other than churches and denominations, on these terms:

Catholic health care providers are participants in the healing ministry of Jesus Christ. Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church and it's [sic] teachings about the dignity of the human person and the sanctity of human life from conception to natural death.<sup>55</sup>

World Vision, the large evangelical relief agency, may be terminated from federal government contracts now because its standards for employees forbid sex outside of male-female marriage. Its general counsel has emphasized the importance of its religious identity to its work:

We are not just another humanitarian organization, but a branch of the body of Christ. . . . The key to our effectiveness is our faith, not our size. If we would lose our birthright, if we ever would not be able to determine our team, we'd lose our vision.<sup>56</sup>

To reiterate, my point is not to argue for Catholics and evangelicals as such; my interest is in partly acculturated religious activity as a category. Such activities, I posit, have features that tend to make them energetic in providing services to the broader society. On the one hand, their countercultural positions tend to create a sense of identity and commitment among their members—while on the other hand, their acculturation means they apply that identity to attempt to serve society rather than withdrawing from

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54 See MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA* (2014); see also ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 297–304 (1993) (emphasizing results caused by, among other things, sense of community, decentralized and non-bureaucratic governance, and “inspirational ideology” of personal dignity); JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* 187 (1982) (emphasizing discipline, academic demands, and other school policies); ANDREW M. GREELEY, *CATHOLIC SCHOOLS AND MINORITY STUDENTS* (2002) (emphasizing quality of teaching and effectiveness of discipline).

55 Letter from Carol Keehan, President, Catholic Health Ass'n, et al. to Marilyn Tavenner, Acting Adm'r, Ctrs. for Medicare & Medicaid Servs. 4 (June 15, 2012), [https://www.chausa.org/docs/default-source/advocacy/061512-cha-comments-on-anprm-on-women\\_s-preventive-services-pdf.pdf?sfvrsn=4](https://www.chausa.org/docs/default-source/advocacy/061512-cha-comments-on-anprm-on-women_s-preventive-services-pdf.pdf?sfvrsn=4). After the Obama Administration strengthened its accommodation for non-church entities, the CHA withdrew its objection. Michael Sean Winters, *Catholic Health Association Says It Can Live with HHS Mandate*, NAT'L CATHOLIC REP. (July 9, 2013), <http://nconline.org/blogs/distinctly-catholic/breaking-cha-can-live-hhs-mandate>.

56 MONSMA, *supra* note 50, at 25 (alteration in original) (quoting interview by Stephen V. Monsma with Steven T. McFarland, Chief Legal Counsel, World Vision (May 24, 2010)).

or simply denouncing it. Let me explicate both of those claims, drawing on recent work, both academic and more popular, in the sociology of religion.

Begin with the importance of countercultural elements. Some forty years ago, Dean Kelley investigated the question why “conservative” churches—primarily evangelical Protestants and Mormons—were growing while their ecumenical (“mainline”) Protestant counterparts were beginning to hemorrhage members.<sup>57</sup> (These trends, although fairly new when Kelley first wrote in 1972, continued after his study was published.<sup>58</sup>) Kelley was no foe of liberal Protestantism; he served as an executive in the liberal National Council of Churches and wanted to understand the declines the mainline churches were experiencing. He posited that evangelicals and Mormons attracted people and maintained greater vigor because they made countercultural demands for commitment from their members—in contrast with the far more lenient attitude of the mainline churches. More precisely then, his thesis was that “strict churches are strong,” “whether liberal or conservative.”<sup>59</sup>

Kelley’s argument began with what he called the three key traits of a strong social group: “commitment,” “discipline,” and “missionary zeal.”<sup>60</sup> The first two reflect the fact that the drive for “meaning” is a fundamental trait of human beings. But they also reflect the fact that “meaning” in this sense does not involve simply concepts and ideas, what Quakers call mere “notions.”<sup>61</sup> Rather, meaning involves “concept plus demand”: the call to

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57 DEAN M. KELLEY, *WHY CONSERVATIVE CHURCHES ARE GROWING: A STUDY IN THE SOCIOLOGY OF RELIGION* (ROSE ed., 1986 prtg.). Compare *id.* at 6–11 (tracing “a significant [yearly] decline in the latter half [of the 1960s]” in the five major ecumenical denominations—Methodist, Episcopal, Presbyterian, Lutheran, and United Church of Christ—in membership as well as in budgets, church construction, and church school enrollment), with *id.* at 21–25 (tracing membership increases in same period of between 2.26% and 9.2% per year in bodies such as Southern Baptists, Seventh-Day Adventists, Nazarenes, Jehovah’s Witnesses, Mormons, and Assemblies of God).

58 See *id.* at xvii (1977 prtg.); *id.* at x–xvi (preface to 1986 prtg.). The trends continued through 2014: by that year mainline Protestantism had an estimated five million fewer adult adherents than in 2007, a drop from 18.1% to 14.7% of the overall adult population, while white evangelicals had two million more adults than in 2007 (still a drop of about one percentage point in the share of the overall population, but a far smaller drop). *America’s Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

59 KELLEY, *supra* note 57, at xvii–xviii (1977 prtg.). Kelley noted the relatively low demands that many mainline churches put on their members. *Id.* at 81–94. Likewise, economist Laurence Iannaccone, whose own work concerning “strict churches” built on Kelley’s thesis, has commented, “One need not look far to find an anemic congregation plagued by free-rider problems—a visit to the nearest liberal, mainline Protestant church usually will suffice.” Laurence R. Iannaccone, *Why Strict Churches Are Strong*, 99 AM. J. SOC. 1180, 1185 (1994); see *infra* notes 68–77 and accompanying text (discussing Iannaccone’s argument). But the problem is not inherent in mainline theology; liberal churches could also impose stricter demands. See *infra* notes 65–67 and accompanying text.

60 KELLEY, *supra* note 57, at 58.

61 *Id.* at 52.



stake something on the belief, to commit to it. What “enables religious meanings to take hold is not their rationality, their logic, their surface credibility, but rather the *demand* they make upon their adherents and the degree to which that demand is met by *commitment*.”<sup>62</sup>

Religions that retain a countercultural element—that articulate a meaning counter to the dominant culture and enforce it—are able to inspire commitment. Their members “are willing to put in more effort for their cause than most people do for even their fondest personal ambitions.”<sup>63</sup> Thus, the discipline that promotes effectiveness involves the “willingness to suffer sanctions for infraction rather than leave the group.”<sup>64</sup>

Kelley made clear, eventually if not initially, that his argument did not simply apply to conservative churches. As he wrote in a later preface, “A more accurate title [for his book] might be ‘Why Strict Churches Are Strong’—whether ‘liberal’ or ‘conservative,’ whether ‘growing’ in membership at the moment or not.”<sup>65</sup> He explicitly denied that “the only *content* about which churches can be strict is fundamentalism,” explaining: “Just as there are many ways to articulate and inculcate ultimate meaning (some better than others) so there are many ways in which serious/strictness can be expressed and invoked.”<sup>66</sup> Theologically liberal religious communities can be strict in demanding commitment to their defining norms and practices: for example, they might demand commitment to the social activism that is central in many liberal theologies.<sup>67</sup> The key is for the community to have

62 *Id.* at 53.

63 *Id.* at 51, 53 (commitment involves “a personal and social earnestness shown by the investment by real people of time, money, effort, reputation, and self in the meaning and the movement that bears it”).

64 *Id.* at 58.

65 *Id.* at xvii.

66 *Id.* at xxii–xxiii (adding examples of such “contemporary and nonfundamentalist modes” of higher-demand Christianity).

67 One commentator on American religious sociology has explored this possibility:

So what if liberal Protestants kept their open-minded, tolerant theology, but started being strict about it—kicking people out for not showing up, or for not volunteering enough? Liberals have historically been wary of authority and its abuses, and so are hesitant about being strict. But strictness matters, if for no other reason because conservatives are so good at it: most of the strict, costly requirements for belonging to Christian churches in American [sic] today have to do with believing theologies that contradict science, or see non-Christians as damned. What if liberal Protestantism flexed its muscle, stood up straight, and demanded its own standards of commitment—to service of God and other people, to the dignity of women, and to radical environmental protection? Parishioners would have to make real sacrifices in these areas, or they’d risk exclusion. They couldn’t just talk the talk. By being strict about the important things, could liberal Protestant churches make their followers walk the walk of their faith—and save their denominations in the process?

Connor Wood, *Why IS Liberal Protestantism Dying, Anyway?*, PATHEOS (July 26, 2013), <http://www.patheos.com//blogs/scienceonreligion/2013/07/why-is-liberal-protestantism-dying-anyway/>.

some such strict, distinctive demands, rather than simply letting members or participants bring into the community whatever norms exist in the surrounding culture. In other words, the key is for the community to be, at least partly, unacculturated.

These arguments for “strict” religion have been formalized, refined, and defended by rational-choice theorists of religion, who aim to explain why churches would make demands for standards of conduct that seem unattractive from a rational perspective. For example, Laurence Iannaccone argues that strict demands “‘strengthen’ a church in three ways: they raise overall levels of commitment, they increase average rates of participation, and they enhance the net benefits of membership.”<sup>68</sup> These strengths, he says, arise “because strictness mitigates free-rider problems that otherwise lead to low levels of member commitment and participation.”<sup>69</sup>

As Iannaccone explains: “Free riders threaten most collective activities, and religious activities are no exception. Church members may attend services, call upon the pastor for counsel, enjoy the fellowship of their peers, and so forth, without ever putting a dollar in the plate or bringing a dish to the potluck.”<sup>70</sup> In the dynamic familiar from other collective situations, the failure to police free riders generates “a pervasive lack of commitment that leaves many potential members feeling that the group has little to offer,” and thus unwilling to devote their own energies.<sup>71</sup>

In contrast, strict demands impose costs that “screen out people whose participation would otherwise be low, while at the same time they increase participation among those who do join.”<sup>72</sup> Penalties and prohibitions attached to behavioral restrictions tend to dissuade “the less committed members. [Penalties and prohibitions] act like entry fees and thus discourage anyone not seriously interested in ‘buying’ the product. Only those willing to pay the price remain.”<sup>73</sup> As a result, “[t]he seductive middle ground”—of participating minimally while reaping the group’s benefits—“is eliminated, and, paradoxically, those who remain find that their welfare has been increased.”<sup>74</sup> The most easily enforced demands, Iannaccone says, are those for visible conduct such as “distinctive diet, dress, grooming, and social customs.”<sup>75</sup> But even restrictions on “potentially private activities”—smoking, drinking, sexual practices, and so forth—can be effective because of “self-enforcement mechanisms” (“guilt, habit”) and because “deception remains costly.”<sup>76</sup>

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68 Iannaccone, *supra* note 59, at 1183.

69 *Id.*

70 *Id.*

71 *Id.* at 1202.

72 *Id.* at 1183.

73 *Id.* at 1187.

74 *Id.* at 1188.

75 *Id.*

76 *Id.*

Reviewing surveys of active participation within different religious groups, Iannaccone concludes that “[t]he character of the group—its distinctiveness, costliness, or strictness—does more to explain individual rates of religious participation than does any standard, individual-level characteristic, such as age, sex, race, region, income, education, or marital status.”<sup>77</sup>

A variation on the free-rider theory, set forth by anthropologist William Irons, emphasizes that costly or unpopular religious practices are “signals of commitment” by the community’s members.<sup>78</sup> This account likewise begins with the necessity of commitment among members to overcoming their individual interests when those conflict with the goals and needs of the community. Such commitment can produce, and perhaps is necessary to producing, trust and reciprocity, “the basis for mutually supportive relationships that would not be possible without such trust.”<sup>79</sup> Commitments must be signaled in order to generate trust, but the possibility of false commitments—of free riding—threatens to undercut trust, and, therefore, for “signals of commitment to be successful they must be hard to fake.”<sup>80</sup> And “[o]ther things being equal, the costlier the signal the less likely it is to be false.”<sup>81</sup>

In Irons’ model, religions in general tend to serve as “hard-to-fake signs of commitment.”<sup>82</sup> Faking a religious commitment presents difficulties in general, because the process of learning and practicing a religion is time consuming and often costly in other ways.<sup>83</sup> Moreover, as the last phrase suggests, the signaling of commitment should tend to be more powerful in religions that require more costly practices: that is, that make more strict or “countercultural” demands. Thus, “[o]ther things being equal, we should expect that more costly religions are more effective at creating intragroup cooperation.”<sup>84</sup> This dynamic can help explain “[t]he stigmatizing and often peculiar behaviors required by strict churches, such as wearing distinctive clothing, abstaining from certain foods or drinks, and moving to a commune.”<sup>85</sup>

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77 *Id.* at 1200.

78 William Irons, *Religion as a Hard-to-Fake Sign of Commitment*, in *EVOLUTION AND THE CAPACITY FOR COMMITMENT* 292 (Randolph Nesse ed., 2001).

79 *Id.*

80 *Id.* at 298.

81 *Id.* (giving examples of how pursuing a college degree gives employers an indicium of one’s commitment to a career, and how completing basic training gives an indication of one’s commitment to military service).

82 *Id.*

83 *Id.*

84 *Id.* at 299.

85 Michael McBride, *Why Churches Need Free-Riders: Religious Capital Formation and Religious Group Survival* 6 (Aug. 21, 2007) (unpublished manuscript), <http://econ.faculty.gmu.edu/pboettke/workshop/fall07/McBride.pdf> (arguing that because such practices “raise an individual’s cost of membership” and “are easier to observe than other actions associated with religious effort,” a church has reasons to police commitment on the basis of “compliance with these codes of conduct”).

At the same time, the commitment and discipline of an organization's members will not provide benefits to society if it directs its activities wholly inwardly. Kelley's third component of social strength is "eagerness to tell the 'good news' of one's salvation to others," instead of keeping it within the insular group.<sup>86</sup> Iannaccone ultimately argues that organizations must seek some combination of strictness and openness: an "optimal level of strictness" that will vary according to the "target population of potential members."<sup>87</sup> Groups that fall below this level will suffer "from free-rider problems and hence from a pervasive lack of commitment."<sup>88</sup> But groups that exceed optimal strictness or insularity "will tend to scare off many potential members with what are perceived as excessive demands."<sup>89</sup> Iannaccone notes that some groups experience "encapsulation" early on, because they are so demanding and never grow beyond insular status.<sup>90</sup> To remain strong—to generate commitment and intra-group trust—a group must make demands that may well entail some "distance or tension between itself and society."<sup>91</sup> But maintaining this "'optimal gap' means walking a very fine line in adjusting to social change so as not to become too deviant, but not embracing change so fully as to lose all distinctiveness."<sup>92</sup>

These arguments for combining strictness and openness in religious organizational life have several implications. First, organizations that combine significant elements of both features—that is, partly acculturated organizations—tend, other things being equal, to maintain a vigor that increases their likelihood of providing valuable services to society.

Second, a good proxy for partial acculturated activity is that an organization simultaneously reaches out to non-adherents, to serve or employ them, but also maintains religiously based standards of conduct that conflict with general societal norms. Those conflicts often mean conflicts with law, and thus such organizations are likely to make claims for accommodation in carrying out their activities. They want to maintain their strict demands, their unacculturated conduct, as part of their religious identity. And those on the other side of such disputes—government itself, or the beneficiaries of the laws in question—are likely to resist accommodation on the ground that the organization is harming others with its behavior.

If partly acculturated religious activity as a category makes distinctive contributions to society, then we ought not to reject accommodation for such activity out of hand merely because the activity affects non-members in a way that society has determined is improper. We ought to make efforts to protect religious freedom for the organization that affects non-members, as we do for the organization that remains insular and has little or no effect on the

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86 KELLEY, *supra* note 57, at 58.

87 Iannaccone, *supra* note 59, at 1202 (emphasis omitted).

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 1203.

92 *Id.*

broader society. Of course, protection cannot be absolute, and the regulatory interests implicated are different for behavior that affects non-members than for behavior that affects only members. But we ought to make as much room as possible for partly acculturated organizations.

A third implication of the tension between strictness and openness is more general. Although some ways of balancing those two qualities are more likely to produce vigor and contributions to others, there is almost certainly no single answer that is optimal for every religious organization or activity. Each organization has to determine the “optimal level of strictness”<sup>93</sup> for its activities in the light of its history and mission, its animating theology, the nature of the human needs it aims to serve, its size and practical resources, and probably many other factors. As I’ve already argued, government should not force all organizations into one or two models—polar models—of acculturation and unacculturation. It should not reject an organization’s claim for accommodation of its countercultural religious norms simply because the activity in question involves non-adherents as employees or clients.

These arguments may show there is value in an organization maintaining strict demands on members and adherents; but do they show there is any value in extending the demands to non-adherents as well? I think the answer is yes. It is often far from easy to distinguish between adherents and non-adherents. If some employees do not have to follow the organization’s rules of conduct, their example might lead other employees, even adherents of the faith, to relax their behavior as well. If this happens, it may activate the cycle described above: weakened commitment in some may increasingly signal to others that they can weaken their commitment as well. Moreover, the organization also depends on other constituencies, such as donors and volunteers, many of whom are members. Some of these may withdraw their own support if they sense that the organization is relaxing its commitment to its distinctive standards. A religious organization that ceases applying its faith-based moral standards to some of its employees, or in some of its activities, has changed its identity in a potentially important way, even if the full effect is not immediately apparent. Many supporters of the organization will perceive it that way.

To be sure, the claims for the advantages of “strict churches” have been vigorously debated. Sociologists and historians have attributed the relative success of evangelical over mainline churches to multiple factors, such as the appeal of evangelical individualism and the lower birth rates among mainline families.<sup>94</sup> And Kelley’s thesis continues to provoke criticism today.<sup>95</sup>

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93 *Id.* at 1202.

94 *See, e.g.*, MARGARET BENDROTH, *THE LAST PURITANS: MAINLINE PROTESTANTS AND THE POWER OF THE PAST 2* (2015) (“There are as many explanations for mainline decline as there are solutions for remedying it.”); David A. Hollinger, *After Cloven Tongues of Fire: Ecumenical Protestantism and the Modern American Encounter with Diversity*, *J. AM. HIST.* 21, 38 (2011) (noting, as an example of the “differential birth rate,” that “[d]uring the baby boom Presbyterian women produced only an average of 1.6 children, while evangelical women produced an average of 2.4”). Hollinger, however, also acknowledged that “[t]he central factor [in mainline church decline] was the decision of the children of [their]

But as already noted, Kelley had a ready response for critics: his argument, he said, would predict vigor and energy in any church making strict, countercultural demands, including a church that emphasizes social activism.<sup>96</sup> Again, a liberal church or synagogue might apply a high-demand sense of activism to serving unauthorized immigrants or the homeless—as do many Catholic and evangelical organizations. Any organization, liberal or conservative, doing such work can come into conflict with strict anti-immigration laws or zoning regulations. We should accommodate them in these conflicts up to the point where accommodation would unavoidably conflict with strong state interests. And we should do the same for any religious organization that seeks to follow the demands of its faith, in a conflict with the law, while providing services to the broader society.

The distinctive value of countercultural elements in religion does not seem to have disappeared in recent years. As I have already noted, the findings of Putnam and Campbell, DiIulio, and others indicate that organizations combining social engagement with countercultural identity are among the most effective in generating commitment, vigor, and social capital.<sup>97</sup> And with respect to pure numbers, the recent decline of religious identification in America is most significant in the (more acculturated) mainline churches: evangelicals are, comparatively speaking, holding their own.<sup>98</sup> I am a mainline Episcopalian; I joined that denomination, after being raised in evangelical Protestant churches, because I agree with more of its theological positions on social issues. But it seems questionable that the mainline churches—or secular organizations, for that matter—can generate enough vigor or commitment to fill entirely the void that evangelical and Catholic agencies will leave if they exit charitable work in significant numbers because of religious freedom issues.

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members not to become members themselves”—a factor that could be another manifestation of the free-rider problem. *Id.* (“Evangelicals had more children *and* kept them.” (emphasis added)).

95 See, e.g., Daniel Schultz, *Are Conservative Churches Really Winning by Being More Orthodox?*, RELIGION DISPATCHES (Mar. 19, 2013), <http://religiondispatches.org/are-conservative-churches-really-winning-by-being-more-orthodox/> (summarizing arguments against Kelley’s thesis, including studies showing millennials *leaving* churches because of adherence to strict rules of conduct).

96 See *supra* notes 65–67 and accompanying text (quoting KELLEY, *supra* note 57, at xxii–xxiii).

97 See *supra* notes 48–56 and accompanying text.

98 According to the recent Pew survey, between 2007 and 2014, Christians as a percentage of the American population declined from 78.4% to 70.6%, a drop of 7.8 percentage points, or almost 10%. As already noted, the most precipitous drop was (as in previous years) among the most acculturated group: mainline Protestants, down 3.4 percentage points from 18.1% to 14.7%, or nearly 20% in just seven years. Evangelicals, by contrast, dropped only 0.9%, i.e., less than 1 percentage point from 26.3% to 25.4%. *America’s Changing Religious Landscape*, *supra* note 58.

## 2. Civic Contributions and Religious Freedom

The argument from civic contributions is not simply a policy-based appeal to preserve the work of effective social-service providers. The argument also stands firmly in America's tradition of religious freedom. One important, longstanding strain in that tradition is that we protect religious exercise because religion, as exercised in voluntary organizations, is an important contributor to civic virtue.

Timothy Hall, for example, has summarized the case that "the Free Exercise and Establishment Clauses had their birth, at least partially, in a regard for religion's role in creating the circumstances in which civic virtue might flourish."<sup>99</sup> Most of the framers no doubt thought that popular government required morality in the citizenry, for if individuals did not exercise self-restraint, government would have to restrain them and might become tyrannical.<sup>100</sup> Many of the framers would have thought religion an important contributor to civic morality. George Washington went so far as to say that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle,"<sup>101</sup> but it would be enough to conclude that religion was an important source of civic virtue. Professor Hall summarizes the features of a "fairly modest" case that recognizes religion's capacity for harm but still values its "capacity . . . to generate virtue":

First, religious groups in general continue to provide the associational structures necessary for training in the idea of the common good. . . .

Religious groups, in the form of voluntary associations, create a context in which individuals become sharers of a common life, and thus have occasion to acquire an other-regarding disposition.

Second, religious groups have traditionally preserved didactic resources for discourse concerning the common good. The major religions, for example, have each emphasized perspectives that temper, at least to some degree, the purely selfish impulses that war against a concept of the public good.

These didactic resources are available for use, and have in fact been used, in specific discourses about the public good, such as the discourse connected with the civil rights movement. . . .

Third, religious groups in American society have provided visionary resources for debate concerning and for pursuit of the public good. Even if religious believers, on average, cannot claim any greater level of virtue than

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99 Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 88 (1992).

100 See, e.g., Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 19–20 (noting that the framers guaranteed religious liberty "in the hope and expectation [among other reasons] that religious observance would flourish, and with it morality and self-restraint among the people").

101 George Washington, Farewell Address (Sept. 19, 1796), [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp).

nonbelievers, one might nevertheless conclude that religions preserve aspirations to virtue that are socially important.<sup>102</sup>

Partly acculturated religious organizations, as a category, fit these characteristics. They take religion's capacity to develop a sense of the common good, and they apply it to contexts that involve providing services to those in the broader society.

This approach provides grounds for preserving freedom for religious organizations even in some instances where they conflict with general societal norms. A group may contribute to the common good in various ways even if it departs from the majority's understanding of that good in a particular instance. This reasoning is exemplified in Washington's attitude toward the Quakers, who were roundly condemned during the Revolutionary Era—and criticized by Washington himself—for refusing to serve in the Continental Army. Later, in a well-known letter he sent to Quakers while he was President, Washington wrote that “(except [for] their declining to share with others the burden of the common defense) there is no denomination among us, who are more exemplary and useful citizens.”<sup>103</sup> He then immediately assured them that “the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.”<sup>104</sup> From a republican perspective, accommodation of the Quakers' dissenting religious beliefs makes sense because the same belief system, as a whole, helps make the Quakers “exemplary and useful citizens.”

As Professor Hall explains, the Framers, even those with a civic-republican perspective, were skeptical of government's ability to inculcate such virtue directly. Sponsorship of a favored religion or religions, Madison and others warned, would corrupt those groups and undermine their capacity to nurture and mobilize civic virtue.<sup>105</sup> Government had to “be satisfied, therefore, with the strategy of indirection, by protecting from the encroachments of government itself those communal forms of existence out of which the virtues are born.”<sup>106</sup> And this strategy extends to the protection of religious organizations in cases where an organization's identity is pitted against the claims of individuals who associate with the organization but depart from its teaching. If organizations are not accommodated, “[t]he possibility of free religious exercise itself is then jeopardized when the associational forms of

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102 Hall, *supra* note 99, at 110–12 (footnotes omitted).

103 Letter from George Washington, President of the U.S., to the Annual Meeting of Quakers (Sept. 1789), <http://teachingamericanhistory.org/library/document/letter-to-the-annual-meeting-of-quakers/>.

104 *Id.*

105 See Hall, *supra* note 99, at 120–21.

106 *Id.* at 124–25 (“[T]he strategy of indirection requires that government attend to the impact of its own action on religion in an effort to preserve a zone of autonomy in which religious groups can create those dispositions to virtue which the republic needs but whose creation it cannot command.” (footnote omitted)).



existence which religious practice almost invariably inhabits become extinct.”<sup>107</sup> As I have written previously, accommodation

marr[ies] the values of pluralism and civic virtue. Protection of conscience and dissent can itself promote the common good by keeping the dissenter not just free, but free to continue to serve others. . . . Forcing an organization to change or minimize a feature of its distinctive identity risks undercutting the organization’s distinctive contributions inspired by that identity.<sup>108</sup>

Thus, if partly acculturated organizations as a category have a distinctive capacity to contribute to the broader society, we should make efforts to accommodate them, instead of forcing them into the poles of acculturation or unacculturation—again, unless accommodation would unavoidably undermine strong state interests.

*C. Pragmatic Concerns: Should We Drive Religions to Be More Insular?*

A final reason to protect partly acculturated religious activity is pragmatic. If organizations lose all right to exemption or accommodation when their activity affects non-adherents, some will respond by becoming wholly insular. To preserve their ability to follow their identity and standards of conduct, they will stop employing or serving persons outside the faith. To take one important example, if organizations lose their ability to demand religiously based standards of conduct of their employees, some—how many is unclear—will exercise their right to limit their hiring to members of their own faith. Federal law guarantees that right in section 702(a) of the Civil Rights Act, which allows a religious organization to prefer “individuals of a particular religion” for employment in all its activities, whether the activity is deemed religious or not.<sup>109</sup> That exemption is a relatively secure alternative for religious organizations; the Supreme Court has unanimously upheld its constitutionality.<sup>110</sup> It is likely to become an increasing resort for organizations that had hired non-adherents in the past.

Such a development should cause concern.<sup>111</sup> Narrower employment policies by religious organizations may reduce the number of situations in which non-adherents will be under pressure to follow the religion’s standards of conduct. But the cost would be that non-adherents would also have reduced opportunities for employment with religious organizations (some of them significant employers). Whether this would produce a net benefit is unclear. Similarly, if religious organizations are never protected in their conscientious objections to direct facilitation of clients’ conduct, some will

107 *Id.* at 128 (“[A]ttention to the ecology of free exercise will require wariness of attempts to privilege the religious claims of particular individuals over the believing communities in which they are situated.”).

108 Berg, *supra* note 50, at 316.

109 See Civil Rights Act of 1964, Title VII, § 702(a), 42 U.S.C. § 2000e-1(a) (2012).

110 See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

111 For discussion of some analogous concerns, see Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301 (2016).

choose to serve only their own members (which they are permitted to do under many civil-rights laws and ordinances). They can choose to provide housing only to their own members;<sup>112</sup> they can choose to open their colleges or schools only to members.<sup>113</sup>

Such changes could mean that non-adherents get worse services overall because they cannot benefit from the distinctive programs and services offered by religious organizations.<sup>114</sup> But the potential costs go beyond that. Pressuring religious organizations to become more insular will also add another incentive for societal balkanization, at a time when people already sort themselves into groups whose members hold similar views across the whole range of important social issues.<sup>115</sup> It is true that if organizations with countercultural religious standards become more consistently insular, it will reduce the situations in which non-adherent employees have to follow those organizations' standards. But it will also reduce opportunities for other employees who are willing to work at such an organization despite its standards. And it will reduce opportunities for employees of differing beliefs to work together in such settings. These effects too should be considered before we categorically reject accommodations for organizations in activities that employ or serve non-adherents.

### III. ACCOMMODATING PARTIALLY ACCULTURATED RELIGION

For the reasons above, both courts and legislatures ought to remain open to protecting religious organizations' freedom even in activities that involve non-adherents as employees or clients. We should avoid forcing all organizations and activities into the two polar categories: either serving and employing only their own (fully unacculturated) or conforming to every legal mandate adopted by the majority (fully acculturated). Courts should take this consideration into account as they fashion religious freedom protections under constitutional and statutory religious-freedom provisions. And legislatures should do the same as they determine the scope of statutory religious accommodations. Section A of this Part develops this argument further.

Of course, to say that partially acculturated organizations and activities should be protected does not mean that they should be absolutely protected. Accommodating partially acculturated organizations does present challenges. In the very act of reaching out to people outside the faith—as clients or employees—cannot those organizations cause harm, for example by demanding standards of conduct from those others? This issue raises legiti-

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112 The federal Fair Housing Act and various state and local laws allow religious organizations to confine sales or rentals of housing they own or operate to members of the faith, provided membership is not restricted by race. *See, e.g.*, 42 U.S.C. § 3607(a); KY. REV. STAT. tit. 27, § 344.365 (2014); N.Y. CITY, N.Y., ADMIN. CODE § 8-107.12 (2015).

113 *See, e.g.*, N.Y. EXEC. LAW § 296.11 (McKinney 2012); OHIO REV. CODE ANN. § 4112.02(K)(1) (West 2013).

114 *See infra* subsection III.B.2.

115 *See, e.g.*, BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008).

mate, sometimes difficult problems. But in the light of the arguments above, the response should not be to reject accommodations altogether. Section B explores solutions to the tensions presented by accommodations for partly acculturated activity.

### A. Means of Accommodation

The arguments for accommodating partly acculturated religious activity can be translated into legal doctrine in several ways. The overarching theme is that courts and legislatures should not refuse to adopt an accommodation simply because the activity affects employees or clients who are non-adherents of the faith in question. At the very least, courts should resist the argument, made in the contraceptive mandate cases, that any accommodation that “material[ly]” or “noticeabl[y]” affects non-adherent employees or clients is a violation of the Establishment Clause.<sup>116</sup> The Establishment Clause, as interpreted in cases such as *Estate of Thornton v. Caldor*,<sup>117</sup> does place limits on the government’s ability to adopt accommodations that impose significant costs on non-consenting third parties. But even under the strongest reading of *Caldor*, effects on others must be balanced against the legitimate interest in removing substantial government-imposed burdens on religious exercise, an interest reflected in the Free Exercise Clause. Thus the courts should not declare an accommodation of a religious organization unconstitutional unless, at the least, the effect on others is disproportionate: if the effect is serious and the burden the accommodation removes from religious exercise is minimal.<sup>118</sup>

Beyond that, courts should be willing to protect partly acculturated activity under religious freedom statutes—RFRA<sup>119</sup> or its state counterparts<sup>120</sup>—or under state constitutional provisions.<sup>121</sup> Courts should not assume that avoiding effects on non-adherents is always a “compelling interest” justifying denial of an exemption to protect religion under these provisions. They should examine the seriousness of the effect, again in light of the seriousness of the burden on religious exercise that the accommodation would remove. And they should require government to pursue alternative means of regula-

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116 See generally, e.g., Gedicks & Van Tassell, *supra* note 5, at 363–71 (expanding on this point).

117 472 U.S. 703 (1985).

118 For fuller defenses of such a standard, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 703 (1992), and Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 142–43 (2015).

119 42 U.S.C. §§ 2000bb to bb-4 (2012); see also Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc to cc-5.

120 See, e.g., Christopher Lund, *Religious Liberty After Gonzales: A Look at State RFRA*s, 55 S.D. L. REV. 466 (2010).

121 See, e.g., Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275.

tion that would limit harmful effects on others but still avoid serious burdens on a religious organization's freedom.

Finally, legislatures should be willing to extend statutory accommodations in specific contexts to include partly acculturated activities, within appropriate limits.

An important example of the interplay of various means of accommodation—specific statutory provisions and general religious-freedom standards—comes in the context where a nonprofit religious organization employs non-adherents to carry out its religiously grounded mission. This context also exemplifies one of the considerations discussed in Part II: namely, that refusing to accommodate religious organizations in activities that involve non-adherents of the faith may well push many such organizations to become narrower and more insular, declining to hire or even serve non-adherents.<sup>122</sup>

This issue has become prominent because of recent advances in sexual-orientation nondiscrimination legislation and regulations. As noted above,<sup>123</sup> federal employment-discrimination law gives religious organizations an exemption—the “section 702 exemption”—permitting them to discriminate in hiring by preferring “individuals of a particular religion to perform work connected with [the organization’s] activities.”<sup>124</sup> Case law interpreting the section 702 exemption makes clear that it gives religious organizations the freedom to hire with respect not just to belief and affiliation, but also to religiously grounded standards of conduct, which would include avoiding abortion, or confining intimate sexual activity to a male-female marriage.<sup>125</sup> The decisions hold that when an organization demands that individuals adhere to a standard of conduct, it is preferring individuals “of a particular religion.”<sup>126</sup> The courts have concluded, in the words of the Third Circuit, that “Congress intended [this and similar] explicit exemptions of Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices.”<sup>127</sup> But the decisions protecting conduct standards have almost all involved suits by the plaintiff for religious discrimination, to which the section 702 exemption is clearly a defense. And several decisions state that the exemption does

122 See *supra* Section II.C.

123 See *supra* notes 110–14 and accompanying text.

124 42 U.S.C. § 2000e–1(a).

125 See, e.g., *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130 (3d Cir. 2006) (702 exemption protected Catholic teacher who signed a pro-choice newspaper advertisement); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (exemption protected Baptist institution that discharged administrator/mentor who was in a lesbian relationship); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (exemption protected a Catholic school that hired a Protestant teacher but discharged her for marrying a Catholic without getting her previous marriage annulled).

126 See, e.g., *Little*, 929 F.2d at 951 (“[T]he permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs *and conduct* are consistent with the employer’s religious precepts.” (emphasis added)).

127 See *Curay-Cramer*, 450 F.3d at 141 (quoting *Little*, 929 F.3d at 951); *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1174–75 (N.D. Ind. 2014).

not allow religious organizations to make employment decisions “on the basis of race, sex, or national origin,” other grounds prohibited under Title VII.<sup>128</sup>

If the latter line of cases is read broadly, then the section 702 exemption will have no application to plaintiffs’ claims other than those for religious discrimination.<sup>129</sup> If so, then if and when sexual orientation becomes a prohibited category in the law and a plaintiff sues on that ground, an organization’s moral-conduct policy that makes any distinction between same-sex and opposite-sex conduct would not be sheltered by the exemption—no matter how deeply that rule is grounded in the religion’s moral teachings. Commentators like Marty Lederman and Rose Saxe have already reached that conclusion with respect to President Obama’s 2014 executive order prohibiting federal contractors from engaging in sexual-orientation discrimination.<sup>130</sup> On the other hand, Professor Carl Esbeck has argued that the exemption continues to apply when “the employer is a religious organization and . . . there is a religious belief or practice behind its staffing decision.”<sup>131</sup>

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128 See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); see also *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (finding the exemption does not authorize discrimination between men and women in enforcing standards against extramarital sexual conduct); *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996).

129 For arguments in support of this conclusion, see Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS (July 31, 2014), <http://berkeleycenter.georgetown.edu/responses/why-the-law-does-not-and-should-not-allow-religiously-motivated-contractors-to-discriminate-against-their-lgbt-employees>, and Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws*, BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS (July 28, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/the-truth-about-religious-employers-and-civil-rights-laws>.

130 *Id.* Obama’s order is Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014). The 2014 order leaves in place a 2002 George W. Bush executive order stating that the 702 exemption protects federal contractors, but the Bush order does not resolve the issue whether section 702 protects against claims other than religious discrimination. See Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 4(c) (Dec. 12, 2002) (amending Exec. Order 11,246, § 204(c), 30 Fed. Reg. 12,319 (Sept. 24, 1965)).

131 Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & REL. 368, 372 (2015).

Even if religious organizations receiving funding are not protected in their religious hiring preferences by section 702, they might be protected by the Religious Freedom Restoration Act. The denial of funding can be a “substantial burden” triggering strong free exercise protection. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). But there is an ongoing debate about precisely when a denial creates such a burden. Compare Office of Legal Counsel (OLC), Dep’t of Justice, Opinion Letter on Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act (June 29, 2007), <https://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision.pdf> (concluding that withdrawing funding because organization hires only religious adherents would violate RFRA), with IRA C. LUPU & ROBERT TUTTLE, *THE STATE OF THE LAW—2008: A CUMU-*

If the section 702 exemption shields only against claims of religious discrimination, organizations that want to claim its protection will have to show that their moral-conduct policy involves only religious discrimination and no other prohibited grounds. They might be able to argue that they apply an extramarital conduct policy consistently to all persons<sup>132</sup>—but they will face the counterargument that the organization’s definition of marriage itself incorporates a distinction between opposite-sex and same-sex relations. An organization’s safer course will be to show that it discriminates against all persons who believe in the legitimacy of same-sex marriage, not just those who engage in same-sex activity. In order to show discrimination based solely on belief, the organization may well have to require a statement of faith from all employees that includes explicit disapproval of same-sex conduct.

For many organizations, requiring such a statement is likely to change them dramatically, forcing them to be far narrower in their reach: far less open to hiring persons of differing theological views, far more demanding of uniformity of belief not just in large outline but in details. It will push them to be more insular, less open to the broader society. It will push them to be wholly unacculturated.

### *B. Limiting Negative Effects from Accommodations*

As I’ve already suggested, accommodations of religious exercise that affect non-adherents (employees or clients) do raise distinctive concerns. Effects on non-adherents do not justify rejecting accommodation altogether, for the reasons already given; but they should be considered in determining the scope of accommodation. Harmful effects from accommodations can be limited through two means: notice to the affected persons and alternatives for the provisions of services.

#### 1. Notice

First, it is important that clients and employees of partially acculturated religious organizations have some notice of the religious practices that could affect them and that could conflict with applicable laws. Without notice, employees may find themselves subject to unexpected standards of conduct that they cannot easily escape. The consequences of lack of notice are often

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LATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS (2008) (criticizing the OLC analysis).

132 Even the *Cline* and *Boyd* decisions above held that discharging an employee for being pregnant would be religious discrimination protected by the exemption—and not sex discrimination—if the organization would also fire a male whose extramarital sexual conduct led to a pregnancy. *Cline*, 206 F.3d at 658 (“[C]ourts have made clear that if the school’s purported ‘discrimination’ is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy in violation of Title VII.” (citing *Boyd*, 88 F.3d at 414–15)).

less severe for clients, who often can find another provider relatively easily.<sup>133</sup> But one reason why religious-objection cases involving for-profit businesses—the baker, the florist—trouble many people is that the nature of the entity will not likely give customers notice that it follows distinctive religious norms. We can debate whether the refusal of a commercial good or service on a ground prohibited by law constitutes a sufficient harm to override religious freedom per se—that is, even when there are readily accessible alternatives. But the absence of notice is cause for concern, and displaying a sign ahead of time saying, “We don’t serve same-sex weddings” creates its own problems.<sup>134</sup>

But the matter is different for organizations that are known as religious. Professors Micah Schwartzman, Richard Schragger, and Nelson Tebbe have been energetic critics of religious-exemption claims by for-profit businesses, but they have acknowledged that religious nonprofit organizations are different. There is often, they say, a “reasonable expectation that employees who work for churches *and religious-affiliated nonprofits* understand that their employers are focused on advancing a religious mission.”<sup>135</sup> “Reasonable expectation” is another term for notice—that the employer is religious and may apply certain religiously based standards of conduct.

Notice and expectations concerning religious organizations also parallel the concept of “implied consent,” which as Michael Helfand reminds us, has long been important in our religious liberty tradition.<sup>136</sup> As far back as *Watson v. Jones* in 1872, the Court said: “All who unite themselves to [a religious] body do so with an implied consent to [its] government, and are bound to submit to it.”<sup>137</sup> This does not apply only to those who choose to be members of the church. It also applies, presumptively at least, to non-members who agree to work for the organization. Because their loyalty is crucial to the organization’s following its mission, they should presumptively be held to have consented, implicitly, to those principles that are foundational to that mission.

Helfand rightly says there must be some basis to infer such consent: something beyond corporate documents, something apparent that would

133 Not always, of course. Even many who would urge exemptions for small wedding photographers or florists would balk at allowing a bed-and-breakfast to refuse to serve a same-sex couple—in part because a surprise refusal of lodging can cause serious costs.

134 See, e.g., Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 198–200 (Douglas Laycock et al. eds., 2008) (exploring benefits and costs of measures requiring small businesses to post their objections to serving same-sex marriages ahead of time).

135 See Micah Schwartzman et al., *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), [http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause\\_9.html](http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html), archived at <http://perma.cc/VWZ6-JEA6> (emphasis added).

136 See, e.g., Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015); Michael A. Helfand, *What Is a “Church”? Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 415–18 (2013) [hereinafter Helfand, *What is a “Church”?*].

137 See 80 U.S. 679, 729 (1872).

lead employees to expect that the organization may apply religious norms to their conduct.<sup>138</sup> The same point could apply to clients' notice that the organization may have religious norms limiting the conduct it is willing to facilitate. Helfand suggests that religious elements should have to be "integrated into the day-to-day operations of an institution[,] through pervasive religious symbols, organized religious prayer," or other "'clear' and 'obvious'" manifestations of its religious mission.<sup>139</sup> Such a test seems too strict, at least if it serves as the exclusive means of establishing notice and implicit consent. An organization may be deeply religiously motivated but engage in service activities without an explicitly articulated religious message. For some organizations, the essence of their mission, to paraphrase words often attributed (or misattributed) to St. Francis, is to "preach the Gospel" but not necessarily "use words."

But there should be reasonable notice in some form. Religious organizations that do not have explicit religious elements in their programs should make it reasonably apparent to employees—through the employee handbook or contract or some other means—that religious norms may apply. (This can have costs for the organization: there is a revolt in the San Francisco's Catholic archdiocese because the archbishop added restrictive "moral conduct clauses" to the faculty handbook for Catholic schools.<sup>140</sup>) I would not require, however, that the language be highly specific, for example identifying each particular practice. A general statement should suffice to put employees on notice. Given the importance of protecting partly acculturated religious organizations, the concept of reasonable notice should not be interpreted in a way that makes it impossible for an organization to ask its employees to adhere to norms of conduct.

## 2. Alternative Providers

The second concept is that of alternatives, which make possible exit from, or avoidance of, religious rules in the sphere of social services. A religious social-service organization should not be made to violate its religious identity merely to ensure that it does not deny a client service, when such clients have alternative providers from whom they can receive the service. But religious organizations may be denied regulatory exemptions when they occupy "chokepoints," where they can substantially limit others' access to services or employment.

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138 See Helfand, *What is a "Church"?*, *supra* note 136, at 422 ("Under an implied consent approach, judicial inquiry evaluating whether an organization is a 'religious institution' should focus less on the corporate structure of the institution and more on the extent to which the religious character of the institution was open and obvious to its employees.").

139 *Id.* at 420–24.

140 See, e.g., *Catholics in San Francisco Rally Against "Morality Clauses"*, CRUX (May 21, 2015), <http://www.cruxnow.com/life/2015/05/21/catholics-in-san-francisco-rally-against-morality-clauses-2/>; Carol Pogash, *Morals Clause in Catholic Schools Roils Bay Area*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/us/archbishop-cordileone-of-san-francisco-defends-changes.html?r=0>.



Religious organizations who object to a legal requirement seldom occupy chokepoints, in services or employment. Usually they are a small part of a much larger range of providers, secular and religious, most of which have no objection. But there are exceptions. For example, there should be no accommodation for religious hospitals in the provision of most medical services, certainly not if the hospital has market power in such provision. By contrast, in the cases involving Catholic adoption agencies and nondiscrimination requirements, there were generally numerous agencies happy to place children with same-sex couples.<sup>141</sup> Accommodation could have preserved the Catholic agencies' ability to deliver effective services and adhere to their beliefs, without depriving anyone of meaningful access.

The role of alternatives was dramatized in the series of judicial and regulatory decisions on whether religious organizations receiving federal funding to assist human-trafficking victims must offer abortion or contraception options to the people they serve. The Trafficking Victims Protection Act (TVPA) of 2000<sup>142</sup> appropriated funds to assist victims of trafficking, primarily women and children. Originally HHS, charged with implementing the statute, awarded grants directly to a variety of nonprofit organizations working with trafficking victims; but in 2006, HHS decided to designate a general contractor to administer the funds, distributing them to subcontractors.<sup>143</sup> HHS chose the U.S. Conference of Catholic Bishops (USCCB), whose general ability to assist victims is well documented. But the HHS contract also allowed the USCCB to refuse to provide, fund, or refer for abortion or contraceptive services because, as the USCCB's contract bid explained, those activities "would be contrary to [Catholic] moral convictions and religious beliefs."<sup>144</sup> The contract also allowed the USCCB to put the same limitation on its subcontractors, many of which were not Catholic organizations.<sup>145</sup> In *American Civil Liberties Union v. Sebelius*,<sup>146</sup> a federal district judge held that this provision violated the Establishment Clause because it "delegated authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endorsed the religious beliefs of the USCCB and the Catholic Church."<sup>147</sup>

The district court's Establishment Clause reasoning has significant weaknesses, but it makes an important point. The weaknesses lie in the fact that

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141 See, e.g., Dale Carpenter, *Let Catholics Discriminate*, METRO WEEKLY (Mar. 29, 2006), <http://www.metroweekly.com/2006/03/let-catholics-discriminate/> (noting that in Massachusetts, "[g]ay couples could still adopt through dozens of other private agencies or through the state child-welfare services department itself, which places most adoptions in the state").

142 22 U.S.C. §§ 7101–13 (2012).

143 See *Am. Civil Liberties Union v. Sebelius*, 821 F. Supp. 2d 474, 476 (D. Mass. 2012), *vacated as moot*, *Am. Civil Liberties Union v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013) (expiration of contract).

144 *Id.* at 476–77.

145 *Id.* at 477–78.

146 821 F. Supp. 2d 474 (D. Mass. 2012).

147 *Id.* at 488.

the court equated an accommodation of religious conscience with other government actions—endorsement of religion and delegation of government power to a church—that raise Establishment Clause concerns. An accommodation is usually not an endorsement of the beliefs in question; after all, an accommodation relieves a burden that exists because the law in question has rejected the burdened organization’s beliefs. And although the Supreme Court has held that government may not delegate to a church the discretion to exercise a government power—in particular, the unlimited discretion to veto a liquor license for a nearby business<sup>148</sup>—the Court’s concern there was that the church might use the discretion not to protect itself from the harms a bar might cause, but to award an illegitimate benefit (the license) to its members.<sup>149</sup> It is quite different when the government identifies and addresses, through accommodation, a specific conflict between its legislation and religious beliefs. Such a provision protects a religious claimant’s legitimate, constitutionally recognized interest in maintaining fidelity to its religious norms while still operating in the civil sphere (including serving others). Virtually any accommodation of religion could be recast as a “delegation” to a religious group to affect the application of law. But that is misguided: freeing a religion from state restriction is not the same as giving it state power.

Nevertheless, the important truth in the district court decision is that the USCCB appeared to operate as a “chokepoint,” with power to control access to abortion and contraception options for all persons receiving assistance under the TVPA. That is because assistance was channeled through the “master contract” with the USCCB, and the exclusion of abortion and contraception there applied as well to all subcontractors. Accordingly, the USCCB appeared to deny significant options to third parties because they lacked alternatives for pursuing those options.

But in the next round of TVPA contracting after the USCCB arrangement expired, the Obama Administration’s HHS overreacted to the previous problems. It shifted from awarding one nationwide master contract to signing multiple contracts with different organizations—a positive development that might have allowed for cooperation both with organizations that provide abortion and contraception and those that do not. But it also determined to “give strong preference” to organizations that will offer all victims referral to “family planning services and the full range of legally permissible gynecological and obstetric care,” including abortion and contraception.<sup>150</sup> Under the

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148 See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982).

149 *Id.* at 125 (objecting that the veto might “be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith”).

150 OFFICE OF REFUGEE RESETTLEMENT, DEP’T OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN AND FAMILIES, NATIONAL HUMAN TRAFFICKING VICTIM ASSISTANCE PROGRAM (2011), [http://www.acf.hhs.gov/grants/open/foa/files/HHS-2011-ACF-ORR-ZV-0148\\_0.htm](http://www.acf.hhs.gov/grants/open/foa/files/HHS-2011-ACF-ORR-ZV-0148_0.htm) (emphasis added); see also *Am. Civil Liberties Union*, 705 F.3d at 50 (noting that “[t]hese terms were markedly different from those in the 2005 [process]”).

new process, the USCCB failed to receive one of the grants despite an otherwise strong track record on the provision of services. Thus, where once the Bush Administration allowed the USCCB to require that every subsidized provider exclude abortion and contraception, now the Obama Administration virtually requires that every subsidized provider include them. Neither course is well suited for handling matters on which people are deeply divided. The Obama Administration's policy will increase the availability of services in some ways, but it will also likely produce significant losses. Some trafficking victims would likely be better served by the Catholic agency—because they are Catholic themselves, but also for other reasons—and do not want abortion or contraceptive services. Instead of considering the possibility of a diverse variety of providers, the government wrongly jumped from one version of uniformity to another.

#### CONCLUSION

Claims for the protection of partly acculturated religious activity present challenges and tensions. The scope of protection must of course take account of effects that these activities have on non-adherents, whether employees or clients. But refusing such protection has serious costs. The opposition to any accommodations for religious activity that affect non-adherents has the effect—and very possibly the aim—of marginalizing organizations that straddle the line between their own members and the broader society. It will force these organizations to deal only with their own adherents, and play less and less of a role in the broader society, if they want to adhere to their doctrinal beliefs. For all the reasons above, this would be a bad development: for religious equality, for the vigor of our educational and social service sectors, and for our ability to engage with each other across lines of disagreement.