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AGAINST MARTYRDOM: A LIBERAL ARGUMENT FOR ACCOMMODATION OF RELIGION

Paul Horwitz*

INTRODUCTION

The debate between liberty and equality is at a particularly fierce, fertile, and interesting pass in the United States. Like many such conflicts over irreconcilable fundamental values, this struggle is always present but not always prominent. Often, it merely ticks away in the background while other issues—political, doctrinal, or theoretical—take center stage. From time to time, however, it vaults into the foreground, recapturing the attention not only of the academics in their hives, but of public commentators and the public itself. This is such a moment.¹ At the heart of the current conflict are

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* Gordon Rosen Professor, University of Alabama School of Law; Visiting Professor, Harvard Law School. I am grateful to the editors of the *Notre Dame Law Review* for the invitation to participate in the Law Review Symposium on the anniversary of *Dignitatis Humanae* and for the comments of my fellow panelists on that occasion. A draft of this Article was presented at a faculty workshop at Harvard Law School, and I am grateful to Gabriella Blum, Avihay Dorfman, Richard Fallon, Noah Feldman, Gerald Frug, Benjamin Sachs, Steve Sachs, and Adrian Vermeule for questions and comments; to Netta Barak-Corren, Abe Delnore, Christopher Lund, Michael Moreland, Eric Rassbach, and Mark Rosen for comments on a written draft; and to Sean Nelson for excellent research assistance.

1 For recent examples, see Mary Anne Case, *Why “Live-and-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (arguing that requests for accommodations of religious liberty pose threats to equality), Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (proposing that with regard to issues of sexual morality, the positions of those advocating for equality and those invoking religious liberty are reconcilable), and Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation*, 88 S. CAL. L. REV. 703 (2015) (suggesting that the conflict between equality and religious liberty in the context of “culture wars” involves serious risks for both sides). Jennifer Pizer frames nicely, if somewhat partially, both the longstanding nature of the conflict and its recurrent, generational nature:

Our twin constitutional commitments to liberty—specifically religious liberty—and to equality may be seen to pose challenging puzzles when the religious demands of some threaten harm to others. The task of managing tensions

two of the most prominent repeat players: religion, or religious groups, and the state.

Equality, and the power and legitimacy of the state to ensure it, are currently and decidedly in the ascendant.² On the other side, religious accommodation—as a fact and as a concept—is in eclipse, vulnerable both politically and intellectually.³ The ranks of vocal supporters of religious accommodation, which sometimes swell to include the vast majority of representatives of the political branches⁴ and liberal public and academic commentators,⁵ have thinned out, and the lines of political division on this issue have become more substantially partisan and religious.⁶ Stock in accommodationism is selling fast and cheap.

Two aspects of this period of realignment are particularly striking. The first is the relative absence of pluralism from the discussion. That it exists as

between such conflicting claims is not new. But in each generation, the puzzles are novel in their particulars and can seem more challenging than the earlier ones because our society continually diversifies.

Jennifer C. Pizer, *Navigating the Minefield: Hobby Lobby and Religious Accommodation in the Age of Civil Rights*, 9 HARV. L. & POL'Y REV. 1, 1 (2015).

2 See, e.g., STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 11 (2014) (arguing that religious freedom is currently jeopardized by “secular egalitarians”); Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 501–02 (2015) (suggesting that in “current academic and political debates,” an equality-centered view that sees “religious authorities, religious teachings, and religious believers’ claims or requests for accommodations as obstacles to the civil rights enterprise[] is, or is becoming, the prevailing one”); Marc O. DeGirolami, *Free Exercise By Moonlight*, SAN DIEGO L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587216 (manuscript at 5) (describing recent resistance to religious accommodation as being “in the service of equality as the master value of our time”); Steven D. Smith, *Religious Freedom and Its Enemies, or Why the Smith Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2045–53 (2011) (describing “a larger movement that we might describe as secular egalitarianism” and arguing that “there are reasons to doubt the capacity or willingness of secular egalitarianism to cherish religious freedom”).

3 See, e.g., DeGirolami, *supra* note 2 (manuscript at 4–5).

4 See, e.g., Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 209–11 (1994) (discussing the political support for the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

5 See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 168–69, 169 nn.103–04 & 106–08 (2014) (collecting examples); Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 784–85 (2015) (same).

6 With greater eloquence and palpable concern, Thomas Berg writes:

The contraception litigation thus reflects, and may accelerate, a trend in which Americans’ divisions over economic regulation reinforce their divisions over cultural matters. At least in the most prominent public rhetoric, we see fewer cross-cutting disagreements, and more that line up so as to harden the divisions. If Americans further separate into religious conservative opponents of regulation and secular, progressive proponents of regulation, polarization is likely to become increasingly unhealthy.

Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 104 (2015) [hereinafter Berg, *Welfare*].

a social *fact*, as a “claim of descriptive sociology[] that the sources of social organization are many, not one,” is not in question.⁷ Nor is there any disagreement with the standard liberal view that the presence of “a variety of reasonable comprehensive doctrines and conceptions of the good . . . is the very condition of modern constitutional democracies.”⁸ But *normative* arguments for religious and other forms of pluralism—strong positive claims that we should “allow[] a plurality of associations, cultures, religions, and so on, to follow their own various norms”⁹—are not major presences in the current discussion.

This is hardly inevitable. The Declaration on Religious Liberty, *Dignitatis Humanae*, whose fiftieth anniversary we mark here, was deeply influenced by both descriptive and normative views of moral and religious pluralism, and specifically by the American experience of religious pluralism (or at least an idealized account of that experience).¹⁰ But that sort of argument has not featured much in a debate that is so centered on a stark opposition between liberty and equality that any *tertium quid* is forgotten or ignored. To the extent that pluralism figures in the current discussion, it is more as a technical problem: something to be acknowledged and certainly not reviled, but above all to be managed.¹¹

The second, and clearly related, point of note is the dominance on the ascendant egalitarian side of the debate of a particular strand of liberalism. Jacob Levy calls it a “rationalist” strand of liberalism, one that is “committed to intellectual progress, universalism, and equality before a unified law, opposed to arbitrary and irrational distinctions and inequalities, and determined to disrupt local tyrannies in religious and ethnic groups, closed associations, [and] families.”¹² With this form of liberalism in the driver’s seat, it is unsurprising that normative pluralism doesn’t feature much in the debate. Nor is it surprising that the focus is on the centrality and inevitability

7 JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM 27 (2015).

8 LUCAS SWAINE, THE LIBERAL CONSCIENCE 76 (2006); *see also* JOHN RAWLS, POLITICAL LIBERALISM 35–40 (1996).

9 LEVY, *supra* note 7, at 27.

10 *See* Paul VI, Declaration *Dignitatis Humanae* (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

11 Occasionally, one does see concerns voiced from other corners about whether the current triumphs for equality are doing an adequate job of acknowledging and embracing other forms of pluralism. *See, e.g.,* Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124 (2015) (arguing that the Supreme Court’s *Obergefell* opinion elevates the institution of marriage at the expense of equality); Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIRCUIT 107 (2015) (same); Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015) (same); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317 (2015) (lamenting “marriage’s role in racial subordination”); Serena Mayeri, *Marriage (In)Equality and the Historical Legacies of Feminism*, 6 CAL. L. REV. CIRCUIT 126 (2015).

12 LEVY, *supra* note 7, at 2.

of state power¹³ and its capacity to regulate public interaction and alter private attitudes.¹⁴

Any debate so stark and polarized cries out for, and inevitably will beget, alternative perspectives. The conflict between liberty and equality in the late 1980s and 1990s resulted in a minority literature rich in normative pluralism and communitarianism. Today, it is beginning to produce writers eager to reengage with the value of pluralism, both as a distinctive approach of its own¹⁵ and as a reminder that there are other resources within liberalism besides the rationalist strand. Those resources include a pluralist liberalism that is “skeptical of the central state and friendly toward local, customary, voluntary, or intermediate bodies, communities, and associations,”¹⁶ and that emphasizes the importance of “recognizing a plurality of norms regarding how best to live, especially considering the tenuous grounding the state has to insist on its position at all times.”¹⁷

Drawing in part on that literature, and in sympathy with the desire to reaffirm the importance of religious freedom and the accommodation of religious groups and practices without opposing or disdaining liberalism or progressivism altogether,¹⁸ this Article offers a liberal argument in favor of

13 See, e.g., Andrew Koppelman, *“Freedom of the Church” and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145, 146 (2013) (“Religion is a value that the state is morally bound to respect and, under the First Amendment of the U.S. Constitution, is legally bound to respect. Conflicts arise, however, between religious and other values. Adjudicating conflicts is the job of the state. So there’s no getting around the fact that the freedom of the church is subordinate to the authority of the state.”); see also *id.* at 152–54, 156–57.

14 For interesting and nuanced recent work on this subject that both complements and cuts against the central argument made here, see Netta Barak-Corren, *Does Anti-Discrimination Law Influence Religious Behavior? Empirical Evidence and Policy Implications*, 67 HASTINGS L.J. (forthcoming 2016) [hereinafter Barak-Corren, *Empirical Evidence*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627808; Netta Barak-Corren, *Compliance with the Law Under Religion-Based Normative Conflicts: A Behavioral Analysis and Preliminary Prescriptions* (Mar. 2013) (unpublished manuscript), <http://blogs.harvard.edu/hnmcpl/files/2013/06/FSP-Winner-Updated-Compliance-with-the-Law-Under-Religion-Based-Normative-Conflicts.pdf>. For a normative argument that the law *should* regulate religious groups and their practices, albeit on a neutral, generally applicable basis, in order to assist in achieving a “broad scale change in social and cultural values” in favor of equality, see for example Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1126 (1996).

15 The work of John Inazu is the most relevant here, although my prediction, and hope, is that this literature will be added to over the next few years. See JOHN D. INAZU, *CONFIDENT PLURALISM* (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612122; John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015). For a valuable, recent collection of essays considering the contemporary relationship among religion, pluralism, and politics and law, see AFTER PLURALISM: REIMAGINING RELIGIOUS ENGAGEMENT (Courtney Bender & Pamela E. Klassen eds., 2010).

16 LEVY, *supra* note 7, at 2.

17 Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161, 193 (2015).

18 The most forthright and interesting proponent of this position is Thomas Berg. See Thomas C. Berg, *Partly Acculturated Religion and Religious Freedom*, 91 NOTRE DAME L. REV.

the legal accommodation of religion, including the accommodation of illiberal religious groups and practices. Although my own work is substantially pluralist in orientation,¹⁹ the argument here is intended to appeal directly to more “rationalist” liberals.²⁰

The main argument here, as I make clear in a moment, is narrow. But the subjects touched on are somewhat broader. One subsidiary goal of this Article is to argue, albeit more implicitly than explicitly, that the current discussion of religious accommodation, and our culture wars more broadly, are missing a sense of pluralism—religious and otherwise—as a positive value to be welcomed, not a problem to be managed. The second is to spotlight and respond to a pair of essays by Mark Tushnet. Along with *Dignitatis Humanae* itself, these articles are the inspiration, or spur, for this Article. Written a decade and a half apart, taken together, the essays provide one of the more interesting arguments against the accommodation of religion. The arguments Tushnet makes there deserve serious attention from those who support religious accommodation on theological or religion-friendly, as opposed to liberal or religion-neutral, grounds.²¹

Nonetheless, the argument made here is *not* theological. Nor, although I understand it to be underwritten by a normative commitment to pluralism, does it require the reader to share that commitment. It is a pragmatic argument, consistent with general liberal views, about the benefits of religious

1341 (2016); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279 (2013) [hereinafter Berg, *Progressive Arguments*]; Berg, *Welfare*, *supra* note 6. This Article’s argument is, I think, complementary to but distinct from the arguments Berg has made in his work.

19 See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013); Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005); Paul Horwitz, *Permeable Sovereignty and Religious Liberty*, 49 TULSA L. REV. 235 (2013); Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1 (1996); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

20 See LEVY, *supra* note 7, at 2.

21 See Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1 (2015) [hereinafter Tushnet, *Thirty Years On*]; Mark Tushnet, *In Praise of Martyrdom?*, 87 CALIF. L. REV. 1117 (1999) [hereinafter Tushnet, *Martyrdom*]. The latter article in particular, although rarely cited by others and not cited at all in his 2015 article on accommodation—although I think the two are properly read as a matched pair—deserves much wider attention. A more direct companion to Tushnet’s piece on martyrdom is Mark V. Tushnet, *Questioning the Value of Accommodating Religion*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 245 (Stephen M. Feldman ed., 2000). For other work on (and skeptical of) religious accommodation by Tushnet, although it receives less attention here, see Mark Tushnet, *“Of Church and State and the Supreme Court”: Kurland Revisited*, 1989 SUP. CT. REV. 373, Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988), and Mark Tushnet, *The Underside of Mandatory Accommodations of Religion*, 26 CAP. U. L. REV. 1 (1997). Also relevant to the argument made here is his recent book review, Mark Tushnet, *Liberals, Litigants, and the Disappearance of Consensus About the Religion Clauses*, 93 TEX. L. REV. 207 (2014) (reviewing SMITH, *supra* note 2).

accommodation and the costs—including the unintended costs to equality—of the refusal to accommodate. It is as much consequentialist as normative.

The argument, in brief, is that refusals to accommodate that arise from opposition to, or concerns about, illiberal groups or practices may actually *reinforce* rather than reduce illiberalism. More specifically, they may do *both*. Refusals to accommodate, and the strong public insistence that religious communities comply strictly with and, in Nancy Rosenblum's words, follow the "logic of congruence" with liberal norms,²² may cause *some* groups, or some members of those groups, to alter their beliefs or conform their conduct to liberal norms of equality and nondiscrimination. It may *also* push some religious individuals and communities to become *more* strongly attached to illiberal beliefs and practices.

One might still conclude on consequentialist grounds that the game is worth the candle. As long as the number of "liberalized" groups or individuals exceeds the number of "illiberalized" groups or individuals, the refusal to accommodate is still both justified and salutary. But part of the cost that must be factored in here is the *intensity* of the illiberal group's (re)attachment to illiberal beliefs and practices, and the degree to which that group becomes more *insular*, more disconnected from the wider liberal society. The more emphatic and categorical the refusal to accommodate, the more likely it is that *some* groups or individuals will become more polarized and more insular in relation to the larger society. To use a phrase that has figured in recent discussions among and about traditionalist religious groups, they will turn to the "Benedict option," "ceas[ing] to identify the continuation of civility and moral community with the maintenance of American empire," and "keen[ly] . . . construct[ing] local forms of community as loci of Christian [or other religions'] resistance against what the empire represents."²³ That result, for both practical and normative reasons, is something many liberals want, or should want, to avoid.

22 NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS* 4, 36–41 (1998); see also Robert C. Post & Nancy L. Rosenblum, *Introduction*, in *CIVIL SOCIETY AND GOVERNMENT* 1, 13 (Nancy L. Rosenblum & Robert C. Post eds., 2002) (describing the logic of congruence as the belief that civil society should "reflect[] common [liberal] values and practices 'all the way down'" and observing that "[c]ongruence is often advocated with regard to the egalitarian norms of liberal democracy. The claim is that the internal lives of associations should mirror public norms of equality, nondiscrimination, due process, and so on.").

23 Rod Dreher, *Benedict Option FAQ*, AM. CONSERVATIVE (Oct. 6, 2015, 2:00 PM), <http://www.theamericanconservative.com/dreher/benedict-option-faq/>. The "Benedict" in "Benedict option" refers to St. Benedict, who "left Rome . . . out of disgust with its decadence" and pursued a hermit's existence, eventually forming a strictly ruled monastic order. *Id.* The story of St. Benedict and the argument for turning inward in response to a decadent or unfriendly "empire" and building insular communities as conservators of traditions and bulwarks against the "new dark ages" that inspired the "Benedict option" is taken from ALASDAIR MCINTYRE, *AFTER VIRTUE* 263 (3d ed. 2007). But it has resonances with some of the statements made by a contemporary Benedict, Pope Benedict XVI, who speculated prior to his pontificate that the Roman Catholic Church might find itself "exist[ing] in small, seemingly insignificant groups that nonetheless live in an intensive struggle against evil and bring the good into the world—that let God in." JOSEPH CARDINAL

The value of this argument does not lie in its novelty so much as its timeliness and, I hope, its acceptability. It is *not* novel, although it is more uncommon in the legal and political literature on religious accommodation than one would expect.²⁴ In a sense, that is part of its value. Arguments that government efforts to tame or suppress illiberal groups can reinforce or exacerbate illiberalism, sometimes to a dangerous degree, are familiar and accepted in other areas of law and policy. That provides some basis to find it plausible here, and thus to change the tenor, or lower the temperature, of the conversation on religious accommodation. Importantly, it offers grounds for *liberal* acceptance of accommodation, at a time when the conversation seems to have polarized between religious conservative arguments for accommodation, on the one hand, and liberal or progressive resistance or antagonism toward accommodation on the other.

Some discussion of the limited scope of the argument is necessary. First, this is a *liberal* argument for religious accommodation, not a theological argument—although, as I have noted, I will address Tushnet’s theological arguments against accommodation.

Second, by “liberal” I mean something general and colloquial, not technical and philosophical. In the next Part, I offer some specification of what “liberalism” entails, drawing on some of the standard liberal literature. Still, for the most part I have in mind the general views, values, and modes of thinking of the average citizen who thinks of himself or herself as having a conventional “liberal” or “progressive” worldview. Some of the descriptions and arguments below—both Part I’s description of standard liberal fears about religious illiberalism and resistance to religious accommodation, and the liberal argument for accommodation presented in Part II—are as much practical, pragmatic, and consequentialist as they are “liberal” in any deeper philosophical sense. My goal here, however, is to describe the kinds of views that characterize the average liberal citizen, and to provide arguments for accommodation (including pragmatic ones) that are *available* to such average citizens—that are consistent with their general thinking and vocabulary and with the kinds of management tools they treat as available within that worldview. Although the Article operates at a degree of abstraction from our own Constitution, it is meant to respond to real-world resistance to religious

RATZINGER, *SALT OF THE EARTH* 16 (1996); *see also id.* at 222 (envisioning that the Church “will live in small, vital circles of really convinced believers who live their faith”); JOSEPH RATZINGER & MARCELLO PERA, *WITHOUT ROOTS* 120 (Michael F. Moore trans., 2006) (emphasizing the importance of “convinced minorities in the Church”). Although the words are not Benedict’s, his views were associated during his papacy with interest in a “‘smaller-but-purer’ church.” DAVID GIBSON, *THE RULE OF BENEDICT: POPE BENEDICT XVI AND HIS BATTLE WITH THE MODERN WORLD* 13, 16 (2006); *see also* Joseph A. Komonchak, “A *Smaller but Purer Church*”?, *COMMONWEAL* (Oct. 21, 2010, 9:07 AM), <https://www.commonwealmagazine.org/blog/smaller-purer-church> (tracing the source of the phrase “smaller but purer Church” and noting that it is not Benedict’s “own expression, although many people attribute the idea to him”).

24 For the most direct arguments on this point, see SWAINE, *supra* note 8, and, to a lesser extent, JEFF SPINNER-HALEV, *SURVIVING DIVERSITY* (2000).

accommodation, and to appeal to real-world “liberals.” Although the argument presented here ought to appeal to more philosophically serious liberals, they are not the primary audience, and the version of liberalism I describe and appeal to below is messier than that—just as real-world liberal views are messier than academic views.

Third, the argument is about the general idea of legal accommodation of religious practices, not its particular form. It does not stake out a strong position on whether those accommodations are or should be entrenched in the Religion Clauses of the First Amendment, or whether they are simply a permissive option for legislators and other political actors.

Fourth, although I do offer some suggestions on these points, this Article does not attempt to provide detailed answers to questions such as what form legal review of such accommodations should take, how extensive their scope should be, and how courts should conduct inquiries where a potential claim of a statutory or constitutional right to accommodation lies. In cases of targeted accommodation of specified conduct,²⁵ for example, such as a law allowing members of the armed forces to wear “neat and conservative” religious apparel like crucifixes or turbans,²⁶ it does not tell us whether a claimant can or must be required to show a sincere personal belief that the apparel is required for religious reasons. In cases of general statutory or constitutional rights to religious accommodations where a legal obligation imposes a “substantial burden” on religious practice, as under the Religious Freedom Restoration Act,²⁷ it does not tell us how courts should evaluate the existence of a burden or its substantial nature, a question the Supreme Court will evaluate this term in *Zubik v. Burwell*.²⁸

Finally, this Article focuses on *religious* accommodation. In so doing, it brackets larger questions about whether religious accommodation is possible or sustainable if “religion” itself is too broad or indistinct as a category,²⁹ or if it is difficult or unprincipled to grant accommodation to “religion” and not to other categories of strongly held belief and practice.³⁰ If this Article were strictly concerned with American constitutional law, this constraint might not be worth foregrounding in this manner. Whatever the theoretical or philosophical difficulties with treating religion as a “special” category, it is plausibly identified as such by the Constitution.³¹ But it *is* worth noting here

25 See, e.g., Tushnet, *Thirty Years On*, *supra* note 21, at 13–15 (discussing targeted accommodations).

26 10 U.S.C. § 774(b)(2) (2012).

27 See 42 U.S.C. § 2000bb-1(a) (2012).

28 136 S. Ct. 444 (2015), *granting cert. to* Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015).

29 For a recent collection discussing such issues from a variety of perspectives, see *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan et al. eds., 2015).

30 See, e.g., BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012); James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

31 See Schwartzman, *supra* note 30, at 1426 (“As a legal matter . . . we cannot ignore the constitutional text that we have inherited. And so the idea that religion *must* be special is

because this Article operates at a level of abstraction from any particular constitutional text or doctrine.

All these are obviously important questions. The questions *which* or what sort of “burdens” ought to be accommodated, whether those burdens must be understood and accommodations administered in strictly secular terms or with deference to the claimants’ religious assertions,³² and how to balance accommodations against competing interests, are the ones currently causing the most difficulties for the courts and arousing the most academic discussion. The difficulties that accompany the technology of religious accommodation—problems of how to shape legislative accommodations and how to administer statutory or constitutional rights to accommodation—provide an independent reason to worry about the viability of religious accommodation even *if* it is justified in principle.

Nevertheless, I believe the narrow intervention provided here is useful and necessary, and that it has implications for some of the current debates over the American legal doctrine of religious accommodation. On the first point, it matters because of the re-contestation over the very idea of religious accommodation that we are currently experiencing. Until recently, the broad consensus favored *some* form of religious accommodation, whether permissive and political, or mandatory and available as a constitutional claim to be administered by judges.³³ Of course it was subject to important disagreement about particulars, and of course there were doubters. But general support for accommodation was sufficiently widespread that “disagreement over religious accommodations was a background issue, not a foreground issue.”³⁴ That is no longer true. Religious accommodation as a

unavoidable. The text simply makes it so.”). As Schwartzman points out, one might still view this as “a reason for moral regret” and seek to mitigate it through positive law or constitutional interpretation. *Id.* at 1427.

32 For recent work on this question, see for example Michael A. Helfand, *Identifying Substantial Burdens*, U. ILL. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728952, Frederick Mark Gedicks, ‘Substantial’ Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA (BYU Law Research Paper No. 15-18, Feb. 20, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657733, and Chad Flanders, *Insubstantial Burdens* (June 2015) (unpublished manuscript) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727423.

33 See ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 5 (2013).

34 Horwitz, *supra* note 5, at 159. It bears emphasis both that consensus is not unanimity, and that identifying a disagreement as a background rather than a foreground issue is not the same thing as calling that disagreement insignificant. My claim is simply that consensus favored the general idea of accommodation, especially once it was abstracted to include both mandatory/judicial and permissive/legislative accommodation, that disagreement on this question was not the main ground of battle within even the American legal interpretive community, and that it certainly did not possess much “social salience” outside that community. Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1804 (1997). Although I think that is an accurate description of the degree of consensus over religious accommodation until recently and of its background status, it is certainly true that there has always been disagreement about accommodation. For a critical response to my account of religious accommodation as a

liberal value is increasingly under question in both academic and public discussion.³⁵

That contestation can matter at the level of implementation as well as the level of theory. Notwithstanding the Supreme Court's continuing support for the general possibility of religious accommodation,³⁶ the lower courts that actually handle most of the religious accommodation caseload have shown an increasing willingness to push the doctrine in favor of more aggressive judicial scrutiny of religious claimants' assertions of a substantial burden.³⁷ While religious accommodation remains available to federal, state, or local political actors, those accommodations have been the subject of widespread public attention and debate.³⁸ And the polarization of that

background issue, see Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. FORUM 24 (2014).

35 See, e.g., Thomas C. Berg, *Are the Welfare State and Religious Freedom Incompatible?*, 8 Sr. THOMAS J.L. & PUB. POL'Y 171, 175–76 (2014) (noting that “[m]ore and more voices from the left reject virtually any religious-freedom exception from generally applicable laws”).

36 See *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (agreeing unanimously that the Arkansas Department of Corrections' refusal to accommodate a prisoner who wished for religious reasons to grow a half-inch beard violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2012)); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (upholding the RFRA claim to religious accommodation from the so-called “contraceptive mandate” under regulations promulgated by the Department of Health and Human Services pursuant to the Patient Protection and Affordable Care Act. Although the vote in *Hobby Lobby* was 5-4, and Justice Ginsburg's dissenting opinion emphasized that “the government's license to grant religion-based accommodations from generally applicable laws is constrained by the Establishment Clause,” *id.* at 2802 n.25 (Ginsburg, J., dissenting), no members of the Court questioned the availability in principle of “religion-based accommodations.” Of course the outcomes in these cases can be viewed as having more to do with compliance with Congress's directives than with support for religious accommodation as such. But the Court *could* interpret statutory religious accommodations extremely narrowly, or hold that they are impermissible under the Establishment Clause. Although, as I discuss in the text above, lower courts have taken the first approach more aggressively in response to *Hobby Lobby* and some Justices clearly favor the same strategy, the current balance on the Court is certainly not opposed to religious accommodation *tout court*; and the last Justice to argue strongly against even statutory religious accommodations on Establishment Clause grounds, Justice John Paul Stevens, did not think they were forbidden altogether. Compare *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) (“In my opinion, [RFRA] is a ‘law respecting an establishment of religion’ that violates the First Amendment to the Constitution.”), with Andrew Koppelman, *Justice Stevens, Religious Enthusiast*, 106 NW. U. L. REV. 567, 572, 580 (2012) (noting that Justice Stevens joined the majority in some accommodation cases, both statutory and constitutional, and concluding that “Justice Stevens has Establishment Clause worries, but they do not preclude every religious accommodation”).

37 See, e.g., Helfand, *supra* note 32, at 11, 15–17 (arguing that lower courts have “expressed a new version of substantial burden skepticism by advancing a narrow interpretation of RFRA's provisions that limited the category of what qualified as a substantial burden”).

38 See *id.* at 2–3 (collecting examples).

debate along culture-war lines,³⁹ with liberal and secularist lines hardening against accommodation and the pro-accommodationist position more likely to stem from, or to be associated with, specifically religious and traditionalist views is likely to heighten legal and political contestation about accommodation. A specifically liberal argument for accommodation thus has particular importance today. And, as I will suggest at the end of the Article, it has implications for the doctrinal discussion as well, although that is not my primary focus here.

In the Parts that follow, I first provide an admittedly stylized outline of a standard liberal argument against religious accommodation, one centered on concerns about illiberal groups and practices and their effects on members as well as outsiders. The next Part lays out the particular liberal defense of accommodation that is this Article's main contribution. I then explore the relationship between that argument and arguments about religious accommodation and "martyrdom," including Tushnet's largely theological argument against accommodation and, in a qualified sense, "in praise of martyrdom." I argue here that whatever merits attach to the argument from a theological perspective—and I think they are real, but limited—the *liberal* perspective should seek to avoid creating religious martyrs, and that this is a good reason to favor religious accommodation in principle. I then discuss the implications of the liberal anti-martyrdom argument for religious accommodation for judges in religious accommodation cases.

I. THE ILLIBERALISM-FEARING ARGUMENT AGAINST RELIGIOUS ACCOMMODATION

In this Part, I outline a standard liberal concern about religious accommodation, one that can lead to substantial skepticism towards or opposition to religious accommodation. This is the perennial problem of "the position of 'illiberal' groups in liberal society."⁴⁰ Call this the "illiberalism-fearing" argument. My goal here is to provide a rough, brief, but fair sketch of the argument and its implications as a basis for the counter-argument in the next Part. If this description is necessarily less than complete, I do not mean for it to serve as a straw man. There is a vast, if not always satisfying, literature on the subject, and my goal here is to situate the argument in the next Part, not to outline all the merits or weaknesses of the illiberalism-fearing position. Its merits and (in some writers' hands) nuances certainly outstrip the account offered here, and I do not want to suggest otherwise.

39 See, e.g., Laycock, *supra* note 1; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011) (suggesting that "important forces in American society" have begun to challenge the principle of religious liberty); Paul Horwitz, *Overheated: The Debate About Indiana's RFRA*, COMMONWEAL (Apr. 8, 2015, 3:19 PM), <https://www.commonwealmagazine.org/overheated> (discussing the rising controversy over religious liberty in the context of "the antidiscrimination rights of the LGBT community").

40 Gay Morgan, *Searching for Common Ground*, 12 J. CONTEMP. LEGAL ISSUES 757, 757 (2002).

Liberalism, on this simplified account, begins with the assumption of individual autonomy and freedom of association. The liberal society is “tolerant, inclusive, and pluralistic.”⁴¹ It “neither favors nor disfavors any particular belief-system; it is neutral.”⁴² Not *absolutely* neutral, perhaps.⁴³ But it “presupposes that there are many reasonable . . . worldviews that are compatible with good citizenship,” and that people are entitled to hold and advocate those worldviews.⁴⁴ Inevitably, if that is the case, people will hold those beliefs not only singly but also in groups. “[A]ssociational pluralism is inescapable so long as there is personal freedom,” and vice versa.⁴⁵ These values do not necessarily require accommodation, whether of religious or other groups. But, for any society that treats a plurality of worldviews as natural or inevitable, recognizes that members of such groups may contribute in various ways to liberal society, and resists the view that the state should compel citizens to hold the same worldview, some degree of accommodation is likely to be treated as a viable option.⁴⁶

This set of propositions, and the values that undergird them—neutrality as to the good, individual autonomy, and pluralism—gives rise to illiberalism-fearing concerns. Liberal democracy depends on “reciprocity” among and between citizens,⁴⁷ and is dedicated to “the principles of equal respect and equal dignity.”⁴⁸ But many individuals and groups interpret those views differently or reject them outright. In their speech, broadcast to members and non-members alike, they may preach “ideologies of hate.”⁴⁹ In their dealings

41 Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 898 (2002).

42 *Id.*

43 For one (among many) pertinent set of criticisms, see Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625 (2002).

44 Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 454 (2000).

45 ROSENBLUM, *supra* note 22, at 10.

46 See also Mark D. Rosen, “*Illiberal*” *Societal Cultures, Liberalism, and American Constitutionalism*, 12 J. CONTEMP. LEGAL ISSUES 803, 806 (2002) (arguing, on a reading of John Rawls and Will Kymlicka, that “liberalism may require more of an accommodation of illiberal groups than [many] commentators suggest. In fact, more than just not interfering with such groups, foundational liberal commitments may require that the liberal State take affirmative steps so as to give some illiberal groups the opportunity to maintain themselves over time and to gain adherents.”).

47 Amy Gutmann, *Introductory Essay*, in FREEDOM OF ASSOCIATION 1, 6 (Amy Gutmann ed., 1998).

48 Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1234 (2011); see also MAXINE EICHNER, *THE SUPPORTIVE STATE* 8–9 (2010); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (describing the development of both substantive due process and equal protection law as “a single, unfolding tale of equal liberty and increasingly universal dignity” that “centers on a quest for genuine self-government of groups small and large, from the most intimate to the most impersonal”).

49 ROSENBLUM, *supra* note 22, at 251–53.

with others, they may practice a policy of exclusivism in the teeth of liberal democracy's tendency to encourage or insist upon an "all comers" approach to great and small interactions.⁵⁰ And in their dealings with each other, they are "internally illiberal or undemocratic, or both."⁵¹ Women, to use a typical (for good reason) example, may be members of a religious sect but forbidden to wield official power within it or assume positions of leadership.⁵²

Some illiberal religious groups, moreover, are "totalistic" or comprehensive in nature: they "immerse members in the organization and take up every moment of their lives."⁵³ The insular and totalistic nature of these groups disrupts or preempts the conditions that allow liberals to tolerate, if sometimes grudgingly, the notion of membership in groups with illiberal worldviews: their autonomy, their capacity to make voluntary choices to join or remain in a group, and their freedom to exit that group.⁵⁴ These concerns are especially great for vulnerable members of the community—vulnerable because they are children and thus unable to fully exercise autonomy, or because, as in the case of women in some insular communities, they are deprived of the resources or information to exit, or challenge the authority of, the community.⁵⁵

50 See SPINNER-HALEV, *supra* note 24, at 2–3; Inazu, *supra* note 15, at 612–13 (discussing, with some ambivalence, the spread of "all-comers" policies for student groups on public and private university campuses). The Court upheld such a policy in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). Although the majority opinion was agnostic about the policy apart from its reasonableness, *see id.* at 665 (arguing that both the Christian Legal Society and Justice Alito, in his dissent, "confuse[d] CLS's preferred policy with constitutional limitation" and that "the *advisability* of Hastings' policy does not control its *permissibility*"), it is arguable that both the majority and Justice Stevens's concurring opinion, *see id.* at 702 (Stevens, J., concurring), and their choice of which doctrinal frame to use in evaluating the case, were underwritten by a "core commitment to equal dignity and equality of opportunity." John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1240–41 (2012).

51 Gutmann, *supra* note 47, at 22.

52 See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007); Gila Stopler, "A Rank Usurpation of Power"—*The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL'Y 365 (2008); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154 (2003).

53 ROSENBLUM, *supra* note 22, at 98.

54 See, e.g., Avigail Eisenberg & Jeff Spinner-Halev, *Introduction*, in MINORITIES WITHIN MINORITIES 1, 7–8 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) (arguing that it can be "difficult for vulnerable members [of certain cultural groups] to use the power of liberal institutions and the influence of mainstream culture to change the oppressive and discriminatory traditions and practices of their communities").

55 See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999) (arguing that accommodation of minority cultural groups often disadvantages women within those communities); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 948 (2013) ("Insular churches pose a special problem, for those who are most vulnerable to injury often have little means to challenge

This is all standard fare. It is nicely summed up in a passage from a recent book by Jacob Levy, describing what he characterizes as the “rationalist” liberal view of associations:

State authority in liberal democracies, at least in principle, is exercised in publicly accountable, rationally-justifiable ways. Authority wielded within other kinds of groups in a society is often quite different: resting on traditional, cultural, or religious claims about hierarchy and subordination. . . . Insofar as intermediate groups do *not* treat their members as free and equal, or teach their members not to view themselves and each other as free and equal, or compete with rationalized state power that upholds the constitutional order, they are suspect at best, illegitimate and despotic at worst. Intermediate groups’ discriminatory rules of admission and of eligibility for leadership, undemocratic internal decision-making processes, substantively repressive rules of conduct and belief, and domineering kinds of power relations all rightly offend the liberal sense of justice and the liberal belief in each person’s standing.⁵⁶

Just as the liberal valorization of autonomy and pluralism may encourage but does not *require* legal accommodation of religion, so liberal concerns about illiberalism do not foreclose accommodation, but certainly can motivate or underwrite resistance to it. One may manage one’s concerns about illiberal groups in ways that are distinct from the question of accommodation and that might, indeed, indirectly make accommodation more palatable for some. Sometimes liberal fears of illiberalism are squared with the general preference for autonomy by insisting on fairly undemanding ground-norms that would permit members of illiberal groups to exit them.⁵⁷ More commonly, a more robust form of exit right is contemplated.⁵⁸ On this view, in order for the liberal state to accept the continued existence of the illiberal group, “citizens [must] be *effectively* free, not just *formally* free, to exit associations that are internally illiberal or undemocratic.”⁵⁹

But not everyone considers exit rights, thick or thin, sufficient—or even entirely to the point. Thus, Oonagh Reitman, arguing that exit serves an important protective role but is unable to “help cure a group of the oppres-

their authority. For example, exit rights are difficult, if not impossible, for children and women to exercise in many insular religious communities.” (footnote omitted)); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (arguing that “freedom of association law authorizes the exclusion of those whose speech challenges cultural norms”).

56 LEVY, *supra* note 7, at 1.

57 See, e.g., CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO* (2003) (defending, on liberal grounds, a strong view of freedom of association accompanied by a right of exit, even if the person possessing that right is unaware even of the possibility of exit or the availability of a different sort of life).

58 See, e.g., Jeff Spinner-Halev, *Autonomy, Association and Pluralism*, in MINORITIES WITHIN MINORITIES, *supra* note 54, at 157, 159–67 (proposing “a meaningful right to exit” as part of a plan to strike a balance between cultural pluralism and individual autonomy); Jacob T. Levy, *Sexual Orientation, Exit and Refuge*, in MINORITIES WITHIN MINORITIES, *supra* note 54, at 172 (stressing the “importance of exit rights” for gay and lesbian members of groups that marginalize homosexuals).

59 Gutmann, *supra* note 47, at 23.

sive elements of its distinct practices by exerting pressure to bring about their reform,” writes that “[w]hen theorists rely on exit, I sense they do so because they misguidedly think that there are no more promising avenues to be explored and that exit is the best mechanism on offer.”⁶⁰ Similarly, Leslie Green argues that “[i]f a certain social structure is unjust, it cannot become just merely by becoming avoidable.”⁶¹ Exit rights are a solution to the concern about lack of individual autonomy in making group membership decisions, especially in the context of illiberal groups. But if the main concern is the injustice of domination and subordination itself, then “[a]utonomy as such was never the point” and the problem cannot be cured by exit rights alone.⁶² The stronger one’s allegiance to this position, the more likely one is to subscribe, sooner or later, to Rosenblum’s description of the “logic of congruence”: to insist that liberal processes, and liberal norms of dignity, equality, and nondiscrimination, must be observed all the way down.⁶³

Illiberalism-fearing concerns that are this serious, or this encompassing and comprehensive, can lead easily to resistance or opposition to accommodation itself. Such views are far from universal. When asked about individual and probably targeted accommodations, at least in cases in which the injustice of the refusal to accommodate is clear and the costs seem low, many people might well agree with such a proposal. Reasonably sophisticated observers, acquainted with the differences between permissive and mandatory or legislative and judicial accommodation, also would be unlikely to count out accommodation altogether as a permissible liberal strategy.

But that is changing, at both levels of the conversation. At *Slate*—roughly speaking, the center of gravity of conventional wisdom for the reasonably well-educated, non-specialist contemporary liberal—the phrase “religious liberty” virtually no longer appears unless set off carefully by ironic quotes. The general theme of such tropes and arguments is that religious liberty consists only of a right against discriminatory treatment and nothing more, and that judicial *or* legislative actions to the contrary are illegitimate. At a greater level of sophistication and familiarity with the existing legal regime and the presence of large and small religious accommodations, more people familiar with the panoply of potential degrees of legal accommodation for religion are openly “taking a strong separatist position—no accommodation at all.”⁶⁴

60 Oonagh Reitman, *On Exit*, in *MINORITIES WITHIN MINORITIES*, *supra* note 54, at 189, 189–90.

61 Leslie Green, *Internal Minorities and Their Rights*, in *THE RIGHTS OF MINORITY CULTURES* 257, 266 (Will Kymlicka ed., 1995), *quoted in* DAVID McCABE, *MODUS VIVENDI LIBERALISM: THEORY AND PRACTICE* 180 (2010).

62 LEVY, *supra* note 7, at 30.

63 ROSENBLUM, *supra* note 22, at 36–41.

64 Martha Minow, *Religious Exemptions*, *Stating Culture: Foreword to Religious Accommodations in the Age of Civil Rights*, 88 S. CAL. L. REV. 453, 459 (2015) [hereinafter Minow, *Religious Exemptions*] (quoting Dick Dahl, *Religious Accommodation in the Age of Civil Rights*, HARV. L. TODAY (Apr. 30, 2014), <http://today.law.harvard.edu/religious-accommodation-age-civil-rights-video/> (remarks of Mark Tushnet)). To be clear, Tushnet notes that this only

The reasons for this change are obvious, and characteristic of what Nancy Rosenblum has called, in a slightly different context but with continued pertinence, “the changed conditions that are at work today unsettling democratic accommodations of religion and inspiring contemporary reflection on this enduring theme.”⁶⁵ When she wrote those words, Rosenblum had in mind three conditions: “an explosion of religious pluralism; an increase in government activism [a]ffecting religious associations—both coercive regulations and subsidies, benefits, and inducements; and the prominence of ‘integralism,’ or the push for a ‘religiously integrated existence.’”⁶⁶ All are still relevant.⁶⁷ More immediately, the intersection of the religious accommodation debate with the increasing success of the movement for LGBT rights, and the increasing political power of women—combined with anger over laws viewed as endangering their reproductive rights and targeting their gains more generally—has raised the salience of the general question of religious accommodation, driving it from the background to the foreground.⁶⁸

Politics often simplifies and polarizes, and so it should not be surprising in these circumstances if religious accommodation is treated as a binary choice—either it should exist as a vigorously exercised option, or it should not exist at all—and positions begin to harden around the poles rather than mixing in the middle. Although this mechanism may be seen as distinct from general illiberalism-fearing concerns about religious accommodation, it

represented the view of a few people, although he adds that he found the fact that anyone took this position (perhaps in this particular audience) striking. Elsewhere, assessing the “division of labor required for social change[,]” Minow suggests that some social change advocates may “push without compromise for their desired ends” while others “play the role of reasonable compromiser.” Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 815 n.217 (2007). For a number of reasons, including the shift in momentum on equality and civil rights for the LGBT community, variations in the strength and intensity of that support or negative reaction to it in different political centers, the state of political polarization and hardening of particular constituencies around the existing political parties, and the polarizing effects of the process of adversarial litigation, adherents on both sides of the debate may have shifted toward the uncompromising position. Those positions in turn may reflect themselves in the state of the public and academic discussion, as priors and strategic choices are converted, consciously or not, into arguments and convictions.

65 Nancy L. Rosenblum, *Introduction*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 3, 4 (Nancy L. Rosenblum ed., 2000).

66 *Id.* The word she uses in the sentence quoted is “effecting,” not “affecting.” One assumes she had the latter in mind, but the former would have been relevant to many observers at the time, when the fight over school vouchers and funding for faith-based religious organizations was at its height. A meaningful world of difference over the accommodations debate and its surrounding politics is probably signaled by one’s conclusion about which vowel is the correct one.

67 See, e.g., Horwitz, *supra* note 5, at 180–84 (discussing the relevance to the *Hobby Lobby* decision and the public controversy surrounding it of changing views of the marketplace and its norms, driven in part by religious integralism).

68 See *id.* at 172–77.

should not be. The two are closely related. Contemporary concerns about religious accommodation are driven largely by the substantive results feared by opponents of particular accommodations: losses in equal dignity and equal rights for LGBT citizens and retreats on women's rights, reproductive and otherwise. But those fears are driven in turn by the existence, or the perceived existence,⁶⁹ of deeply illiberal groups. From a particular liberal perspective, these groups will not honor the rights of the members of their own communities, will take an expansive view of the definition of those communities,⁷⁰ or simply will refuse to honor any bargains at all.⁷¹

Under these circumstances—with the particular constellation of issues at stake, and with the legal and political process and the political discussion caught up in polarization and a frequently binary description of the available choices—it is, again, unsurprising that concerns over illiberalism have expressed themselves increasingly in resistance or opposition to religious accommodation altogether.⁷² More important, perhaps, that polarization has resulted in an increasing association between liberalism or political progressivism and anti-accommodationist positions. It has also left those liberals arguing for the continued importance and justifiability of religious accommodation deprived, relatively speaking, of liberal allies and interlocutors,⁷³ and raised the profile of those arguing for accommodation from a theological or religious traditionalist perspective—which, in turn, will doubtless fuel more illiberalism-driven concern by liberals and a corresponding increase in resistance to accommodation.

If accommodationists—liberal or conservative, religious or non-religious—want to make headway on the basis of something other than raw political power, they will need to find new liberal arguments for accommodation, or retrieve neglected arguments that liberals might find attractive, thus slow-

69 In this respect, the fear voiced by Professor Nan Hunter of “the conversion of disagreement into demonization” is surely relevant, insofar as it suggests that the contending sides will be more likely to view one another as “illiberal.” Minow, *Religious Exemptions*, *supra* note 64, at 455 (describing comments by Professor Hunter at a recent conference on religious accommodation).

70 See Horwitz, *supra* note 5, at 180–84.

71 See, e.g., Case, *supra* note 1.

72 See Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standards of Application* 4 (Columbia Law Sch., Pub. Law & Legal Theory Working Paper No. 14-421, Oct. 2014), <http://ssrn.com/abstract=2512906> (predicting that the *Hobby Lobby* decision “may well intensify resistance to religious exemptions in general”).

73 A related point may be the dominance within mainstream liberal thought of what Levy identifies as the “rationalist” strand of liberalism, as opposed to its “pluralist” strand. See LEVY, *supra* note 7, at 1–2 (describing these two strands of liberal thought and arguing that “[t]he uneasy relationship between the two mindsets is . . . an enduring and indeed necessary problem within liberal political thought. There is a deep, recurring tension within liberal political thought between seeing those groups that stand between the person and the central state as sites where free people live their diverse lives, and seeing them as sites of local tyranny that the liberal state must be strong enough to keep in check.”); *id.* at 3 (arguing that pluralist liberalism “is the more neglected and unfamiliar of the two strands”).

ing or disrupting the momentum away from accommodationism. I turn to one such argument now.

II. ACCOMMODATION AS AN ILLIBERALISM-EASING, NOT ILLIBERALISM-ENHANCING, STRATEGY

As the temperature and momentum of the argument over the accommodation of religion has changed, there have been some efforts to identify specifically liberal or politically progressive arguments in favor of accommodation. One might view Douglas Laycock's arguments—still successful in court, but arguably losing luster outside it—in this vein.⁷⁴ Similarly, Robin Fretwell Wilson has argued in a series of articles, as well as in the political arena, for compromise religious accommodation legislation that would recognize LGBT rights against discrimination while carving out particularized religious exemptions.⁷⁵ She makes the pragmatic argument that such compromises present the best chance for state-level agreements offering something to both parties, rather than a patchwork of results favoring one side or the other according to the political coloration of individual states.⁷⁶

In a series of recent articles, Thomas Berg has offered a broader set of explicitly politically progressive arguments in favor of both religious accommodation and religious institutional autonomy.⁷⁷ Berg, who identifies as both a political progressive and a believer in strong religious institutional freedom, is up-front about his concerns and his goals, warning of “a worrying trend of more and more progressives questioning meaningful protection for religious liberty in significant instances,” and declaring, “I believe it is vital at this juncture to bolster the commitment among political progressives to religious liberty, even for traditionalists with whom they disagree.”⁷⁸

Berg's arguments feature a mix of pragmatism and solidaristic sentiments, both a call to common causes and a reminder of their value. The first and least immediately pragmatic is a civil libertarian argument: “If a progressive-oriented society values free exercise as a civil liberty, as it should, then its accommodation for faith-based service organizations in cases of conflicts of conscience should be generous and meaningful.”⁷⁹ His second is more prag-

74 See, e.g., Laycock, *supra* note 1; Laycock, *supra* note 39.

75 See, e.g., Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010).

76 See, e.g., Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485 (2014); Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015); Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

77 Berg, *supra* note 35; Berg, *Progressive Arguments*, *supra* note 18; Berg, *Welfare*, *supra* note 6.

78 Berg, *Progressive Arguments*, *supra* note 18, at 284–85.

79 *Id.* at 299.

matic, although, like his civil libertarian argument, he also appeals to common progressive values: “In pursuing progressive values of the common good and service to the needy, we act at our peril if we threaten institutions that are particularly effective at mobilizing people for those values.”⁸⁰ Finally, like Wilson and Laycock, with whom he has worked on legislative projects, Berg makes the “simply pragmatic” argument that “[a]ccommodations make it possible to enact [progressive] legislation and answer religious-liberty objections.”⁸¹

In this Part, I offer a separate liberal argument for religious accommodation. Its goal is to respond more directly to the illiberalism-fearing concerns that, when combined with the focus of current disputes on issues of equality and nondiscrimination, may lead to general resistance or opposition to religious accommodation as a legal and political strategy. Whether it will prove any more convincing than Berg’s pragmatic and solidaristic arguments is another question. But I think it is an argument that, whatever attention it has received at other times and in other places, has been neglected in the current debate.

Illiberalism-centered arguments against accommodation, as we saw in the previous Part, focus on concerns about the entrenchment of illiberal communities, and the effect of these communities on their own members—most notably, given actual conditions, women and children—and on general social conditions and norms of equality. Thus, in arguing that “courts are constitutionally required to enforce civil rights laws against all religious groups and institutions[,]” Jane Rutherford maintains: “The problems of discrimination persist because they are deeply embedded in our common culture. Law, alone, has been unable to eradicate bias. The only hope is broad scale change in social and cultural values. One part of that culture is a religious heritage that is pervasively discriminatory.”⁸² The assumption here is that the enforcement of generally applicable laws, and particularly nondiscrimination laws, will disrupt the discriminatory culture of illiberal groups and encourage more widely held values of legal and substantive equality.

So it might.⁸³ There are some broad historical experiences to suggest this, sometimes relying on legal compulsion and sometimes on general cultural shifts. As Jeff Spinner-Halev notes, “[r]eligious beliefs often turn out to be quite malleable,” and “[s]ometimes, the right kind of incentive can work changes in a church’s doctrine.”⁸⁴ Religious groups, like other actors, respond to incentives, including incentives to change the shape of their doctrines and practices.⁸⁵ Thus, “religious doctrines or organizations, over time,

80 *Id.* at 308.

81 *Id.* at 318.

82 Rutherford, *supra* note 14, at 1126–28.

83 The empirics of this question are sensitively examined in two articles by Netta Barak-Corren. See *supra* note 14.

84 SPINNER-HALEV, *supra* note 24, at 208.

85 See generally ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776–2005* (2005); *THE OXFORD HANDBOOK OF THE ECONOMICS OF RELIGION* (Rachel M. McCleary ed.,

may adjust or diversify the package of costs and benefits they offer in order to maintain or increase their market share.”⁸⁶ One such adjustment is to lessen the demands on current or would-be religious believers, “thus decreasing the tension between members’ religious obligations and their secular or worldly obligations and desires.”⁸⁷ If liberal norms of equality and nondiscrimination, understood in their own terms and in relation to particular issues such as LGBT equality, are widely held, one can expect to see—and does see—changes in religious views on these questions, changes that will eventually reflect themselves in religious doctrine and the views of members.⁸⁸

There are grounds to think, then, that compliance—with culture, with law—can influence or incentivize illiberal groups to liberalize over time.⁸⁹ Liberals who might reject the “secularization thesis,”⁹⁰ the once-common prediction that the secularization of society would gradually tame or kill off religion, as a normative goal might be more well-disposed toward more forceful anti-illiberal strategies, including a refusal to accommodate, if the result were not the strangling of religion, but its liberalization.

But Spinner-Halev’s “malleability” metaphor is not quite apt, or complete. Illiberal religious groups—like other groups—harden as well as soften, snap as well as bend, react as well as give. One response to opposition or resistance to illiberal groups is for them to become *more*, not less, illiberal.

This is an intuitive, common-sense point as a general matter. There is nothing in the general observation that should surprise liberal theorists, and one might rest on the point itself. It may be viewed as somewhat more counter-intuitive in this context, however. Illiberal religious practices are costly for believers and groups, the more so the less common or welcome they are in the broader society. But the picture is filled out by economists,

2011) [hereinafter OXFORD HANDBOOK]; Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59 (2013).

86 Horwitz, *supra* note 85, at 91.

87 *Id.* at 99 (citing RODNEY STARK & ROGER FINKE, *ACTS OF FAITH* 142–43, 151–54 (2000); FINKE & STARK, *supra* note 85, at 235–83).

88 See, e.g., ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION* 3 (2003) (concluding that “religion in the United States is being transformed in radically new directions”); Robert P. Jones, *Attitudes on Same-sex Marriage by Religious Affiliation and Denominational Family*, PUB. RELIGION RES. INST. (Apr. 22, 2015), http://publicreligion.org/2015/04/attitudes-on-same-sex-marriage-by-religious-affiliation-and-denominational-family/#.Vs_LxFKgvdM.

89 Cf. SPINNER-HALEV, *supra* note 24, at 23 (“[I]t’s true and even fortunate that many religions have changed to accommodate liberal theory.”).

90 See, e.g., LARRY WITHAM, *MARKETPLACE OF THE GODS: HOW ECONOMICS EXPLAINS RELIGION* 139–59 (2010) (offering a popularized discussion of the secularization thesis debate); STARK & FINKE, *supra* note 87, at 29 (defining the secularization thesis: “that in response to modernization, ‘religious institutions, actions, and consciousness, [will] lose their social significance’” (alteration in original) (citation omitted)); Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *THE DESECULARIZATION OF THE WORLD* 1 (Peter L. Berger ed., 1999) (refuting the secularization thesis); Steve Bruce, *Secularization and Economic Models of Religious Behavior*, in OXFORD HANDBOOK, *supra* note 85, at 289 (describing and defending the secularization thesis).

sociologists, and historians of religion. On this view, religions offer credence goods: “goods [that] require that certain types of assurances be given in order to satisfy purchasers because the quality of the good in question cannot be determined either before or after the sale.”⁹¹ Thus, one strategy of maintaining a religious group’s viability in the face of resistance and threats from competitors is to engage in costly signaling of the confidence of the group that its beliefs are true and the benefits worth the cost. That may include a willingness, on the part of church leaders and members, to impose on themselves and endure strict rules and practices.⁹²

More generally, as the work of Laurence Iannaccone has suggested, religious groups, including illiberal ones, may respond to competition by *raising*, rather than lowering, the cost of membership in the group.⁹³ They may reconfirm or reinforce the aspects of their faith that make it a “high-tension” rather than “low-tension” religion.⁹⁴ Aside from signaling the seriousness of the religion’s faith commitments, this also has the benefit of enabling the community to monitor and police its members’ behavior more easily and reduce shirking.⁹⁵

This story of bifurcation—of some religious groups liberalizing and others (or subgroups within a particular faith) becoming stricter and more illiberal, or maintaining their distinctive illiberal practices against the pressures of the broader society—is a historically accurate one as well. In their overview of religious history and demographics in the United States, Roger Finke and Rodney Stark observe that the liberalization of mainline American churches may have helped maintain their *de facto* establishment status, but also sapped them of energy and, in the long run, a committed membership, and left some members abandoning them for more high-tension churches. “The churching of America,” they write, “was accomplished by aggressive churches committed to vivid otherworldliness.”⁹⁶

91 ROBERT B. EKLUND, JR. ET AL., *THE MARKETPLACE OF CHRISTIANITY* 27–28 (2006); see also Anthony Gill, *Religion and Civil Liberties in the United States*, in OXFORD HANDBOOK, *supra* note 85, at 275, 281 (“[R]eligious goods at their core are credence goods, wherein it is difficult for the consumer to know the quality of the good until some distant point in the future.”).

92 See Horwitz, *supra* note 85, at 96–97.

93 See, e.g., Laurence R. Iannaccone, *Sacrifice and Stigma: Reducing Free-Riding in Cults, Communes, and Other Collectives*, 100 J. POL. ECON. 271 (1992); Laurence R. Iannaccone, *Why Strict Churches Are Strong*, 99 AM. J. SOC. 1180 (1994).

94 STARK & FINKE, *supra* note 87, at 151–54.

95 See, e.g., Rachel M. McCleary, *The Economics of Religion as a Field of Inquiry*, in OXFORD HANDBOOK, *supra* note 85, at 3, 8–9 (discussing Iannaccone’s cost-benefit analysis of strict religions); see also Horwitz, *supra* note 85, at 99–100 & n.224 (noting the consistency with this picture of the practices of sects like the Satmar Hasidim, described in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), and the Old Order Amish, described in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which make it more difficult for members to exit a faith community or assimilate into the larger society).

96 FINKE & STARK, *supra* note 85, at 1.

At least for liberals committed to some degree of respect for pluralism and reluctance to intervene too heavily in ways that might affect the ability of different groups to survive, this point ought to carry some weight—if not in favor of broad accommodations, then against too ready a resistance to the idea of accommodation. It should tell them something about *why* religious groups, illiberal or otherwise, may react so strongly to the enforcement of generally applicable laws, such as civil rights statutes, that they perceive as affecting their distinctive practices, including leadership and staffing decisions, and tending toward the “mainstreaming” of those churches and their practices.⁹⁷ For such groups, the resistance to such laws—the insistence on remaining “stubbornly illiberal”⁹⁸—may represent not a desire to remain “above the law,”⁹⁹ but a matter of existential survival.

For those liberals driven by fear of or concern about illiberalism, that might not be sufficient reason to reconsider accommodation. The costs to members, and particularly vulnerable members, might understandably be seen as exceeding the costs of enforcing generally applicable laws in a way that alters doctrine and mainstreams those groups. The doctrine-softening effects of generally applicable legal rules on such groups might be seen as just in themselves, or as insufficiently distinct from the general mainstreaming effects of social change, which will occur no matter what, to counsel particular caution about enforcing generally applicable laws in the public interest. Or one might simply make a straight utilitarian calculation that as long as such laws result in a greater number of individuals or groups softening or abandoning their illiberalism than reaffirming or reemphasizing it, the refusal to accommodate is justified.

Again, perhaps so. But this calculation must take into account a richer understanding of the illiberalizing effect of refusals to accommodate and other responses to illiberal groups, one that considers both the particular processes such groups may undergo, and the intensity of preferences that may be reflected in these processes.

For some illiberal groups faced with the pressure to liberalize and abandon strict illiberal practices, one response is not simply to resist through liberal political dialogue and action: voting, lobbying, litigating, speaking, and so on. It is, rather, to cut one’s ties: to *abandon* participation in the liberal sphere, to become increasingly insular rather than remaining within the broader community as vocal dissenters.

This is *one* version—a controverted one, to be sure—of the asserted “evangelical retreat” of conservative evangelical Protestants from public involvement following the *Scopes* trial and the failure of the national experiment with Prohibition.¹⁰⁰ More recently, it has figured in some proposals by

97 See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

98 SPINNER-HALEV, *supra* note 24, at 23.

99 See Corbin, *supra* note 52.

100 For a standard account, as well as a discussion of recent revisionist accounts, see Patrick Daniel Jackson, *Lost: American Evangelicals in the Public Square, 1925–1955*, at

traditionalist Roman Catholics and evangelical Protestants in response to surrounding social changes and to changes in the public and political square. In lighter form, it is consistent with the prediction by Joseph Cardinal Ratzinger, later Pope Benedict XVI, that Catholic communities might become “small, vital circles of really convinced believers who live their faith” intensely.¹⁰¹ For some commentators, whatever Ratzinger actually meant, this was taken as recommending that the Church become “smaller but purer”¹⁰²—a “more fervent, orthodox, evangelical church—even if it drives people away.”¹⁰³

It is far from clear that this was Ratzinger’s (and, later, Pope Benedict’s) actual message.¹⁰⁴ But the “smaller but purer” idea, accompanied by the notion of retreat and insularity, has been taken positively by some conservative religious traditionalists just the same. Conservative blogger Rod Dreher, referring to St. Benedict and not Pope Benedict XVI, has written for some time, and “with rapidly increasing intensity,”¹⁰⁵ about what he calls “the Benedict Option.”¹⁰⁶

The “Benedict Option” represents an “inward turn toward community-building” in which “traditionalist Christians choos[e] to step back from the now-futile political projects and ambitions of the past four decades to cultivate and preserve a robustly Christian subculture within an increasingly hostile common culture.”¹⁰⁷ It has grown in popularity “among social conservative intellectuals,” partly in response to specific court rulings like

1–7 (Dec. 2012) (unpublished Ph.D. dissertation, Vanderbilt University), <http://etd.library.vanderbilt.edu/available/etd-11202012-102226/unrestricted/Jackson.pdf>. See *id.* at 3–4 (quoting RANDALL BALMER, *BLESSED ASSURANCE: A HISTORY OF EVANGELICALISM IN AMERICA* 102 (2000) (noting that in the period between the Scopes trial and the rise of the Moral Majority, “evangelicalism grew increasingly and intentionally separate from the larger culture”); JOEL CARPENTER, *REVIVE US AGAIN: THE REAWAKENING OF AMERICAN FUNDAMENTALISM* 8, 58 (1997) (acknowledging fundamentalists formed “a sheltered community of congregations, schools, and other religious agencies,” from within which “the surviving fundamentalist movement would tend its own affairs, nurse its own grudges, and prophesy God’s impending wrath”)).

101 RATZINGER, *supra* note 23, at 222.

102 GIBSON, *supra* note 23, at 13, 16. For discussion of the genealogy of that phrase, which was not used by Ratzinger himself, see *supra* note 23.

103 Ian Fisher, *Benedict XVI and the Church That May Shrink. Or May Not.*, N.Y. TIMES (May 29, 2005), <http://www.nytimes.com/2005/05/29/weekinreview/benedict-xvi-and-the-church-that-may-shrink-or-may-not.html> (attributing the quote to an unnamed article in *The New Yorker*, most likely Peter J. Boyer, *A Hard Faith: How the Pope and His Predecessor Redefined Vatican II*, NEW YORKER, May 16, 2005, at 54, though the quote does not appear in that article).

104 See, e.g., Richard W. Garnett, *Church, State, and the Practice of Love*, 52 VILL. L. REV. 281, 284–90 (2007) (“Much of this commentary now appears to have misunderstood or mischaracterized Cardinal Ratzinger’s points, predictions and hopes.”).

105 Damon Linker, *The Benedict Option: Why the Religious Right Is Considering an All-Out Withdrawal from Politics*, WEEK (May 19, 2015), <http://theweek.com/articles/555734/benedict-option-why-religious-right-considering-allout-withdrawal-from-politics>.

106 Dreher, *supra* note 23.

107 Linker, *supra* note 105.

Obergefell v. Hodges,¹⁰⁸ but also in response to increased resistance and opposition to religious accommodation strategies.¹⁰⁹

Similarly, Patrick Schoettmer has compared European and American Muslim reactions to the perception of threat from the larger community and how those perceptions affect civic and political participation and in-group solidarity. Schoettmer finds that while the American Muslim community has increased its political participation along with its sense of in-group solidarity, the European Muslim community has displayed a tendency toward “political disengagement and social isolation.”¹¹⁰ He warns that “if the American Muslim community loses confidence in the essential fairness and neutrality of the U.S. government, we may be looking at the disengagement of European Muslim minorities not as a counterexample of the American case but rather as an example of things to come.”¹¹¹ In short, one response to illiberalism-fearing moves, including a resistance or opposition to religious accommodation, may be not a reduction in illiberalism, but an increased attachment to illiberal practices and traditions, accompanied by a greater intensity of preference.¹¹²

Another possible response, perhaps in sequence following the move toward retrenchment and insularity, or perhaps arising immediately and independently under conditions of sufficient pressure, is radicalization. “[O]nce a particular minority group or association comes to believe that its views are beyond the pale, incapable of ever persuading the majority to take its views seriously, militancy becomes a logical consequence.”¹¹³ Repression of religion—the creation of religious “martyrs”—“may positively contribute

108 135 S. Ct. 2584 (2015).

109 Linker, *supra* note 105 (“Over the past couple of years, but especially since the RFRA conflagration, this idea has caught on among social conservative intellectuals . . .”).

110 PATRICK SCHOETTMER, *American Muslim Political Responses to Threat*, in RELIGION AND POLITICAL TOLERANCE IN AMERICA 228, 229 (Paul A. Djupe ed., 2015).

111 *Id.* at 243. One distinction between the two cases neglected by Schoettmer, but relevant to the current discussion, may be that American Muslim engagement occurs within a framework of (imperfect) accommodation of Muslim religious practices, rather than a state policy of resistance or opposition to accommodation. See, e.g., *Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern*, EEOC, http://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employers.cfm (last visited Mar. 1, 2016); *Questions and Answers for Employees: Workplace Rights of Employees Who Are, or Are Perceived to Be, Muslim or Middle Eastern*, EEOC, http://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employees.cfm (last visited Mar. 1, 2016).

112 Elsewhere, I have called this the “Ninotchka strategy,” after a line from the classic comedy *Ninotchka*, in which Greta Garbo, as a Soviet apparatchik, announces that after the most recent purges, “There are going to be fewer but better Russians.” Horwitz, *supra* note 85, at 100 (quoting NINOTCHKA (Metro-Goldwyn-Mayer Studios 1939)).

113 RICHARD BOYD, UNCIVIL SOCIETY 230 (2004).

to the intensity of religious experience,”¹¹⁴ but in a way that “contribute[s] to violent extremism.”¹¹⁵

As I have taken pains to emphasize, religious accommodation is only one possible mechanism for liberal pluralists, and resistance or opposition to religious accommodation is only one possible liberal response to illiberalism-fearing concerns. Moreover, to the extent that the argument in this Part relies on pragmatic cost-benefit considerations, it is subject to the conclusion that the benefits of the resistance to accommodation, or the refusal to countenance accommodation altogether as an acceptable liberal strategy, outweigh its costs. It does fill out the picture of those costs and benefits, however, in a way that ought to help counter what I think is the current liberal momentum against accommodation. That is so for several reasons.

First, in a crudely consequentialist way, it suggests that accommodation might be a better strategy for addressing illiberalism and illiberal groups and practices than refusing to accommodate. Second, it serves as a reminder that the picture of illiberal groups reacting in one way to the refusal to accommodate, or more generally the insistence on compliance with nondiscrimination laws and other generally applicable laws and legal norms, is too simple.¹¹⁶ Even within the same broad religious community, some sectors of the community may liberalize, but other sectors of that community will become more confirmed in their attachment to existing illiberal values and practices.

Third, such illiberal groups, confronted with suspicion or an adamant refusal to accommodate, may not only reaffirm their illiberalism but become more vehemently attached to it, and become more inward-looking and insular, or even violent. That intensity of preference makes the simple numbers—the head count of believers who liberalize or leave the church versus those who become more attached to illiberal norms or practices—an insufficient guide in considering the continuing value of religious accommodation.

That is especially true if the motivation for suspicion of or opposition to accommodation is that it will support structures of subordination that leave some members of the community in a more vulnerable situation and less capable of making a free and voluntary decision to exit. For those portions

114 Mathijs Pelkmans, *Religious Repression and Religious Freedom: An Analysis of Their Contradictions in (Post-) Soviet Contexts*, in *POLITICS OF RELIGIOUS FREEDOM*, *supra* note 29.

115 Engy Abdelkader, *The Rohingya Muslims in Myanmar: Past, Present, and Future*, 15 *OR. REV. INT’L L.* 393, 408 (2013) (citing PETER HENNE ET AL., *RELIGIOUS FREEDOM AND VIOLENT RELIGIOUS EXTREMISM* (2012), http://repository.berkeleycenter.georgetown.edu/121205/RFP/ReligiousFreedomViolentReligiousExtremismSourcebookModernCasesAnalysis_low%20res.pdf). For a conventional account of this mechanism, see Jennifer Earl, *A Lawyer’s Guide to the Repression Literature*, 67 *NAT’L LAW. GUILD REV.* 3, 26–27 (2010). For a much more complex and multi-factored account, see for example Aziz Z. Huq, *The Social Production of National Security*, 98 *CORNELL L. REV.* 637 (2013), and Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 *DUKE F. FOR L. & SOC. CHANGE* 39 (2010). For a connection between that issue and the Religion Clauses, see Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 *HARV. L. & POL’Y REV.* 347 (2011).

116 For an empirical examination of this question, see Barak-Corren, *Empirical Evidence*, *supra* note 14.

of a religious group that respond to outside pressure by becoming more insular and isolated, those members may be fewer in number but will also be further isolated from exposure to information, resources, and meaningful exit options. A strategy for “managing” pluralism and illiberalism that encourages more unmanageable rump religious groups may be a suboptimal option.

III. ON MARTYRDOM

Martyrdom is a prominent “feature of American secular as well as religious history,”¹¹⁷ but a decidedly, perhaps surprisingly, ambivalent one. Paens to religious liberty evoke the Wars of Religion and its martyrs,¹¹⁸ tell stylized stories about Thomas More,¹¹⁹ or treat conscience claims (religious and otherwise) as raising an analogy to “a martyr obedient to an orthodox religion.”¹²⁰ Martyrdom, for some religious believers and communities, speaks across centuries and represents the paradigmatic account of the “conflict between the will of secular government and what [they] understand as the will of God.”¹²¹ It is not hard to tell a story about both religion clauses of the First Amendment as the legal expression of a recognition of the pains of martyrdom and the desire to disable government from imposing it.¹²²

Those are the romantic traces of a resistance to deliberate government-imposed martyrdom. Beyond that general narrative, however, legal actors

117 Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221, 253 n.150 (2002).

118 See, e.g., STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 121–27 (2010); Oliver B. Pollak, “*Be Just Before You’re Generous*”: *Tithing and Charitable Contributions in Bankruptcy*, 29 CREIGHTON L. REV. 527, 532 (1996) (“The First Amendment’s concern for free exercise of religion and prohibitions on the establishment of religion arise out of colonists’ memories, experiences, and martyrology in England.”).

119 See, e.g., Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655, 657–58 (2009); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 16–17 (2000).

120 *United States v. Sisson*, 297 F. Supp. 902, 905 (D. Mass. 1969); see J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 341–42 (1969).

121 Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 27 (1983) (quoting Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 4, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3)); see *id.* (“The purpose of the first amendment free exercise clause for members of this church is constituted, in part, by a live sense of the crisis of obligation posed by their religious beliefs.”); *id.* at 28 (“The Mennonite narratives, whether the quasi-sacred tales of martyrs or the more recent stories of conscientious objectors, help to create the identity of the believer and to establish the central commitment from which any law—and especially any organic law—of the state will be addressed.” (footnotes omitted)).

122 See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 9–11 (1947) (relating a history of European and colonial practices of persecution and punishment for religious beliefs that “shock[ed] the freedom-loving colonials into a feeling of abhorrence,” feelings which, along with “indignation” at the “imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property[,] . . . found expression in the First Amendment”).

are much less interested in or troubled by martyrdom, at least if it is understood as involving unwise individual choices or the private imposition of martyrdom on the vulnerable. Far more frequently quoted by courts and scholars than any rhapsodies about Thomas More is Justice Rutledge's conclusion in *Prince v. Massachusetts*: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹²³

Martyrdom is a limit case, presenting the highest conflicts between the most serious religious obligations and the most punishing secular consequences. Most religious accommodations involve less dramatic burdens on religion and less severe consequences. But martyrdom still lurks behind the general notion of accommodation: to "enable a person to practice his faith, usually by removing social or governmental obstacles."¹²⁴ And asking whether the government should care about religious martyrdom in the first place, or indeed is *disabled* from caring about it, raises interesting questions about the very idea of religious accommodation and its role in the constitutional system.

Some of these questions are explored in a 1999 article by Mark Tushnet, tentatively and perhaps puckishly titled *In Praise of Martyrdom?*¹²⁵ Too rarely cited,¹²⁶ Tushnet's article makes some of the most interesting arguments against religious accommodation. Although most of Tushnet's arguments elsewhere against religious accommodation are phrased in more secular and doctrinal terms, traces of the earlier article are evident in one of his more recent treatments of the subject of religious accommodation.¹²⁷

It is worth describing his argument and asking how it fits with the liberal argument for accommodation made in this Article. For a mix of theological and secular liberal reasons, I conclude that Tushnet's objections are insufficient to derail this argument for religious accommodation, although I also believe Tushnet rightly and importantly reveals the deeper stakes and tensions that the question of accommodation raises, and makes clear that the relationship between religion and liberal democracy is and should remain a troubled one.¹²⁸

123 *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

124 Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 35.

125 Tushnet, *Martyrdom*, *supra* note 21.

126 The most relevant citation to the article is in a recent paper by Louis Michael Seidman, *Political and Constitutional Obligation*, 93 B.U. L. REV. 1257, 1269–70 (2013) (arguing that "the best way to manifest respect" for "alternative sources of normative authority . . . may be by punishing violators," and arguing that this "points away from rather than toward a system of exemptions").

127 See Tushnet, *Thirty Years On*, *supra* note 21, at 24–29.

128 See PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 303–04 (2011).

Tushnet's *Martyrdom* article is written as a brief response to a lecture by Professor Stephen Carter.¹²⁹ In his lecture, Carter, reflecting on church-state law before and after RFRA, expresses his doubts that RFRA or any positive law "could provide the solution" to what he calls "the challenge facing religions under the American constitutional regime."¹³⁰ The problem with any such solution, he suggests, is that "religion itself, particularly deeply committed religious faith, with all the discipline that the term implies, is simply not a force that law can afford to unleash."¹³¹ Later he writes, "[O]ur theories of religious freedom are not theories about religion; they are theories about the state and its needs."¹³²

Tushnet begins by "welcom[ing] Professor Carter to the (unfortunately thin) ranks of skeptics about the entire project of defending the propriety of accommodations of religion,"¹³³ a sentence worth quoting in this context because, as I have suggested, the ranks of accommodation skeptics seem bigger now, a mere seventeen years later.¹³⁴ Rather than advancing a doctrinal secular argument against accommodation, as he has done elsewhere,¹³⁵ Tushnet takes Carter's opening to offer "what I take to be the theological case against accommodation."¹³⁶

That case involves two concerns. The first is "[t]he concern that accommodations are bad for religion."¹³⁷ This concern itself takes two forms. The first is that, since accommodations inevitably will come up against limits, "a religion that has grown accustomed to having its concerns accommodated may be particularly disappointed when it presses its concerns beyond the limits the State is willing to recognize."¹³⁸ This Tushnet finds insufficient,¹³⁹ albeit with some important and interesting reservations.¹⁴⁰ Better half of five (or seven) loaves than none at all, so to speak.¹⁴¹

The second objection is broader and depends on "something ontological, an aspect of religion as such and independent of *any* social arrangement."¹⁴² On this view, "the State is just irrelevant to religion."¹⁴³ The two

129 Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CALIF. L. REV. 1059 (1999).

130 *Id.* at 1060.

131 *Id.*

132 *Id.* at 1072.

133 Tushnet, *Martyrdom*, *supra* note 21, at 1117.

134 Whether the thinning or thickening of the ranks is likely to be a continuous process or a cyclical one is a separate question.

135 *See supra* note 21.

136 Tushnet, *Martyrdom*, *supra* note 21, at 1117.

137 *Id.*

138 *Id.* at 1118.

139 *See id.*

140 *See id.* at 1118–19.

141 *See Matthew* 14:13–21, 15:32–16:10; *Mark* 6:31–44, 8:1–9; *Luke* 9:10–17; *John* 6:5–15 (King James) (providing Gospel accounts of the feeding of 5000 people with five loaves and two fish and a later miracle involving the feeding of a multitude with seven loaves and a few small fish).

142 Tushnet, *Martyrdom*, *supra* note 21, at 1120.

operate in, and concern themselves with, two different domains. The state can act on religious *believers*—it can fine them, jail them, or burn them—but it cannot alter religious belief itself: “A person who truly believes cannot—simply cannot—be induced to change his or her beliefs.”¹⁴⁴

More than being simply distinct from religion and its domain, “[t]he State is *hostile* or unfriendly to religion in its very essence *because* religion and the State deal with two entirely separate domains.”¹⁴⁵ And for the religious believer, “seeking an accommodation moves [her] in the wrong direction, into the State’s domain.”¹⁴⁶ It places religion in the position of supplicant. Tushnet makes clear that he is not celebrating either religious oppression or religious martyrdom as such. But “I do not expect oppression to disappear either, and so do not expect martyrdom to disappear. Accommodations of religion make it easy to overlook the fact that oppression is a brute fact about the pre-millennial world.”¹⁴⁷ Better to reject accommodations, even when they are freely offered, and make that brute fact palpable, than to postpone the inevitable or blind oneself to the fact of the state’s oppression of others.

This is a striking and powerful objection to religious accommodation, for several reasons. It honors religion’s subversive and oppositional power rather than treating it as insignificant or indistinct. As Carter’s article does, this objection recognizes the danger involved in coming to the state with one’s hand out and asking for a political or judicial ruling favoring an accommodation: doing so cedes to the state ground that, on this view, does not belong to it—and that, once ceded, may be lost for good. And Tushnet’s objection recognizes the *power* of martyrdom, in the very act of questioning whether it is appropriate to forestall it at the cost of recognizing the state’s authority within the religious domain. It does not quite tell us whether it is inappropriate as such for the state to *offer* accommodations, although another suite of arguments may address that question.¹⁴⁸ But it does suggest that if liberals reject accommodation for secular reasons, religious objectors will be left without standing to object, so to speak, and should accept, if not welcome, the confrontation.

I am moved but not finally persuaded by this account. It tells *a* story about religion and about martyrdom, but not the only story. For one thing, from a perfectly common religious perspective, there are other goods to be achieved in *this* world besides the immediate and ultimate transformation of authority. These goods may be imbricated with religious meaning and purpose, but they are achieved in the physical world and undertaken pragmati-

143 *Id.*

144 *Id.* at 1119.

145 *Id.* at 1121 (emphasis added).

146 *Id.*; see also Tushnet, *Thirty Years On*, *supra* note 21, at 29 (recalling a statement by the Mennonite theologian John Howard Yoder: “It’s not the Christian’s role to tell Satan how to do his job”). Tushnet adds: “Satan is no less a deluder when he offers religious accommodations.” *Id.*

147 Tushnet, *Martyrdom*, *supra* note 21, at 1121.

148 See, e.g., Tushnet, *Thirty Years On*, *supra* note 21, at 13–22.

cally—subject, to be sure, to the ultimate limits of conviction.¹⁴⁹ Religious individuals or groups may wish to feed the poor. They may believe, indeed, that it is *everyone's* duty to feed the poor. They may give all that they have to accomplish this, ask or demand more from others, and haggle over the price of the goods needed to do so. But most such groups do not believe they should walk into a supermarket and commandeer the goods on the shelf to achieve that goal, and they know their goal will be impeded if they do. Not every religious act is a confrontation; many such acts are negotiations, and are understood by the religious, and from within religion, as such.

I also believe Tushnet's account of religious belief and its relationship with the world, including the domain of the State, is too narrow, or based too much on a theology that assumes God is done speaking. This view is implicit in the statement that "[a] person who truly believes cannot—simply cannot—be induced to change his or her beliefs."¹⁵⁰ Tushnet adds in a footnote that of course "truly held religious beliefs" can change, but they "can change [only] through the methods that each religion acknowledges as a basis for belief (revelation or reasoning, for example)," not "by the operation of [secular] incentives." Some religions may, he supposes, "allow for religious change in response to external incentives." But he doubts whether many religious believers "would acknowledge that their religious beliefs are of this sort."¹⁵¹

The footnote to the statement, I think, comes closer to the truth, for some or perhaps many religionists, than the statement itself. It is true that religions—especially those that rely in substantial measure on ancient texts, as the Mosaic faiths do—can have complex relations with the phenomenon of changes in religious belief.¹⁵² But where reasoning is available as a method of assessing religious obligation and its limits in particular circumstances, it will necessarily consider the facts of those circumstances as well as the religious principles that apply to it. A religious group in such an instance is not necessarily *changing* its beliefs in response to external incentives, but it can certainly refine or alter its understanding of what the principles demand in the circumstances. It may ask—as some groups did in the recent negotiations with the government over the scope of religious accommodations within the contraceptive mandate regulations—what it can or cannot do by way of compliance with the law.¹⁵³ These kinds of negotiations are particu-

149 See generally Berg, *Progressive Arguments*, *supra* note 18.

150 Tushnet, *Martyrdom*, *supra* note 21, at 1119.

151 *Id.* at 1119 n.16.

152 For one such perspective, see generally JOHN T. NOONAN JR., *A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING* (2005).

153 See, e.g., Heather Sawyer, *The Role of Congress in Advancing Civil Rights: Lessons from Two Movements*, 29 COLUM. J. GENDER & L. 165, 173 & n.26 (2015) (listing groups that were substantially or partially satisfied by the administration's final rule); Michael Sean Winters, *Catholic Health Association Says It Can Live with HHS Mandate*, NAT'L CATHOLIC REP. (July 9, 2013), <http://ncronline.org/blogs/distinctly-catholic/breaking-cha-can-live-hhs-mandate> (noting the Catholic Health Association's acceptance of the final rule implementing the contraception mandate).

larly likely—and pertinent, if, as is the case for many of the groups currently involved in public controversies over religious accommodation, a group’s *religious* beliefs include the view that one should try to comply with the law *as well* as a belief that one cannot always do so.

Things are still more complicated where a religious group believes itself still to be in the grip of *ongoing* religious revelation, and in which the living and speaking God is, so to speak, watching the news every day and negotiating His rules for His flock accordingly. In American history, the paradigmatic example involves the conflict between the United States government and the Church of Jesus Christ of Latter-day Saints, the Mormon church, over plural marriage.¹⁵⁴ When the conflict was at its height, and “it had become clear that the Mormons would lose this confrontation,” Wilford Woodruff, the “president and prophet of the Mormon church, issued a declaration which Mormons know as the Manifesto.”¹⁵⁵

The short version, of course, is that the church abandoned the practice of plural marriage. But the reasons Woodruff gave were striking, not least for being both “religious” and “secular.” God, Woodruff said, had put a question to the faith: whether it was wiser to insist on the divinely ordained practice of plural marriage, at the cost of immense damage to the church, its leaders, and its mission, or, “after doing and suffering what we have through our adherence to this principle[,] to cease the practice and submit to the law.”¹⁵⁶ He added:

I saw [through revelation] exactly what would come to pass if there was not something done. I have had this spirit upon me for a long time. But I want to say this: I should have let all the temples go out of our hands; I should have gone to prison myself, and let every other man go there, had not the God of heaven commanded me to do what I did do; and when the hour came that I was commanded to do that, it was all clear to me. I went before the Lord, and I wrote what the Lord told me to write.¹⁵⁷

As Tushnet comments, “[e]xternal observers sometimes take the cynical view that [such] changes are insincere capitulations to external pressure.”¹⁵⁸ From an internal perspective, however, the decision was sincere and rooted

154 See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

155 Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167, 169 (1992). The Manifesto is collected with excerpts from three subsequent addresses by Woodruff and referred to collectively as “Official Declaration 1” in the “Doctrine and Covenants” of the church. See *Official Declaration 1*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/scriptures/dc-testament/od/1>. (last visited Mar. 2, 2016).

156 *Official Declaration 1*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/scriptures/dc-testament/od/1> (last visited Mar. 2, 2016).

157 *Id.*

158 Tushnet, *Thirty Years On*, *supra* note 21, at 25 n.125.

within a *continuing* revelation about one's religious beliefs and their implications.¹⁵⁹ In a thoughtful discussion, Frederick Mark Gedicks puts it this way:

Just as Wilford Woodruff had made it clear that the survival of the Mormon church depended on its abandoning plural marriage, he had also made it clear that this abandonment was the will of God. He maintained that he had received direct revelation that God no longer required the church to practice polygamy. In my religion, God does not always demand faithfulness over survival.

....

... [I]t does not seem to me that [Woodruff] erred in compromising to preserve the church. Mormons understand their church to exist in the world to do God's work, and the church clearly cannot do God's work unless it exists in the world. For Mormons, then, there is religious integrity even in compromise and survival.¹⁶⁰

This puts a very different gloss on the *theological* question of martyrdom and the accommodation of religion, which Gedicks calls "one of the most serious crises of religious conscience: the choice between faithfulness and survival."¹⁶¹ It suggests that, for some and perhaps many faiths, negotiating or pleading within the state's "domain" is a matter of *religious* obligation and can be undertaken and understood within *that* domain. The multiple religious works and values prized by a religious believer or group *may* require indifference to the state's laws, up to and including martyrdom. But they

159 For useful discussions of this episode from both internal and external perspectives, see for example GORDON, *supra* note 154, Robert J. Morris, *Both "New" and "Everlasting": Law and Religion in the Creation of Neo-Mormon Doctrine on (Homo)sexuality*, 6 RUTGERS J.L. & RELIGION 8 (2004), and Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998).

160 Gedicks, *supra* note 155, at 171–72. Gedicks's article, like Tushnet's article on martyrdom, deserves greater attention from law and religion scholars, and each is more powerful when read alongside the other. In my law and religion class, I provide students with both, as well as the text of Woodruff's revelation, in teaching *Reynolds v. United States*, 98 U.S. 145 (1878), which rejected a First Amendment argument for an exemption from a federal law prohibiting polygamy. Beyond the gloss they provide on the "belief-conduct" distinction employed by the Court in *Reynolds* and returned to, in substantial part, in its epochal decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), these materials lead students to think productively about the complex relationship between church and state in the formation and alteration of religious belief, and about the extent to which the American church-state legal regime is built on centuries of historically specific and contingent conflicts and compromises between specifically Christian sects and specifically Western states. That, in turn, influences students' understanding of cases like *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which held that no claim for a First Amendment "burden" on religion lies where the government builds a road on its own land "in ways that [do not] comport with the religious beliefs of particular citizens," *id.* at 448 (quoting *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)), even if doing so will "virtually destroy" the claimants' "ability to practice their religion," *id.* at 464 (Brennan, J., dissenting) (quoting *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 692 (1986)).

161 Gedicks, *supra* note 155, at 171.

may also allow or require “do[ing] all [they] can to stave off the end.”¹⁶² That can include arguing for accommodation.

Even outside the framework of ongoing revelation and within the core tradition of martyrdom, seeking or accepting accommodation can be seen as a theologically acceptable move. God made minds as well as martyrs. As Robert Bolt puts it in his dramatization of St. Thomas More’s martyrdom, God “made [man] to serve him wittily, in the tangle of his mind.”¹⁶³ Even someone who accepts the value of martyrdom and the precedence of religious obligations to any command of the state may, as More did, employ his wit to survive insofar as that is compatible with those higher obligations.¹⁶⁴ As with the Mormon example, sometimes that “may” is a “must,” where one has a religious obligation to stay alive, out of respect for life or the duty to do other good works.¹⁶⁵

I have given substantial space to these questions, despite their distance from a *liberal* argument for religious accommodation, because I think Tushnet raises important questions about the relationship between law and martyrdom, and between martyrdom and accommodation, and because his discussion of this subject is, in my opinion, the most intellectually *interesting* and demanding criticism of accommodation. In the end, however, I think the answer to the argument he presents is easy, albeit incomplete.

Tushnet’s theological argument is compelling because, by giving a heroic account of the “domain of religion” and its *ultimate* indifference to the state and its use of violence, it presents a stark vision of the potential confrontation between the two. But it is not the *only* vision of what religious belief entails or how it is carried out in this world. One can accept the ultimate possibility or necessity of martyrdom without craving it devoutly. As long as that is the case, it is possible to imagine working with the state to avoid its occasions—including by seeking a space for accommodation. Exactly when this will involve a move “in the wrong direction, into the State’s domain,”¹⁶⁶ remains a difficult and pressing question for religious believers.¹⁶⁷ And so Tushnet’s argument continues to have bite. But it does not preclude the possibility of a plausible *theological* argument for accommodation.¹⁶⁸

162 *Id.*

163 ROBERT BOLT, *A MAN FOR ALL SEASONS* 126 (Random House 1990) (1960).

164 See, e.g., Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 589 (2003).

165 See *id.* at 589 n.40 (“It is possible, . . . as [Richard] Marius speculates, that More might have desired death but also believed it was his duty to maintain his life—to ‘stay at his post,’ so to speak—as long as he could without violating other higher duties.” (citing RICHARD MARIUS, *THOMAS MORE* 499 (1984))).

166 Tushnet, *Martyrdom*, *supra* note 21, at 1121.

167 See, e.g., Carter, *supra* note 129; Gedicks, *supra* note 155, at 172–73 (asking whether the Mormon Church is “better off [today] than it would have been had it chosen faithfulness over survival” and conceding, “I do not even know how to think about th[at] question”).

168 Notwithstanding his general worries about the relationship between religion and liberalism, Carter appears to agree (perhaps inconsistently). See Stephen L. Carter, *Must*

That a *theological* case for accommodation may remain despite Tushnet's argument does not directly affect the availability of a liberal argument for accommodation. But it can be important to that argument nonetheless. For one thing, it gives "standing" back to religious advocates for accommodation, allowing them to argue appropriately for accommodations, rather than restricting them to the role of accepting accommodations (maybe) when they are offered by a generous state, but not arguing for them.

For another, the story told in this Part—of religious individuals and groups acting "neither [as] unearthly saint[s] nor despicable sinner[s]" but as possessors of piety *and* wit,¹⁶⁹ seeking sufficient room to comply with the law *and* their religious obligations, and thus remaining in dialogue with the liberal state—adds flesh to the argument made in Part II. It does not make religious accommodation mandatory or necessary for liberals, but it does leave the possibility of accommodation available, even advisable. It suggests that there are liberal gains to be made by accommodation, by maintaining lines of contact and communication even between the liberal state and illiberal groups. And it suggests by implication that absent that prospect, the result instead will be one of *greater* illiberalism and *less* communication, of retrenchment, retreat, and insularity—or, perhaps, of martyrdom or violence. That is a prospect that liberals justifiably and consistently may wish devoutly to avoid.

IV. IMPLICATIONS FOR ACCOMMODATION CASES AND CONTROVERSIES

The goal of this Article has been to offer a reason for liberals not to back off the religious accommodation project altogether. I have avoided intervening in the current besetting legal questions—which are, to be sure, many, serious, and difficult—over its administration. But there are one or two related points about the law of religious accommodations, and about the spirit in which it is undertaken, that I think follow from or are consistent with the argument.

There is some danger in doing so, if only the danger of falling into cliché. No matter the theoretical abstraction of the main argument or its "plea for difficulty" in addressing an issue,¹⁷⁰ it is all too customary for legal scholarship to labor to turn a mountain into a mouse. Even broad discus-

Liberalism Be Violent? A Reflection on the Work of Stanley Hauerwas, 75 LAW & CONTEMP. PROBS. 201, 215–18 (2012) (arguing, from what seems both a theological and a political perspective, that there is room for those who wish to live out a life of Christian witness to seek to "reduce rather than expand the reach of the violence that undergirds the state," and that this can include "a robust principle of accommodation [that] would help protect and nurture communities of difference").

169 H. Jefferson Powell, *Who's Afraid of Thomas Cromwell?*, 74 CHI.-KENT L. REV. 393, 394 (1999).

170 Megan Pearson, *Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty*, 15 RUTGERS J.L. & RELIGION 47 (2013) (drawing for inspiration on Martha C. Nussbaum, *A Plea for Difficulty*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 55, at 155).

sions of the impossibility of meaningful resolution are strained into narrow “prayer[s] for relief.”¹⁷¹ Legal scholarship routinely transforms real tragedy into less-than-convincing comedy.¹⁷²

It bears emphasis, then, that less turns on the specific recommendations made here than on the broader point that there are continuing reasons for liberals not to turn in principle against religious accommodation altogether. The most important aspect of the recommendations in this Part, and the one that is most closely connected to the arguments made in Part II, is not what it says about the mechanics of implementing religious accommodation, but what it says about the spirit in which that implementation is conducted, especially by judges.

The first suggestion concerns so-called “targeted” or “specific” accommodations of religion: accommodations designed and tailored to alleviate a specific burden on religion, as opposed to a general statutory or constitutional right of accommodation for religious burdens, to be applied on a case-by-case basis.¹⁷³ Targeted accommodations, granted through the political process in response to specific concerns, are acceptable even to many who are broadly skeptical about religious accommodations.¹⁷⁴ That position may be ambivalently held. Those who question whether accommodation of religion “can . . . serve as a master concept for the field”¹⁷⁵ may recommend sharply limiting the likely availability of permissible targeted accommodations,¹⁷⁶ or acknowledge the continuing problems, from their perspective, of even targeted accommodations.¹⁷⁷ Nevertheless, even these accommodation skeptics may conclude that the difficulties posed by targeted accommodations are not as great as those posed by general accommodations.

171 Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 813 (2009); see also Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 116, 123 (2015).

172 For reflections on the inevitability of tragedy and tragic choices in religious freedom, see generally MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013); see also HORWITZ, *supra* note 128, at xxv; Paul Horwitz, *Permeable Sovereignty and Religious Liberty*, 49 TULSA L. REV. 235, 238, 238 n.25 (2013).

173 See Tushnet, *Thirty Years On*, *supra* note 21, at 14–15; Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703 (2014).

174 See, e.g., IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 216–19 (2014); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 101 (2015) [hereinafter Lupu, *Dubious Enterprise*].

175 Tushnet, *Thirty Years On*, *supra* note 21, at 32.

176 See, e.g., Lupu, *Dubious Enterprise*, *supra* note 174, at 101 (“In those few circumstances in which religion-specific accommodations are appropriate, legislators and administrators are free to act, subject to Establishment Clause concerns.”).

177 See Tushnet, *Thirty Years On*, *supra* note 21, at 32 n.154; Lupu, *Dubious Enterprise*, *supra* note 174, at 101 (noting critics’ suggestion that if “the enterprise of judicial exemptions under general regimes like RFRA, or pre-*Smith* free exercise norms, is so dubious,” that ought to raise questions about “why [targeted] legislative and administrative accommodations should be acceptable”).

From the perspective of the specific, pragmatic, liberal argument offered in this Article—that concerns about illiberalism are sometimes better addressed by accommodating illiberal groups than by refusing accommodation altogether and thus risking a reaction of greater illiberalism—targeted accommodations ought to be both acceptable and, in many cases, attractive. Not only are the costs of such accommodations lower, but they often represent substantive judgments in line with general liberal approval of individual autonomy, diversity, and pluralism.

The targeted legislative accommodation that followed the Supreme Court's decision in *Goldman v. Weinberger*¹⁷⁸ provides an example. Whatever value uniformity has in the armed forces, and whatever value universal compliance with rules has in general, those rules can be “tailored” to acknowledge existing practices of great importance to religious individuals and groups without doing undue damage to those general values.¹⁷⁹ The legislative accommodation in this case represented a reasonable policy judgment arrived at through the democratic political process. It facilitated military service by religious individuals, and preserved the military's interest in uniformity and *esprit de corps* and its ability to deal with special circumstances, by permitting members of the armed forces to wear “neat and conservative” religious clothing when it does not interfere with their duties.¹⁸⁰ From the illiberalism-fearing perspective, it kept members of religious groups as participants *within* the institutions of the liberal state rather than setting them against it. Like all accommodations, it did not do so completely or without raising larger questions, such as how to determine what constitutes “neat and conservative” appearance. But it was a plausible liberal resolution.

General religious accommodations raise more difficult questions, of course. By general religious accommodations, I mean here either statutes or constitutional regimes, like the one that ostensibly prevailed between *Sherbert v. Verner*¹⁸¹ and *Employment Division v. Smith*,¹⁸² that mandate accommodation for religious believers whose religious practices are burdened by even a generally applicable law. My primary focus is on judges *administering* such a regime, whether statutory or constitutional, in particular cases.

The central point here is one made sometimes in the context of the Religion Clauses, and often in general discussions of judicial review: *how* courts speak to litigants, and the broader social, political, and cultural con-

178 475 U.S. 503 (1986).

179 That is especially true if the “uniform” rules themselves either already incorporate majority cultural norms—pants rather than kilts, say—or are applied unevenly in a way that reflects majority values and fails to acknowledge the importance of minority practices. For a discussion of the latter in the context of the *Goldman* case, see Samuel J. Levine, *Untold Stories of Goldman v. Weinberger: Religious Freedom Confronts Military Uniformity*, 66 AIR FORCE L. REV. 205 (2010).

180 10 U.S.C. § 774(b)(2) (2012).

181 374 U.S. 398 (1963).

182 494 U.S. 872 (1990).

troversies they represent, can matter.¹⁸³ As Eric Berger writes, decisions rendered with

absolutist rhetoric signal[] that a given case's losers are not just wrong, but fundamentally misguided about the country's core principles. Losing litigants, then, are cast as outsiders, alienating them and encouraging them to retort with their own incendiary constitutional rhetoric.¹⁸⁴

In so doing, such decisions may “inflict harms on constitutional losers that exceed the harm inherent in losing a substantive constitutional argument.”¹⁸⁵

One may reasonably question how much the language of judicial opinions matters to non-lawyers, even to the litigants themselves, compared to the outcome.¹⁸⁶ Insofar as liberal *theorists* agree that “the meaning of losing, and its significance for our experience of autonomy, are profoundly affected by how we talk to each other in our deliberations[,]”¹⁸⁷ liberals considering the argument for accommodation in this Article may be willing to go along with it regardless of the answer to that question.¹⁸⁸ But we can, I think, add safely that whatever the general answer is, there is good reason to think it is important here and now, in religious accommodation cases, given the visibility and salience of these issues and the fact that these debates are taking place simultaneously in both the judicial and the political domains.

To the extent that one shares the premise that courts and other legal decisionmakers should avoid alienating legal and political losers, as opposed to simply deciding against them, that premise is especially relevant to the argument that the general rejection of religious accommodation may fuel illiberalism rather than ease it.¹⁸⁹ These are not obscure, low-visibility cases. They are actively under dispute in current public discussion and political deliberation, and decisions like *Hobby Lobby* are more visible than even most high-profile Supreme Court decisions. And these disputes and decisions are indeed actively encouraging discussion over whether religious accommodation is appropriate at all, and provoking deliberation within some religious communities about the prospects of insularity or resistance. Thus, even if

183 For an excellent bibliographical essay collecting and discussing relevant sources, see EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* 117–23 (2011). Another strong discussion published since Calhoun's book is Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667 (2015). This discussion draws on both those sources and on ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

184 Berger, *supra* note 183, at 675.

185 CALHOUN, *supra* note 183, at 4.

186 Relevant sources on this question are noted and discussed briefly in Calhoun's book, *id.* at 122–23.

187 Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 153 (2007) (emphasis omitted).

188 See, e.g., Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 22, 35–36 (Robert I. Rotberg & Dennis Thompson eds., 2000).

189 For similar arguments, see SWAINE, *supra* note 8, at 12–28.

one assumes that accommodation is not *always* appropriate, how and when one decides that it is not appropriate can matter for the liberal project.¹⁹⁰

In the specific context of religious accommodations cases in American courts, I think that means courts should favor balancing over categorical approaches,¹⁹¹ even—perhaps especially—in cases where the religious claimant loses.¹⁹² Government often has excellent, public-regarding reasons to limit religious accommodation, reasons available and plausible to many who also hold strong religious views or disagree with the ultimate balance of public goods. It is better to decide against accommodation on that basis than to reject such a claim at the outset on the categorical grounds that there is no “burden” on the believer’s religion, which may well be understood—perhaps rightly—as a statement of contempt or disbelief rather than a mere managerial technique.

Losing on balancing rather than categorical grounds will not answer the intractable question how we should balance religious and secular obligations. Nor will it remove the religious believer or community’s ultimate need to choose between compliance and martyrdom.¹⁹³ But it may affect the illiberal religious group’s response to the judgment. It may make the difference between its decision whether to remain within the broader liberal society, perhaps liberalizing its views and practices or perhaps maintaining its position as a dissentient group, but one situated *within* the liberal circle¹⁹⁴—or to retreat, to become more illiberal, and to cut off productive ties of commerce, communion, and conversation.

One example—neither the hardest nor the easiest—will serve here.¹⁹⁵ Many members of the Sikh faith believe male members of the community should wear a ceremonial dagger known as a *kirpan* at all times. That practice conflicts with school no-weapons policies and school administrators have sometimes banned Sikh boys from carrying *kirpans* at school. In such a case, and particularly absent a regime favoring religious accommodation, adminis-

190 See, e.g., *id.* at 28; McConnell, *supra* note 44, at 457.

191 I reserve here the question whether that balancing should take place under something like the existing statutory regime of RFRA or the pre-*Smith* regime, which (at least ostensibly in the latter case) requires strict scrutiny, or—as Robert Burt’s argument suggests—should instead favor a more evenly weighted balancing approach, such as intermediate scrutiny. See BURT, *supra* note 183, at 362–68. Although I think there is much that is attractive about such an approach, I also think one value of strict scrutiny is that in particular kinds of disputes, it may encourage government to invest in accommodations mechanisms that serve both the needs of the religious objector and the strong interests of the public beneficiaries of the policy.

192 Cf. Horwitz, *supra* note 5, at 157 n.16 (arguing briefly that “I would not have been terribly distressed if the plaintiffs had lost in *Hobby Lobby*, provided that they had lost at the interest-balancing stage rather than having their claims denied on categorical grounds”).

193 In fairness, most conflicts do not present that dilemma in anything like so urgent and unavoidable a sense.

194 Cf. Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indocination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993).

195 I draw here on HORWITZ, *supra* note 128, at 205–08.

trators, legislators, and judges can point to ostensibly strong reasons for such policies and for the refusal to accommodate the Sikh practice: safety, security, and uniformity.¹⁹⁶ We regularly recognize and enforce such interests. An accommodation-skeptical liberal might conclude—and say to the community of believers—that “[o]nly a flawed legal doctrine would lead a court [or some other decision-maker] out on such a weak limb” as to accommodate the *kirpan*. “Knives are knives, and children are not safe in their presence, no matter who they are.”¹⁹⁷

Courts and schools *have* found various ways of accommodating the wearing of *kirpans*, sometimes by requiring that they be blunted, or that they be sewed into their sheaths.¹⁹⁸ The point here is not that this is the right decision, although I certainly think it is. It is that an approach that rejects or is highly suspicious of accommodation as such would not have the occasion to reach it, or would hand the claimants a defeat in particularly stinging terms that would encourage separatism and illiberalism rather than dialogue. It would lose the opportunity for the religious community and the state “to reconcile their positions and find common ground tailored to their own needs.”¹⁹⁹

In arguing that such an approach “suspend[s] common sense,” Marci Hamilton points to various examples of violence involving *kirpans*, and argues that Sikh families might instead send their children to private schools or home-school them, or suspend the practice of wearing a *kirpan* during school hours, or simply “jettison[] the practice altogether.”²⁰⁰ Yet all the examples of *kirpan*-related violence she cites appear to involve insulated and insular segments of the Sikh community, not violence occurring within schools or other public institutions. Her accommodation-skeptical approach, rejecting categorically the *kirpan* practice and refusing to treat it as anything other than an instrument of violence, is more likely to drive the Sikh community, or similarly situated communities, out of public institutions and into insularity and resentment than to address the fear of illiberal practices and their harms. As I have written elsewhere, “it may be that a pluralistic society can do far more to reduce the threat of violence by welcoming dialogue and participation . . . than by having no kirpans and no dialogue.”²⁰¹

196 On the last interest, see LEITER, *supra* note 30, at 1–3. For discussion, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 799–802 (2013) (reviewing LEITER, *supra* note 30).

197 MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 116 (2005).

198 For relevant decisions, see for example *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.), and *Cheema v. Thompson*, No. 94-16097, 1994 WL 477725 (9th Cir. Sept. 2, 1994).

199 *Multani*, [2006] 1 S.C.R. para. 131.

200 HAMILTON, *supra* note 197, at 115–16, 118.

201 HORWITZ, *supra* note 128, at 207.

CONCLUSION

The immediate occasion for this Article is the fiftieth anniversary of *Dignitatis Humanae*. It declares that that “the human person has a right to religious freedom,” such that “no one is to be forced to act in a manner contrary to his beliefs, whether privately or publicly,” and that this freedom must be observed “within due limits.” This right applies both to individuals acting alone and “when they act in community,” but with the caveat that “the just demands of public order [must be] observed.”²⁰² Its arguments are religious but also “undoubtedly compatible with the liberalism reflected in the American constitutional scheme.”²⁰³ On both understandings, accommodations of religion are subject to limitations—but they *are* and should be available, at a minimum. On this view, religious groups ought to acknowledge the role of reasonable limitations to accommodation, and liberals ought to acknowledge the general value and necessity of accommodation.

I have offered one argument—a pragmatic and *liberal* argument—in favor of accommodation, one focusing on the danger that the refusal to accommodate will encourage rather than erase illiberalism. Although I have offered some suggestions about the spirit in which accommodations might be undertaken, my primary goal has been to ensure that liberals have reasons of their own not to forego the accommodation project altogether.

If liberals continue to squarely support religious accommodation in principle and practice, even if they disagree with religious communities or each other about the occasions for such accommodations and their limits, then the need for a reminder of such an argument is concededly less urgent. I do not think that religious liberty, including the availability of religious accommodations in principle, is dramatically “under threat.”²⁰⁴ But neither am I wholly convinced that the need for liberal reminders about the value and viability of religious accommodation as such is non-existent, or that those who perceive such a need are merely alarmists.

It is always difficult to tell whether a change in the degree of attachment to a particular idea, or a disagreement over its application in a particular charged case, represents a simple adjustment or something more wholesale in nature. But my sense is that skepticism, resistance, and even opposition to religious accommodation as such have risen substantially in liberal circles, and that the momentum has shifted a great deal in a short time. If that is right, then this reminder is needed.

202 *Dignitatis Humanae*, *supra* note 10.

203 John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL’Y 513, 539 (2009); see also JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 336 (1998).

204 *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, U.S. CONF. CATHOLIC BISHOPS (2012), <http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm>.