

Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy

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TABLE OF CONTENTS

I.	INTRODUCTION	306
II.	JEWS AND THE RELIGIOUS LIBERTY CONSENSUS	320
III.	RELIGIOUS LIBERTY DISSENSUS, PHASE I: EMPLOYMENT LAW AND ANTIDISCRIMINATION NORMS	328
	A. <i>Religious Liberty and Establishment Clause Constraints in Employment Law</i>	330
	B. <i>Religious Liberty and Clashes with Compelling Government Interests</i>	338
IV.	RELIGIOUS LIBERTY DISSENSUS, PHASE II: THE CONTEMPORARY CULTURE WARS.....	345
	A. <i>RFRA, RLUIPA, and the Origins of the New Jewish Dissensus</i>	347
	B. <i>Culture Wars and the New Jewish Dissensus</i>	354
	1. <i>Hosanna-Tabor v. EEOC (2012)</i>	360
	2. <i>Burwell v. Hobby Lobby (2014) and Zubik v. Burwell (2016)</i>	365

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3. Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018)	375
V. CONCLUSION	390

I. INTRODUCTION

It has certainly become typical to describe current debates over hot-button social and legal doctrines as reflecting what James Davison Hunter identified as the “culture wars.”¹ By that, Hunter famously intended to capture how ongoing clashes over headline-grabbing social issues reflected deeper divisions “over the very meaning and purpose of the core institutions of American civilization.”² Thus, the salience of debates over abortion, contraception, and same-sex marriage stemmed from core arguments—between groups Hunter labeled “traditionalists” and “progressives”³—over the meaning of motherhood, family, and sexuality. Together, these debates reflected a conflict over the very definition of America.⁴

In the years after Hunter first published *Culture Wars: The Struggle to Define America*,⁵ some critics argued these so-called wars did not trickle down to average Americans; instead, they contended, the culture wars were battled among political elites, activists, and journalists.⁶ But recent polling data highlighting the growing political polarization of Americans has, to some extent, bolstered Hunter’s claims that contemporary conflicts reflect an underlying and growing divide between progressives and traditionalists over the definition of America and American culture.⁷

1. See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

2. JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?: A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* 13 (2006).

3. HUNTER, *supra* note 1, at 84, 96.

4. See generally *id.*

5. See *id.*

6. See generally, e.g., MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2004); ALAN WOLFE, *ONE NATION, AFTER ALL* (1998).

7. See generally STEPHEN HAWKINS ET AL., *HIDDEN TRIBES: A STUDY OF AMERICA’S POLARIZED LANDSCAPE* (2018), https://static1.squarespace.com/static/5a70a7c3010027736a22740ft/5bbcea6b7817f7bf7342b718/1539107467397/hidden_tribes_report-2.pdf [<https://perma.cc/3ZE5-CJXZ>]; *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affects Politics, Compromise and Everyday Life*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [<https://perma.cc/998U-2VHR>]. However, as Steven Smith notes, Hunter himself made more modest claims about the penetration of these culture wars into widespread American consciousness. See STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* 263–64 (2018).

Central to Hunter's contentions was a secondary claim that these culture wars triggered new cross-cutting alliances between traditionalists within various faith communities.⁸ In Hunter's words, historical divisions between, for example, Catholics, Protestants, and Jews had morphed whereby "[t]he orthodox traditions in these faiths now have much more in common with each other than they do with progressives in their own faith traditions, and vice versa."⁹ Indeed, a recent Pew Research Center survey provided an important example of this phenomenon: American Jews.¹⁰ According to the study, which asked about frequency of attendance at religious services, attitudes about homosexuality, and the percentage of registered Republicans, Orthodox Jews resembled evangelical Christians far more than other Jewish denominations, such as Conservative and Reform Jews.¹¹

Recognizing that American Jewish denominations increasingly diverged in their political and religious attitudes raised important questions about how American Jews might intervene in the ongoing culture wars—and in particular, recent legal debates over what might be the most salient culture-war controversy: the appropriate scope of religious liberty. Over the past decade, contestation over the scope of religious liberty reached an apex as it came into conflict with other deeply held social values, such as same-sex marriage and contraception.¹² And as these questions increasingly found their way to the Supreme Court—in cases such as *Burwell v. Hobby Lobby Stores, Inc.*¹³ and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*¹⁴—“the rapid changes and reversals of view . . . have thrown one of the central aspects of the American church-state settlement into question.”¹⁵

As these debates over religious liberty persisted, commentary turned to the denominational divide within the American Jewish community. Did the realignment of faith communities predicted by Hunter hold true for

8. See HUNTER & WOLFE, *supra* note 2, at 16.

9. *Id.*

10. See generally LUIS LUGO ET AL., PEW RES. CTR., A PORTRAIT OF JEWISH AMERICANS (Sandra Stencel et al. eds., 2013), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2013/10/jewish-american-full-report-for-web.pdf> [<https://perma.cc/W2CD-BXFM>].

11. *Id.* at 76, 95–98.

12. See generally Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014) (analyzing the legal and social factors that made *Burwell v. Hobby Lobby Stores, Inc.* such a controversial case).

13. 134 S. Ct. 2751 (2014).

14. 138 S. Ct. 1719 (2018).

15. Horwitz, *supra* note 12, at 158.

Jewish approaches to the frontline, so to speak, of the contemporary culture wars? The standard answer has been a yes—but a yes of a certain kind. Conservative and Reform Jews supported the government’s authority to require employers to provide contraception¹⁶ as well as to apply the demands of antidiscrimination law¹⁷ over and above claims for religious exemptions to such requirements. By contrast, the institutions of American Orthodox Judaism have generally sided with the religious liberty claimants even when doing so comes at the potential expense of antidiscrimination law and the need for cost-free contraception.¹⁸

Many of the popular claims about this realignment have not only identified this denominational split but have also argued that it represented a contortion—if not outright perversion—of the historical approach of the Jewish community on questions of religious liberty.¹⁹ Thus, the denominational

16. See *Central Conference of American Rabbis Resolution on State Religious Freedom Restoration Acts*, CCAR (May 6, 2015), <https://www.ccarnet.org/ccar-resolutions/ccar-resolution-state-religious-freedom-restoratio/> [<https://perma.cc/FZA8-6XV4>] [hereinafter *CCAR on State RFRAs*] (“[The CCAR] [d]eplors the Supreme Court’s interpretation of federal RFRA in Hobby Lobby, which extended religious freedom rights to at least some corporations.”); *Rabbinical Assembly Expresses Grave Concerns over Hobby Lobby Decision*, RABBINICAL ASSEMBLY, <https://www.rabbinicalassembly.org/story/rabbinical-assembly-expresses-grave-concern-over-hobby-lobby-decision> [<https://perma.cc/22AE-WSA7>] (“To the extent that any Justice on the court intended today’s decision to be read as justifying a denial of access to women’s contraceptive choices based on employers’ religious beliefs, we categorically reject that interpretation.”).

17. See generally, e.g., Brief for Amici Curiae the Central Council of American Rabbis et al., *Masterpiece*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5036302 (including as amici Central Conference of American Rabbis; Reconstructionist Rabbinical Association; Union for Reform Judaism; and Women of Reform Judaism); Brief of Amici Curiae Anti-Defamation League et al., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (No. 2013-0008), 2015 WL 13622555 (including as amici Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Hadassah: The Women’s Zionist Organization of America; Keshet; National Council of Jewish Women; Nehirim, Reconstructionist Rabbinical College and Jewish Reconstructionist Communities; T’ruah: The Rabbinic Call for Human Rights; Union for Reform Judaism; and Women of Reform Judaism).

18. See, e.g., Press Release, *Union of Orthodox Jewish Congregations of America Welcomes Supreme Court Ruling Defending Religious Liberty in Face of State Government Hostility*, ORTHODOX UNION ADVOC. CTR. (June 4, 2018), <https://advocacy.ou.org/union-orthodox-jewish-congregations-america-welcomes-supreme-court-ruling-defending-religious-liberty-face-state-government-hostility-7-2-ruling-masterpiece-cakeshop-case-sen/> [<https://perma.cc/HVC8-6NLD>]; Press Release, *Union of Orthodox Jewish Congregations Applauds Supreme Court “Hobby Lobby” Ruling Upholding Religious Liberty in “Obamacare” Mandate*, ORTHODOX UNION ADVOC. CTR. (June 30, 2014), <https://advocacy.ou.org/union-orthodox-jewish-congregations-applauds-supreme-court-hobby-lobby-ruling-upholding-religious-liberty-obamacare-mandate/> [<https://perma.cc/MM6C-Z9WV>].

19. Jill Jacobs, *Why Are Orthodox Organizations Embracing Christian Values?*, FORWARD (Nov. 16, 2017), <https://forward.com/opinion/spirituality/387741/why-are-orthodox-organizations-embracing-christian-values/> [<https://perma.cc/U7TF-J87J>]; Batya Ungar-Sargon, *Are*

divergence was, according to such accounts, the result of a rightward shift within the institutions of Orthodox Judaism that had increasingly embraced a broad view of the religious exemptions legally due to faith communities.²⁰ For example, Rabbi Jill Jacobs, executive director of the Jewish human rights organization, T’ruah, penned an op-ed in the Jewish Daily Forward titled *Why Are Orthodox Organizations Embracing Christian Values?*²¹ Two weeks later, Batya Ungar Sargon, opinion editor of the Forward, titled a news column, asking *Are Orthodox Jews Assimilating to the Christian Right?*²² The implied answer: yes. Importantly, the evidence for both authors focused primarily on Orthodox Jewish advocacy for religious exemptions from government regulation.²³ Jacobs pressed this view, criticizing the Union of Orthodox Jewish Congregations of America—one of the largest umbrella organizations of American Orthodox Judaism—for “voic[ing] its support for religious exemptions for employers who refuse to provide birth control as part of their health care plan.”²⁴ And Ungar Sargon described this same shift by highlighting religious liberty disputes as providing “another layer of tissue connecting Orthodox Jews with the Christian right.”²⁵

Moreover, the laments over this purported rightward shift within Orthodox Judaism have had a sense of urgency—urgency that flowed from recent demographic trends.²⁶ Recent polls have identified not only a denominational divergence within the American Jewish community but also a fundamental shift in demographics. For example, in 2013, the Pew Research Center released a report titled *A Portrait of Jewish Americans*,²⁷ which—summarized

Orthodox Jews Assimilating to the Christian Right?, FORWARD (Dec. 3, 2017), <https://forward.com/opinion/388782/are-orthodox-jews-assimilating-to-the-christian-right/> [<https://perma.cc/6WDD-UZA6>].

20. See Jacobs, *supra* note 19.

21. See *id.*

22. See Ungar Sargon, *supra* note 19.

23. See Jacobs, *supra* note 19; Ungar Sargon, *supra* note 19. To be sure, Nathan Diament, Executive Director for Public Policy of the Orthodox Union, has previously articulated the OU’s rationale. See Nathan J. Diament, *Why the Orthodox Union Supports Religious Exemptions to the Contraception Mandate*, TABLET (Jan. 28, 2014, 9:00 AM), <https://www.tabletmag.com/scroll/160928/why-the-orthodox-union-opposes-the-contraception-mandate> [<https://perma.cc/D8CE-V83J>]; Aylana Meisel & Mitchell Rocklin, *American Jews—Not Just the Orthodox—Should Join Christians in Defending Religious Liberty*, FORWARD (Dec. 20, 2017), <https://forward.com/opinion/national/390474/american-jews-not-just-the-orthodox-should-join-christians-in-defending-rel/> [<https://perma.cc/C696-85YE>].

24. Jacobs, *supra* note 19.

25. Ungar Sargon, *supra* note 19.

26. See LUIS LUGO ET AL., *supra* note 10, at 7.

27. *Id.*

in the words of one expert—painted a picture where “[t]he Orthodox population . . . is exploding. The non-Orthodox are in sharp decline.”²⁸ While Orthodox Jews currently make up only 10% of the total American Jewish population—with Reform Jews making up 35% and Conservative Jews making up 18%—trends point to that number rising significantly in coming years.²⁹ For example, among American Jews aged 0–17, 27% are Orthodox;³⁰ the birth rate among American Orthodox Jews is 4.1 children per family;³¹ Orthodox Jews marry much younger than their non-Orthodox counter-parts;³² only 2% of Orthodox Jews marry outside of the Jewish community;³³ and 69% of Orthodox Jews are members of a synagogue.³⁴

Accordingly, if Orthodox Jews were truly deviating from the historical Jewish approach to religious liberty, that trend would have a growing impact on the so-called Jewish voice as Orthodox Judaism secured a larger and larger share of the Jewish demographic. In turn, criticism of Orthodox Jewish institutions has entailed a secondary claim; in the coming decades, the dominant stance within American Judaism on questions of religious liberty would look far more like that of Evangelical Christianity. As a result, this stance would deviate from the professed established Jewish approach and move the Jewish community to the traditionalist side of the ledger with respect to religious liberty debates at the center of the culture wars.³⁵

Not surprisingly, given the continued contestation over denominational and religious realignment, questions surrounding the appropriate place of American Jews within the broader culture wars have persisted—most recently in debate over one of the central theses of Steven Smith’s book, *Pagans and Christians in the City*.³⁶ Adopting much of the Hunter framework, Smith’s extraordinary work—extraordinary in both intellectual breadth and analytical incisiveness—seeks to reframe recent culture-war debates as not a clash between religion and secularism but as a clash between two

28. Steven M. Cohen, *Dramatic Orthodox Growth Is Transforming the American Jewish Community*, FORWARD (Dec. 19, 2016), <https://forward.com/opinion/357517/dramatic-orthodox-growth-is-transforming-the-american-jewish-community/> [<https://perma.cc/H6JN-3D2U>].

29. LUIS LUGO ET AL., *supra* note 10, at 10.

30. Cohen, *supra* note 28.

31. LUIS LUGO ET AL., *supra* note 10, at 40.

32. *Orthodox Jews More Likely to Marry at Younger Age*, PEW RES. CTR., (Aug. 25, 2015), https://www.pewforum.org/2015/08/26/a-portrait-of-american-orthodox-jews/pr_2015-08-26_orthodox-jews-05/ [<https://perma.cc/S6MM-RCGE>].

33. LUIS LUGO ET AL., *supra* note 10, at 37.

34. *Id.* at 60.

35. See Ari Feldman & Laura E. Adkins, *Orthodox to Dominate American Jewry in Coming Decades as Population Booms*, FORWARD (June 12, 2018), <https://forward.com/news/402663/orthodox-will-dominate-american-jewry-in-coming-decades-as-population/> [<https://perma.cc/NTQ5-DDSX>].

36. See SMITH, *supra* note 7, at 111.

views of the sacred: modern paganism and proto-typical faith-communities.³⁷ In Smith’s words, “Pagan religion locates the sacred *within* this world. In that way, paganism can consecrate the world from within: it is religiosity relative to an *immanent* sacred. Judaism and Christianity, by contrast, reflect a *transcendent* religiosity; they place the sacred, ultimately, *outside* the world”³⁸ In this way, Smith argues that both sides in the ongoing culture wars—progressives and traditionalists—maintain their own views of the sacred. Both are, so to speak, religious.

On this account, the core difference between the warring combatants in the culture wars flows not from which side believes in the sacred, but which is willing to allow for the possibility of a transcendent—or otherworldly—vision of the sacred. According to Smith, progressives—who he characterizes as modern pagans—resist extending religious accommodations to antidiscrimination contexts because they “decline[] to afford respect to [transcendent] reasons.”³⁹ The goal, he believes, is an attempt to reconstitute the ancient Roman city to replace the Christian city—to ensure that political and social life is animated by an immanent religiosity that can provide a sense of community to all citizens and not just the faithful.⁴⁰

Given its breadth and depth, Smith’s extended argument has made its way into the public debate, with Ross Douthat exploring Smith’s thesis and its implications in an opinion piece in the *New York Times* titled *The Return of Paganism*.⁴¹ Picking up on one of the central themes of Smith’s work, Douthat wonders whether the standard “secularization story” misses the mark and that civilization, instead of becoming increasingly secular, is in the process of creating a new form of religious life that combines paganism and civil religion into a post-Christian society.⁴² Smith, however, in exploring this question, answers in the negative; he ultimately concludes that modern paganism simply lacks the internal resources to generate the solidarity necessary to build that sort of political community.⁴³

37. *See id.* at 111–12.

38. *Id.*

39. *Id.* at 339.

40. *See id.* at 344–47, 353, 377–79.

41. Ross Douthat, *The Return of Paganism*, N.Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/opinion/christianity-paganism-america.html?fbclid=IwAR0AHI SXVUJmAByoXwMZJYqTNomXEtCgTJg-n32lZrOc0nYAgMPtK_X16GE [https://perma.cc/62P9-TPMA].

42. *Id.*

43. *See SMITH*, *supra* note 7, at 346–47.

And yet one of the challenging features of Smith’s narrative—indeed, one that is replicated as his work has entered the public discourse—is that it marginalizes the role of Jews. This is not to say that Smith does not discuss Jews or Jewish thought on core matters; he certainly does and at great length.⁴⁴ Moreover, in reframing the culture wars as a clash between modern pagans and the Christian city, Smith does often place Jews within the “Christian city”—at times, by referencing “devout Jews” as standing alongside traditionalists.⁴⁵ But, as argued by Richard Schragger and Micah Schwartzman in an article titled *Jews Not Pagans*, Smith’s dichotomy of Christians and pagans “erases Jews as having any distinct identity.”⁴⁶ Like the contemporary criticism of Orthodox Jewish institutions described above, Schragger and Schwartzman worry that for Smith, Jews serve as simply a footnote to the Christian narrative on church-state questions, all-too often viewed synonymously with a Christian traditionalist agenda.⁴⁷

Accordingly, Schragger and Schwartzman argue that Smith’s dichotomy is fundamentally flawed—and to see how, they point to the historical commitments of the American Jewish community as providing “a powerful counter-example.”⁴⁸ Thus, “Jews are neither Christians nor pagans,”⁴⁹ in that they, on the one hand, “believe in a transcendent religious power”; yet, on the other hand, are not “Christians in Smith’s sense, at least not in the context of debates about religious freedom.”⁵⁰ Indeed, when it has come to questions of church-state separation, there has long been a strong impulse among the most prominent American Jewish institutions to advocate for robust—and at times, unyielding—separationism.⁵¹ As noted by Schragger and Schwartzman, “[i]t is true that American Jews sought to diminish state support for Christianity, but their purpose was not to supplant Christianity with immanent religion. After all, those Jews who opposed Sunday closing laws, school prayer, and state support of religious schools were themselves

44. See, e.g., *id.* at 31–33 (quoting ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN: A PHILOSOPHY OF JUDAISM* 107, 119 (1966)) (discussing Rabbi Abraham Heschel’s understanding of the origin of religion); *id.* at 108–16 (comparing paganism to Christianity and Judaism).

45. *Id.* at 13, 248, 276 (referencing devout Jews as part of the traditionalist alliance).

46. Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 *SAN DIEGO L. REV.* 497, 505 (2019).

47. *Id.* at 499, 505.

48. *Id.* at 499.

49. *Id.*

50. *Id.* at 511, 512.

51. See generally GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* (1995). Leo Pfeffer was perhaps the most well-known advocate of absolute separationism. See *id.* at 28; JONATHAN D. SARNA & DAVID G. DALIN, *RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE* 233–34 (1997); see also LEO PFEFFER, *CHURCH STATE AND FREEDOM* 149–80 (rev. ed. 1967).

believers in a transcendent God.”⁵² Ultimately, Jewish advocacy on behalf of an absolutist version of separationism derived not from fidelity to modern paganism but from the experience of minority status, religious oppression, and political exclusion.⁵³

That Schragger and Schwartzman would object so vociferously to any conflation of Jews with Christians is far from surprising. As a historical matter, American Jewish institutions have long played an outsized role in church-state litigation, particularly with respect to debates over the meaning of the Establishment Clause. For example, from 1969 to 1989, the institutions related to the Jewish community filed more amicus briefs before the Supreme Court in church-state cases than any other faith community.⁵⁴ Indeed, during the mid to late twentieth century, Jewish organizations—in particular the American Jewish Congress under the leadership of renowned constitutional scholar and lawyer Leo Pfeffer—likely impacted the course of Establishment Clause jurisprudence more than any other organization.⁵⁵ As noted in 1992 by Gregg Ivers, “[t]hat Jewish organizations intervene more often in church-state litigation and find more resonance in the wall of separation metaphor than other religious denominations is consistent with the unparalleled security that the constitutional principles of disestablishment has provided Jews in the United States.”⁵⁶ As a result, to subsume Jews within a broader traditionalist framework when it comes to questions of church and state neglects the unique—and important—role of the American Jewish community in the evolution of legal doctrine surrounding such dilemmas.⁵⁷

52. Schragger & Schwartzman, *supra* note 46, at 513 (footnotes omitted).

53. See NAOMI W. COHEN, *Jews in Christian America: The Pursuit of Religious Equality* 128 (1992) (“Some Americans may not have understood the vehemence of the Jewish response to those church–state issues, but even in postwar America the memory of disabilities at the hands of Christian majorities could not easily be shrugged off.” (footnote omitted)); EUGENE J. LIPMAN & ALBERT VORSPAN, *A Tale of Ten Cities: The Triple Ghetto in American Religious Life* 278 (Eugene J. Lipman & Albert Vorspan eds., 2d prtg. 1962); SARNA & DALIN, *supra* note 51, at 1, 12–13, 16.

54. See Gregg Ivers, *Religious Organizations as Constitutional Litigants*, 25 *POLITY* 243, 255–57 (1992).

55. For a history of the remarkable impact of the “big three” of Jewish organizations—the American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League—on the history of church-state separation, see generally *supra* note 51.

56. Ivers, *supra* note 54, at 256.

57. This is an ongoing endeavor. Indeed, there is no shortage of articles advising American Jews how they ought to respond to religious-liberty developments and trends. See, e.g., Ryan Anderson & Daniel Mark, *Jews, Christians, and the Future of Religious Liberty*, *MOSAIC* (July 14, 2017), <https://mosaicmagazine.com/picks/2017/07/jews-christians-and-the-future-of-religious-liberty/> [<https://perma.cc/DN8G-H9TH>]; David E.

But while the history of American Jewish advocacy on behalf of disestablishment does provide an important correction to Smith's thesis, especially as it pertains to his discussion of contemporary controversies surrounding religious displays,⁵⁸ it does somewhat miss one of the central features of Smith's argument. Smith is certainly aware that his overarching argument submerges some of the uniquely Jewish concerns in the clash between pagans and the Christian city.⁵⁹ However, his views of the culture wars appear more driven by clashes over religious freedom—and specifically the free exercise of religion—than disestablishment.⁶⁰ As Smith notes, “[t]he contemporary fight over religious freedom is one battleground—a central one, as it happens—in the larger and essentially religious struggle to define and constitute America.”⁶¹

Thus, although Schragger and Schwartzman may have good reason to contest Smith's dichotomy in principle—to use their words, to argue “[t]he choice of society is not binary: Christian or pagan? It is ternary: Christian or pagan or Jew?”⁶²—their secondary historical claim about the American Jewish experience is somewhat more fraught. In turn, to the extent they hope to advance a historical claim—that the history of American Jewish advocacy “provides a powerful counter-example”⁶³ to Smith's dichotomy, thereby supporting the claim “Jews are not pagans, nor are they Christians . . .

Bernstein, *How Anti-Discrimination Became a Religion, and What it Means for Judaism*, MOSAIC (Aug. 8, 2016), <https://mosaicmagazine.com/response/2016/08/how-anti-discrimination-became-a-religion-and-what-it-means-for-judaism/> [<https://perma.cc/V63A-ZYNT>]; Jay Michaelson, *Trump's 'Religious Liberty' Executive Order Should Scare the Bejesus out of Jews*, FORWARD (May 4, 2017), <https://forward.com/opinion/370998/religious-liberty-executive-order-should-scare-jews/> [<https://perma.cc/23KF-3V3H>]. Admittedly, I have written a few such articles myself. See Michael Helfand, *In Colorado Cake Case, Religious Values Clash with Discrimination. Jews Have Been on Both Sides*, N.Y. JEWISH WEEK (Dec. 11, 2017, 12:51 PM), <http://jewishweek.timesofisrael.com/jews-as-a-bridge-on-religious-liberty/> [<https://perma.cc/Z3MH-ETRD>]; Michael A. Helfand, *The Price of Pluralism*, MOSAIC (Aug. 20, 2015), <https://mosaicmagazine.com/response/2015/08/the-price-of-pluralism/> [<https://perma.cc/7YUR-R7GY>].

58. See SMITH, *supra* note 7, at 267–82.

59. See *id.* at 272 (“Religious minorities may, to be sure, feel like political ‘outsiders’ by virtue of their minority status, with the attendant political disadvantages and discomforts that minority status may sometimes entail.”); see also *id.* at 205–06 (“The depiction of Christianity in particular as intolerant, usually in cruder and less discriminating terms, is pervasive in Western culture. . . . These accusations have their historical bases. There were of course the Crusades, and the inquisitions (and one critical reader urges that these should be mentioned more frequently and underscored in these pages).”).

60. See *id.* at 304 (noting the chapter on “religious freedom” focuses primarily on the second theme of “accommodation,” which “is often tied to [the First Amendment’s] free exercise clause (. . . or prohibiting the free exercise thereof).”).

61. *Id.* at 302–03.

62. Schragger & Schwartzman, *supra* note 46, at 499.

63. *Id.*

in the context of debates about religious freedom”⁶⁴—their failure to consider what the unique Jewish approach has, or approaches have, been to questions of religious liberty and religious accommodation leaves us with an incomplete picture. That is, to what extent, when it has come to questions of religious liberty, has Smith’s dichotomy held true because the Jewish voice aligned with Christian traditionalists?

This is an important oversight given that clashes over religious liberty—and in turn, religious accommodations—have, in many ways, been at the epicenter of the broader culture wars. As described above, because the culture wars have coincided with demographic and political shifts within the American Jewish community, much is at stake in identifying the, so to speak, Jewish take—or takes—on the religious accommodation project. How has the American Jewish community responded to laws that impinge on religious practice and conduct?

Identifying such a “Jewish take” is both a retrospective and prospective endeavor. It first requires recounting the historical approach of the American Jewish community: has the American Jewish community historically aligned itself on questions of religious accommodations with traditionalists—to use Smith’s frame on matters of religious liberty, has the Jewish community aligned itself with the Christian city? Or, alternatively, might we extend the contentions of Schragger and Schwartzman to the religious liberty context and conclude that the historical approach of the American Jewish community represents a third way—neither Christian nor pagan—one that is both derived from traditionalist commitments, but ultimately aligned with progressive conclusions?

And second, it requires diagnosing the current Jewish moment within the culture wars. To what extent do current views among Jewish institutions and denominations align with, or deviate from, these historical approaches to religious liberty? Do current debates over the nature of Jewish religious liberty advocacy—contentions that the trajectory of such advocacy efforts has been altered by the growing Orthodox Jewish demographic—represent a new direction for how one of the prototypical American religious minority engages in controversies over the religious accommodation project? Put succinctly, what is the past of Jewish religious liberty advocacy—and how should that shape thinking over its present and future?

Providing an answer to these questions is a significant historical undertaking. The coming pages serve as a first step in such a project by exploring the

64. *Id.* at 412.

history of Jewish institutional amicus curiae briefs—or amicus briefs—in religious liberty litigation before the Supreme Court.⁶⁵ Supreme Court rules allow third parties to file a brief as an amicus curiae—friend of the Court—with the stated objective of such an option so as to “bring[] to the attention of the Court relevant matter not already brought to its attention by the parties.”⁶⁶ Although the first recorded appearance of an amicus brief before the Supreme Court was in 1821,⁶⁷ the use of such briefs has, in recent decades, exploded on the Supreme Court’s docket.⁶⁸ Third parties increasingly use such briefs to accomplish a range of objectives—with a range of audiences in mind. Although organizations frequently draft amicus briefs in order to influence the Supreme Court and thereby alter the outcome of a case,⁶⁹ scholars have noted “the real audience for amicus briefs is [often] the membership of the group sponsoring the brief.”⁷⁰ Thus, organizations can benefit from credibility if cited by the Court, but they can also signal to their membership, by the mere act of filing a brief, their continued dedication to the institution’s core mission and values.⁷¹

65. See generally SARNA & DALIN, *supra* note 51, at 245–69 (describing the growing criticism the 1950s and 1960s of the prevailing Jewish institutional approach to church-state separation); Jack Wertheimer, *The Jewish Debate over State Aid to Religious Schools*, in *JEWS AND THE AMERICAN PUBLIC SQUARE: DEBATING RELIGION AND REPUBLIC* 217 (Alan Mittleman, Robert Licht & Jonathan D. Sarna eds., 2002).

66. SUP. CT. R. 37(1).

67. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 n.1 (2000). For more on the history of amicus briefs, see generally Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

68. Kearney & Merrill, *supra* note 67, at 752 (“The Court received some 4907 amicus briefs in the last decade (1986–1995), as opposed to 531 briefs in the first decade (1946–1955)—an increase of more than 800%.”); Karen O’Connor & Lee Epstein, Research Note, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman’s “Folklore,”* 16 LAW & SOC’Y REV. 311, 315 (1982) (“[I]nterest group amicus participation in noncommercial cases before the Supreme Court was nearly nonexistent until World War II, that it rose significantly after the war, and that it then accelerated rapidly in the late 1960s and 1970s.”); see also Nathan Hakman, *Lobbying the Supreme Court—An Appraisal of “Political Science Folklore,”* 35 FORDHAM L. REV. 15, 26 (1966) (identifying only a modest increase in amicus brief filings between 1958 and 1964).

69. See, e.g., Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC’Y REV. 917, 938 (2015); Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC’Y REV. 807, 808 (2004).

70. Kearney & Merrill, *supra* note 67, at 824.

71. See, e.g., Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 660 (1993) (noting the importance of “organizational maintenance,” such as “keeping members satisfied,” to organizations’ decisions to file amicus briefs); Kearney & Merrill, *supra* note 67, at 825 (“Citation or quotation of a brief in the official Reports of the United States Supreme Court can lend legitimacy to a group, and may be used by the group in its publicity efforts to create the impression that it has ‘access’ to or

Drawing conclusions from the history of amicus briefs filed by Jewish institutions before the Supreme Court in religious liberty cases has some drawbacks. First, individual institutions do not file briefs in each and every religious liberty case before the Supreme Court, leaving the record incomplete at times. Second, limiting our purview to religious liberty cases is itself somewhat fraught; the two religion clauses are often intertwined in complicated ways, and therefore, only focusing on Free Exercise cases does not provide a full picture.⁷² Third, amicus briefs, by their nature as documents of legal advocacy, take—at least to some extent—the law at any point in time as given; thus, using them to identify historical trends and evolutions can be difficult, given that filing organizations are always updating the manner in which they press their claims based upon changes in legal doctrine. And fourth, amicus briefs are certainly only a small piece of the historical record capturing how the American Jewish community approached questions of religious liberty. A full history would certainly involve mining other sources to develop a broader historical record, including amicus briefs in lower court cases.

That being said, the impressive frequency with which numerous Jewish institutions have filed briefs in free exercise cases before the Court—combined with the significant number of Jewish institutions that have historically taken advantage of this option to intervene in Supreme Court litigation—create a relatively robust historical record. Accordingly, Jewish institutional amicus briefs provide an important first cut documenting and tracking what positions some of the leading Jewish institutions have taken in response to the ebb and flow of religious liberty doctrine.⁷³ And in this way, amicus briefs sketch the beginnings of a picture for the trajectory of Jewish religious liberty advocacy—highlighting the American Jewish community’s historical commitment to religious accommodations and how that historical commitment has been challenged by the dilemmas at the heart of the current culture wars.

All told, these amicus briefs before the Supreme Court paint a picture of three broad stages of Jewish institutional responses to religious liberty cases. In the first stage, discussed in Part II and spanning the early 1960s

‘influence’ with the Court. Interest groups can use this impression to obtain new members and contributions. Even if the group’s briefs are never cited, the brief can be distributed to members and others as evidence that the group’s leadership is diligently pursuing its members’ interests in high places. No doubt emulation enters into the picture here as well.’).

72. See generally COHEN, *supra* note 53; IVERS, *supra* note 51; SARNA & DALIN, *supra* note 51.

73. See *supra* text accompanying note 56.

through the late 1970s, Jewish institutions manifested broad consensus over religious liberty and support for religious accommodations. In so doing, Jewish institutions filed briefs supporting the conventional doctrinal framework—the one applicable in the pre-*Employment Division v. Smith* era⁷⁴—that protects against government substantially burdening religious exercise unless doing so is the least restrictive means for advancing a compelling government interest.⁷⁵ In the second stage, discussed in Part III, Jewish institutions largely retained consensus over these fundamentals of free exercise doctrine, but they began to splinter over how to apply limiting principles to free exercise claims. Thus, during the period from the late 1970s through the late 1990s, some Jewish institutions, while almost uniformly supporting claims asserting the existence of a burden on religious exercise, began to also support limitations on religious liberty flowing from external constraints, such as either Establishment Clause concerns or the compelling nature of implicated government interests.⁷⁶ Accordingly, Jewish institutions continued to experience broad consensus over the applicable legal framework for evaluating religious liberty claims; however, institutional dissensus grew with respect to where to draw the line at the outer limits of the doctrine.

In the third and current stage, discussed in Part IV, Jewish institutions begin, largely for the first time, to file briefs challenging the very existence of religious liberty claims or the sufficiency of religious burdens. Indeed, beginning at the tail end of the 1990s, as part of the broader culture wars, some Jewish institutions start to not only propose limitations on free exercise rights, but they question whether certain claims are sufficient to trigger a religious liberty right in the first place.⁷⁷ And these seeds of dissensus come into full bloom in the twenty-first century's second decade, as the Supreme Court begins to hear religious liberty cases implicating the rights of women and the LGBT community. Indeed, by the time the cases at the heart of recent religious liberty controversies—such as *Hosanna-Tabor*

74. See *infra* Section IV.A. I use the term *conventional* throughout this article to describe the substantial burden framework simply because it was the doctrinal framework embraced by the Court during much of the time period covered by this article. To be sure, scholars have long debated the substantial burden framework's historical record. See, e.g., Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 571 (1998); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120–28 (1990); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1420 (1990); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 134–35 (1993). I take no position here on this debate.

75. See *infra* Part II.

76. See *infra* Part III.

77. See *infra* Part IV.

Evangelical Lutheran Church & School v. EEOC,⁷⁸ *Hobby Lobby*,⁷⁹ *Zubik v. Burwell*,⁸⁰ and *Masterpiece Cakeshop*⁸¹—make their way to the Supreme Court, Jewish institutional consensus has all but dissipated. Moreover, this current dissensus over the very viability of religious liberty claims now exists not only between progressive and traditionalist Jewish institutions, to use Hunter’s dichotomy,⁸² but also among traditionalist institutions themselves.

This overall trajectory indicates that views on religious liberty within the American Jewish community originally aligned, to again use Hunter’s contemporary categories, with views associated with traditionalists.⁸³ However, over time, many Jewish institutions—particularly those with more progressive leanings—have been increasingly willing to challenge not only the limits on religious liberty but also on the viability of certain categories of religious liberty claims themselves.⁸⁴ As a result, dissensus among Jewish institutions has grown greater with each passing phase.⁸⁵ Moreover, although this shift is taking place primarily among more historically progressive organizations, some traditionalist institutions are also following this trend;⁸⁶ accordingly, some more modest degree of dissensus has begun to creep in among traditionalist institutions as well.⁸⁷ In sum, this overall trajectory makes it difficult to think of Jewish institutions as having, in their initial phases, provided a third way with respect to religious liberty. However, as Jewish institutions—encountering the increasingly complex and multifaceted religious liberty claims of the culture wars—have migrated towards more progressive views on religious liberty, the possibility that Jewish institutions might in fact embrace something akin to a third way—one that is, to use Schragger and Schwartzman’s phrase, “neither Christian nor pagan”⁸⁸—has become more and more likely.

To be certain, these conclusions are by their nature somewhat tenuous. The stakes in religious liberty cases across time—as well as the nature of

78. 565 U.S. 171 (2012).

79. 134 S. Ct. 2751 (2014).

80. 136 S. Ct. 1557 (2016).

81. 138 S. Ct. 1719 (2018).

82. See HUNTER, *supra* note 1, at 46.

83. See *infra* pp. 345–46.

84. See *infra* Section IV.B.

85. See *infra* Section IV.B.

86. See *infra* text accompanying note 345.

87. See *supra* text accompanying notes 19–25.

88. Schragger & Schwartzman, *supra* note 46, at 510.

the relevant interests in each case—somewhat resist comparison. Indeed, the religious liberty story over the past half century has been typified by evolution; settled positions have become unsettled as the law has responded to new challenges and questions.⁸⁹ Thus, using Hunter’s traditionalist-progressive frame—with all its intentionally contemporary baggage—is itself somewhat of an anachronism.⁹⁰ Still, the contemporary debates over where Jewish religious liberty advocacy has come from and where it is headed—both in the academy and among the general public—have looked to the past of such advocacy to interpret the present moment. And in response to some of those arguments, interrogating Jewish institutional amicus briefs before the Supreme Court helps identify a trajectory of these advocacy efforts, providing an important starting point for telling the story of Jews and the culture wars. In so doing, it serves as a point of departure for determining whether American Jewish advocacy around religious liberty has been historically aligned with our contemporary categories of progressives or traditionalists—or, whether it has represented a third way that is neither Christian nor pagan.

II. JEWS AND THE RELIGIOUS LIBERTY CONSENSUS

Attempting to identify the dominant Jewish approach to questions of religious liberty is an inherently fraught endeavor, and certainly no article can capture the entirety of this rich and complex story. Indeed, much has already been written with respect to the history of Jewish engagement with questions revolving around the Establishment Clause of the First Amendment, including attendant questions of church-state separation.⁹¹ This is far from surprising given that American Jewish institutions played a pivotal role in litigation around such issues in the mid to late twentieth century, influencing the trajectory of Establishment Clause doctrine for decades.⁹²

At the same time, scholars have spent less time evaluating how these same Jewish institutions intervened in litigation over the Free Exercise Clause—cases that deal more directly with religious liberty issues.⁹³ This

89. For a discussion of some of the central evolutions and inversions in the religious liberty story, see *infra* Section IV.A.

90. A complete picture of how these categories have played out in the religious liberty context would entail a similar study on the evolution of advocacy within other interested groups and, in particular, with the broader American Christian community. However, that investigation is beyond the scope of this more limited project.

91. See, e.g., COHEN, *supra* note 53; IVERS, *supra* note 51, at 205–06; SARNA & DALIN, *supra* note 53, at 1.

92. See COHEN, *supra* note 53, at 123–30; IVERS, *supra* note 51, at 66–188.

93. To be sure, separating between Free Exercise and Establishment Clause cases is no easy task. In the words of Leo Pfeffer, “there is rarely a case involving one of

is true even as the amicus briefs filed before the Supreme Court provide a useful and ready window into how Jewish institutions approached religious liberty questions. Indeed, one of the interesting features of American Jewish institutional intervention in religious liberty questions is the relative consensus around religious liberty issues that persisted until the very end of the twentieth century—at least in contrast to the complexities that typified internal Jewish debates over issues of separationism.

The intervention of Jewish institutions in Supreme Court church-state litigation through the public filing of amicus briefs is somewhat recent, becoming prolific in the 1940s.⁹⁴ Scholars and advocates have often divided the Jewish institutions that frequently advocated through amicus briefs into the broad, even if imperfect, categories of “secular” and “religious.”⁹⁵ The primary secular organizations filing briefs before the Court, often referred to as the “big three,” included the American Jewish Congress (AJCongress), the American Jewish Committee (AJCommittee), and the Anti-Defamation League (ADL).⁹⁶ Although the three organizations, all founded in the early twentieth century, initially served as “social service agencies” for Jews, they evolved over the mid-twentieth century “into powerful ethnic defense organizations determined to vindicate their civil rights through all available vehicles of organized advocacy.”⁹⁷

Another important amicus participant has been the Jewish Council for Public Affairs (JCPA)—a national umbrella organization for “125 local Jewish Community Relations Councils, and 16 national Jewish agencies.”⁹⁸ Originally called the National Community Relations Advisory Council (NCRAC), it changed its name in 1971 to the National Jewish Community Relations Advisory Council, finally switching to the JCPA in 1997.⁹⁹ The JCPA currently describes its mandate as “to advance the interests of the Jewish people; support Israel’s quest for peace and security; to promote a

the Religion Clauses that does not at the same time involve the other.” Leo Pfeffer, *Amici in Church-State Litigation*, 44 *LAW & CONTEMP. PROBS.* 83, 94 (1981).

94. *Id.* at 84–85.

95. *Id.* at 84–86; *see also* COHEN, *supra* note 53, at 126–27 (describing the trend of secularization within the big three as the organizations professionalized).

96. COHEN, *supra* note 53, at 123; *see also* IVERS, *supra* note 51, at 34–65.

97. IVERS, *supra* note 51, at 64.

98. *Mission and History*, JEWISH COUNCIL FOR PUB. AFF., <http://www.jewishpublicaffairs.org/about-jcpa/mission-and-history/> [<https://perma.cc/V3SQ-TPDS>].

99. *Id.*; *see also* J.J. GOLDBERG, *JEWISH POWER: INSIDE THE AMERICAN JEWISH ESTABLISHMENT*, at xiii (1996).

just American society; and advocate for Human Rights around the world.”¹⁰⁰ Finally, the National Council for Jewish Women (NCJW), founded in 1893,¹⁰¹ has also participated in a number of religious liberty amicus briefs.¹⁰² Describing itself as the “first and most progressive Jewish women’s organization in the United States,” the NCJW characterizes its historical mission as “dedicated to improving the quality of life for women, children, and families, and to safeguarding individual rights and freedoms both in the U.S. and Israel.”¹⁰³

In terms of “religious” Jewish organizations, frequent amicus brief contributors have historically included the Synagogue Council of America,¹⁰⁴ which was an interdenominational umbrella of the congregational and rabbinic arms of the Reform, Conservative, and Orthodox streams, and ultimately disbanded in 1994;¹⁰⁵ the Central Conference of American Rabbis (CCAR),¹⁰⁶ which serves as the primary voice of the Reform Jewish rabbinate and aims to, among other goals, “[a]mplif[y] the voice of the Reform Rabbinate in the Reform Movement, the Jewish community, and the world in which we live”;¹⁰⁷ the Union of Orthodox Jewish Congregations (OU)¹⁰⁸—the umbrella organization of centrist American Orthodox Judaism—which maintains an advocacy center that serves at “the non-partisan public policy arm of the nation’s largest Orthodox Jewish organization, representing nearly 1,000 congregations nationwide, and leads the OU’s advocacy efforts in Washington, DC, and state capitals”;¹⁰⁹ the Union for Reform Judaism (URJ), previously referred to as the Union of American Hebrew Congregations,¹¹⁰ which serves as “the umbrella organization for North American Reform Judaism” that includes over nine hundred congregations—

100. *Mission and History*, *supra* note 98.

101. FAITH ROGOW, *GONE TO ANOTHER MEETING: THE NATIONAL COUNCIL OF JEWISH WOMEN, 1893–1993*, at 2 (1993). For a general history of the NCJW, see *id.*

102. IVERS, *supra* note 51, at 177.

103. *About Us*, NAT’L COUNCIL JEWISH WOMEN, <https://www.ncjw.org/about/> [<https://perma.cc/TS65-VURZ>].

104. Pfeffer, *supra* note 93, at 84–85.

105. Jonathan J. Golden, *From Cooperation to Confrontation: The Rise and Fall of the Synagogue Council of America* (May 2008) (unpublished Ph.D. dissertation, Brandeis University) (on file with Center for Jewish History). For a history of the Synagogue Council of America, see *id.*

106. IVERS, *supra* note 51, at 177.

107. *Mission Statement*, CENT. CONFERENCE AM. RABBIS (Jan. 17, 2008), <https://www.ccarnet.org/about-us/mission-statement/> [<https://perma.cc/7XT9-QZ3X>].

108. See *Archive of Court Involvement*, ORTHODOX UNION ADVOC. CTR., <https://advocacy.ou.org/issue/in-the-courts/> [<https://perma.cc/B48W-345W>].

109. *About the OU*, ORTHODOX UNION, <https://www.ou.org/about/> [<https://perma.cc/97VD-CZQR>].

110. *Reform Judaism Group Decides to Update Name*, WASH. POST, Nov. 8, 2003, at B8.

with over one million affiliated members—in the United States and Canada;¹¹¹ the Rabbinical Council of America (RCA), an Orthodox rabbinical organization affiliated with the OU;¹¹² and the Jewish Committee on Law and Public Affairs (COLPA),¹¹³ an organization founded in 1965 to “defend the interests of Orthodox Jews in church-state matters.”¹¹⁴

Although these organizations have long disagreed over how the American Jewish community ought to debate questions of disestablishment and separationism,¹¹⁵ their official positions from the 1960s through the early 1990s—as captured in amicus briefs before the Supreme Court—largely demonstrated significant consensus over the proper approach to religious liberty.¹¹⁶ The earliest manifestation before the Supreme Court of this consensus dates back to the twin Sunday Closing Law cases of 1961—*Braunfeld v. Brown*¹¹⁷ and *Gallagher v. Crown Kosher Super Market, Inc.*¹¹⁸ Both cases considered the claims of Orthodox Jewish merchants who argued that Sunday-closing laws were unconstitutional under the religion clauses of the First Amendment.¹¹⁹ These twin cases implicated both the Establishment Clause and the Free Exercise Clause.¹²⁰ As a result, much of the dissensus that animated Jewish institutional views on the best way to approach questions of separationism manifested itself in the Sunday Closing Law cases.¹²¹

111. *The Reform Movement in North America*, UNION FOR REFORM JUDAISM, <https://urj.org/reform-movement> [<https://perma.cc/T6BY-6K5S>].

112. *About Us*, RABBINICAL COUNCIL AM., <http://www.rabbis.org/about-us/> [<https://perma.cc/RJD5-33DK>].

113. David G. Dalin, *Jewish Critics of Strict Separationism*, in *JEWS AND THE AMERICAN PUBLIC SQUARE*, *supra* note 65, at 291, 298.

114. SARNA & DALIN, *supra* note 51, at 261; *see also* COLPA, *The Legal Arm of Observant Jewry*, JEWISH L., <http://www.jlaw.com/LawPolicy/colpa.html> [<https://perma.cc/W4PD-9GZ4>] (describing itself as the “Legal Arm of Observant Jewry,” and stating it “has been responsible for the enactment of over twenty major pieces of federal and state legislation and scores of amendments and administrative regulations which have dramatically improved the ‘quality of life’ for observant Jews throughout the United States”).

115. *See, e.g.*, SARNA & DALIN, *supra* note 51, at 47; Dalin, *supra* note 113; *see also supra* note 91 and accompanying text.

116. Naomi W. Cohen, *An Overview of American Jewish Defense*, in *JEWS AND THE AMERICAN PUBLIC SQUARE*, *supra* note 65, at 13, 39–40, 42.

117. 366 U.S. 599 (1961).

118. 366 U.S. 617 (1961).

119. *Id.* at 618, 622; *Braunfeld*, 366 U.S. at 600–01.

120. *Gallagher*, 366 U.S. at 618; *Braunfeld*, 366 U.S. at 600–01.

121. *See* COHEN, *supra* note 53, at 214–28 (describing division over whether Jewish institutions should advocate for the wholesale rejection of Sunday Closing Laws as violating

Notwithstanding those divisions, Jewish institutions were united in their view that Sunday Closing Laws violated the Free Exercise Clause by placing Sabbath-observing merchants at a “serious economic disadvantage,” because, in keeping with Jewish law, they already closed their stores on Saturday.¹²² Thus, the amicus brief jointly submitted by the NCRAC and the SCA—the two large umbrella organizations of American Jewry representing both secular and religious institutions—emphasized in the statement of interest that “[e]nforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of their civil, religious and economic rights and imposes a heavy burden upon their adherence to their religious beliefs.”¹²³ Following up on this opening salvo, the brief argued that Sunday Closing Laws violated the Free Exercise Clause of the First Amendment because “[r]equiring such a person to abstain from engaging in his trade or business two days each week whereas his Sunday observing competitor is required to abstain only one day a week obviously imposes upon the former a competitive disadvantage and thus penalizes him for adhering to his religious beliefs.”¹²⁴ Importantly, this remained true even though the claimed burden was indirect:

Nor, we submit, is it material that the economic sanction is indirect rather than direct The decisions of this Court make no distinction between indirect and direct economic sanctions on the exercise of a right guaranteed by the First Amendment, so long as the causal connection is clear.¹²⁵

Similarly, the amicus brief submitted by the AJCommittee and ADL argued that Sunday Closing Laws violated the religion clauses—both of which had, as their ultimate purpose, “to assure religious freedom.”¹²⁶ Although the joint AJCommittee and ADL brief focused on the disestablishment concern presented by the Sunday Closing Laws, it also characterized such laws as tantamount to economic coercion: A Sunday Closing Law “also places an economic penalty upon Jews and upon those Christian denominations that observe Saturday as the Sabbath, to the prejudice of the latter groups.”¹²⁷

the Establishment Clause or whether they should pursue the more modest objective of simply seeking religious exemptions from such laws).

122. *Braunfeld*, 366 U.S. at 602.

123. Brief for Synagogue Council of America & National Community Relations Advisory Council as Amici Curiae at 4, *Gallagher*, 366 U.S. 617 (No. 11), 1960 WL 98548, at *4.

124. *Id.* at 25.

125. *Id.* at 27.

126. Brief for American Jewish Committee & Anti-Defamation League of B’nai B’rith as Amici Curiae at 30, *Gallagher*, 366 U.S. 617 (No. 11), 1960 WL 98549, at *30 [hereinafter Brief for AJCommittee & ADL].

127. *Id.* at 33.

The Supreme Court rejected the claim, explaining that the laws did not violate the Free Exercise Clause because they simply made the Sabbatarian “religious beliefs more expensive.”¹²⁸ That being said, the Court also noted in passing that government may not impose an incidental and indirect burden on religious conduct where “the State may accomplish its purpose by means which do not impose such a burden,”¹²⁹ a comment that ultimately morphed into the broader protections afforded religious conduct in subsequent Supreme Court cases.¹³⁰

Indeed, in the next Free Exercise case before the Supreme Court, *Sherbert v. Verner*,¹³¹ Jewish organizations were again unified in their support of the Free Exercise claim at stake. In *Sherbert*, the Supreme Court addressed the claims of a South Carolina Seventh-day Adventist who, having been terminated for refusing to work on Saturday, was denied unemployment benefits.¹³² Sherbert argued that withholding her unemployment benefits on account of her refusal to work on her Sabbath constituted a violation of her Free Exercise rights.¹³³

Jewish groups, not surprisingly, agreed. The ADL and the AJCommittee, along with the ACLU, filed an amicus brief declaring that they “believe[d] that freedom of religion is a basic right of every American and that it must be defended against all attempts at abridgment.”¹³⁴ Accordingly, the brief outlined how the denial of unemployment benefits violated the Free Exercise Clause:

Appellant, because of her religious beliefs, was deprived of a statutory right and economic benefit, available generally to citizens of South Carolina. That imposed an economic disadvantage upon her solely because of her religious convictions and her conduct in accordance with such convictions. Thus, as in the cases involving taxes on the exercise of religious beliefs, the individual is

128. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

129. *Id.* at 607.

130. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937–42 (1989) (describing the origins of the substantial burden standard in free exercise doctrine).

131. 374 U.S. 398 (1963).

132. *Id.* at 398.

133. Brief for the Appellant at 21–22, *Sherbert*, 374 U.S. 398 (No. 526), 1963 WL 105527, at *21–22.

134. Brief of the American Jewish Committee et al. Amici Curiae at 4, *Sherbert*, 374 U.S. 398 (No. 526), 1963 WL 105530, at *4 [hereinafter AJCommittee Brief *Sherbert*].

disadvantaged because he suffers a monetary loss imposed on him solely because of his religion.¹³⁵

This same approach was also at the center of the brief filed jointly by the AJCongress, the SCA, the Jewish Labor Committee, and the Jewish War Veterans: “A statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions does not labor on Saturdays deprives him of free exercise of his religion.”¹³⁶ Moreover, the fact that the burden was, in some manner of speaking, indirect should not change the Court’s analysis:

Only in the narrowest and most unrealistic sense can it be said that the State of South Carolina is not forcing the appellant to violate her Sabbath. An unemployed worker, without a source of livelihood, can hardly be said to be exercising full freedom of choice. While the compulsion may be indirect, it is quite substantial.¹³⁷

The Court ultimately agreed, holding that a law may not impose an “incidental burden on the free exercise of appellant’s religion,” unless the burden can be justified by a “compelling state interest,” thereby making the substantial-burden standard an explicit centerpiece of its Free Exercise doctrine.¹³⁸

Many Jewish groups similarly lined up to support claims for religious accommodation in the Court’s next landmark religious liberty case, *Wisconsin v. Yoder*.¹³⁹ In *Yoder*, the Court addressed whether Wisconsin’s compulsory education law infringed on the free exercise rights of Amish parents who, in accordance with their religious beliefs, refused to send their children to public school beyond eighth grade.¹⁴⁰ Filing an amicus brief supporting *Yoder*, the SCA and the AJCongress expressed their “strong interest in religious freedom and in a religiously and culturally pluralistic America.”¹⁴¹ Accordingly, they endorsed the religious accommodation approach outlined in *Sherbert*, arguing that:

The applicable principle in resolving the clash of competing interests in these cases is based upon a recognition that the freedoms secured by the First Amendment are our most precious heritage as a nation. It is because of this recognition that, when our courts consider the validity of legislation regulating rights secured by

135. *Id.* at 12 (footnote omitted).

136. Brief of Synagogue Council of America et al. as Amici Curiae at 6, *Sherbert*, 374 U.S. 398 (1963) (No. 526), 1963 WL 105529, at *6.

137. *Id.* at 7. It is worth noting that in their jointly filed brief, the AJCommittee and ADL argued that the claims of burden in *Sherbert* were more direct than the claims in *Braunfeld*, thereby encouraging the Court to uphold the former even though it had rejected the latter. See AJCommittee Brief *Sherbert*, *supra* note 134, at 19.

138. *Sherbert*, 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

139. 406 U.S. 205 (1972).

140. *Id.* at 207.

141. Brief Amici Curiae of the Synagogue Council of America et al. at 2, *Yoder*, 406 U.S. 205 (No. 70-110), 1971 WL 126412, at *2 [hereinafter SCA Brief *Yoder*].

the Amendment, they do not apply the usual strong presumption of constitutionality applicable to other types of legislation.¹⁴²

Similarly, COLPA filed an amicus brief, encouraging the court to adopt *Sherbert*'s compelling government interest test and to conclude that the government's interest in *Yoder* was insufficient to support application of Wisconsin's compulsory education law against the Amish.¹⁴³ Indeed, COLPA's amicus brief expressed an underlying worry that government regulation of minority religious practices often stemmed from an undercurrent of religious discrimination: "We believe that it is important, at this time in the nation's history, that this Court reaffirm that principle [of religious liberty] and thereby stem an alarming and ever-increasing tide of private and governmental hostility to, and discrimination against, religious nonconformists."¹⁴⁴

Thus, all Jewish organizations filing amicus briefs in *Yoder* lined up in favor of granting a constitutionally mandated religious accommodation, arguing that no compelling government interest existed to justify the burden imposed by Wisconsin's compulsory education law.¹⁴⁵ The court ultimately agreed, concluding "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."¹⁴⁶

In this way, Jewish advocacy in the few landmark free exercise cases of the 1960s and 1970s highlighted the collective commitment to the accommodationist project—that is, a commitment to protecting against substantial burdens on religious exercise in the absence of a compelling government interest. Indeed, it was a communal commitment to the importance of "religious and culturally pluralistic" America that led American that had to be "defended against all attempts at abridgment."¹⁴⁸ In so doing, these organizations embraced a doctrinal framework that protected government burdens on religious exercise even where those burdens were somewhat indirect. They encouraged the Court to override such burdens only where the government could demonstrate the existence

142. *Id.* at 9.

143. Brief of the National Jewish Commission on Law & Public Affairs, Amicus Curiae at 4–5, *Yoder*, 406 U.S. 205 (No. 70-110), 1971 WL 126414, at *4–5.

144. *Id.* at 2.

145. *See supra* notes 141–44.

146. *Yoder*, 406 U.S. at 220 (citing *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

147. SCA Brief *Yoder*, *supra* note 141.

148. AJCommittee Brief *Sherbert*, *supra* note 134.

of some compelling government interest for doing so—a threshold these organizations, at least in the cases presented, refused to concede the government had met.¹⁴⁹ In turn, Jewish institutions, to support this overall framework for addressing religious liberty claims, filed amicus briefs both in cases that implicated the religious practices of the Jewish community as well as in cases that implicated the religious practices of other faith communities to support this overall framework for addressing claims of religious liberty.

III. RELIGIOUS LIBERTY DISSENSUS, PHASE I: EMPLOYMENT LAW AND ANTIDISCRIMINATION NORMS

The story of Jewish institutional advocacy in cases like *Braunfeld*, *Gallagher*, *Sherbert*, and *Yoder* is in many ways far from surprising. As a religious community—and a minority religious community at that—Jewish organizations viewed Free Exercise rights as essential to ensuring that the Jewish community’s religious practices would have constitutional protection from majoritarian laws. In this way, Jewish institutions initially entered religious liberty cases as enthusiastic supporters of the religious accommodationist project, advocating for government to protect the religious practices of all faith communities. In so doing, they strongly supported application of the conventional substantial-burden framework, which prohibited government from imposing substantial burdens on religious exercise absent a sufficiently compelling justification.¹⁵⁰ In the 1960s and 1970s, this uniform response found ready supporters across the Jewish institutional landscape.

Nevertheless, cases did not remain quite so simple. In the 1980s, the accommodationist agenda began clashing with another important commitment of the American Jewish community—the commitment to antidiscrimination laws or, more broadly, antidiscrimination norms.¹⁵¹ The American Jewish community—or certainly its more liberal denominations—had long been committed to the enactment and implementation of far more robust antidiscrimination laws in the United States.¹⁵² Indeed, the 1964 Civil Rights Act itself was drafted in the conference room of the Reform Movement’s Religious Action Center.¹⁵³

149. See *id.* at 16; SCA Brief *Yoder*, *supra* note 141, at 10–11.

150. See, e.g., SCA Brief, *Yoder*, *supra* note 141, at 10–11.

151. See *infra* Sections III.A–B.

152. See ALBERT VORSPAN & DAVID SAPERSTEIN, JEWISH DIMENSIONS OF SOCIAL JUSTICE: TOUGH MORAL CHOICES OF OUR TIME 204–05 (1998); James F. Findlay, *Religion and Politics in the Sixties: The Churches and the Civil Rights Act of 1964*, 77 J. AM. HIST. 66, 66–67, 67 n.3, 68 (1990).

153. VORSPAN & SAPERSTEIN, *supra* note 152, at 205.

This outsized role is far from surprising given the levels of discrimination encountered by Jews prior to the enactment of federal civil rights laws. For example, according to a 1957 study, nearly 23% of resort hotels discriminated against Jews;¹⁵⁴ and a number of employment surveys from the 1950s determined that rates of religious discrimination against Jews hovered around 20%.¹⁵⁵ As a result, although American Jewish institutions were unanimous in their endorsement of the religious accommodation project, they were far more conflicted about how to respond to cases where religious individuals and groups sought religious exemptions from antidiscrimination laws and religious accommodations in the face of antidiscrimination norms. Ultimately, such cases brought two overarching commitments into conflict, complicating the otherwise cemented consensus over the religious accommodation project. And this ambivalence, maybe not surprisingly, was particularly manifest in Supreme Court litigation related to various forms of employment benefits and discrimination.

In this first phase of communal dissensus, division between Jewish organizations over religious liberty claims before the Supreme Court fell into two categories. The first related to whether broad statutory exemptions intended to protect religious practice or observance violated the Establishment Clause by providing impermissible benefits on the basis of religion. The second related to balancing the claims of religious liberty against other important government interests, including antidiscrimination norms. However, without diminishing the importance and impact of this first phase of dissensus, there was minimal division among Jewish organizations beyond these two categories. Absent extreme Establishment Clause worries and concerns over the government's ability to promote its compelling interest in antidiscrimination norms, Jewish organizations retained a broad consensus over the religious accommodation project from the late 1970s through the end of the twentieth century.

154. *Anti-Jewish Discrimination in American Hotels Declines Sharply*, JEWISH TELEGRAPHIC AGENCY DAILY NEWS BULL., Jan. 31, 1964, at 2.

155. Lois Waldman, *Employment Discrimination Against Jews in the United States—1955*, 18 JEWISH SOC. STUD. 208, 211 (1956). Interestingly, some worried that these forms of discrimination also arose within the Jewish community. See, e.g., Charles S. Liebman, *Orthodoxy in American Jewish Life*, 66 AM. JEWISH Y.B. 21, 91 (1965) (“Many Orthodox Jews have been personally as well as intellectually and emotionally alienated from the non-Orthodox world through employment discrimination. Instances of observant Jews who have been denied employment in Jewish federation-supported institutions or national Jewish organizations because they are Sabbath and holiday observers are legion.”).

*A. Religious Liberty and Establishment Clause Constraints in
Employment Law*

The first Supreme Court case that raised questions about the relationship between religious accommodation and employment discrimination garnered a high degree of consensus within the American Jewish community. In 1977, the Supreme Court addressed *Trans World Airlines v. Hardison*—a case of an employee, Larry Hardison, who claimed Trans World Airlines (TWA) violated his rights under Title VII for failing to accommodate his religious observance of the Sabbath.¹⁵⁶ TWA responded on multiple fronts, first arguing that its failure to accommodate Hardison was simply the result of following the collectively-bargained seniority system for selecting work shifts and that its failure to circumvent that seniority system did not constitute impermissible religious discrimination.¹⁵⁷

TWA, however, did not stop there. It then argued that the religious accommodation requirement of Title VII violated the neutrality demanded by the Establishment Clause.¹⁵⁸ Such an argument had the potential to find a ready home within the halls of American Jewish organizations who had long pressed Establishment Clause arguments before the Supreme Court.¹⁵⁹ Yet, at least in this early stage, an extraordinarily broad range of Jewish organizations—including the AJCommittee, AJCongress, ADL, and the official rabbinic organizations of Reform, Conservative, and Orthodox Judaism—joined an amicus brief, emphatically contesting TWA’s Establishment Clause challenge and doing so on two fronts.¹⁶⁰ The first argument focused on the core of the Establishment Clause inquiry, arguing that the religious accommodation provision of Title VII had a secular purpose, did not advance or inhibit religion, and did not require excessive government entanglement with religion.¹⁶¹

That argument, however, was followed by a second that emphasized the Free Exercise Clause. The brief contended that under the Necessary and Proper Clause, Congress had the authority to enact the religious accommodation provision of Title VII to “carry out the provisions of the Free Exercise Clause.”¹⁶² In making this argument, the brief leveraged prior free exercise case law, such as *Sherbert* and *Yoder*, and then emphasized that

156. 432 U.S. 63, 66–69 (1977).

157. Brief for Petitioner Trans World Airlines, Inc. at 25–29, *TWA*, 432 U.S. 63 (No. 75-1126), 1977 WL 189766, at *25–29.

158. *Id.* at 19–20.

159. *See supra* Part II.

160. *See generally* Brief of Central Conference of American Rabbis et al., Amici Curiae, *TWA*, 432 U.S. 63 (No. 75-1126), 1977 WL 189779.

161. *See id.* at 8–23.

162. *Id.* at 23–29.

America's long-standing commitment to religious freedom demanded that the Court allow Congress to ensure religious employees would receive accommodation of their practices: "[T]his Court in the case at bar must protect respondent Hardison from the needless requirement of choosing between gainful employment and following the religious dictates of his conscience. To do less would be to deny the principle of religious liberty which drew the earliest settlers to our shores."¹⁶³

Tracking similar themes, COLPA filed a brief on behalf of a number of Orthodox Jewish organizations,¹⁶⁴ and, by special leave of the Court, also represented these groups at oral argument.¹⁶⁵ In so doing, it argued that by providing "[s]pecial protection for religious liberty," Title VII did not violate the Establishment Clause because "Congress act[ed] reasonably to shield religion and those who practice it from the effects of governmental or private action that would, absent such legislation, have the effect of infringing religious belief or practice."¹⁶⁶

The Court's holding ultimately refrained from striking down the religious accommodation provisions of Title VII on Establishment Clause grounds.¹⁶⁷ However, the Court did find in favor of TWA on other grounds and concluded that Title VII did not require circumventing the existing seniority system, which would have placed more than a *de minimis* burden on TWA.¹⁶⁸ As the Court explained, "[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment."¹⁶⁹ At this point, with respect to Establishment Clause limitations on religious

163. *Id.* at 28–29.

164. *See generally* Brief for the National Jewish Commission on Law & Public Affairs ("COLPA") as Amicus Curiae, *TWA*, 432 U.S. 63 (No. 75-1126), 1977 WL 189774 (representing the Agudath Israel of America, National Council of Young Israel, Rabbinical Council of America, and Union of Orthodox Jewish Congregations of America) [hereinafter COLPA Brief *TWA*].

165. *See* Transcript of Oral Argument at 49, *TWA*, 432 U.S. 63 (No. 75-1126) (noting appearance and argument of COLPA attorney Nathan Lewin). For more on this history, see Nathan Lewin, *Will the Supreme Court Finally Protect the Right Not to Work on the Sabbath?*, TABLET (Feb. 26, 2019, 10:00 AM), <https://www.tabletmag.com/jewish-news-and-politics/281122/the-right-not-to-work-on-the-sabbath> [<https://perma.cc/WLP5-BXKY>].

166. COLPA Brief *TWA*, *supra* note 164, at 19–20 (emphasis omitted).

167. *See generally* *TWA*, 432 U.S. 63.

168. *Id.* at 84.

169. *Id.* at 81.

accommodations, the Court and Jewish institutional advocates remained largely aligned.¹⁷⁰

But the American Jewish consensus on how to address religious claims for accommodation within the prevailing Title VII framework would soon begin to splinter around the edges of the doctrine. In the 1985 case, *Estate of Thornton v. Caldor, Inc.*, the Supreme Court addressed an Establishment Clause challenge to a Connecticut statute, which provided, in part, that “[n]o person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee’s refusal to work on his Sabbath shall not constitute grounds for his dismissal.”¹⁷¹ In contrast to its decision in *Hardison*, the Court embraced this Establishment Clause argument, concluding the “absolute and unqualified right” granted by the statute “imposes on employers and employees an absolute duty to conform” to the asserted religious observances and that “[t]his unyielding weighting in favor of Sabbath observers over all other interests [had] a primary effect that impermissibly advances a particular religious practice.”¹⁷²

This “unyielding” quality of the statute was not only central to the Court’s opinion,¹⁷³ but it also, even if ever so slightly, split the response of American Jewish institutions. Attorneys from both COLPA and the AJCongress represented the petitioner in the case, arguing for the constitutionality of the statute.¹⁷⁴ The ADL filed an amicus brief supporting Connecticut’s statute, concluding that it not only satisfied the requirements of the Establishment Clause’s *Lemon* test—having a secular purpose, neither advancing nor inhibiting religion, and lacking excessive entanglement—but that, like in *Hardison*, the statute was justified on account of the state’s “legitimate interest in protecting the free exercise rights of its citizens.”¹⁷⁵ By contrast, the AJCommittee, filing a brief jointly with the ACLU, struck a more ambivalent tone, describing the case as addressing a “sensitive and difficult

170. To be sure, the Court appeared to reach this holding by concluding that Title VII’s religious exemption only required employers to absorb *de minimis* burdens. See, e.g., Lewin, *supra* note 165. By adopting this standard, the Court put itself at odds with some Jewish institutions, which believed that Title VII required employers meet the more demanding “undue hardship” standard as per the text of the statute. *Id.*

171. 472 U.S. 703, 706 (1985) (quoting CONN. GEN. STAT. § 53-303e(b) (1985)).

172. *Id.* at 709–10.

173. *Id.* at 710.

174. See generally Brief for Petitioner, *Estate of Thornton*, 472 U.S. 703 (No. 83-1158), 1984 WL 566029 (including as attorneys for petitioner Nathan Lewin as well as Dennis Rapps of the Commission on Land and Public Affairs and Marc Stern of the American Jewish Congress).

175. Brief of Amicus Curiae of the Anti-Defamation League of B’nai B’rith at 4–5, *Estate of Thornton*, 472 U.S. 703 (No. 83-1158), 1984 WL 566046, at *4–5 [hereinafter ADL Brief *Thornton*].

issue.”¹⁷⁶ Although the brief argued that the Court should reverse the lower court’s decision finding that the statute violated the Establishment Clause, it also encouraged the Court to remand the case for additional factual findings and conceded that, contrary to the religious accommodation requirements at issue in *Hardison*, “an absolute statutory command that a private employer defer to the religious interests of employees regardless of the cost to the employer or consequences to other employees would be capable of unconstitutional applications under both the Establishment and Due Process Clauses.”¹⁷⁷

Divisions among American Jewish institutions became even more pronounced when the Supreme Court addressed the constitutionality of § 702 of Title VII, which granted an exemption to religious organizations from the general prohibition against employment discrimination on the basis of religion.¹⁷⁸ The particular case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, involved the termination of an employee, Arthur Mayson, from the Deseret Gymnasium, a nonprofit facility, open to the public and run under the auspices of entities associated with the Church of Jesus Christ of Latter-Day Saints.¹⁷⁹ The grounds for Mayson’s termination were his failure to secure a “temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples.”¹⁸⁰ When Mayson filed suit, alleging impermissible employment discrimination on the basis of religion, his former employer asserted that it was shielded by § 702 of Title VII, which excluded from liability any “religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”¹⁸¹ And in response, Mayson contended that § 702, if applied to allow religious employers to assert religious grounds for discrimination in hiring for even nonreligious jobs, would violate the Establishment Clause.¹⁸²

176. The American Civil Liberties Union & the American Jewish Committee for Leave to File a Brief Amici Curiae in Support of Petitioner at 4, *Estate of Thornton*, 472 U.S. 703 (No. 83-1158), 1984 WL 566040, at *4 [hereinafter AJC Motion].

177. *Id.* at 5, 7.

178. See 42 U.S.C. § 2000e-1(a) (1998 & Supp. V 1994).

179. 483 U.S. 327, 330 (1987).

180. *Id.*

181. *Id.* at 329 n.1 (quoting Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1)).

182. *Id.* at 331.

The Court rejected the Establishment Clause challenge in *Amos*,¹⁸³ but Jewish institutions were divided on whether this was the appropriate outcome. On the one hand, COLPA and the AJCongress rejected the claim that the exemption from Title VII afforded to religious institutions violated the Establishment Clause.¹⁸⁴ In reaching this conclusion, both COLPA and the AJCongress focused on the relevance of the Free Exercise Clause for analyzing Establishment Clause violations.¹⁸⁵ Thus, the AJCongress explained:

The Constitution prohibits not only the reality of government support for religion, but also the appearance of such support. However, in evaluating whether the appearance of endorsement exists, it is necessary to bear in mind the values that the Free Exercise Clause protects. . . . The American political tradition recognizes that the quid pro quo of the ban on establishments of religion is the relative freedom of churches from regulation. Church exemptions are quite common in American law for just this reason.¹⁸⁶

Similarly, COLPA argued that “[t]he Establishment Clause permits Congress to protect the free exercise of religion by granting statutory exemptions that provide ‘breathing space’ to religious institutions.”¹⁸⁷

However, the ADL disagreed, concluding that § 702 of Title VII “has the primary effect of advancing religion and thereby fail[ed]” under the *Lemon* test.¹⁸⁸ In taking a stand against a statutory exemption for religious institutions, the ADL’s brief stands out for two reasons. First, the brief relies on the Court’s “unyielding weighting” argument in *Estate of Thornton*¹⁸⁹—an argument the ADL had rejected in the amicus brief it filed in *Estate of Thornton* only a few years prior.¹⁹⁰ Second, the ADL’s brief, in arguing

183. *Id.* at 337.

184. *See generally* Brief of the National Jewish Commission on Law & Public Affairs (“COLPA”) as Amicus Curiae, *Amos*, 483 U.S. 327 (Nos. 86-179, 86-401), 1987 WL 864782 [hereinafter COLPA Brief *Amos*]; Brief of the American Jewish Congress as Amicus Curiae in Support of Appellants, *Amos*, 483 U.S. 327 (Nos. 86-179, 86-401), 1987 WL 864772 [hereinafter AJCongress Brief *Amos*].

185. *Compare* COLPA Brief *Amos*, *supra* note 184, at 4, with AJCongress Brief *Amos*, *supra* note 184, at 32–33.

186. AJCongress Brief *Amos*, *supra* note 184, at xiii–xiv (emphasis omitted).

187. COLPA Brief *Amos*, *supra* note 184, at 4.

188. Brief of the Anti-Defamation League of B’nai B’rith, as Amicus Curiae in Support of Appellees at 3, *Amos*, 483 U.S. 327 (Nos. 86-179, 86-401), 1987 WL 864783, at *3 [hereinafter ADL Brief *Amos*]. The ADL was not the only Jewish institution to support Mayson. *See generally* Brief of the Women’s Legal Defense Fund et al., Amici Curiae, *Amos*, 483 U.S. 327 (Nos. 86-179, 86-401), 1987 WL 864786 (similarly arguing § 702 violated the Establishment Clause and joined by the National Council for Jewish Women).

189. ADL Brief *Amos*, *supra* note 188, at 6.

190. *See* ADL Brief *Thornton*, *supra* note 175, at 2 (“We believe that legislative attempts to reasonably accommodate the religious beliefs of all citizens are in accord with the principles of religious freedom upon which this nation was founded and are consistent with the strictures of the religious clauses of the First Amendment.”).

in favor of striking down § 702, spent significant effort identifying robust statutory and constitutional protections available to religious institutions, thereby attempting to allay concerns that striking down § 702 would leave religious institutions open to significant exposure for liability under Title VII.¹⁹¹

On the statutory side, the ADL argued that even without § 702, Title VII shielded religious organizations from liability when terminating employees on religious grounds, so long as those religious grounds represented a bona fide occupational qualification.¹⁹² Moreover, according to the ADL, Title VII was not, even as a statutory matter, intended to “apply to the relationship between a church and its ministers or minister-like personnel.”¹⁹³ As a result, the ADL concluded:

Title VII does not apply to discrimination by a religious organization within two of its most important spheres of religious activity—the hiring and supervision of ministers and minister-like employees, and the operation of religious schools—or in any setting where the religion of an employee is a *bona fide* occupational qualification.¹⁹⁴

The ADL, however, did not stop there. In outlining the protections afforded to religious institutions with respect to religious-based employment, the ADL argued that the Free Exercise Clause provided broad protections as well, noting that the Supreme Court had “long barred governmental attempts to interfere with religious doctrine or internal church affairs.”¹⁹⁵ Combining those protections with other First Amendment protections would “provide a potent defense for any religious organization when a Title VII claim threatens to interfere with its fundamental religious liberty to establish doctrine, provide religious education, choose its ministers, or manage its internal religious affairs.”¹⁹⁶ Furthermore, claimants faced with the requirements of Title VII could also avail themselves of standard free exercise protections “if that regulation threatens to create a burden upon the conscientious exercise of religious duty,”¹⁹⁷ given that a “religious organization may assert a claim for free exercise exemption on behalf of its individual members . . .

191. ADL Brief *Amos*, *supra* note 188, at 14, 17.

192. *Id.* at 14–15.

193. *Id.* at 15.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 16.

or on the basis of its own rights.”¹⁹⁸ Therefore, in the main, religious institutions concerned about the prospects of the Court striking down § 702 on Establishment Clause grounds did not have to worry; they could leverage free exercise protections to ensure that employment decisions made on religious grounds were largely insulated from the legal liability otherwise present under Title VII.

That being said, the ADL viewed none of these free exercise protections as relevant given the facts of *Amos*. Terminating Mayson, “a gymnasium building engineer,” could be justified neither by the prohibition “barring interference in the relationship between a church and its ministers or minister-like employees” nor by an assertion that religion was “a *bona fide* occupational qualification.”¹⁹⁹ Moreover, because Mayson’s duties were “purely secular” and the gymnasium’s activities neither included any “religious ritual” nor any attempt to “teach[] or spread[] the Mormon Church’s religious beliefs or practices,” the ADL concluded that no free exercise protections were relevant.²⁰⁰ Indeed, the complete absence of religious responsibilities or religious activities led the ADL to conclude that denying the applicability of free exercise protections did not require the court to impermissibly “inject itself into the Church’s internal affairs,” or “interfere[] in any way with the religious doctrine or internal affairs of the Church.”²⁰¹ Thus, the ADL concluded, Mayson’s suit should proceed uninhibited by statutory or constitutional bars to liability.²⁰²

The ADL’s brief in *Amos* represents the outer boundary of Jewish institutional dissensus in this second phase of Jewish advocacy around religious liberty before the Court. And yet even in taking this relatively aggressive stance encouraging the Court to strike down employment protections for religious institutions, the ADL still affirmed robust protections when it came to conduct and activity more central to the mission of religious institutions. Moreover, this gentle shift away from a full-throated defense of religious exemptions in employment law—likely triggered by increasingly complex cases related to the relative burdens borne in clashes between employment discrimination and religious observance—did not undermine the underlying consensus over the constitutionality of religious accommodation more broadly. Indeed, during this very time period, Jewish institutions remained unanimous in cases that largely tracked the original facts of

198. *Id.* at 16 n.8 (citations omitted) (citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985)).

199. *Id.* at 17.

200. *Id.* at 18.

201. *Id.* at 18–19.

202. *Id.* at 21.

Sherbert.²⁰³ Thus, in the 1987 case *Hobbie v. Unemployment Appeals Commission*,²⁰⁴ the ADL, AJCommittee, and AJCongress sided with the Appellant, concluding the state's failure to provide unemployment benefits violated the Free Exercise Clause—and that providing an exemption from the standard rules governing unemployment benefits did not violate the Establishment Clause.²⁰⁵

Similarly, in *Thomas v. Review Board*,²⁰⁶ the AJCongress stated disqualification of the petitioner from unemployment benefits violated the Free Exercise Clause, emphasizing that—like in *Sherbert*—“[w]hile the compulsion may be indirect, the infringement of free exercise rights is nonetheless substantial.”²⁰⁷ And, because “it is justified by no compelling state interest, it violates the First Amendment.”²⁰⁸ The Jewish Peace Fellowship, the only other Jewish organization to file a brief in *Thomas*, advanced a parallel argument.²⁰⁹ Authored by Leo Pfeffer, the brief argued “[a] statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions will not engage in the manufacture of arms deprives him of free exercise of his religion.”²¹⁰

And in *Smith*,²¹¹ the AJCongress—the only Jewish organization to file a brief in that case—once again advanced this familiar free exercise argument, arguing that, absent proof of a compelling government interest, denial of employment benefits violated the Free Exercise Clause.²¹² Explaining its particular interest in the case, the AJCongress reiterated its core mission:

203. 374 U.S. 398 (1963).

204. 480 U.S. 136 (1987).

205. See Brief of the American Jewish Congress et al., Amici Curiae at 6–7, *Hobbie*, 480 U.S. 136 (No. 85-993), 1986 WL 727638, at *6–7; Brief of Baptist Joint Committee on Public Affairs et al. as Amici Curiae in Support of Appellant at 5–6, *Hobbie*, 480 U.S. 136 (No. 85-993), 1986 WL 727633, at *5–6.

206. 450 U.S. 707 (1981).

207. Motion for Leave to File Brief Amicus Curiae and Brief for American Jewish Congress, Amicus Curiae at 6, *Thomas*, 450 U.S. 707 (No. 79-952), 1980 WL 339248, at *6.

208. *Id.* (citing *Sherbert*, 374 U.S. 398).

209. See Motion for Leave to File Brief Amici Curiae and Brief of Jewish Peace Fellowship & Fellowship of Reconciliation, Amici Curiae at 3–4 *Thomas*, 450 U.S. 707 (No. 79-952), 1980 WL 339252, at *3–4.

210. *Id.* at 3.

211. 494 U.S. 872 (1990).

212. See generally Brief Amicus Curiae of the American Jewish Congress in Support of Respondents, *Smith*, 494 U.S. 872 (No. 88-1213), 1989 WL 1126849.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of religion. In particular, AJCongress seeks to ensure that the religious practices of minority religions are not burdened or prohibited absent compelling justification.²¹³

*B. Religious Liberty and Clashes with Compelling
Government Interests*

Jewish institutional responses to Supreme Court religious liberty cases in the 1980s outside the employment context followed a somewhat similar script. On the one hand, consensus remained with respect to the fundamentals of the religious accommodation agenda—the importance of protecting against substantial burdens on religious exercise in the absence of a compelling government interest. At the same time, Jewish institutional responses to cases that raised questions about the scope of those protections received more varied reactions, with different organizations drawing the line in different places. Ultimately, Jewish institutions did not harbor concerns with the fundamental objectives of the religious accommodationist agenda; instead, to the extent they exhibited concerns, they flowed from the increasing number of instances where antidiscrimination norms tangled with claims for religious exemptions or accommodations.

The two best examples of this phenomenon may be two landmark religious liberty cases from the 1980s: *Bob Jones University v. United States*²¹⁴ and *Goldman v. Weinberger*.²¹⁵ In *Bob Jones*, the Supreme Court addressed an IRS decision withdrawing tax-exempt status from Bob Jones University (BJU) on account of the university's policy prohibiting interracial dating.²¹⁶ BJU argued withdrawal of their tax-exempt status violated its free exercise rights—a claim the Supreme Court, in an 8–1 decision, ultimately rejected.²¹⁷ In the Court's view, the government had an “overriding interest in eradicating racial discrimination in education” and “[t]hat governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.”²¹⁸

In contrast to the Supreme Court's near unanimity, Jewish organizations were far more divided over the appropriate outcome. Both the ADL and the AJCommittee sided with the IRS, arguing that revoking tax-exempt status did not violate the requirements of the Free Exercise Clause because

213. *Id.* at xiv.

214. 461 U.S. 574 (1983).

215. 475 U.S. 503 (1986).

216. *Bob Jones*, 461 U.S. at 580–81.

217. *See id.* at 602–03.

218. *Id.* at 604.

the government interest at stake was compelling.²¹⁹ Thus, the ADL asserted that “the governmental interest in eradicating racial discrimination is among the most compelling in our society today.”²²⁰ The AJCommittee, filing a joint brief with the ACLU, pressed the argument even further, contending that pursuant to the Fifth Amendment, there exists a “compelling, constitutionally mandated national interest in eliminating all government support for race discrimination in all schools.”²²¹ In turn, the existence of this compelling government interest also outweighed any possible free exercise claim: “[T]he I.R.S. rule . . . must be upheld since the conduct at which it is aimed—government support of racially discriminatory schools—poses uniquely substantial threats to our social fabric. The compelling national interest in eliminating such government support . . . has expressly been held to override free exercise claims.”²²²

COLPA, on the other hand, weighed in on the side of BJU, filing a brief representing a wide range of Orthodox Jewish organizations.²²³ Although COLPA emphasized that racial discrimination in education violates Jewish religious principles, it nonetheless argued that withdrawing tax-exempt status because of an institution’s religious commitments and practices would violate the First Amendment:

The purpose of the First Amendment is to protect minorities from the tyranny of the majority. . . . Th[is] purpose of the First Amendment and its limitation on the powers of the majority would be frustrated if tax exemption and, with it, economic viability, could be granted to or withheld from the minority by the majority merely because the minority, in pursuit of its religious rights, refuses to conform to the

219. Compare Motion for Leave to File Brief and Brief for Anti-Defamation League of B’nai B’rith, as Amicus Curiae, *Bob Jones* 461 U.S. 574 (Nos. 81-1, 81-3), 1982 U.S. S. Ct. LEXIS 1234 [hereinafter ADL Brief *Bob Jones*], with Brief of the American Civil Liberties Union & the American Jewish Committee, Amici Curiae in Support of Affirmance, *Bob Jones*, 461 U.S. 574 (Nos. 81-1, 81-3), 1982 U.S. S. Ct. Briefs LEXIS 1239 [hereinafter ACLU Brief *Bob Jones*].

220. ADL Brief *Bob Jones*, *supra* note 219, at *33.

221. ACLU Brief *Bob Jones*, *supra* note 219, at 10 (emphasis omitted).

222. *Id.* at 42.

223. See generally Brief of the National Jewish Commission on Law & Public Affairs (COLPA) as Amicus Curiae, *Bob Jones*, 461 U.S. 574 (No. 81-3, 81-1), 1981 U.S. S. Ct. Briefs LEXIS 1357 [hereinafter COLPA Brief *Bob Jones*] (including Agudath Israel of America, National Council of Young Israel, Rabbinical Council of America, Torah Umesorah, National Society of Hebrew Day Schools, and Union of Orthodox Jewish Congregations of America).

social practices of the majority. If the majority could so behave, the First Amendment would be meaningless.²²⁴

Given the stakes, COLPA also concluded that no compelling government interest justified overriding Bob Jones’s free exercise rights because none of “the acts of the petitioners herein constituted crimes or otherwise violated specific laws.”²²⁵

Maybe the most noteworthy Jewish institutional reaction—or nonreaction—to *Bob Jones* was the decision of the AJCongress not to file or join an amicus brief. While typically it is difficult to read too much into the failure of an organization to file an amicus brief, Marc Stern, then a member of the legal staff of the AJCongress’s Commission on Law and Social Action (CLSA), has described the internal decision-making calculus as follows:

Our CLSA thought that *Bob Jones* was right [and] that the free exercise claim was very strong. It was a very tangential form of race discrimination. But you could not take that position publicly. No way. We would have had some company in that case that our leadership could not bear to keep. So we stayed out.²²⁶

Given its status as one of the most prominent institutional advocates in church-state cases, the AJCongress’s reluctance to enter the fray is noteworthy,²²⁷ highlighting the extent of Jewish institutional ambivalence surrounding clashes between antidiscrimination norms and religious liberty.

While not particularly surprising, this split in *Bob Jones* stood in stark contrast to Jewish institutional responses to *Goldman*.²²⁸ In *Goldman*, the Supreme Court addressed the free exercise claims of Simcha Goldman, an Orthodox Jewish Air Force officer, who argued the Air Force had violated his free exercise rights by applying its regulation against the wearing of headgear to prohibit him from wearing a *yarmulke*.²²⁹ Jewish organizations all lined up to support Goldman, each arguing that the military lacked a compelling government interest to justify abridging the free exercise rights at stake. COLPA served as part of the legal team representing Goldman.²³⁰ In its amicus brief, the AJCommittee argued:

224. *Id.* at *6–7.

225. *Id.* at *9.

226. IVERS, *supra* note 51, at 205–06 (quoting Marc D. Stern).

227. See COHEN, *supra* note 53, at 125 (describing how the AJCongress, by the mid-twentieth century, had cultivated a reputation for “rashness—the eagerness . . . to hold forth publicly on sensitive issues and its uncompromising defense of strict separationism”).

228. 475 U.S. 503 (1986).

229. *Id.* at 504.

230. See generally Brief for the Petitioner, *Goldman*, 475 U.S. 503 (No. 84-1097), 1985 WL 669072 (including Dennis Rapps of COLPA as well as Nathan Lewin and David Butler, as attorneys for Goldman).

On the facts of this case, in which the wearing of a yarmulke was unchallenged for several years, the military's interest in enforcement of its regulations, merely for the sake of enforcement, does not constitute a state interest of the necessary magnitude to justify abridgment of a serviceman's free exercise rights."²³¹

The ADL struck a similar note, focusing on the Court's past precedent:

The free exercise cases, in short, convincingly testify to the weighty concerns implicated when government impinges on matters of religious conscience. There can be no doubt that, in the civilian context, petitioner's right to wear a yarmulke—a religious article obviously posing no threat to public safety, peace or order—could not be proscribed or subjected to regulation.²³²

The AJCongress and the SCA—along with the ACLU—joined the institutional chorus supporting Goldman, filing a joint brief that described the broader issue at stake as “whether an Orthodox Jew who wishes to serve his country is unwelcome in the Air Force.”²³³ In turn, the brief focused on the “unbroken line of cases” reaffirming “that government may burden religious liberty only when such a burden ‘is essential to accomplish an overriding governmental interest,’” a requirement *amici* believed was wholly unsatisfied given the facts of the case.²³⁴

There is no doubt the particular Jewish interest at stake in *Goldman*, as opposed to that in *Bob Jones*, played an important role in the uniformly supportive Jewish institutional response to the free exercise claim—a position ultimately rejected by the Supreme Court, which deferred to the Air Force's judgment that the important values of military hierarchy imparted by uniform dress constituted sufficient justification to override Goldman's claims.²³⁵ That being said, the doctrinal distinction by and large embraced by Jewish institutions in both cases focused on the very different government interests at stake in the two cases. For the most part, Jewish institutions

231. Brief of the American Jewish Committee & Christian Legal Society as Amici Curiae Supporting Petitioner at 2, *Goldman*, 475 U.S. 503 (No. 84-1097), 1985 WL 669068, at *2.

232. Brief of the Anti-Defamation League of B'nai B'rith as Amicus Curiae at 9, *Goldman*, 475 U.S. 503 (No. 84-1097), 1985 WL 669070, at *9 (citation omitted).

233. Brief of American Jewish Congress et al. Amici Curiae at 3, *Goldman*, 475 U.S. 503 (No. 84-1097), 1985 WL 669074, at *3 [hereinafter AJCongress Brief *Goldman*].

234. *Id.* at 12 (quoting *United States v. Lee*, 455 U.S. 252, 257–58 (1982)).

235. See *Goldman*, 475 U.S. at 509–10. To be sure, in 1987, Congress—adopting legislation drafted by Goldman's attorney, Nathan Lewin of COLPA—modified the military's dress code to largely permit the wearing of a yarmulke. See 10 U.S.C. § 774(a) (2012) (“Except as provided under subsection (b), a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force.”); SARNA & DALIN, *supra* note 51, at 279.

that supported the free exercise claim in *Goldman* viewed the military's interest as far weaker than the IRS's interest in eradicating racial discrimination in higher education.²³⁶ The AJCommittee captured this difference in a footnote of its amicus brief in *Goldman*, which explained the government retains the right to override religious liberty claims where “the conduct in question assaults one of the most fundamental bedrock values of our society or legal order” and cited *Bob Jones* as an example.²³⁷

In this way, Jewish institutional responses in the 1980s did not attack the fundamental building blocks of religious accommodation doctrine. All told, Jewish institutions adopted the conventional framework where substantial burdens on religious exercise could only be justified by narrowly tailored laws that advanced a compelling government interest. Moreover, in the main, they did not challenge free exercise claims on the ground that the petitioner failed to satisfy the threshold requirement of a substantial burden on religious exercise; instead, they differed over where to draw the line given differing views of what ought to qualify as a compelling government interest.

Accordingly, in other 1980s free exercise cases, where governmental claims for the existence of compelling government interest were relatively weak or nonexistent, Jewish institutions lined up in support of religious liberty claimants. Examples include the AJCongress's brief in *McDaniel v. Paty*²³⁸—signed along with numerous other organizations—which argued Tennessee's constitution prohibiting ministers seats in the state legislature violated the Free Exercise Clause.²³⁹ Similarly, in *O'Lone v. Estate of Shabbazz*,²⁴⁰ the AJCongress and SCA filed a brief supporting the free exercise claim of Muslim inmates, arguing that the conventional substantial burden framework should be applied to the prison's failure to permit attendance at Jumu'ah—a Friday afternoon congregational service.²⁴¹ And the brief filed by the AJCongress and the NJCRAC in *Hernandez v. Commissioner of Internal Revenue*²⁴² supported the Church of Scientology's claim that denying tax deductions for participating in “auditing” sessions, intended to

236. See, e.g., Brief of the American Jewish Committee & Christian Legal Society as Amici Curiae Supporting Petitioner at 5 n.2, *Goldman*, 475 U.S. 503 (No. 84-1097), 1985 WL 669068, at *5 n.2.

237. *Id.* (citing *Bob Jones*, 460 U.S. 574 (1983)).

238. 435 U.S. 618 (1978).

239. Motion for Leave to File Brief and Brief Amici Curiae of American Civil Liberties Union et al. at 2–5, *McDaniel*, 435 U.S. 618 (No. 76-1427), 1977 WL 189707, at *2–5.

240. 482 U.S. 342 (1987).

241. Brief Amici Curiae of the American Jewish Congress on Behalf of Itself & the Synagogue Council of America in Support of Respondents at 9–10, *O'Lone*, 482 U.S. 342 (1987) (No. 85-1722), 1987 WL 880918, at *9–10.

242. 490 U.S. 680 (1989).

promote spiritual engagement and awareness, violated the Free Exercise Clause.²⁴³ In all these cases, Jewish institutions filing amicus briefs sided with religious liberty claimants, thereby promoting the application of the prevailing Free Exercise doctrine.

Another noteworthy example of this ongoing consensus with respect to the fundamental free exercise framework was the Jewish institutional response to *Lyng v. Northwest Indian Cemetery Protective Ass'n*.²⁴⁴ In *Lyng*, the Court addressed claims that government construction through a national forest would substantially burden the religion of three Native American tribes who had been using the forest for religious purposes.²⁴⁵ The Court rejected these claims, holding that, although “the challenged Government action would interfere significantly with private persons’ abilit[ies] to pursue spiritual fulfillment,” precedent demanded the Court reject the claim because “the affected individuals [were not] coerced by the Government’s action into violating their religious beliefs.”²⁴⁶ In so doing, the Court limited the protections of the Free Exercise Clause to cases where government regulations coerced individuals to act in a manner contrary to their faiths—a shift that raised the dissent’s ire.²⁴⁷

In their filings, Jewish institutions argued against this conclusion, emphasizing both that the burdens in *Lyng* ought to qualify for free exercise protection and that the purported compelling government interest was insufficient to justify this incursion into the rights of those affected by the government’s conduct.²⁴⁸ The AJCongress filed an amicus brief encouraging the Court to decline the persistent attempts by the government to “water down the content of this compelling interest requirement” and also supporting the substantial burden claim by emphasizing “that territory can be sanctified, that places used by generations of believers for ritual purposes have special

243. Brief of the American Jewish Congress & the National Jewish Community Relations Advisory Council as Amici Curiae in Support of the Petitioners at 3–4, *Hernandez*, 490 U.S. 680 (Nos. 87-963, 87-1616), 1988 WL 1025634, at *3–4.

244. 485 U.S. 439 (1988).

245. *Id.* at 441–42.

246. *Id.* at 449.

247. *See id.* at 468 (Brennan, J., dissenting) (“Ultimately, the Court’s coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance.”).

248. *See generally* Brief Amici Curiae of American Jewish Congress, in Behalf of Itself & the Bureau of Catholic Indian Missions, in Support of Respondents, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 WL 880357 [hereinafter AJCongress Brief *Lyng*].

holiness and special conduciveness for prayer”—all of which were threatened by the government’s road-building plans.²⁴⁹

And the AJCommittee also filed an amicus brief arguing the Free Exercise Clause protected “the right of traditional site-specific religious practices to . . . constitutional protection”—a right it believed had been “already accorded to more mainstream beliefs.”²⁵⁰ In turn, the AJCommittee reiterated that, under its view of the prevailing doctrine, the existence of this free exercise right required the government to provide a compelling government interest to justify its actions, which it failed to do.²⁵¹ In this way, both the AJCongress and AJCommittee sought in *Lyng* to stave off both changes to the substantial burden doctrine and expansions of what might qualify as a compelling government interest justifying a substantial burden on religious exercise.

The one exception to this overall trend prior to the more recent culture war cases comes from *Bob Jones*. Although the dominant theme of the briefs filed by the ADL and the AJCommittee focused on the government’s compelling government interest in eradicating racial discrimination, both included secondary or tertiary arguments that focused on the quality of the burden on religious exercise. For example, towards the end of its amicus brief, the ADL noted that the IRS’s withdrawal of tax-exempt status did “not directly prohibit the actual practices of religious beliefs, as would a statute banning polygamy. Petitioners remain free to teach their doctrines about the separation of the races. Their members individually may still conduct their private affairs in a manner consistent with the teachings of their religion.”²⁵² Although this argument initially appears to take issue with the degree of the burden experienced by BJU, a full view of the ADL’s argument makes clear that it largely avoids casting doubt on whether the religious exercise in question was deserving of protection. Instead, the argument ultimately focuses on the limited theological burden imposed by the government not to question whether the burden was sufficiently substantial but to support the conclusion that the IRS had employed the least-restrictive means in response to the BJU policy.²⁵³ Thus, the brief argued, “terminating the grant of tax benefits to petitioners is the least restrictive

249. *Id.* at *xiii, *23.

250. Brief of the Christian Legal Society et al. as Amici Curiae Supporting Respondents at 3, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 WL 880357, at *3 [hereinafter Christian Legal Society Brief *Lyng*].

251. *Id.* at *13–16.

252. Motion for Leave to File Brief and Brief for Anti-Defamation League of B’nai B’rith as Amicus Curiae Supporting Respondents at 34, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Nos. 81-1, 81-3), 1982 U.S. S. Ct. Briefs LEXIS 1234, at *34.

253. *See id.*

way in which the government could end its involvement with practices that it could not constitutionally engage in itself.”²⁵⁴

By contrast, the AJCommittee’s brief in *Bob Jones* did contest the very existence of a substantial burden. The AJCommittee argued that the IRS’s withdrawal of tax-exempt status, “[i]n stark contrast with cases where this Court has sustained free exercise claims,” did not involve “the outright governmental ban on any religious belief or practice, nor the requirement that, in order to receive a government benefit, petitioners abandon any religious belief or practice.”²⁵⁵ In supporting this claim, the AJCommittee emphasized “the I.R.S. rule d[id] not directly compel petitioners, under threat of criminal or civil sanctions, to embrace any repugnant religious belief or to abandon any religiously motivated practice.”²⁵⁶ In making this claim, the AJCommittee characterized the university’s religious claims somewhat narrowly. In its view, BJU was only committed “to eschew[ing] interracial marriages and dating relationships; [it] d[id] not assert any religious duty to shun racially integrated schools.”²⁵⁷ By narrowly cabining BJU’s asserted “religious duty,” the AJCommittee argued the IRS’s determination had not, in fact, burdened religious exercise.²⁵⁸ Although this claim had less to do with a narrow construction of what qualifies for the legal category of a burden—it focused more on the factual assertion of BJU—the AJCommittee’s brief in *Bob Jones* is noteworthy in its willingness to challenge a religious liberty claim based on the nature of the burden on religious exercise.²⁵⁹ In so doing, the AJCommittee stepped beyond what other Jewish institutions were willing to argue—at least in the first phase of Jewish institutional dissensus over religious liberty.

IV. RELIGIOUS LIBERTY DISSENSUS, PHASE II: THE CONTEMPORARY CULTURE WARS

We began our exploration of Jewish institutional advocacy before the Court by wondering whether we could speak coherently about a Jewish view on religious liberty, and whether that view aligned with Hunter’s contemporary

254. *Id.*

255. Brief of the American Civil Liberties Union & the American Jewish Committee, Amici Curiae in Support of Affirmance at 35–36, *Bob Jones*, 461 U.S. 574 (Nos. 81-1, 81-3) (footnotes omitted).

256. *Id.* at 36.

257. *Id.* at 37.

258. *Id.*

259. *See id.*

categories of traditionalists and progressives.²⁶⁰ Identifying the content and trajectory of Jewish religious liberty amicus briefs could shed light on whether Jewish institutions had provided a third way that, to use Schragger and Schwartzman’s phrase, was neither pagan nor Christian in the same way as they had when it came to the Establishment Clause.²⁶¹ In this way, the story of Jewish amicus briefs may help determine to what extent, when it came to questions of religious liberty, Jews aligned themselves with—or were outsiders to—Smith’s image of the Christian city.

As described above, in the 1960s and 1970s, Jewish institutions took largely traditionalist approaches to free exercise doctrine, embracing the substantial burden framework for analyzing religious liberty claims. These early views were therefore far from idiosyncratic, falling in line with standard conceptions of traditionalist approaches to religious liberty. Indeed, such views would find a ready home in Smith’s Christian city.

In the 1980s, Jewish institutions responded to increasingly complex religious liberty claims—claims that implicated countervailing Establishment Clause and antidiscrimination concerns—that led to the beginning of dissensus on the outer boundaries of religious liberty doctrine. But while the Court’s decisions during the 1980s—in the face of these increasing complexities—zigged and zagged in somewhat unpredictable ways,²⁶² the basics of Jewish institutional amicus responses remained, by and large, consistent, supporting the basic doctrinal framework with disagreement reserved for the margins of application. Indeed, in this first phase of dissensus, Jewish institutions rarely, if ever, pushed back at the core of religious liberty doctrine, continuing to support the same substantial burden framework as they had in the 1960s and 1970s. Accordingly, they consistently supported the viability of religious liberty claims and the existence of prima facie religious liberty rights, veering from full-throated support only where they believed countervailing concerns required line-drawing at the outskirts of the doctrine.

The prevailing doctrinal consensus, however, would not last as Jewish institutions began responding to religious liberty controversies at the heart of the culture wars. While the transformation from predominant consensus to dissensus would not begin until the tail end of the 1990s—and then only appear in amicus briefs before the Court yet another decade later—the seeds of division were sown with the Supreme Court’s landmark 1990 decision in *Smith*.²⁶³ In contrast to prior cases, the Court held that the denial of

260. See *supra* Part I.

261. Schragger & Schwartzman, *supra* note 46, at 510.

262. See Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 556–63 (2015).

263. 494 U.S. 872 (1990).

claimants' unemployment benefits was not entitled to constitutional protection under the Free Exercise Clause.²⁶⁴ Instead, the Court held that the Free Exercise Clause only protects against laws that target or discriminate against religion.²⁶⁵ More precisely, the Free Exercise Clause does not provide any protection against "neutral" and "generally applicable" laws with legitimate secular objectives and only unintentionally burden religion.²⁶⁶

The Supreme Court's interpretation of the Free Exercise Clause represented a departure from prior Supreme Court precedent.²⁶⁷ The free exercise doctrine prior to *Smith*, embraced by Jewish institutions in their amicus briefs,²⁶⁸ afforded far broader religious liberty protections and required courts to grant exemptions from laws that substantially burdened religiously motivated conduct unless applying the law was necessary to achieve a compelling government interest.²⁶⁹ In *Smith*, the Court discarded this more protective framework, only providing constitutional protection against laws that *targeted* religiously motivated conduct.²⁷⁰ In turn, this doctrinal shift began a long process of legal evolution from *Smith*, to the Religious Freedom Restoration Act (RFRA), and then to the current debates at the heart of the contemporary culture wars.

A. RFRA, RLUIPA, and the Origins of the New Jewish Dissensus

Although in *Smith* the Court eliminated the constitutional requirement to provide exemptions for incidental burdens on religious exercise, it still believed it had left those seeking religious accommodations with a viable alternative: namely, petitioning the legislature.²⁷¹ Thus, those seeking exemptions could still look to their legislature to incorporate a religious exemption into the relevant law. This alternative legislative strategy, however, provided cold comfort to critics of *Smith*. Petitioning a legislature might

264. *Id.* at 872, 890.

265. *Id.*

266. *Id.* at 878.

267. For commentary soon after the *Smith* decision, see generally William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

268. See *supra* Parts II–III.

269. See generally, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

270. See Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7, 45 (1996).

271. See 494 U.S. 872, 890 (1990).

serve as a viable alternative for more well-established and better-organized religious communities, but minority religious communities would be far less likely to secure the legislative exemptions necessary to protect their less familiar religious practices from legal burdens.²⁷²

These worries formed the primary catalyst behind the RFRA,²⁷³ which aimed, as a matter of federal legislation, to undo *Smith* and restore the prior applicable free exercise standard. Enacted into law in 1993, RFRA prohibits laws that substantially burden a person's religious exercise, unless imposing

272. See *id.* at 902 (O'Connor, J., concurring) (“[T]he Court today suggests that the disfavoring of minority religions is an ‘unavoidable consequence’ under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses and the Amish.” (citation omitted)).

273. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb–2000bb-4), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil & Constitutional Rights on the H. Comm. on the Judiciary*, 101st Cong. 22 (1990) [hereinafter *Hearing on RFRA*] (statement of Rep. Lamar Smith, Texas) (“The free exercise of religion is one right that separates a free nation from a totalitarian, suppressive regime. For over 40 years we have condemned communist countries for their official atheism and persecution of religious minorities and, in fact, during World War II we fought to end the Holocaust. We have to practice what we preach.”); *id.* at 34 (statement of Reverend Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) (“It is only the unconventional practices of minorities and nonconforming individuals that put the guarantees of the Bill of Rights to the test. And now the court has abandoned the very test it had long enunciated to protect the free exercise of religion.”). The secondary literature is replete with criticism of *Smith* highlighting the particular challenges to religious minorities. See, e.g., Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U.L. REV. 145, 155 (2004) (“The rule of *Smith* risks legislative indifference to the plight of unfamiliar minority religions.”); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 224 (“Formally neutral laws can lead to persecution for a simple reason: Once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point to that demand. Conscientious resistance by religious minorities sometimes inspires respectful tolerance and exemptions, but sometimes it inspires religious hatred and determined, systematic efforts to suppress the religious minority.”); McConnell, *supra* note 267, at 1132 (“Prior to *Smith*, the Free Exercise Clause functioned as a corrective for th[e] bias [against minority religions], allowing the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process. The Free Exercise Clause, prior to *Smith*, was an equalizer.”); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 32 (2004) (“The *Smith* case thus reeks of insensitivity to the plight of a religious minority.”); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992) (describing the “big flaw” of *Smith* as “entrench[ing] patterns of de facto discrimination against minority religions”).

that burden is necessary to achieve a compelling government interest.²⁷⁴ Given that religious minorities are comprised of a relatively small number of adherents and therefore are less likely to successfully petition a legislature,²⁷⁵ it is far from surprising that numerous Jewish organizations joined the Coalition for the Free Exercise of Religion that supported RFRA legislation. This united a wide-range of Jewish organizations under the Coalition's umbrella, ultimately including Agudath Israel of America, AJCommittee, AJCongress, ADL, Central Conference of American Rabbis, Council of Jewish Federations, Federation of Reconstructionist Congregations and Havurot, National Council for Jewish Women, COLPA, RCA, OU, Union of American Hebrew Congregations, and United Synagogue of Conservative Judaism.²⁷⁶ In a statement submitted to the House of Representatives' Subcommittee on Civil and Constitutional Rights, the American Jewish Congress emphasized this concern for religious minorities post-*Smith*:

Some may question why federal legislation to undo *Smith* is considered so essential. But that is to underestimate the role of courts in protecting religious minorities.

. . . [W]ithout a legal basis for a religious claim, religious adherents have no protection against the most capricious acts of government. All religious minorities must be alarmed when the courts are stripped of the power to require government to accommodate those religious practices, to use Justice Scalia's words, "not widely engaged in."²⁷⁷

Additionally, the Anti-Defamation League's statement similarly noted that, because of *Smith*, "an individual can no longer rely on the free exercise clause to exempt a religious practice . . . under any law a state may pass unless that law expressly targets a specific religious practice. . . . The potential implications of this decision for general religious practice in this country

274. RFRA § 3.

275. Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 359 (2010) ("[S]tatutes burdening small religious minorities are disproportionately likely to be uniform ones, immune to challenge under the *Smith* rule [because] [s]mall religious minorities often want idiosyncratic things—they demand rights that no one else wants. As a result of their nonmainstream beliefs, they are often burdened by laws that burden no one else. Because no significantly sized group is burdened, no exceptions to the law ever develop." (footnote omitted)).

276. *Hearing on RFRA*, *supra* note 273, at 61 (statement of the Coalition for Free Exercise of Religion); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 n.9 (1994).

277. *Hearing on RFRA*, *supra* note 273, at 66–67 (statement of the American Jewish Congress) (emphasis added).

are significant and disturbing.”²⁷⁸ This consensus as to the troubling—and potentially devastating—consequences of *Smith* ultimately led to RFRA’s enactment.²⁷⁹

This continued consensus spilled over into the amicus briefs filed by Jewish institutions. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*²⁸⁰—the first post-*Smith* free exercise case before the Court—Jewish groups lined up to support the petitioners with near unanimity.²⁸¹ The petitioners were members of a Santerian church who claimed that the City of Hialeah had issued discriminatory regulations prohibiting their ritual sacrifice of animals.²⁸² The AJCongress, AJCommittee, and ADL all signed on to a brief that argued the regulations in question violated the Free Exercise Clause “because they [were] specifically directed at a religious practice.”²⁸³ And the brief, while not expressly asking the Court to overturn its decision in *Smith*, did state “religious and civil liberties communities, across the spectrum of theological and political opinion, are united in the conviction that *Smith* was wrongly decided.”²⁸⁴ Specifically, these groups argued that *Smith* “radically diminished the substantive liberty of each American to worship in the manner and season most agreeable to the dictates of his own conscience, subject only to the overriding responsibility of the state to maintain public peace and safety.”²⁸⁵

Similarly, COLPA filed a brief on behalf of numerous Orthodox Jewish organizations—including the Agudath Israel, OU, and RCA—arguing that the city’s regulation violated the Free Exercise Clause even under the new *Smith* standard because the regulations were “directed against religious practice.”²⁸⁶ The brief then expressed broader worries about how *Smith* “elevat[e] form over substance,” noting that “[h]ad Hialeah more cleverly drafted its Resolutions and Ordinances . . . its legislation could have passed constitutional muster under *Smith*.”²⁸⁷

278. *Id.* at 69–70 (statement of the Anti-Defamation League).

279. *Id.* at 2 (opening remarks of Don Edwards).

280. 508 U.S. 520 (1993).

281. *But see* Brief Amicus Curiae of Institute for Animal Rights Law et al. in Support of Respondent City of Hialeah, Florida, *Church of Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 12008584 (including Jews for Animal Rights among those joining the brief).

282. *Church of Lukumi*, 508 U.S. at 525–28.

283. Brief Amicus Curiae of Americans United for Separation of Church and State et al., in Support of Petitioners at 8, *Church of Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 12008578, at *8.

284. *Id.* at 16.

285. *Id.* at 16–17.

286. Brief of the National Jewish Commission of Law and Public Affairs (“COLPA”) as Amicus Curiae at 6, *Church of Lukumi*, 508 U.S. 520 (No. 91-948), 1992 WL 12008552, at *6.

287. *Id.* at 12–13.

Moreover, when the Supreme Court considered a challenge to RFRA's constitutionality,²⁸⁸ Jewish organizations lined up to support RFRA either under the Coalition for Free Exercise of Religion's umbrella²⁸⁹ or on an individual basis.²⁹⁰ Ultimately, the Supreme Court rejected this view and invalidated RFRA's applicability to state law as beyond Congress's constitutional authority.²⁹¹ In response, many states enacted their own versions of RFRA or, in some instances, interpreted state constitutional provisions so that those provisions provided analogous RFRA protections against state law.²⁹² In this way, the RFRA initiative—joined by Jewish institutions—undid what it perceived as significant damage to religious liberty and ensured that the pre-*Smith* framework remained applicable not only on the federal level but also in a large number of states.²⁹³

By the late 1990s, consensus around the pre-*Smith* substantial burden standard began to splinter as some groups from the Coalition for Free Exercise “began to address the question of religious exemptions to civil rights laws.”²⁹⁴ These worries included cases such as where “religious landlords or employers claim the right not to comply with laws that forbid them from discriminating on basis of religion, marital status, or sexual orientation.”²⁹⁵ Accordingly, by early 2000, the number of Jewish institutions

288. See *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

289. See, e.g., Brief Amicus Curiae of the Coalition for the Free Exercise of Religion, Amicus Curiae, in Support of Respondent Flores app. A at app. 1–2, *Flores*, 521 U.S. 507 (No. 95-2074), 1997 WL 10286, at *30 (including as amici Agudath Israel of America; Aleph Institute; AJCommittee; AJCongress; ADL; B'nai B'rith; Central Conference of American Rabbis; Council of Jewish Federations; Hadassah: The Women's Zionist Organization of America; International Association of Jewish Lawyers and Jurists; Jewish Reconstructionist Federation; National Council of Jewish Women; COLPA; NJCRAC; RCA; Union of American Hebrew Congregations; OU; United Synagogue of Conservative Judaism; Women of Reform Judaism—Federation of Temple Sisterhoods).

290. See, e.g., Brief of the National Jewish Commission on Law & Public Affairs (“COLPA”) as Amicus Curiae in Support of Respondents at 1–2, *Flores*, 521 U.S. 507 (No. 95-2074), 1997 WL 9092, at *1–2; Brief Amicus Curiae of Prison Fellowship Ministries & the Aleph Institute in Support of Respondents at 1–2, *Flores*, 521 U.S. 507 (No. 95-2074), 1997 WL 10274, at *1–2.

291. *Flores*, 521 U.S. at 511.

292. As of 2015, twenty-one states guaranteed RFRA protections either statutorily or constitutionally. *State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/5ZBU-NETP>].

293. See *id.*

294. Bradley P. Jacob, *Free Exercise in the “Lobbying Nineties,”* 84 NEB. L. REV. 795, 828 (2006).

295. *Id.*

supporting additional legislative expansion of the substantial burden framework had dwindled.²⁹⁶ That notwithstanding, Congress still bolstered religious liberty efforts in 2000 by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA),²⁹⁷ which extended the federal RFRA framework to “land use regulation” and “persons[s] residing in or confined to an institution.”²⁹⁸

As a result of these legislative developments, much of the religious liberty litigation before the Supreme Court in the twenty-first century has centered around statutory claims related to either RFRA or RLUIPA, with the Free Exercise Clause taking somewhat of a back seat due to the limited protections it provides post-*Smith*. However, this growing dissensus among Jewish institutions did not manifest itself immediately in litigation before the Supreme Court. Thus, although the legal hook for many religious liberty claims changed, Jewish institutions initially remained largely aligned as they had in the 1980s. Collectively, at least in the early rounds of Supreme Court litigation during the 2000s, these groups did not directly challenge the substantial burden framework of the pre-*Smith* days. Rather, they focused their disagreement on where the precise boundaries for these religious liberty claims should lie.

For example, amicus briefs filed by Jewish institutions in *Locke v. Davey*²⁹⁹ split over whether Washington State violated the Free Exercise Clause by excluding individuals pursuing a degree in devotional theology from its state scholarship for post-secondary school. Jewish institutional positions tracked typical views on the interaction between the Free Exercise and Establishment Clauses.³⁰⁰ The ADL, along with the JCPA and a number of other Jewish organizations, filed a brief supporting the State of Washington, which argued that the exclusion in the scholarship program “protects the religious exercise rights of all [Washington’s] citizens by providing greater

296. In 1998, the Coalition for Free Exercise of Religion still retained its broad consensus. See *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 305 (1998) (memorandum to Members of Congress from the Coalition for the Free Exercise of Religion, including list of members). However, by 1999, far fewer institutions joined a letter to Orrin Hatch from the Religious Liberty Protection Act Leadership Group, encouraging Congress to move forward with the Religious Land Use and Institutionalized Persons Act instead of the Religious Liberty Protection Act. Jacob, *supra* note 294, at 829 n.146, 829–30 (listing organizations signing the letter to Orrin Hatch).

297. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc–2000cc-5 (2012)).

298. *Id.* §§ 2000cc(a)(1), 2000cc-1(a).

299. 540 U.S. 712 (2004).

300. See *infra* notes 301–05 and accompanying text.

anti-establishment protections than . . . the United States Constitution.”³⁰¹ Advancing parallel disestablishment arguments, the AJCongress advanced the claim ultimately adopted by the Court³⁰² that “[t]here is ‘play in the joints,’ interstitially, for legislators to widen or contract the gap between religion and state without violating the Free Exercise Clause, precisely as the legislature may expand the scope of religious accommodation without violating the Establishment Clause.”³⁰³

By contrast, COLPA—again representing a range of Orthodox Jewish institutions—took the opposite view, arguing that “[d]isqualifying students seeking to pursue religious studies—no matter what else they may be studying simultaneously—constitutes a degree of hostility to religion that is unconstitutional under authoritative rulings of this Court.”³⁰⁴ Although not unified on the ultimate merits of the case, Jewish institutions filing amicus briefs in *Davey* split in ways that were consistent with the debates of the 1980s—the degree to which the Establishment Clause ought to place limits on the scope of the Free Exercise Clause.³⁰⁵

Continued debates over the extent to which disestablishment principles limited religious liberty protections resurfaced again in the 2006 Supreme Court decision *Cutter v. Wilkinson*, where the constitutionality of RLUIPA was challenged on Establishment Clause grounds.³⁰⁶ Here, Jewish institutions lined up behind RLUIPA and supported its constitutionality. The AJCommittee, ADL, and JCPA all jointly filed a brief with the Coalition for Free Exercise of Religion, which, quoting *Amos*, argued that “RLUIPA, like so many other statutes accommodating religious exercise, fits comfortably within the ‘ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and

301. Brief of Amici Curiae Anti-Defamation League et al. in Support of Petitioners at 5, *Locke*, 540 U.S. 712 (No. 02-1315), 2003 WL 21692828, at *5 (including as amici the ADL; Hadassah: The Women’s Zionist Organization of America; JCPA; and the Commission on Social Action of Reform Judaism).

302. See *Locke*, 540 U.S. at 718–19 (quoting *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 669 (1970)).

303. Brief Amici Curiae of the American Jewish Congress et al. at 1, *Locke*, 540 U.S. 712 (No. 02-1315), 2003 WL 21697726, at *1 (quoting *Walz*, 397 U.S. at 669).

304. Brief of the National Jewish Commission on Law & Public Affairs (“COLPA”) as Amicus Curiae in Support of Respondent at 5, *Locke*, 540 U.S. 712 (No. 02-1315), 2003 WL 22087608, at *5.

305. See Robert A. Destro, “By What Right?”: *The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters “Touching Religion,”* 29 IND. L. REV. 1, 21 (1995).

306. See 544 U.S. 709, 713–14 (2005).

without interference.”³⁰⁷ The OU filed a brief similarly contending that “[e]xemptions do not support religion in any way that was ever part of an establishment of religion. Properly administered, exemptions are substantively neutral.”³⁰⁸ The AJCongress, among others, served as counsel for the petitioners and argued to uphold their rights under RLUIPA.³⁰⁹

Only two years later, the Court addressed yet another RFRA challenge—this time, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, a case that involved a religious sect that received communion via the drinking of a sacramental tea, which included a hallucinogen prohibited under federal law.³¹⁰ The sect sued for protection under RFRA—a claim supported by Jewish institutions’ filing amicus briefs.³¹¹ Thus, a number of Jewish institutions—including the AJCongress, AJCommittee, ADL, and JCPA—joined an amicus brief supporting, once again, the constitutionality of RFRA.³¹² Another brief, joined by the Agudath Israel and the Union for Reform Judaism, contested the government’s claim that it could satisfy the “compelling government interest” required by RFRA and thereby justify its refusal to allow use of the sacramental tea.³¹³

B. Culture Wars and the New Jewish Dissensus

After 2006, consensus among Jewish institutions in the briefing before the Supreme Court on religious liberty claims, tracking the dissensus of the late 1990s over religious liberty legislative initiatives,³¹⁴ would be increasingly hard to come by. As foreshadowed at the end of the 1990s, much of this growing division coincided with the culture wars, in which the

307. Brief Amicus Curiae of the Coalition for the Free Exercise of Religion at 4, app. A at 31–32, *Cutter*, 544 U.S. 709 (No. 03-9877), 2004 WL 2961151, at *4, *1A–2a (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of LDS v. Amos*, 483 U.S. 327, 334 (1987)) (including as amici Agudath Israel of America; Aleph; AJCommittee; ADL; B’nai B’rith International; Central Conference of American Rabbis; Hadassah; The Women’s Zionist Organization of America; Jewish Council for Public Affairs; Jewish Prisoner Services International; Jewish Reconstructionist Federation; RCA; Union for Reform Judaism; OU; and United Synagogue of Conservative Judaism).

308. Brief of National Association of Evangelicals & Union of Orthodox Jewish Congregations of America as Amici Curiae in Support of Petitioners at 2, *Cutter*, 544 U.S. 709 (No. 03-9877), 2004 WL 2967824, at *2.

309. See generally Brief for Petitioners, *Cutter*, 544 U.S. 709 (No. 03-9877), 2004 WL 2967822.

310. 546 U.S. 418, 423 (2006).

311. See *infra* notes 312–13 and accompanying text.

312. See Brief Amicus Curiae of Various Religious & Civil Rights Organizations in Support of Respondents app. A at A-1–A-5, *Gonzales*, 546 U.S. 418 (No. 04-1084), 2005 WL 2237537, at *1A–3a.

313. Brief Amicus Curiae of the Baptist Joint Committee et al. in Support of Respondents at 4, 13–14, *Gonzales*, 546 U.S. 418 (No. 04-1084), 2005 WL 2237539, at *4, *13–14.

314. See *supra* notes 294–96 and accompanying text.

broader religious liberty consensus—and consensus around RFRA—dissipated. Indeed, criticism grew as RFRA—originally viewed as protecting vulnerable and politically marginalized religious minorities—became increasingly seen as a statutory tool to discriminate against other vulnerable groups such as women and members of the LGBT community.³¹⁵ Maybe the clearest statement of this concern came from Louise Melling, deputy legal director of the ACLU, in a 2015 op-ed in the *Washington Post*.³¹⁶ In Melling’s words, RFRA was “initially passed to protect the exercise of religious belief, including by vulnerable religious minorities.”³¹⁷ But, in Melling’s view, the ACLU could

no longer support the law in its current form. For more than 15 years, we have been concerned about how the RFRA could be used to discriminate against others. As the events of the past couple of years amply illustrate, our fears were well-founded. . . . [RFRA] is now often used as a sword to discriminate against women, gay and transgender people and others. Efforts of this nature will likely only increase should the Supreme Court rule—as is expected—that same-sex couples have the freedom to marry.³¹⁸

This rationale captures the stakes in the culture wars—a clash built upon two primary shifts in social reality. The first was the increasingly rapid social change³¹⁹ with respect to “sexual norms”³²⁰ or “sexual morality,”³²¹ including views on abortion, contraception and—maybe most importantly—same-sex marriage.³²² The second shift was the locking of swords on

315. See Louise Melling, *ACLU: Why We Can No Longer Support the Federal ‘Religious Freedom’ Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.fdb21c33d207 [<https://perma.cc/34VE-QW2T>].

316. *Id.*

317. *Id.*

318. *Id.*

319. See Peter Baker, *Same-Sex Marriage Support Shows Pace of Social Change Accelerating*, N.Y. TIMES (May 11, 2012), <https://www.nytimes.com/2012/05/11/us/same-sex-marriage-support-shows-pace-of-social-change-accelerating.html> [<https://perma.cc/7WDR-JPHW>].

320. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518 (2014).

321. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 846 (2014).

322. Horwitz, *supra* note 12, at 159–60 (“This legal contestation has been accompanied by—indeed, may be driven by—significant social dissensus. Although *Hobby Lobby* itself involves a controversial social issue—the status of women’s reproductive rights—much of the reason for the shift in views on accommodation involves another contested field in

issues surrounding sexual morality through the assertion of “[c]omplicity claims”—that is, “faith claims about how to live in community with others who do not share the claimant’s beliefs, and whose lawful conduct the person of faith believes to be sinful.”³²³ Together, these two social shifts have led to an increasing number of clashes between religiously-motivated individuals and the law; accordingly, because many religious individuals maintain traditional views about sexual morality, they therefore refuse to abide by laws they view as requiring participation in or support for “sinful” conduct that embraces an alternate view of sexual morality.

Maybe the two most well-known of these conflicts have been over the so-called contraception mandate and over public accommodations laws.³²⁴ Conflict in the former category began when many for-profit employers were required, pursuant to the Affordable Care Act’s contraception mandate, to provide employees with health insurance that covered FDA-approved contraceptives or face significant penalties.³²⁵ A wide range of religiously motivated for-profit institutions brought suit against the mandate, arguing that providing employees with insurance coverage for contraception made them complicit in conduct they believe to be sinful—in other words, complying with the mandate required them to violate their religious consciences.³²⁶ Because religious for-profit institutions were not exempted from the mandate, these institutions asserted religious liberty claims pursuant to RFRA.

The latter category of complicity-claim conflicts includes a series of cases where religiously motivated businesses—including a baker,³²⁷ a florist,³²⁸

the American culture wars: the status of gay rights and same-sex marriage.” (footnote omitted)).

323. NeJaime & Siegel, *supra* note 320, at 2519.

324. *See infra* text accompanying notes 325–30.

325. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). *But see* Marty Lederman, *Hobby Lobby Part III—There is No “Employer Mandate,”* BALKINIZATION (Dec. 16, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html> [<https://perma.cc/TK2E-3ZJ6>] (arguing that employers are not mandated to provide contraception and have other alternatives such as not providing an employee health-care plan).

326. For a list of cases brought against the contraception mandate, *see HHS Case Database*, BECKET, <http://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/> [<https://perma.cc/M7WS-QSHN>].

327. *See generally* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (holding the Colorado Civil Rights Commission violated the Free Exercise Clause when it ruled a baker violated a state antidiscrimination act because the its treatment of the baker’s case displayed prohibited hostility towards his religious beliefs).

328. *See generally* *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (granting the petition for certiorari, vacating the Washington Supreme Court’s opinion denying the florist’s Free Exercise claims and remanding for further consideration in light of *Masterpiece Cakeshop*).

and a photographer³²⁹—have clashed with prevailing antidiscrimination laws by refusing to provide their services at same-sex weddings and commitment ceremonies. In those cases, the vendors argued that, as religiously motivated individuals, their right to religious liberty was abridged by the prevailing public accommodations laws—laws that prohibited them, via their commercial enterprises, from discriminating on the basis of sexual orientation in the provision of services, notwithstanding the fact they believed that providing services at a same-sex wedding ceremony violated their religious consciences.³³⁰

Not surprisingly, as these disputes unfolded, the narrative surrounding religious liberty began to change,³³¹ with a growing perception that religious liberty stood at odds with either women’s health or same-sex marriage.³³² Accordingly, some viewed the doctrinal tools of religious liberty—such as RFRA and the Free Exercise Clause—as the tools of discrimination rather than shields to prevent discrimination.³³³

This shift in perception was not without consequences. Maybe nowhere has it been more evident than in recent clashes over attempts by state

329. See generally *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014) (rejecting the RFRA defense in a case dealing with a photographer).

330. See *supra* notes 327–29.

331. I have explored this further in Michael A. Helfand, *Religion and the Family in the Wake of Hobby Lobby*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 40* (Robin Fretwell Wilson ed., 2018).

332. See *Using Religion to Discriminate*, ACLU, <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate> [<https://perma.cc/8UWT-REDL>] (providing examples of individuals and institutions using religious objections to discriminate against women and LGBT people).

333. See, e.g., Josh Eidelson, *Conservative Regroup on Religious-Freedom Bills*, BLOOMBERG (Apr. 14, 2015, 3:00 AM), www.bloomberg.com/politics/articles/2015-04-14/conservatives-regroup-on-religious-freedom-bills [<https://perma.cc/CJW4-VUMD>] (quoting Adam Talbot, spokesman of the Human Rights Campaign, as saying RFRA’s are “being used as a cudgel by religious majorities to evade the enforcement of civil rights law”); Dahlia Lithwick & Mark Joseph Stern, *The 10 Worst Civil Liberties Violations of 2014*, SLATE (Dec. 29, 2014, 1:32 PM), www.slate.com/articles/news_and_politics/jurisprudence/2014/12/civil_liberties_violations_of_2014_civil_forfeiture_grand_juries_religion.html [<https://perma.cc/D9BN-3FCP>] (“Increasingly, to the conservatives of the Roberts court, ‘religious liberty’ means the freedom of religious majorities to push their religious beliefs on the rest of us.”); Meredith Somers, *Religious Freedom Cases to Fill Supreme Court Docket*, WASH. TIMES (July 7, 2014), www.washingtontimes.com/news/2014/jul/7/religious-freedom-cases-to-fill-supreme-court-dock/?page=all [<https://perma.cc/G5AY-P2RK>] (quoting Alex Luchenitser, associate legal director at Americans United for the Separation of Church and State, arguing that the *Hobby Lobby* ruling “allow[s] religious majorities to impose their religious beliefs on people who don’t follow those beliefs”).

legislatures to enact new versions of RFRA. Of these clashes, the conflict surrounding Indiana's attempt to enact a new RFRA in 2015 stands out for its relentlessness.³³⁴ While many states maintained similar statutes, the national backlash against Indiana's attempt to do so was swift, overwhelming, and ubiquitous.³³⁵ Actors, CEOs, athletes, pop stars, and politicians all decried Indiana's new "religious freedom law," characterizing it as driven by antigay discrimination.³³⁶ Much of this perception resulted from the timing; the legislature's attempt to enact a state RFRA in Indiana arose as debate over the public accommodations cases worked their way through the legal system.³³⁷ Indeed, some supporters of the Indiana bill claimed the new legislation was needed to protect business owners from liability under antidiscrimination laws,³³⁸ leading to the rank condemnation of the law across the United States. The Indiana legislature hurriedly amended the law in an attempt to quell the growing outrage.³³⁹ And Indiana has turned out to be just the beginning.³⁴⁰ Other states have also introduced bills with

334. See Associated Press, *Indiana Enacts Religious-Objections Law*, WALL ST. J. (Mar. 26, 2015, 11:20 AM), www.wsj.com/articles/indiana-enacts-religious-objections-law-1427383220 [<https://perma.cc/5M6M-HHPA>].

335. See Mark Peters & Jack Nicas, *Indiana Religious Freedom Law Sparks Fury*, WALL ST. J. (Mar. 27, 2015, 7:34 PM), www.wsj.com/articles/indiana-religious-freedom-law-sparks-fury-1427491304 [<https://perma.cc/N9CX-EHLU>].

336. German Lopez, *How Major Celebrities and Businesses Are Reacting to Indiana's Religious Freedom Law*, VOX (Mar. 31, 2015, 1:45 PM), <https://www.vox.com/2015/3/30/8312423/indiana-lgbt-businesses-celebrities> [<https://perma.cc/5FGB-JGAR>].

337. See Brian Miller, *The Age of RFRA*, FORBES (Nov. 16, 2018, 3:46 PM), <https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/#2dfe1c3977ba> [<https://perma.cc/387U-U8BZ>] (discussing notable years of RFRA).

338. See, e.g., Jeremy Diamond, *Indiana's Religious Freedom Law: What You Need To Know*, CNN (Mar. 29, 2015, 4:24 PM), <https://www.cnn.com/2015/03/27/politics/indiana-religious-freedom-explainer/index.html> [<https://perma.cc/HHG3-7FRY>] ("[S]tanding behind with Pence as he signed the bill were several socially conservative lobbyists, the ones who pushed for the law and are fiercely opposed to same-sex marriage. One of those lobbyists, Eric Miller, explicitly wrote on his website that the law would protect businesses from participating in 'homosexual marriage.'"); Sandhya Somashekhar, *Christian Activists: Indiana Law Tried To Shield Companies Against Gay Marriage*, WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89_story.html?utm_term=.3c3249952e58 [<https://perma.cc/7NKT-HNYT>].

339. See Mark Peters & Ana Campoy, *'Religious Freedom' Measures Revamped*, WALL ST. J. (Apr. 2, 2015, 6:27 PM), www.wsj.com/articles/indiana-lawmakers-unveil-changes-to-religious-freedom-law-1427981035 [<https://perma.cc/57QR-9QYY>].

340. See, e.g., Tamara Audi, *Arizona Vetoes Religious Bill Criticized as Anti-Gay*, WALL ST. J. (Feb. 27, 2014, 10:26 AM), www.wsj.com/articles/SB10001424052702304255604579407784144050074 [<https://perma.cc/GVX8-GQY6>]; Laura Meckler & Ana Campoy, *Arkansas Governor Calls for Changes to 'Religious Freedom' Bill*, WALL ST. J. (Apr. 1, 2015, 7:43 PM), www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religious-freedom-bill-1427904740 [<https://perma.cc/EY6Y-K7RK>].

new wrinkles to the RFRA framework,³⁴¹ many of which have similarly faced significant criticism. In light of that criticism, some of these bills have been amended³⁴² and some vetoed.³⁴³

Given these broad social shifts—and the overall change in perception surrounding both religious liberty and the religious accommodationist agenda—it is not surprising that Jewish institutions have become increasingly divided on questions of religious liberty. But what is unique about this new wave of dissensus is not that it simply exists, but that in recent amicus briefs, Jewish institutions have modified their historical positions and advanced fundamentally new arguments before the Court. In this way, early indications from the culture wars are that they will not only increase the degree of dissensus among American Jewish institutions, but they also will unsettle—across the political spectrum—the fundamental areas of agreement that existed until recently. To be sure, reading too much into this wave of briefs would be hasty. The time period in question—approximately a decade old—provides a limited set of cases, and therefore a limited set of briefs, to examine. Yet, these initial indications of growing dissensus highlight that new debates between Jewish institutions are not simply a rehashing of old—even if more extreme—arguments, although there is certainly some of that.

Instead, Jewish institutions have responded to culture war litigation over religious liberty by making new types of arguments that not only encourage limits on the pre-*Smith* substantial burden framework but also raise increasing skepticism of the asserted religious liberty claims themselves.³⁴⁴ Maybe

341. For a collection of attempts to enact state Religious Freedom Restoration Acts in 2015, 2016, and 2017, see *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. ST. LEGIS. (Sept. 3, 2015), www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx [https://perma.cc/9MVG-REHF]; *2016 State Religious Freedom Restoration Legislation*, NAT'L CONF. ST. LEGIS. (Dec. 31, 2016), www.ncsl.org/research/civil-and-criminal-justice/2016-state-religious-freedom-restoration-act-legislation.aspx [https://perma.cc/9C3S-BQ76]; *2017 Religious Freedom Restoration Act Legislation*, NAT'L CONF. ST. LEGIS. (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/2017-religious-freedom-restoration-act-legislation.aspx> [https://perma.cc/2K75-4EWU].

342. See, e.g., Eric Bradner, *Arkansas Governor Signs Amended 'Religious Freedom' Measure*, CNN (Apr. 2, 2015, 5:59 PM), www.cnn.com/2015/03/31/politics/arkansas-religious-freedom-anti-lgbt-bill/ [https://perma.cc/BB3G-7ZXJ].

343. See, e.g., Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2016), www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.85a716f3c87e [https://perma.cc/6ZHK-7F4V].

344. See Ungar-Sargon, *supra* note 19.

even more remarkable is that, notwithstanding some commentary to the contrary, these shifts towards a more progressive agenda have occurred across the political spectrum of Jewish institutions, including some of the very institutions perceived as shifting towards more traditionalist views.³⁴⁵ In this way, the morphing positions of various Jewish institutions have increased the scope and depth of dissensus over religious liberty while simultaneously opening the possibility of alternative approaches to religious liberty issues that might be seen as, to use the now familiar frame, neither Christian nor pagan. Below, I highlight these shifts by considering the amicus briefs in three key areas of culture war litigation before the Supreme Court.

I. *Hosanna-Tabor v. EEOC* (2012)

Although identifying the beginnings of this period of transition is somewhat challenging, the Supreme Court’s 2012 *Hosanna-Tabor*³⁴⁶ decision provides a useful starting point. In *Hosanna-Tabor*, the Court considered the claims of Cheryl Perich, an elementary school teacher at a church-operated school alleging that her employer violated her rights under the Americans with Disabilities Act.³⁴⁷ The employer, however, claimed that because Perich was a “called” teacher, it was shielded from liability pursuant to the “ministerial exception,” which exempts religious institutions from complying with various antidiscrimination statutes in the hiring and firing of ministers.³⁴⁸ In turn, the case put the applicability and constitutionality of the ministerial exception front-and-center before the Court.

Briefing from the parties emphasized the high constitutional stakes facing the Court. Although lower courts had long adopted the ministerial exception as a doctrinal outgrowth of the religion clauses,³⁴⁹ Perich and the EEOC encouraged the Court to adopt a new constitutional approach—that whatever protections were afforded religious institutions by the First Amendment stemmed from the freedom of association and not the religion clauses.³⁵⁰

345. *Id.*

346. 565 U.S. 171 (2012).

347. *Id.* at 178–79.

348. *Id.* at 177, 180 (differentiating “called” teachers—those “called to their vocation by God through a congregation”—from “contract” teachers—those “appointed by the school board, without a vote of the congregation”).

349. *Id.* at 188 (“[T]he Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.”).

350. See Transcript of Oral Argument at 37, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553) (“We don’t see that line of church autonomy principles in the religion clause jurisprudence as such. We see it as a question of freedom of association.”).

Thus, as characterized by the Court, “[t]he EEOC and Perich . . . see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.”³⁵¹ The Court, in a unanimous decision, rejected this claim, finding for the employer and reasserting that the religion clauses served as the proper constitutional home for the ministerial exception.³⁵²

Not surprisingly, a variety of Jewish institutions filed amicus briefs supporting the church-operated school. COLPA filed a brief representing a range of Orthodox Jewish institutions and endorsing a broad application of the ministerial exception because “controversies between religious institutions and their present or former employees should be considered and determined by religious authorities applying the principles that govern the faith.”³⁵³ The brief further stated that limiting application of the exception based upon the “primary duties” of the employee violated the strictures of the religion clauses.³⁵⁴ The OU filed an amicus brief as well, which unequivocally supported the church-operated school: “The church has the right to select its ministers, and when the dispute is between the church and the church member who seeks to serve in ministry, there is no occasion—no justification whatsoever—for the state to become involved.”³⁵⁵

But some of the other amicus interventions struck a different note. The AJCommittee and the Union for Reform Judaism filed a brief that supported the church-operated school,³⁵⁶ albeit in a limited fashion. The brief argued

351. *Hosanna-Tabor*, 565 U.S. at 189.

352. *Id.* at 189 (“[T]he text of the First Amendment . . . gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”).

353. Amicus Curiae Brief of the National Jewish Commission on Law & Public Affairs (“COLPA”) et al. in Support of Petitioner at 2, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 2470841, at *2 [hereinafter COLPA Brief *Hosanna-Tabor*] (including as amici COLPA; Agudath Israel; National Council of Young Israel; Agudas Harabonim of the United States and Canada; Rabbinical Alliance of America; Torah Umesorah; Baltimore Bais Din; Beth Din of the Rabbinical Council of California; Kehilla Beis Din of Los Angeles; Maysharim Bais Din of Lakewood; and Bais Din Tzedek U’Mishpat of New York).

354. *Id.* at 12–14.

355. Brief of the United States Conference of Catholic Bishops et al. as Amici Curiae in Support of Petitioner at 3, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 2470845, at *3. In addition, the Jewish Educational Center joined an amicus brief with other religious educational institutions supporting the church-operated school. *See generally* Brief of Amici Curiae Jewish Educational Center et al. in Support of Petitioner, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 2470835 [hereinafter Jewish Educational Center Brief *Hosanna-Tabor*].

356. It is worth noting that the AJCongress closed in 2010—an event triggered by its significant endowment exposure to the Bernie Madoff Ponzi scheme. *See* Jacob Berkman,

that the lower court erred when it failed to classify Perich as a minister based upon a quantitative assessment—“based on arbitrary factors such as the comparative quantity of time spent on activities the court deems ‘religious’”—as opposed to a qualitative assessment that is “holistic, objectively examining the nature of the position and the particular employee’s function within the religious organization.”³⁵⁷ This assessment stood in contrast to COLPA and the OU, which had advocated for far broader application of the ministerial exception than a “primary duties” approach would allow.³⁵⁸

Moreover, a number of Jewish institutions filed briefs in favor of Perich. This included the National Council for Jewish Women, which joined the ACLU and other organizations;³⁵⁹ the Jewish Board of Advocates for Children, which joined other victims’ rights groups;³⁶⁰ and the Society for Humanistic Judaism, which joined other secular, humanist, and atheist organizations.³⁶¹ Perhaps the most noteworthy amicus brief filed by a Jewish institution supporting Perich was that submitted by the ADL. In setting up the argument in its brief, the ADL noted that evaluating an application of the ministerial exception brought two of its principal

American Jewish Congress Closes After 88 Years of Human Rights Work, JEWISH CHRON. (July 29, 2010), <http://www.jewishchronicle.org/2010/07/29/american-jewish-congress-closes-after-88-years-of-human-rights-work/> [<https://perma.cc/475E-UWSC>]. Marc Stern, General Counsel from 1999 until the AJCongress’s closure, subsequently became the Associate General Counsel at the AJCommittee in 2010. Am. Jewish Comm., *Marc Stern Named AJC Associate General Counsel*, CISION (Aug. 2, 2010, 2:23 AM), <https://www.prnewswire.com/news-releases/marc-stern-named-ajc-associate-general-counsel-99774564.html> [<https://perma.cc/63NT-E8QC>].

357. Brief of the American Jewish Committee & the Union for Reform Judaism as Amici Curiae in Support of Petitioner at 2–3, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 2470842, at *2–3.

358. COLPA Brief *Hosanna-Tabor*, *supra* note 353, at 2 (“This principle extends beyond employment controversies with employees whose ‘primary duties’ are religious. It includes all claims made by or against any employee whose duties relate in any manner to the religious doctrine or teaching of his or her employer, particularly if, as is true of Jewish institutions, a meaningful internal religious remedy is available to the plaintiff.”); Jewish Educational Center Brief *Hosanna-Tabor*, *supra* note 355, at 5 (“But this case illustrates the flaw in the ‘primary duties’ formulation: the Court of Appeals decided that a ‘called’ teacher of religion, who also led students in prayer three times a day, could nonetheless challenge her termination because these duties were not ‘primary’—too many other ‘secular’ duties were *also* part of her job. In *amici*’s view, the church must have the right, free from state interference, to select those engaged in church governance, worship, teaching or other related functions, regardless of whether they have other duties as well.”).

359. *See generally* Brief of Americans United for Separation of Church and State et al. as Amici Curiae in Support of Respondents, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 3532695.

360. *See generally* Brief of BishopAccountablity.org et al. as Amici Curiae in Support of Respondents, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 3532696.

361. *See generally* Brief Amici Curiae of the American Humanist Association et al. in Support of Respondents, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 3488989.

commitments into tension. On the one hand, the “ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause” and “a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society;” on the other hand, the “ADL is a fervent advocate of the enforcement of antidiscrimination laws that aim to eradicate discrimination.”³⁶²

To balance these commitments, the ADL argued that the ministerial exception should be crafted as an affirmative defense, which would ensure that courts engage in the “factual inquiry [that] is needed as to the merits of the claims.”³⁶³ By endorsing the ministerial exception but advocating for judicial latitude “to delve into the merits of a plaintiff’s claim of discrimination in order to ascertain whether the ministerial exception applies in each such case,” the ADL presented an approach it believed provided “the best way to guarantee the proper balance between the eradication of discrimination and the protections afforded under the First Amendment.”³⁶⁴

What makes the brief filed by the ADL, and to a lesser extent by AJCommittee, noteworthy is that they advocated limiting the religious liberty rights of institutions by encouraging judicial inquiry into the religious quality of the asserted ministerial claim. In so doing, both the ADL and AJCommittee compromised, to some extent, some of their longstanding separationist commitments that animated their prior interventions in conflicts between religious liberty and employment law.

On this count, it may be worth contrasting the ADL’s brief in *Hosanna-Tabor* with its brief in *Amos*, discussed at length above.³⁶⁵ In *Amos*, the ADL supported striking down § 702 of Title VII, which provided a statutory exemption to religious organizations on Establishment Clause grounds.³⁶⁶ Accordingly, the ADL’s brief constituted somewhat of an outlier in the broader scheme of Jewish institutional amicus briefs filed in the 1980s. Even so, the ADL’s position in *Amos* was predicated on the important free exercise protections that would still redound to religious organizations’ benefit in the absence of § 702. Thus, in *Amos*, the ADL took the position that the prohibition of Title VII would not apply to a religious organization in the “the hiring and supervision of ministers and minister-like employees”

362. Brief of Amicus Curiae Anti-Defamation League in Support of Respondents at 1, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), 2011 WL 3532694, at *1.

363. *Id.* at 3.

364. *Id.* at 5–6.

365. *See supra* notes 188–202 and accompanying text.

366. *See supra* notes 188–93 and accompanying text.

or “the operation of religious schools.”³⁶⁷ Indeed, the reasons why the ADL argued that the Free Exercise Clause did not shield the employer from the Title VII claims in *Amos* were closely tied to the fact that the employee’s duties were “purely secular” and the employer’s activities neither included any “religious ritual” nor any attempt to “teach[] or spread[] the Mormon Church’s religious beliefs or practices.”³⁶⁸ This absence guaranteed that enforcing Title VII avoided constitutionally prohibited religious inquiries—ensuring the Court would not impermissibly “interfere[] in any way with the religious doctrine or internal affairs of the Church.”³⁶⁹

The ADL’s position in *Hosanna-Tabor* appeared to expand beyond many of these constitutional constraints. A court addressing Perich’s claim would engage in an inquiry into the underlying facts of whether the employee was indeed a minister.³⁷⁰ In so doing, the ADL believed a court could potentially find liability notwithstanding the fact that the claims implicated an employee who certainly seemed “minister-like”; proceeding on such claims would require intervening in the “operation of religious schools”; the required judicial inquiry would entail an assessment of the religious content of the employer relationship in an employment environment geared towards teaching “religious beliefs or practices.”³⁷¹

To be sure, this is not to say that the ADL’s brief in *Hosanna-Tabor* contradicted its brief in *Amos*—far from it. The ADL’s brief in *Amos*, however, represented an outlier in terms of Jewish institutional willingness to strike down statutory provisions protective of religious institutional employment practices. And as the first salvo from a Jewish institution in the culture war litigation, the ADL pressed beyond even those asserted limitations, opening up the door to finding religious institutions liable—and even inviting courts to inject themselves into the internal affairs of church-operated schools and minister-like employees.³⁷²

Accordingly, briefs in *Hosanna-Tabor* expanded the dissensus among Jewish institutions in two important ways. First, Jewish institutions divided over whether courts could inquire into the religious responsibilities of employees and thereby limit the reach of free exercise protections afforded religious institutions. Second, some Jewish institutional *amici* moved beyond

367. ADL Brief *Amos*, *supra* note 188, at 15.

368. *Id.* at 18.

369. *Id.* at 19.

370. Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 *FORDHAM L. REV.* 1847, 1874 (2018).

371. ADL Brief *Amos*, *supra* note 188, at 15, 18.

372. For my attempt at doing so, see generally Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 *MINN. L. REV.* 1891 (2013), which describes how “principles of the implied consent and marginal judicial review provide a vision of church autonomy that tracks the structure of arbitration.”

prior willingness to apply relatively broad protections to minister and minister-like employees when in the service of a religious organization pursuing religious objectives. In so doing, progressive Jewish institutions explored alternative ways to limit and interrogate the scope of religious protections afforded religious institutions—alternatives directed no longer at the periphery of religious liberty doctrine, but to its center.

2. *Burwell v. Hobby Lobby* (2014) and *Zubik v. Burwell* (2016)

If *Hosanna-Tabor* demonstrated a willingness among some Jewish institutions to nudge beyond old constitutional limits, the contraception mandate cases—*Hobby Lobby* and *Zubik*—would represent an even broader embrace of that trend. *Hobby Lobby* and *Zubik* find their origins in the Affordable Care Act’s contraception mandate,³⁷³ which was enacted pursuant to the guidelines promulgated by the Department of Health and Human Services.³⁷⁴ Those guidelines required covered insurance plans to include “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”³⁷⁵ Final rules issued by the Department of Health and Human Services provided an exemption for “religious employers,” although that exemption did not cover for-profit companies.³⁷⁶ In response to the guidelines, numerous Christian institutions filed suit, arguing that complying with the contraception mandate would require them to violate

373. See *Trump Administration Issues Final Rules Protecting Conscience Rights in Health Insurance*, HHS (Nov. 7, 2018), <https://www.hhs.gov/about/news/2018/11/07/trump-administration-issues-final-rules-protecting-conscience-rights-in-health-insurance.html> [<http://perma.cc/85K9-J84K>].

374. See 42 U.S.C. § 300gg-13(a) (2012) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.”).

375. *Women’s Preventative Services Guidelines*, HEALTH RESOURCES & SERV. ADMIN., <https://www.hrsa.gov/womens-guidelines/index.html> [<https://perma.cc/K8PC-EVQG>]; see also *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130 (2018)).

376. 45 C.F.R. § 147.130.

their religious consciences.³⁷⁷ This wave of lawsuits fell into two broad categories.

The first category of lawsuit included for-profit companies who argued that the government's refusal to extend its exemption beyond the category of nonprofit companies violated their rights under the federal RFRA.³⁷⁸ In 2014, this claim made its way before the Supreme Court in *Hobby Lobby*, in which the Court held that the contraception mandate substantially burdened the companies' religious exercise and was not the least restrictive means for ensuring employees received cost-free contraception.³⁷⁹ Indeed, the Court noted the government could extend the "religious employers" exemption—applicable to nonprofit companies—to for-profit companies, thereby ensuring that employees received cost-free contraception without burdening their employers' religious commitments.³⁸⁰

In reaching its holding, the Court addressed two central issues in the case—whether for-profit entities, given their overriding pecuniary motives, could engage in the "exercise of religion," and therefore qualify for RFRA's protection, and whether in objecting to the contraception mandate, companies could demonstrate a substantial burden.³⁸¹ Because both questions were threshold issues, the Court, holding in favor of *Hobby Lobby*, answered in the affirmative. Referencing both the Dictionary Act and indications from past precedent, the Court held that for-profit entities qualified as "persons" for the purpose of RFRA and that, given the costs of non-compliance with the mandate, the plaintiffs had demonstrated the contraception mandate imposed a substantial burden on their religious exercise.³⁸² The Court did so even though the link between the provision of insurance and the alleged "sinful" conduct—the use of contraception—was somewhat attenuated.³⁸³

The Orthodox Jewish Institutions, in an amicus brief filed by COLPA on behalf of the OU and RCA, among others, supported the RFRA claimants.³⁸⁴ In their brief, COLPA targeted the government's argument

377. For updated information on the range of lawsuits filed against the contraception mandate, see *HHS Mandate Information Central*, BECKET L., <https://www.becketlaw.org/research-central/hhs-info-central/> [<https://perma.cc/G6FE-QXVZ>].

378. See Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U.L. REV. 589, 593 (2014).

379. 134 S. Ct. 2751, 2759, 2785 (2014).

380. *Id.* at 2782–84.

381. *Id.* at 2768, 2775.

382. *Id.* at 2768–77, 2779.

383. *Id.* at 2765, 2775, 2777–79. See generally Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771 (2016) ("[C]ourts should assess the substantiality of the civil penalties triggered by religious exercise.").

384. See Brief Amicus Curiae of the National Jewish Commission on Law & Public Affairs ("COLPA") et al., in Support of Respondents in No. 13-354 & in Support of Petitioners

that excluded for-profit entities from RFRA's protections.³⁸⁵ Specifically, the brief highlighted how neither the corporate form nor the choice to operate as a for-profit justified restricting an entity's religious liberty protections under the Court's precedent.³⁸⁶ This was of particular importance from the perspective of these organizations given that Jewish law, they argued, imposed religious obligations on entities regardless of their corporate form or profit motive.³⁸⁷ As a result, to withhold RFRA protections from for-profit companies would leave many Jewish for-profit entities both subject to their own perceived religious obligation—and thereby engaged in religious exercise—but without parallel religious liberty protections.³⁸⁸

By contrast, the AJCommittee and JCPA filed a brief in favor of the contraception mandate which was very much in the mold of briefs from the 1980s. It expressly avoided the questions of “whether (i) a for-profit corporation has Free Exercise rights under the First Amendment or RFRA, or (ii) the Mandate imposes a substantial burden on religious practices.”³⁸⁹ Instead, the brief focused its efforts on the limiting principle of RFRA, evaluating whether the purported substantial burden on religious exercise was the least restrictive means for advancing a compelling government interest.³⁹⁰ Ultimately, the brief concluded “the Mandate furthers the government's compelling interests in promoting women's equality and public health in the least restrictive means available.”³⁹¹

But a number of Jewish institutions took a very different route when filing briefs in *Hobby Lobby*. In stark contrast to the tactics in the first phase of dissensus, several Jewish institutions attacked the very existence

in No. 13-356, at 15–16, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 343186, at *15–16.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 11–14, 15–17 (providing examples of for-profit corporate religious exercise where RFRA protections would be necessary); *see also* Brief of the Christian Booksellers Ass'n et al. as Amici Curiae in Support of Hobby Lobby and Conestoga, at 1–3, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 343200, at *1–3.

389. Brief Amicus Curiae of American Jewish Committee & Jewish Council for Public Affairs in Support of the Government at 3, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 333892, at *3.

390. *Id.*

391. *Id.* *See generally* Brief for the National Women's Law Center et al. as Amici Curiae in Support of the Government, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 333895.

of a viable religious liberty claim in the first place. Thus, the amicus brief filed by, among others, the ADL, the Women’s Zionist Organization of America, and the National Council of Jewish Women argued that the for-profit corporations’ RFRA claims failed because the government’s regulation did not constitute a substantial burden on two counts:

First, . . . the connection between the contraceptive rule and any impact on Appellants’ religious exercise is simply too attenuated The law does not require Appellants to use contraception themselves, to physically provide contraception to their employees, or to endorse the use of contraception. . . . Second, the employee’s independent decision about whether to obtain contraception breaks the causal chain between the government action and any potential burden on Appellants’ free exercise.³⁹²

This argument is noteworthy because it somewhat contrasts with the ADL’s argument in *Bob Jones*.³⁹³ As described above, the ADL largely avoided addressing the quality or content of the religious liberty claim in *Bob Jones*, instead opting to focus on the compelling nature of the government’s interest.³⁹⁴ In so doing, the ADL—and others—avoided building limitations on religious liberty protections into the core of the substantial burden framework, leveraging instead side constraints on the doctrine that flowed from external considerations like the fundamental importance of the government’s implicated interest.³⁹⁵

Other institutions attacked the viability of the religious liberty claim by contesting whether for-profit entities were proper subjects of RFRA’s protections. Thus, the Jewish Social Policy Action Network argued that “[e]xtending the definition of ‘person’ in RFRA to for-profit corporations would upset the delicate balance and lead us down a path where individuals could be deprived of federally protected rights because they did not share the religious views of the company’s owners.”³⁹⁶

The ADL was not alone in adopting this new approach to identifying limits on religious liberty. Several other Jewish organizations have made similar arguments about the exclusion of for-profit entities from religious liberty protections in various amicus filings before the Court. For example, eleven Jewish institutions, including the AJCommittee, the National Council of Jewish Women, and the CCAR, referenced this issue in a joint amicus

392. Brief for the American Civil Liberties Union et al. as Amici Curiae in Support of Defendants-Appellees and Urging at 8, *Hobby Lobby v. Burwell*, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), 2013 WL 1291180, at *8 (citation omitted).

393. 461 U.S. 574 (1983).

394. See *supra* note 220 and accompanying text.

395. See *supra* notes 219–22 and accompanying text.

396. Brief of Amicus Curiae Jewish Social Policy Action Network in Support of the Government at 27, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 356644, at *27.

brief³⁹⁷ filed in *Obergefell v. Hodges*—the case in which the Court upheld a constitutional right to same-sex marriage.³⁹⁸ In so doing, they argued, under the heading, “Commercial Businesses Have No Constitutional Right To Discriminate,” that “[a] business that avails itself of the benefits of doing business with the public must be subject to the public’s rules for conducting that business.”³⁹⁹ Considering these principles in the public accommodations context, the brief went on to state that “when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve.”⁴⁰⁰

Indeed, the primary arms of Reform Judaism, the CCAR and the RAC, would go on to reiterate this point in subsequent policy papers—papers that made their way into their Supreme Court amicus brief in *Masterpiece Cakeshop*.⁴⁰¹ In their view, the fundamental problem with *Hobby Lobby* was its holding “that RFRA applied to closely held for-profit corporations,” which is why “[t]he Reform Movement vociferously criticized the Supreme Court’s decision in *Hobby Lobby*, emphasizing the problems that stem from giving corporations the same religious freedom rights as individuals under RFRA.”⁴⁰²

The increasing number of Jewish institutions adopting the view that religious liberty claims in general—and RFRA claims in particular—ought not be available to for-profit corporations represents a shift from the general consensus among Jewish institutions in the 1960s that for-profit entities ought to be able to assert free exercise rights. As described above, Jewish institutions unanimously supported Orthodox Jewish merchants challenging Sunday Closing laws, in part, because of a uniformly held view that these laws violated the free exercise rights of for-profit entities.⁴⁰³ The size and

397. Other signors included the Bend the Arc: A Jewish Partnership for Justice; Haddasah: The Women’s Zionist Organization of America; the Jewish Social Policy Action Network; Keshet; Reconstructionist Rabbinical College and Jewish Reconstructionist Communities; T’ruah: The Rabbinic Call for Human Rights; Women of Reform Judaism; and Women’s League for Conservative Judaism. See generally Brief of Amici Curiae Anti-Defamation League in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004712 [hereinafter ADL Brief *Obergefell*].

398. 135 S. Ct. at 2604–05.

399. ADL Brief *Obergefell*, *supra* note 397, at 29.

400. *Id.*

401. See Brief for Amici Curiae the Central Conference of American Rabbis et al. in Support of Respondents at 20 n.35, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5036302, at *20 n.35.

402. CCAR on State RFRA’s, *supra* note 16 (emphasis added).

403. See *supra* notes 122–27 and accompanying text.

scope of some contemporary for-profit entities certainly dwarfs the scale of the shops owned by mid-twentieth century Orthodox Jewish merchants, but the shift towards rejecting the religious liberty rights of for-profit entities represents yet another important way in which Jewish institutional dissensus during the culture wars has grown in fundamentally new ways.⁴⁰⁴

And the growing divide over what claims qualify for religious liberty protections did not stop with *Hobby Lobby*. In the wake of the Court's decision in *Hobby Lobby*, the government amended its contraception mandate regulations to exempt both nonprofit as well as closely-held, for-profit entities that "hold[] [themselves] out as . . . religious organization[s]."⁴⁰⁵ Initially, these nonprofits and closely-held, for-profit entities, unlike core religious organizations such as churches and their auxiliaries,⁴⁰⁶ had to self-certify to qualify for this exemption by filling out Form 700 and sending the form to their respective insurers or third-party administrators.⁴⁰⁷ However, many nonprofit companies objected to filling out Form 700; they viewed filing the paperwork—which secured the religious exemption—also triggered contraceptive insurance coverage for their employees.⁴⁰⁸ In turn, triggering such coverage—even if provided by a third party and not paid for by the employers—would make them complicit in conduct they believe to be sinful. Therefore, they contended that being put to the choice of filling out the form or complying with the mandate still constituted a substantial burden on their religious exercise—it continued to put them to the choice of compliance with the mandate or the payment of hefty financial penalties. Accordingly, they argued the self-certification requirement itself violated the protections afforded by RFRA.⁴⁰⁹

404. The importance of the for-profit question is particularly noteworthy given the increasing growth of forms of commerce where parties simultaneously pursue commercial objectives alongside religious aspirations. See generally Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015).

405. 45 C.F.R. § 147.131(b) (2018).

406. See *id.* § 147.131(a) (incorporating the definition from I.R.C. § 6033(a)(3)(A)(i) (2012)).

407. If the entity is self-insured, it can provide Form 700 to the third-party administrator of its health plan. See *id.* § 147.131(c)(1)(i).

408. See, e.g., Brief Amici Curiae of American Jewish Committee et al. in Support of Respondents at 4–5, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 675867, at *4–5 [hereinafter *AJCommittee Brief Zubik*].

409. See, e.g., *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated*, 136 S. Ct. 1559; *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015), *vacated*, No. 15-775, 2016 WL 2842448 (May 16, 2016); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1559; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372 (6th Cir. 2014), *vacated*, 135 S. Ct. 1914 (2015).

Initially, nearly all the federal appellate courts roundly rejected this claim, concluding the requirement to fill out Form 700 could not be considered a “substantial burden.”⁴¹⁰ For example, the D.C. Circuit concluded the burden could not be viewed as substantial given that “[a]ll Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations’ compliance with law in the modern administrative state.”⁴¹¹ Nearly all other federal courts reached similar decisions.⁴¹² But the Eighth Circuit disagreed, thereby creating a circuit split ripe for the Court to address.⁴¹³

The Court indeed granted certiorari in *Zubik* on the substantial burden question, indicating that it would rule on the extent to which complicity claims might qualify for protection under RFRA.⁴¹⁴ However, instead of addressing the substantial burden question, the Court—left with only eight justices at that time because of Justice Scalia’s death in early 2016—chose to vacate the nonprofit cases and remand them to the federal courts of appeals.⁴¹⁵ In so doing, the Court took the extraordinary step of indicating a strong desire for the parties to compromise, stating “the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time

410. *Priests for Life*, 772 F.3d at 237.

411. *Id.* at 237.

412. *See, e.g., Geneva Coll.*, 778 F.3d at 442 (“[C]an the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a ‘substantial’ burden on the appellees’ free exercise of religion? We think not. . . . [W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.”); *Mich. Catholic Conference*, 755 F.3d at 388 (“The government’s imposition of an independent obligation on a third party does not impose a substantial burden on the appellants’ exercise of religion. . . . [T]he Government’s instruction to insurance issuers and third-party administrators to provide contraceptive coverage does not force the appellants to provide, pay for, and/or facilitate access to the coverage.”).

413. *See Sharpe Holdings*, 801 F.3d at 937 (“Here, the substantial burden imposed by the government . . . is the imposition of significant monetary penalties should CNS and HCC adhere to their religious beliefs and refuse to comply with the contraceptive mandate or the accommodation regulations.”).

414. *See Order Granting Certiorari*, 136 S. Ct. 444 (2015).

415. *See Zubik*, 136 S. Ct. at 1560 (“The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners’ religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.”).

ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"⁴¹⁶

Jewish institutions, however, filed amicus briefs in *Zubik* indicating they were in far less compromising moods.⁴¹⁷ COLPA, once again filing a brief on behalf of Orthodox Jewish organizations, supported the RFRA claimants and focused its argument on the government's exclusion of "independent institutions or entities which are not themselves houses of worship or their 'auxiliaries'" from the accommodation provisions of the mandate, thereby requiring such auxiliary institutions to self-certify.⁴¹⁸ This was particularly troubling to COLPA given that under Jewish law, "[a]lthough the Jewish place of worship—a Synagogue—is a very sacred location, its sanctity is exceeded by a location where there is communal Torah study—a Yeshiva."⁴¹⁹ Thus, setting a precedent that distinguished between houses of worship and other religious institutions raised, in COLPA's view, constitutional infirmities that would significantly impact the Jewish community.

A brief filed by Orthodox Jewish Rabbis supporting the petitioners attacked the broader argument against applying RFRA: to deny the existence of a substantial burden would lead "courts to weigh theological burdens," which would entail "second-guess[ing] religious adherents' sincerely held beliefs. Such a reversal would dramatically weaken RFRA's protection of religious liberty."⁴²⁰

But numerous Jewish institutions—led by the ADL and including Bend the Arc: A Jewish Partnership for Justice, the Jewish Social Policy Action Network, Keshet, the National Council of Jewish Women, and Women's League for Conservative Judaism—extended the arguments they made in *Hobby Lobby*, challenging the RFRA claims asserted by nonprofits on the ground that the petitioners had not satisfied the substantial burden requirement.⁴²¹ Accordingly, they argued the following:

416. *Id.* (citation omitted).

417. *See generally* AJCommittee Brief *Zubik*, *supra* note 408.

418. Brief Amicus Curiae of the National Jewish Commission on Law & Public Affairs ("COLPA") in Support of Petitioners in Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191, at 5, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 159297, at *5.

419. *Id.* at 10.

420. Brief of Amici Curiae Orthodox Jewish Rabbis in Support of Petitioners at 3, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191), 2016 WL 93990, at *3.

421. Brief of the Anti-Defamation League et al. as Amici Curiae Supporting Respondents at 1–5, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 675862, at *1–5 [hereinafter ADL Brief *Zubik*]; *see also supra* note 392 and accompanying text.

[T]he objective facts do not support a substantial burden. The Government’s opt-out procedures . . . allow organizations to self-certify that they have religious objections to providing contraceptive insurance coverage. The form requires an organization to write in just four boxes, providing its name, authorized agent’s name, contact information, and signature. The form is itself an accommodation to alleviate religious objections to directly providing contraceptive coverage.⁴²²

In making this argument, the ADL’s brief emphasized that “[t]he determination of whether a burden on religious exercise is substantial requires an objective assessment of the actual effect of state action.”⁴²³ Merely assessing the sincerity of the religious belief in question should not qualify.⁴²⁴ When reaching this conclusion, the ADL relied on the Court’s precedent in *Lyng*⁴²⁵ as support because “when faced with a religious challenge to the construction of a Forest Service road through sacred ground, the Court accepted that Indian tribes believed the road posed a ‘grave’ threat to their religious practice, but it declined to measure the burden by comparison to that religious belief.”⁴²⁶

Moreover, the ADL argued that if the Court found the burden imposed by the government on the petitioners was substantial, it would violate the Establishment Clause for “fail[ing] to wrestle with burdens on third-party non-beneficiaries.”⁴²⁷ Relying on the Court’s decision in *Estate of Thornton*,⁴²⁸ the brief explained that “shifting adverse effects of religious exercise onto third parties—who possess their own First Amendment and RFRA rights—is an unconstitutional Establishment Clause violation.”⁴²⁹

A separate brief filed jointly by the AJCommittee, JCPA, URJ, and CCAR hit similar notes.⁴³⁰ Like the ADL, these institutions argued that “RFRA’s use of the phrase ‘substantially burden a person’s exercise of religion’ necessarily implicates more than the objector’s assertion that his or her religious beliefs are offended.”⁴³¹ Accordingly, they argued for an objective standard to assess the substantiality of burdens:

422. ADL Brief *Zubik*, *supra* note 421, at 7.

423. *Id.* at 10.

424. *Id.* at 11–15.

425. 485 U.S. 439 (1988).

426. ADL Brief *Zubik*, *supra* note 421, at 10 (citing *Lyng*, 485 U.S. at 451).

427. *Id.* at 21.

428. 472 U.S. 703 (1985).

429. ADL Brief *Zubik*, *supra* note 421, at 21 (citing *Estate of Thornton*, 472 U.S. 703).

430. See generally AJCommittee Brief *Zubik*, *supra* note 408.

431. *Id.* at 5 (quoting 42 U.S.C. § 2000bb-1(a) (2012)).

The manifestations of a substantial burden could take a variety of forms not present here—financial, volitional, administrative, managerial, or otherwise. And the manifestations of such a burden need not be secular—a substantial imposition on the objector’s sincere religious exercise may also suffice—but in all events they must mean something more than the personal conviction that one’s religious beliefs are substantially burdened.⁴³²

Not surprisingly, in making this argument, they also relied heavily on *Lyng*⁴³³ as supporting two propositions. The first was the somewhat standard proposition that “not all burdens [are] sufficient to warrant an exemption or other accommodation.”⁴³⁴ But secondly, and perhaps more importantly, the brief quoted extensively from *Lyng* as part of its argument why mere complicity claims could not qualify as substantial burdens. Thus, the brief argued that “the logical consequence of a finding that others’ compliance with a law can impose a substantial burden on objectors’ religious exercise is that there must be ‘no law at all’ addressing whatever happens to be the contested issue.”⁴³⁵ And this, the brief contended, was an impossibility because it fundamentally contravened *Lyng*’s statement that “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.”⁴³⁶

The heavy reliance by Jewish institutional *amici* in *Zubik* on both *Estate of Thornton* and *Lyng* is a useful marker for increased dissensus among Jewish institutional *amici* triggered by the cases at the heart of the culture wars. In crafting their objections to the RFRA claim in *Zubik*, both the ADL’s and AJCommittee’s briefs leveraged holdings from cases they previously had viewed as wrongly decided.⁴³⁷ This doctrinal migration among some of the progressive Jewish institutions helps demonstrate the ways in which some institutions expanded the range of views held among the broad class of Jewish *amici*. Thus, the fact that cases like *Estate of Thornton* and *Lyng* became so central to arguments imposing internal limits on the content and quality of RFRA claims highlights the shift from the earlier phases of Jewish institutional dissensus to the dissensus typical of the current culture war phase. In the 1980s, Jewish institutions gently leveraged external constraints, such as disestablishment concerns or the compelling nature of

432. *Id.* at 5–6.

433. 485 U.S. 439 (1988).

434. AJCommittee Brief *Zubik*, *supra* note 408, at 12–13 (citing *Lyng*, 485 U.S. at 451–52).

435. *Id.* at 21.

436. *Id.* at 21–22 (quoting *Lyng*, 485 U.S. at 451–52).

437. The ADL and AJCommittee each filed briefs for petitioners in *Estate of Thornton* showing their support for the parties that the court ultimately decided against. *See generally* ADL Brief *Thornton*, *supra* note 175; AJC Motion, *supra* note 176.

implicated government interests. They almost uniformly lined up with claimants asserting religious liberty claims in cases like *Estate of Thornton*⁴³⁸ and *Lyng*.⁴³⁹ With the rise of the culture wars, however, Jewish institutional responses have morphed to support new threshold requirements for a *prima facie* religious liberty claim.

3. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)

The contraception mandate provided fertile ground for progressive Jewish institutions to expand the scope of Jewish dissensus by utilizing new arguments to address increasingly complex religious liberty claims. That divide ultimately persisted among Jewish institutions in debates at the very center of the culture wars—namely, debates over same-sex marriage and, more specifically, public accommodation cases.⁴⁴⁰ To be sure, it is not surprising that the prevailing dissensus persisted, continuing past the contraception mandate and into public accommodations. Instead, the continued advocacy through amicus briefs from the same-sex marriage cases into the realm of public accommodations stands out for something quite different; in the public accommodation cases, not only does the predictable dissensus exist, but it even trickles down to the institutions on the traditionalist side of Hunter’s divide. In this way, the dueling amicus briefs in the same-sex marriage cases as well as the briefs in *Masterpiece Cakeshop* itself⁴⁴¹ fill out the picture of the growing dissensus among Jewish institutions over religious liberty.

Public accommodations cases—cases where businesses, in contravention of state law, discriminate in the provision of their services or goods—wound through various state courts in the better part of the decade preceding *Masterpiece Cakeshop*.⁴⁴² Importantly, these cases followed a recurring pattern; the businesses in question refused to provide their services at same-sex weddings, viewing professional participation in such events through the provision of goods and services as violating their religious commitments.⁴⁴³ As a result, those cases lurked in the background as *amici* filed briefs in

438. The AJCommittee filed a brief for respondents in *Lyng*, showing its support for non-prevailing parties. See generally Christian Legal Society Brief *Lyng*, *supra* note 250.

439. See, e.g., *supra* note 437; see also AJCongress Brief *Lyng*, *supra* note 248.

440. For important public accommodations cases, see *supra* notes 327–29.

441. 138 S. Ct. 1719 (2018).

442. See, e.g., *supra* notes 327–29.

443. See, e.g., *supra* notes 327–29.

the same-sex marriage cases. Repeatedly, in those briefs, parties opined on whether recognizing a constitutional right to same-sex marriage would ultimately jeopardize religious liberty rights through the application of antidiscrimination laws to protect members of the LGBT community.⁴⁴⁴

Similarly, many Jewish institutions had already begun staking out positions on this issue early on, incorporating analysis on the connection between same-sex marriage and antidiscrimination law into briefs filed in the 2013 Supreme Court cases implicating the constitutional right to same-sex marriage: *Hollingsworth v. Perry*⁴⁴⁵ and *United States v. Windsor*.⁴⁴⁶ In so doing, a number of Jewish institutions pressed the Court to consider the religious liberty implications of same-sex marriage as part of any decision on the constitutional right to same-sex marriage. In turn, they highlighted concerns that the right to same-sex marriage might lead to legal impingements on the rights of religious institutions and organizations opposed to such marriages.⁴⁴⁷

Perhaps the best example of Jewish institutions addressing this issue in advance of *Masterpiece Cakeshop* is the AJCommittee's brief in *Hollingsworth*.⁴⁴⁸ In *Hollingsworth*, the Court reviewed a lower court decision holding that the Equal Protection Clause prohibited California from defining marriage as only between a man and a woman—a decision the Court ultimately vacated on standing grounds.⁴⁴⁹ Notwithstanding the focus of the case, the AJCommittee filed a brief that began the summary of its argument as follows: "The Court must protect the right of same-sex couples to marry, and it must protect the right of synagogues, churches, and other religious organizations not to recognize those marriages."⁴⁵⁰ In so doing, the AJCommittee highlighted various areas in which a decision upholding a constitutional right to same-sex marriage—an outcome the brief unequivocally endorsed—would implicate questions of religious liberty,

444. See, e.g., Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners at 2, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004526, at *2; Brief of Americans United for Separation of Church & State et al. as Amici Curiae in Support of Respondents at 4, 19–20, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4998227, at *4, 19–20 [hereinafter Americans United Brief *Masterpiece Cakeshop*].

445. 133 S. Ct. 2652 (2013).

446. 133 S. Ct. 2675 (2013).

447. See generally, e.g., Brief Amicus Curiae of the American Jewish Committee in Support of the Individual Respondents on the Merits, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) 2013 WL 4737187 [hereinafter AJCommittee Brief *Hollingsworth*]; Brief of Amici Curiae Anti-Defamation League et al. as Amici Curiae in Support of Respondents, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 769319.

448. See generally AJCommittee Brief *Hollingsworth*, *supra* note 447.

449. *Hollingsworth*, 133 S. Ct. at 2659.

450. AJCommittee Brief *Hollingsworth*, *supra* note 447, at 2.

including public accommodation “disputes . . . about individuals who provide creative and personal services that directly assist or facilitate marriages.”⁴⁵¹

The AJCommittee expressly took no position on the range of such cases, instead choosing to highlight the existence of “doctrinal tools . . . available to protect religious liberty with respect to marriage.”⁴⁵² In its estimation, those protections relevant to the marriage context included the free exercise protections afforded to religious organizations to be free from governmental intervention into internal religious decisions; free exercise protection from laws that substantially burden religion but fail the general applicability test by providing various other secular exceptions; and statutory protections under state and federal RFRAs.⁴⁵³ Importantly, the brief ended by noting that those tools had limited ability to provide—in the AJCommittee’s estimation—sufficient religious liberty protections.⁴⁵⁴ As a result, it encouraged the Court to reconsider *Smith* to better allow courts to adequately address the competing claims in highly charged cases:

Smith appears to mean that if a rule is generally applicable, government can refuse religious exemptions whether or not it has a plausible reason, or any reason at all. A rule of law that takes account of the weight of the competing constitutional interests would do justice more often than a rule of law that ignores those interests.⁴⁵⁵

Although the AJCommittee worried about the religious liberty implications of a constitutional right to same-sex marriage—particularly in the public accommodation context—a host of Jewish institutions filed briefs to the contrary in other cases, expressing that these worries were either overblown or unfounded. The ADL, and a number of other organizations filed a brief in *Windsor*,⁴⁵⁶ in which the Court addressed the constitutionality of the Defense of Marriage Act (DOMA).⁴⁵⁷ In the brief, these organizations argued

451. *Id.* at 7, 26.

452. *Id.* at 26–27.

453. *See id.* at 27–31.

454. *See id.* at 32.

455. *Id.* at 34.

456. 133 S. Ct. 2675 (2013).

457. *See generally* Brief for the Anti-Defamation League et al. as Amici Curiae in Support of Respondent Edith Windsor on the Merits Question, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 840022 [hereinafter ADL Brief *Windsor*] (including as amici the Anti-Defamation League; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Congregation Beit Simchat Torah; Hadassah; Jewish Social Policy Action Network; Keshet; National Council of Jewish Women; Nehirim; T’ruah: Rabbis

that recognition of same-sex marriage had no implications for public accommodations—as well as other similar—cases.⁴⁵⁸ Responding to claims of other *amici* that striking down DOMA would immediately subject “those who wish to discriminate against gay and lesbian people” to lawsuits pursuant to antidiscrimination laws, the brief argued “[t]his argument is nonsensical. . . . [D]iscrimination against gay and lesbian people is already illegal in many states, and it will continue to be illegal in those states if this Court overturns DOMA.”⁴⁵⁹

In another brief, a group of Jewish institutions—including the Rabbinical Assembly, the United Synagogue of Conservative Judaism, Reconstructionist Rabbinical Association, and the URJ similarly argued that the constitutional recognition of same sex marriage would not impact the scope of available religious liberty protections: “Where lawful civil marriages of same-sex couples are recognized, the First Amendment’s guarantees continue to protect the decisions of those faiths that choose not to solemnize such marriages, as well as those that do.”⁴⁶⁰ Therefore the brief continued, striking down DOMA “would not alter the freedom of all religious communities to decide which religious unions are consistent with their beliefs. Nor would affirmance burden religious persons and institutions in the pursuit of their religious activities or the exercise of conscience.”⁴⁶¹

In supporting this claim, the brief first asserted, citing *Hosanna-Tabor*, that “existing constitutional principles protect the autonomy of various religious entities to define religious marriages to comport with their respective tenets.”⁴⁶² Beyond those principles, the brief contended that recognizing a constitutional right to same-sex marriage would not impact public accommodations cases: “the types of disputes anticipated . . . have more to do with existing civil rights laws barring discrimination based on sexual orientation than with any conflicts that are likely to arise based on marital

for Human Rights-North America; Women of Reform Judaism; and Women’s League for Conservative Judaism).

458. *Id.* at 24–26.

459. *Id.* at 26.

460. Brief of Amici Curiae Bishops of the Episcopal Church in the States of California, Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia et al. on the Merits and in Support of Affirmance in Favor of Respondent at 28, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 840023, at *28 [hereinafter Episcopal Church Bishops Brief *Windsor*].

461. *Id.*

462. *Id.* at 29 (emphasis omitted). It is worth noting that in its brief, the ADL asserted that the protections for religious organizations come from the freedom of association and did not reference the religion clauses. See ADL Brief *Windsor*, *supra* note 457, at 27 (“According to well-established precedent, people of religious conscience may worship as they please and adopt eligibility criteria for membership in their private and religious associations.”).

status.”⁴⁶³ Other briefs made similar claims.⁴⁶⁴ All told, these briefs manifested, even if somewhat implicitly, a broadly held view among progressive Jewish institutions that if the Court were ever to hear a public accommodations case, religious liberty protections ought to have no purchase in tilting the outcome in favor of religiously motivated businesses.

Similar dissensus among Jewish organizations typified the amicus briefing in the next same-sex marriage case, *Obergefell*⁴⁶⁵—only this time, the claims of Jewish institutions became clearer even as the institutional line-up somewhat differed. In *Obergefell*, the Agudath Israel filed a brief, arguing that “[t]he recognition of same-sex marriage poses a threat to the liberty of religious organizations and individuals whose faith prevents them from acting in accordance with that recognition.”⁴⁶⁶ In identifying the “most obvious areas of conflict,” the brief identified clashes between “religious institutions and the people they service or employ.”⁴⁶⁷ Accordingly, the brief highlighted some of the previously litigated public accommodations cases, noting that “[t]he Orthodox Jewish community that we represent is likely to also encounter some of those conflicts.”⁴⁶⁸ Supporting this worry, the brief—without expressing a view on the substantive requirements of Jewish law—noted it “ha[d] personal knowledge of such an incident. In a local Jewish community in Maryland, a kosher certification agency was compelled to certify the kosher status of a gay wedding out of fear of a discrimination lawsuit.”⁴⁶⁹

463. Episcopal Church Bishops Brief *Windsor*, *supra* note 460, at 36. Many of these organizations filed a brief with identical language in *Hollingsworth* as well. See Brief of Amici Curiae Bishops of the Episcopal Church in the State of California et al. in Support of Affirmance in Favor of Respondents at 36, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 840012, at *36 (including among amici the Rabbinical Assembly; The Reconstructionist Rabbinical Association; Reconstructionist Rabbinical College; Union for Reform Judaism; and the United Synagogue of Conservative Judaism).

464. See, e.g., Brief for Amici Curiae California Council of Churches et al. in Support of Respondents & Urging Affirmance at 30–31, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 12354917, at *30–31 (including the Pacific Association of Reform Rabbis among amici); Brief Amici Curiae of the American Humanist Association & American Atheists, Inc. et al. in Support of Respondents Addressing the Merits at 24–25, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), 2013 WL 823226, at *24–25 (including the Society for Humanistic Judaism among amici).

465. 135 S. Ct. 2584 (2015).

466. Brief of Amicus Curiae Agudath Israel of America in Support of Respondents at 17, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1906364, at *17.

467. *Id.*

468. *Id.* at 19.

469. *Id.*

On the other side, the ADL once again filed a brief with a coalition similar to its *Windsor* brief,⁴⁷⁰ although this time it included the AJCommittee—a somewhat surprising turn given the AJCommittee’s brief in *Windsor*.⁴⁷¹ Picking up on the argument in the *Windsor* brief, the ADL’s brief in *Obergefell* argued that recognition of same-sex marriage was unrelated to the public accommodations cases: “Regardless of whether the ceremonies are official, vendors have been—and will continue to be—subject to any applicable antidiscrimination laws just as they would be if they refused to provide service for an interfaith couple or an interracial couple.”⁴⁷² In turn, “[a]llowing the ceremonies to be official civil marriage ceremonies—though important for the couple—will make no difference whatsoever to any vendor’s pre-existing obligation to comply with antidiscrimination laws.”⁴⁷³ To the extent it remained unclear, the brief continued in the following subsection, titled “Commercial Businesses Have No Constitutional Right To Discriminate,” asserting that “[a] business that avails itself of the benefits of doing business with the public must be subject to the public’s rules for conducting that business.”⁴⁷⁴ The brief then emphasized that “it is a fundamental principle of public accommodations law that when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve.”⁴⁷⁵

Another brief, joined by numerous Jewish rabbinical organizations and schools—including the Jewish Theological Seminary, the Reconstructionist Rabbinical Association, the Reconstructionist Rabbinical College and Jewish Reconstructionist Communities, and the United Synagogue of Conservative Judaism—made parallel arguments.⁴⁷⁶ This brief argued that recognizing a constitutional right to same-sex marriage would not “unduly burden religious persons and institutions in the pursuit of their public, community, or

470. See generally Brief of Amici Curiae Anti-Defamation League in Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1004712 [hereinafter ADL Brief *Obergefell*] (including as additional *amici* the American Jewish Committee; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Hadassah: The Women’s Zionist Organization of America; Jewish Social Policy Action Network; Keshet; The National Council of Jewish Women; Nehirim; Reconstructionist Rabbinical College and Jewish Reconstructionist Communities; Society for Humanistic Judaism; T’ruah: The Rabbinic Call for Human Rights; Women of Reform Judaism; and Women’s League for Conservative Judaism).

471. See generally AJCommittee Brief *Hollingsworth*, *supra* note 447.

472. ADL Brief *Obergefell*, *supra* note 470, at 28.

473. *Id.* at 28–29.

474. *Id.* at 29.

475. *Id.* (citing *Bell v. Maryland*, 378 U.S. 226, 314–15 (1964) (Goldberg, J., concurring)).

476. See generally Brief for Amici Curiae President of the House of Deputies of the Episcopal Church & the Episcopal Bishops of Kentucky, Michigan, Ohio & Tennessee et al. in Support of Petitioners at 28, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1057623.

commercial activities. Religious actors become subject to public accommodation laws and other neutral government regulation when they engage in the public sphere.”⁴⁷⁷ Thus, the brief noted that the “tradition of respect for religious autonomy has, indeed, permitted various religions to define religious marriage in ways that would be unenforceable under civil law—declining to sanctify or even recognize, for example, marriages between persons of different faiths and races or successive marriage following divorce.”⁴⁷⁸

However, when it came to public accommodation cases, the brief stated that granting a constitutional right to same-sex marriage has “more to do with existing civil rights laws barring discrimination based on sexual orientation, where such laws exist, than with any conflicts likely to arise based on marital status.”⁴⁷⁹ In expressing how such public accommodation cases ought to be decided, the brief simply pointed to “existing law.”⁴⁸⁰ In describing that existing law, the brief implicitly differentiated between the limited protection afforded commercial institutions and the robust protections afforded religious institutions. To make this point through the existing case law—and thereby express its approval for the distinction between religious institutions and for-profit corporations—it contrasted a 2013 public accommodations case where a photographer was found liable for refusing to provide her service at a same-sex wedding with *Hosanna-Tabor*, which affirmed the ministerial exception so as to “ensure[] that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”⁴⁸¹

Given these indications in the initial amicus filings before the Court in the same-sex marriage cases, the dissensus among Jewish institutions—between traditionalists and progressives—in the first public accommodations case before the Court, *Masterpiece Cakeshop*, was wholly predictable. In *Masterpiece Cakeshop*, the Court addressed the religious liberty claim of Colorado baker Jack Phillips, who refused to bake a cake for a same-sex wedding because doing so violated his religious conscience.⁴⁸² He refused even though state public accommodations law prohibited businesses from

477. *Id.* at 28.

478. *Id.* at 29.

479. *Id.* at 33.

480. *Id.*

481. *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194–95 (2012)).

482. 138 S. Ct. 1719, 1723–24 (2018).

discriminating against customers on the basis of sexual orientation.⁴⁸³ Moreover, because Colorado had not enacted a state RFRA, Phillips’s religious liberty claims hinged on the Free Exercise Clause.⁴⁸⁴ Given this background, the case brought to the fore the clash between LGBT and religious rights, an issue that in many ways stood at the very center of the culture wars.⁴⁸⁵ And given the stakes, numerous Jewish institutions filed amicus briefs to provide their own views on how the clash should be resolved.

Accordingly, amicus filings by Jewish institutions in *Masterpiece Cakeshop* largely replicated the pre-existing dissensus manifested in *Hobby Lobby* and the prior same-sex marriage cases before the Court. On the one hand, numerous Jewish organizations encouraged the Court to reject Phillips’s religious liberty claim.⁴⁸⁶ Such a legal argument was far from novel; given that *Smith* held the Free Exercise Clause provided no protection from laws, even if the laws incidentally burden religion, so long as those laws were neutral and generally applicable,⁴⁸⁷ Phillips’s religious liberty claim faced a steep uphill battle. Indeed, a brief joined by, among others, the ADL, Bend the Arc, and the National Council of Jewish Women, pressed this point as follows:

[P]etitioners ask this Court to grant them . . . an impermissible license to discriminate. They claim entitlement to a constitutionally mandated exemption from a neutral, generally applicable law intended to protect minority and marginalized groups, so that they may legally refuse service to and exclude customers who do not conform to their religious views. The Free Exercise Clause grants no such right.⁴⁸⁸

In light of the somewhat straightforward argument supporting the denial of Phillips’s religious liberty claim, numerous Jewish groups seized the opportunity to file briefs geared towards changing the narrative of the case. For instance, a number of Reform and Reconstructionist Jewish organizations—including the CCAR—joined other religious groups in filing a brief that challenged the prevailing characterization of the case as

483. *Id.* at 1723.

484. *See generally id.*

485. *See SMITH, supra* note 7, at 302–03 (“The contemporary fight over religious freedom is one battleground—a central one, as it happens—in the larger and essentially religious struggle to define and constitute America.”); Horwitz, *supra* note 12, at 160 (“Same-sex marriage and its consequences have become a central, foregrounded, socially contested issue. The church-state consensus, drawn into the gravitational pull of this contest, has been put up for grabs as a result.”).

486. *See, e.g.,* Americans United Brief *Masterpiece Cakeshop, supra* note 444, at 2–3 (rejecting Phillips’ argument as “a basic misunderstanding of the fundamental protections for religious freedom embodied in the First Amendment”).

487. *See supra* notes 263–70 and accompanying text.

488. Americans United Brief *Masterpiece Cakeshop, supra* note 444, at 2–3.

a clash between “LGBT consumers” and “people of faith.”⁴⁸⁹ Accordingly, the brief sought to leverage the identity of the *amici*—as people of faith who see marriage as having spiritual significance but who are still committed to a vision of the case as implicating prohibited discrimination: “[I]t is precisely [the *amici*’s] understanding of human dignity as both a religious value and a feature of this Court’s equal rights jurisprudence that leads *Amici* to view this dispute first and foremost as a discrimination case, not a religious liberty case.”⁴⁹⁰ Indeed, the brief highlighted efforts of religious organizations to oppose efforts to “enable religious liberty claims to prevail in a way that would permit discrimination against protected classes and other minorities, including but not limited to the LGBT community,” referencing in a footnote the Reform Jewish community’s opposition to claims that for-profit businesses ought to have religious liberty protections.⁴⁹¹ Accordingly, the brief argued that, “contrary to the suggestion of some *amici* that LGBT equality broadly threatens mainstream religion, an emerging consensus among people of divergent faith beliefs [reflects] that enforcing principles of antidiscrimination in the civic arena is compatible with—or at least does not endanger—their religious sensibilities and practices.”⁴⁹²

Importantly, the brief emphasized that, in its view, numerous other spheres of religious belief and conduct would remain off limits to government intervention.⁴⁹³ For example, it took aim at the amicus brief of the Agudath Israel for arguing that if Phillips’s claim were denied, the government “could even force an Orthodox rabbi to preside at a wedding of two men, or of a Jew and a non-Jew.”⁴⁹⁴ Citing *Obergefell*, the brief noted religious organizations would still have “‘proper protection’ with respect to practices consistent with that [religious] understanding.”⁴⁹⁵ Moreover, the “Constitution’s longstanding respect for religious autonomy” would ensure that religious groups would remain free to maintain doctrines—such as “prohibiting interfaith marriage” or “declining to recognize the union of those civilly divorced

489. Brief for Amici Curiae the Central Conference of American Rabbis et al. in Support of Respondents at 2, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5036302, at *2 [hereinafter CCAR Brief *Masterpiece Cakeshop*].

490. *Id.* at 3.

491. *Id.* at 20, 20 n.35 (citation omitted).

492. *Id.* at 19.

493. *See id.* at 22.

494. *Id.* (quoting Brief of Amicus Curiae Agudath Israel of America in Support of Petitioners at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004519, at *3 [hereinafter Agudath Israel Brief *Masterpiece Cakeshop*]).

495. *Id.* at 23 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)).

and remarried”—as “religions and persons of faith like Petitioners remain free to define *religious* marriage as limited to the union of one man and one woman and to withhold spiritual blessing from any marriages, or bar those entering into them from being congregants at all.”⁴⁹⁶ In supporting this claim, the brief referenced the fact that Colorado’s own antidiscrimination laws excluded houses of worship or any place “principally used for religious purposes” from the definition of public accommodations—although it did not make clear what the contours of the constitutional protection of such houses of worship might be.⁴⁹⁷

Other progressive Jewish groups also used their briefs to attack some of the case’s underlying narratives. For example, T’ruah, The Rabbinic Call for Human Rights, joined a brief of fifteen faith and civil rights organizations that highlighted the ways in which finding for Phillips would undermine the rights of religious minorities, arguing that the case was not simply about LGBT versus religious rights.⁴⁹⁸ And Hadassah, The Women’s Zionist Organization of America, joined—alongside numerous other groups—a brief filed by the National Women’s Law Center, which focused on the historical importance of public accommodations laws to women.⁴⁹⁹

All told, given that the case was argued under the Free Exercise Clause—as no RFRA applied—briefs arguing against Phillips’s claims did not focus on the content or quality of the religious liberty at stake. Thus, nearly all such briefs—in stark contrast to much of the briefing in *Hobby Lobby* and *Zubik*—avoided questions related to the substantiality or attenuated nature of the burdens on religious exercise.⁵⁰⁰ That being said, briefs from progressive Jewish organizations contested Phillips’s religious liberty claim much in the same way they had in the contraception cases.⁵⁰¹ This was an alignment

496. *Id.* at 23–24.

497. *Id.* at 24 (quoting COLO. REV. STAT. § 24-34-601(1) (2018)).

498. See Brief of Amici Curiae 15 Faith and Religious Civil Rights Organizations in Support of Respondents at 7–8, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5036298, at *7–8 (“Public accommodation laws are essential to protecting against religiously motivated discrimination. Any exemption from these laws, especially one as far-reaching as the one requested by petitioners, risks causing serious harm to the religious minorities who rely on these laws to safeguard their right to equal protection under the law.”).

499. See Brief of the National Women’s Law Center & Other Groups as Amici Curiae in Support of Respondents at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 6988027, at *3 (“*Amici* focus on women and the importance of enforcing public accommodations laws to ensure the full participation of women in the marketplace. If the Court creates an exemption from the public accommodations law to permit the Company to refuse service to a gay couple on First Amendment grounds, the implications of such a precedent for undermining the protections of these laws for women are far-reaching.”).

500. *But see* CCAR Brief *Masterpiece Cakeshop*, *supra* note 489, at 3 (making oblique reference to the lack of a substantial burden at stake and to the attenuated nature of the burden on the claimant’s religious exercise).

501. See *generally*, e.g., Horwitz, *supra* note 12.

that had become increasingly familiar in this second phase of religious liberty dissensus among Jewish institutions.

In keeping with this alignment, numerous traditionalist Jewish institutions filed amicus briefs supporting Phillips. COLPA filed a brief arguing two points. First, it emphasized the significance of Jewish law's prohibition against participating in sinful conduct: "Jewish Law reproaches not only one's own violations but, based on a Biblical passage and extensive rabbinic interpretation over centuries, also deters active participation in another person's conduct that violates religious prohibitions."⁵⁰² Second, the brief argued that imposing liability on Phillips violated *Smith*'s more narrow interpretation of the Free Exercise Clause because it constituted a "covert suppression of particular religious beliefs."⁵⁰³ The reason: The only possible justification for imposing Colorado's public accommodations law against Phillips "was to compel Phillips and others who have religious objections to same-sex marriages to violate their religious convictions and participate in the ceremony if another same-sex couple ever requests meaningful participation in a same-sex wedding."⁵⁰⁴

Agudath Israel took a similar approach in its brief, although its rhetoric was far more direct. Beginning with an explanation that "Jewish law . . . prohibits aiding and abetting forbidden practices," the brief went on to explain that "Jewish law unequivocally prohibits and condemns homosexual practices."⁵⁰⁵ Further, it stated that "Jewish law does not limit itself to religious practices as that term is generally understood, but also governs every aspect of day-to-day life[,] includ[ing] tort law, contract law, other aspects of business law, and family law."⁵⁰⁶ Therefore, based on this combination of theological commitments, the brief—invoking *Braunfeld v. Brown*⁵⁰⁷—summarized its argument as follows: "Our argument was summarized by Justice William J. Brennan, Jr., 56 years ago: 'The issue in this case is whether a State may put an individual to a choice between his business and his religion. Such a law prohibits the free exercise of

502. Brief Amicus Curiae of the National Jewish Commission on Law & Public Affairs ("COLPA") Filed on Behalf of Orthodox Jewish Organizations in Support of Petitioners at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005661, at *4 [hereinafter COLPA Brief *Masterpiece Cakeshop*].

503. *Id.* at 5 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

504. *Id.* at 9.

505. Agudath Israel Brief *Masterpiece Cakeshop*, *supra* note 494, at 3 (citation omitted).

506. *Id.* at 2.

507. 366 U.S. 599 (1961) (Brennan, J., concurring and dissenting).

religion.”⁵⁰⁸ Striking a defiant tone, the brief continued by describing the case in culture war terminology:

The contemporary *zeitgeist*, however, had made a 180 about-face. Among the intellectual and philosophical opinion-shapers of America, a consensus formed that homosexual activities are just another type of sex, and that same-sex “marriage” is just a marriage. While U.S. constitutional law may have this flexibility, Jewish law, based upon the divinely revealed Written Law and Oral Law, [is] immutable. Thus, under Jewish law, homosexual activities remain an abomination, and a marriage of two men remains inconceivable.⁵⁰⁹

Indeed, in many ways the Agudath Israel’s brief—as well as COLPA’s—harkened back to positions the organizations had staked out in *Bob Jones*.⁵¹⁰ Both *Masterpiece Cakeshop* and *Bob Jones* shared structural similarities; both represented complicity claims where the religious claimant argued that the law served to pressure them into participating or supporting conduct viewed by the relevant religious community as sinful.⁵¹¹ For both COLPA and the Agudath Israel, such cases highlighted how religious liberty protections—even in the complicity cases of the culture wars—were necessary to protect religious groups that maintained theologies unpopular in the prevailing *zeitgeist*.

And yet, notwithstanding these arguments and rhetoric, neither COLPA’s brief nor the Agudath Israel’s brief made clear whether Jewish law, in fact, prohibited the baking of a cake for a same-sex wedding. COLPA described the theological dilemma as follows: “If an Orthodox Jewish owner of a limousine service were asked, for example, to provide group transportation to a religious ceremony in which participation is prohibited by Torah law, *he could find rabbinic support for claiming that he, like Jack Phillips, would be committing a personal sin by complying.*”⁵¹² Similarly, Agudath Israel stated it is

quite likely that an Orthodox Jewish baker would refuse to design and bake a cake for an event celebrating a marriage of two men, and it is likely that an Orthodox Jewish caterer would refuse to prepare food for it, and that Orthodox Jewish photographers, musicians, printers, florists, etc. would refuse to provide their services.⁵¹³

These equivocations—reflecting the multiplicity of legal views under Jewish law—captured the continued approach of such organizations to support

508. Agudath Israel Brief *Masterpiece Cakeshop*, *supra* note 494, at 4 (quoting *Braunfeld*, 366 U.S. at 611).

509. *Id.* at 6.

510. 461 U.S. 574 (1983).

511. Compare *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018), with *Bob Jones*, 461 U.S. at 602 n.28, 602–03.

512. COLPA Brief *Masterpiece Cakeshop*, *supra* note 502, at 8 (emphasis added).

513. Agudath Israel Brief *Masterpiece Cakeshop*, *supra* note 494, at 3 (emphasis added).

religious liberty claims, even where those claims did not necessarily implicate the interest of Jews directly.

But in this contemporary alignment—with progressive Jewish institutions continuing to challenge the expansion of religious liberty in culture war cases and traditional Jewish institutions continuing to support religious liberty cases that do not directly implicate their interests—one brief stands out as noteworthy. A brief written by law professors Douglas Laycock and Thomas Berg—and signed by numerous religious organizations, including the OU and the RCA—emphasized the need to protect both members of the LGBT community and members of religious communities.⁵¹⁴ Indeed, the brief describes the interest of the *amici* as “religious organizations who accept that same-sex civil marriage is the law of the land” and then explains that “[m]ost of these amici are involved in ongoing efforts, mostly unsuccessful so far, to negotiate legislation prohibiting sexual-orientation discrimination while providing religious exemptions.”⁵¹⁵

In stark contrast to the culture war language of the Agudath Israel, the brief signed by the OU and RCA framed the issue in *Masterpiece Cakeshop* as follows:

In its decision protecting the right of same-sex couples to marry, this Court affirmed that “the Constitution promises liberty to all within its reach,” allowing “persons, within a lawful realm, to define and express their identity.”

Now this Court must hold that religious dissenters from same-sex marriage have the same liberty to live consistently with their identity.⁵¹⁶

In turn, the brief focused on the inherent religious nature of participation in a wedding, arguing that the case pit a strong religious liberty interest against the government’s weaker interest.⁵¹⁷ In a particularly noteworthy section, the brief—foreshadowing the Court’s eventual decision in *Masterpiece Cakeshop*—focused on how the Colorado Civil Rights Commission (CCRC) had failed to neutrally and uniformly apply the provisions of the state public accommodations law, denying protection to Phillips but granting protection

514. See generally Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662 [Christian Legal Society Brief *Masterpiece Cakeshop*].

515. *Id.* at 1.

516. *Id.* at 2 (citation omitted) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015)).

517. See *id.* at 13–16.

to Colorado bakers in a parallel case when they refused to bake a cake denouncing same-sex relationships.⁵¹⁸

The Court, in holding in favor of Phillips, adopted this argument, concluding that “the [CCRC’s] consideration of this case was inconsistent with the State’s obligation of religious neutrality.”⁵¹⁹ In reaching this conclusion, the Court noted that one of the commissioners of the CCRC expressed during one of the hearings how “[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust” and then described claims like Phillips’s as “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”⁵²⁰ Comparing Phillips’s claims to the Holocaust made the Supreme Court dubious as to whether the CCRC’s decision could have been reached fairly and neutrally.⁵²¹

In addition, incorporating much of the brief signed by the OU and RCA, the Court was also disturbed by what it saw as the inconsistent treatment of Phillips’s claim. The CCRC found in favor of the couple that filed suit against Phillips but rejected the similar claims of another consumer who filed suit against three bakers for refusing to bake a custom cake with decorations that demeaned same-sex marriage by, among other things, incorporating biblical verses stating that such marriages were sinful.⁵²² Colorado law, however, prohibits businesses from discriminating on the basis of religion *and* sexual orientation, leading the Court to conclude that these divergent outcomes demonstrated that Colorado had failed to live up to the First Amendment’s demands of religious neutrality when adjudicating Phillips’ claims.⁵²³

That the Court adopted much of the logic of the amicus brief signed by the OU and RCA is not itself remarkable for our purposes. But the choice of the OU and RCA to forego signing both COLPA’s and the Agudath Israel’s briefs is noteworthy when compared to the brief that all four parties joined together in *Bob Jones*.⁵²⁴ As noted above, in *Bob Jones*, all four parties filed a brief that highlighted the role of the First Amendment in “protect[ing] minorities from the tyranny of the majority,” emphatically arguing that it would undermine the core purposes of the Free Exercise

518. *See id.* at 18–21.

519. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

520. *Id.* at 1729.

521. *See id.* at 1729–30.

522. *See id.* at 1730–31.

523. *See id.* at 1731.

524. *See generally* COLPA Brief *Bob Jones*, *supra* note 223 (including Agudath Israel of America; National Council of Young Israel; Rabbinical Council of America; Torah Umesorah; National Society of Hebrew Day Schools; and Union of Orthodox Jewish Congregations of America).

Clause if government could withhold benefits “from the minority . . . merely because the minority, in pursuit of its religious rights, refuses to conform to the social practices of the majority.”⁵²⁵

But in *Masterpiece Cakeshop*, this Orthodox Jewish consensus over how to approach complicity claims split. On the one hand, organizations like the Agudath Israel and COLPA continued using the argumentative and rhetorical structure of *Bob Jones*, arguing that the Free Exercise Clause demanded that majoritarian norms should not be deployed against minority religious groups with unpopular theologies and practices.⁵²⁶ By contrast, the OU and RCA adopted a new approach, intervening in the culture wars by encouraging the Court to find a middle path—one that did not fit easily with either progressives or traditionalists. Thus, both organizations chose a brief that struck a far more conciliatory tone, pressing the Court to resolve the case with a narrower argument that focused on the constitutional requirement of a neutral adjudicative process.⁵²⁷

To be sure, the choice of briefs and arguments is often a strategic decision that takes a variety of factors into account, including changes in doctrine as well as likelihood of success. Yet this choice is noteworthy given that both organizations had, in the not so distant past, issued press releases that resolved, in response to debates over same-sex marriage, the necessity “to forcefully resist all attempts . . . to legitimize that which our Torah, our history and our traditions have deemed illegitimate”⁵²⁸ and “call[ed] upon Jews and citizens everywhere to oppose any effort to bestow the sanctity of marriage upon same sex couples.”⁵²⁹ The public accommodations claims in *Masterpiece Cakeshop* triggered a very different response. Thus, in evaluating the impact of the culture wars on Jewish institutional consensus around religious liberty, the growing split even among traditionalist responses

525. *Id.* at 10.

526. See Agudath Israel Brief *Masterpiece Cakeshop*, *supra* note 494, at 6–7, 13; COLPA Brief *Masterpiece Cakeshop*, *supra* note 502, at 4–5.

527. See Christian Legal Society Brief *Masterpiece Cakeshop*, *supra* note 514, at 2–5.

528. *OU Convention Resolution Text*, ORTHODOX UNION ADVOC. CTR. (Oct. 12, 2010), <https://advocacy.ou.org/ou-convention-resolution-text/> [<http://perma.cc/K4SQ-K6RR>]. The choice of the OU was also somewhat surprising given that it had joined an amicus brief in *Hollingsworth* that articulated the values behind traditional, as opposed to same-sex, marriage. See Brief of Amici Curiae National Ass’n of Evangelicals et al. in Support of Petitioners at 6–11, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 390990, at *6–11.

529. *Same-Sex Marriage*, RABBINICAL COUNCIL AM. (Mar. 30, 2004), <http://www.rabbis.org/news/article.cfm?id=100556> [<http://perma.cc/UG9W-XPS8>].

to clashes between LGBT and religious rights stands out. Indeed, on this count, it is not simply that the culture wars have triggered increasing dissensus between traditionalist and progressive Jewish institutions, but they have also introduced dissensus among the very organizations that retained consensus even in the face of *Bob Jones*.

V. CONCLUSION

We began our discussion with questions about the place of the American Jewish community in the culture wars over religious liberty. Both in popular and academic press, scholars and authors expressed concern that the historical place of the American Jewish community would soon be lost. In the popular press, this was expressed in concerns over demographic shifts among denominations, where a growing Orthodoxy would pull the traditional place of American Jews under the broader umbrella of conservative Christians. And in the academic press, scholars wondered whether classifying Jews—or maybe just “devout Jews”⁵³⁰—as simply a footnote in a broader Christian story distorted the unique place of Jews as between two worlds: Neither Christian nor pagan, neither fully traditionalist, nor fully progressive.

But through an exploration of Jewish institutional amicus briefs before the Supreme Court in religious liberty cases, we identified a somewhat different story. Instead of the American Jewish voice being dragged into the traditionalist camp—or, better yet, the Christian city—the story moved, even if somewhat unevenly, in the opposite direction. Thus, historically, the consensus position of the American Jewish community aligned with views regarding religious liberty most closely associated with contemporary traditionalists. They were full-throated supporters of the religious accommodation project, unequivocally embracing the need for the law to protect religious conduct from substantial burdens on religious exercise.

However, over time, consensus around this view waned. In the early years of dissensus, Jewish institutions began to splinter over the principles limiting religious liberty. These limiting principles, at least initially, lived on the outskirts of the doctrine; Jewish institutions remained deeply protective of the substantial-burden framework but divided over when concerns over disestablishment or antidiscrimination norms—concerns that could constitute compelling government interests—ought to supersede religious liberty. In this way, dissensus increased, but it rarely led Jewish institutions to question whether claimants had a *bona fide* religious liberty right; those advocating for limitations simply thought that, at times, other considerations ought to win out.

530. SMITH, *supra* note 7, at 13.

The culture wars, by contrast, have generated a far deeper and wider dissensus among Jewish institutions, undermining the fundamental consensus both between progressive and traditionalist Jewish institutions as well as between traditionalist groups themselves. In so doing, the culture wars—with their increasingly complex and challenging set of dilemmas—have led some institutions to adopt new views regarding who is eligible to assert a religious liberty claim and under what circumstances perceived burdens on religious exercise are sufficiently substantial to qualify for legal protection. Moreover, dissensus has emerged among traditionalist institutions as they reconsider whether old tactics, views, and rhetoric continue to have purchase in the age of the culture wars. As a result, the span of views on religious liberty questions has widened as the poles between Jewish institutional traditionalists and progressives—and between traditionalists and traditionalists—have moved further apart.

But precisely because the culture wars have undermined much of the long-standing consensus, the possibility that Jewish institutions will develop a religious liberty agenda that lives between increasingly prevalent dichotomies—traditionalist and progressive, Christian and pagan—has grown. Much is now uncertain as to how Jewish institutions will navigate new dilemmas that will surely come with successive waves of the culture wars. Indeed, instead of concern over whether the culture wars are leading to the co-opting of the uniquely American Jewish voice on questions of religious liberty, the preceding story encourages us that the exact opposite is true. American Jewish communities are changing old views and exploring new doctrinal alternatives. Where this will lead is far from certain. If there is any lesson from the past, it is that the future of the Jews and the culture wars is yet to be written.

