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## Taking Conflicting Rights Seriously

Netta Barak-Corren

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## Articles

### TAKING CONFLICTING RIGHTS SERIOUSLY

NETTA BARAK-CORREN\*

#### ABSTRACT

Conflicts between religious liberty and gender and LGBTQ equality are polarizing the American society, obsessing constitutional law scholars, and earning a slot of their own on the Supreme Court docket.

Despite the broad social significance of religion–equality conflicts, their legal analysis has been largely captured by a handful of high-profile cases and has ignored the varied ways in which conflicts are resolved on the ground, often outside the courtroom. As a result, lawmakers, scholars, and even courts fail to fully understand conflicts of rights and fail to consider all available tools to mitigate these conflicts.

This Article advances a methodological and normative approach that improves law’s ability to take conflicts between religion and equality seriously. First, I expose the misperceptions caused by the excessive focus on court cases and establish the need for empirical research of conflicts of rights. Second, I demonstrate the contribution of the suggested approach qualitatively, using evidence from in-depth interviews with religious leaders and reports of conflicts from a range of contexts. The findings shed light on the existence of systematic variation in the religious regulation of sexual nonconformity. In contrast to common assumptions, conservative religious leaders do not rush to secure a license to discriminate, nor do they perceive religion and equality as necessarily incommensurable. In-

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\* Assistant Professor of Law, Hebrew University of Jerusalem. For helpful comments and discussions I thank Will Baude, Kate Bass, Yochai Benkler, Lisa Bernstein, Elena Chachko, Robert Clark, Yuval Feldman, Larry Friedman, Meirav Furth-Matzkin, Rick Garnett, Talia Gillis, Joanna Grossman, Dave Hoffman, Paul Horwitz, William Hubbard, Aziz Huq, Lisa Kelly, Amalia Kessler, Greg Klass, Adi Leibovich, Francisco Martins, Jonathan Mazur, Martha Minow, Richard McAdams, Rogelio Pérez-Perdomo, Susan Silbey, Daniel Statman, Anna Su, Cass Sunstein, Oren Tamir, Crystal Yang, and audiences at Chicago Law School, Harvard Law School, the Hebrew University of Jerusalem, Tel Aviv University, Toronto Law School, the 2017 Annual Roundtable of Law and Religion, and the 2018 Stanford International Junior Faculty Forum. Kate Bass, Roni Gal On, and Amit Haim provided superb research assistance.

stead, they attempt to find accommodations on the ground, drawing on distinctions of sphere and role in an attempt to square traditional and liberal norms, often reasoning their actions in terms of compassion, forgiveness, evangelism, and humility.

These findings shed new light on the evidentiary value of selective enforcement and religious consistency. I consider three models for normatively analyzing these questions, discuss the implications of the findings for the present and future of religion–equality conflicts—will they escalate or evaporate?—and offer several tools for political negotiators aiming to resolve rights conflicts outside the courtroom.

2020]	TAKING CONFLICTING RIGHTS SERIOUSLY	261
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## CONTENTS

INTRODUCTION .....		262
I. UNDERSTANDING THE CONFLICT BETWEEN RELIGION AND EQUALITY .....		267
A. <i>The Culture War Paradigm</i> .....		267
B. <i>From a War Between Cultures to a War Within Culture</i> .....		277
C. <i>The War Within Culture: Between Opposition and Tolerance</i> .....		279
II. OVERVIEW OF METHODOLOGY .....		281
A. <i>Studying the Conflict from Cases: The Limitations</i> .....		282
B. <i>Studying the Conflict from Within</i> .....		284
III. GOVERNING THE CONFLICT: THE SOCIAL IMPACT REGULATION OF EQUALITY CHALLENGES .....		288
A. <i>The War, as Experienced from Within Religion</i> .....		289
B. <i>Social Impact Regulation</i> .....		291
1. <i>Sphere as a Dynamic Tool: Privatizing to Avoid Conflict</i> .....		291
2. <i>Role: Heightened Positions Come with Less Tolerance</i> .....		295
3. <i>Social Impact Regulation in Context</i> .....		299
IV. EXPLANATIONS AND IMPLICATIONS .....		304
A. <i>What Explains Social Impact Regulation?</i> .....		305
1. <i>Social Impact Regulation as a Compromise</i> .....		305
2. <i>Social Impact Regulation as a Distinction Between Wrongs</i> .....		307
3. <i>Social Impact Regulation as a Bridge to Acceptance</i> .....		309
B. <i>How Social Impact Regulation Informs Law and Politics</i> .....		311
1. <i>The Adjudication of Religious Claims</i> .....		311
2. <i>The Negotiation of Solutions and Accommodations</i> .....		318
CONCLUSION .....		319

## INTRODUCTION

CONSIDER a puzzle. In Boston, Catholic Charities withdrew from providing adoption services following an objection to a Massachusetts requirement to place children with families regardless of sexual orientation.<sup>1</sup> The Catholic Church (the Church) refused to comply with this law despite having been placing children with same-sex families for nearly twenty years beforehand.<sup>2</sup>

Several years earlier, the City of San Francisco government required all contracting partners to provide health insurance to same-sex partners.<sup>3</sup> Though the Church initially refused, ultimately the parties negotiated a solution that allowed each employee to designate any member of the household—effectively including same-sex partners—to receive health benefits.<sup>4</sup>

What explains these contrasting stories of opposition of and tolerance to LGBTQ equality? Not religious doctrine, as both cases involve branches of the Catholic Church, that opposed (and still opposes) the recognition of same-sex marriage. Yet in the San Francisco case, the Church was able to reconcile its position with the demand for LGBTQ equality and in the Boston case it failed to do so. The puzzle is also not explained by the background laws, as both cities prohibited sexual-orientation discrimination with no religious exemptions. Neither is the puzzle solved by the initial status quo. In Boston, the Church had been placing children with LGBTQ parents on its own initiative, yet eventually withdrew from adoptions altogether. In San Francisco, the Church did not provide and initially refused to provide health benefits to same-sex partners, yet ultimately provided them.<sup>5</sup> If it was not religious doctrine, legal doctrine, or the initial positions that led to these contrasting outcomes, what can explain the highly antithetical results of these two cases? More generally, what can we learn from such cases about the state of the conflict between religion and equality, its dynamics, and its present and future points of compromise and resolution?

This question could not be more pressing. In recent decades, fundamental disagreements over the definition of American values and basic social structures have formed what some call a culture war. In this war, conservatives and progressives engage in a multifaceted conflict over a range of issues, including abortion, gender, sexuality, education, and race, among others.<sup>6</sup> One of the central fault lines in this conflict has been the

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1. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 843 (2007). For a further discussion of the dispute between the Catholic Charities and the City of Boston, see Section I.C, *infra*.

2. Minow, *supra* note 1, at 832.

3. *Id.* at 829. For a further discussion of the dispute between the City of San Francisco government and the Church, see Section I.C, *infra*.

4. Minow, *supra* note 1, at 830.

5. *Id.*

6. See *infra* Section I.A.

tension between religious liberty and gender and LGBTQ equality, which has developed inextricably with legal and legislative action in the last fifty years.<sup>7</sup> High profile cases such as *Burwell v. Hobby Lobby Stores, Inc.*,<sup>8</sup> and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>9</sup> or even *Obergefell v. Hodges*<sup>10</sup> have appeared to epitomize the culture war and were analyzed both in legal and broader public discourse with growing concerns from the prospect of further escalation and the seeming inability to bridge the gap between religious liberty and gender equality. On the religious liberty side, Reverend Donald Armstrong alerted that the legalization of same-sex marriage would ignite another civil war:

The church has always stood apart from culture and state to speak truth to both. . . . But will Christians be granted the protections to continue to speak and act according to their faith, or will Christian teaching become hate speech[?] . . . Will the cross become the next Confederate flag?<sup>11</sup>

Legal scholars have also embraced assumptions from the culture war paradigm. Robert Cochran and Michael Helfand describe the conflict between law and religion as a “culture war[,]” in which “[t]here is no common morality to which the competing sides may look; the sides have incommensurable values.”<sup>12</sup> Paul Horwitz decries that the debate “is so centered on a stark opposition between liberty and equality that any *tertium quid* is forgotten or ignored.”<sup>13</sup> Douglas NeJaime and Reva Siegel, strong advocates of gender and LGBTQ equality, describe a cross-denominational Catholic and Evangelical coalition that works to promote traditional values through lawmaking and litigation, and they alert that faith claims will escalate in number and significance.<sup>14</sup>

In its 2020 term, the Supreme Court will consider religion–equality conflicts yet again in *Fulton v. City of Philadelphia*,<sup>15</sup> involving the argument

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7. See *infra* Section I.A.

8. 573 U.S. 682 (2014).

9. 138 S. Ct. 1719 (2018).

10. 135 S. Ct. 2584 (2015) (despite not involving any direct religious liberty claim).

11. John Stonestreet, *Christian Leaders Respond to Obergefell v. Hodges: A Colson Center Symposium*, STREAM (June 26, 2015), <https://stream.org/christian-leaders-respond-to-supreme-court-decision-same-sex-marriage/> [https://perma.cc/L8VQ-GYC7].

12. Robert F. Cochran, Jr. & Michael A. Helfand, *Symposium: The Competing Claims of Law and Religion: Who Should Influence Whom*, 39 PEPP. L. REV. 1051, 1056 (2013).

13. Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301, 1303 (2016) [hereinafter Horwitz, *Against Martyrdom*].

14. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2520 (2015) [hereinafter NeJaime & Siegel, *Complicity-Based Conscience*].

15. 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

that religious adoption agencies should be exempted from rules compelling equal treatment of adoptive same-sex couples.<sup>16</sup> The Court's frequent and repeated consideration of religion–equality conflicts is a testament to the intensity of these conflicts and to absence of legal frameworks that successfully advance their resolution. The “culture war” paradigm is part of the problem. On the one hand, it captures the intensity of the political and legal battles waged by radical ideologists who represent opposite cultural worldviews. But the paradigm also overlooks a large part of the religion–equality tension, namely the conflict that occurs within conservative religious groups on “one side” of the culture wars, as demonstrated in the puzzle of the Boston and San Francisco cases discussed *supra*. Most of these conflicts are never litigated and entirely evade legal analysis.

This Article argues for an expanded framework that acknowledges and interrogates the conflict that occurs within religion in response to equality challenges. Developing this framework is important because these unexamined, often ignored conflicts bear on the assessments of scholars regarding the religion–equality conflict, compel courts to address new questions of law, and expose overlooked points of compromise and resolution that could answer the urging need for tools that promote the resolution of conflicts between religion and equality. In other words: unless we investigate these conflicts, we will not be taking conflicts between religion and equality seriously.

My argument is accordingly threefold. After discussing the culture war paradigm and the pertinent legal background, the remainder of Part I addresses the theoretical flaws of the culture war paradigm, primarily its lack of sufficient attention to the variation in the religious response to equality challenges and its insufficient explanatory power. That is, the culture war paradigm does not explain instances of religious compliance and compromise. And there is a lot to explain, because in reality, conflict is absent from many potentially conflictual scenes. I exemplify this argument by closely analyzing the San Francisco and Boston cases.

Part II elucidates the role of methodology in constructing the culture war paradigm and in moving forward to better models of the conflict. First, Section II.A traces the theoretical problems of the culture war paradigm to the methods that constitutional scholars use to produce an account of the conflict—the focus on high profile cases of religious objection. Cases are essential sources of knowledge for studying legal doctrine and court behavior. Nevertheless, litigated cases are a highly selective pool of disputes, particularly in the context of equality claims.<sup>17</sup> Less than 1% of all discrimination grievances evolve into legal complaints and

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16. *Id.* at 146–47.

17. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 *LAW & SOC'Y REV.* 1133 (1990).

only 6% of court filings ever reach trial.<sup>18</sup> Additional barriers within religious communities prevent conflicts from reaching the courts. Therefore, focusing on high-profile cases of religious objection is likely to skew the analysis of religion–equality conflicts, highlighting more intractable conflicts and steering attention away from more commonplace disputes.

Because of these flaws, the culture war paradigm obscures the reality of the war within religion, in which religious decision-makers respond to equality challenges not only with fire and fiery, but also with tolerance and compromise. The critical question that follows is, *what factors* determine whether the religious response to equality challenges would be oppositional or tolerant?

Uncovering these factors will improve our understanding of the conflict and its sources. It can also guide the development of means to steer away from impasse more effectively. To get there, Section II.B argues, legal scholarship cannot continue to focus on the selective pool of cases that feed the courts. The shift to the war within religion requires more intense usage of empirical studies, primarily sociological and psychological studies, that can uncover the dynamics within commonplace communities and institutions.

Part III then turns to examine the response of religious institutions to perceived sexual nonconformity, drawing on a qualitative study that conducted a series of in-depth interviews with Catholic leaders and on insights from a range of conflicts that occurred in additional contexts and denominations, including Evangelical Baptists, Lutherans, adherents of the Alliance Church, and Orthodox Jews. Based on the findings, Section III.A argues that in reality, conservative religious groups debate their views of and approaches towards issues such as same-sex marriage, unmarried pregnancy, controversial health benefits, and so on. Even more frequently, religious decision-makers find themselves carefully balancing traditional religious norms which they are committed to uphold against other religious values that support equality and inclusion, including compassion, forgiveness, humility, kindness, and love.

Section III.B then demonstrates that the religious response to claims for LGBTQ and gender equality is often more compromising than simply demanding exclusion and exemption. Instead, it is moderated by what I term *social impact regulation*. That is, religious leaders decide whether to exclude or tolerate individuals perceived to defy traditional religious norms, including employees and students who are LGBTQ or unmarried and pregnant, based on the perceived impact of nonconformity. In other words, religious leaders were more likely to seek compromise and permissiveness when they believed that the perceived nonconformity was not

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18. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 13, 41–42, 47–49 (1st ed. 2017).



likely to influence the behavior of other community members or weaken the religious norm.

Notably, when confronting an equality challenge, religious decision makers in the study did not relish the opportunity to strengthen religious authority at all costs, as culture war analyses suggest. Rather, they experienced the conflict as “really, really tough” and even a “nightmare.”<sup>19</sup> In many cases, religious leaders took affirmative actions to *prevent* exclusion and avoid conflict, by ignoring and tolerating private violations of religious norms. For example, leaders often attempted to “privatize” sexual nonconformity rather than expose and condemn it, directing nonconformists to keep their nonconformity discreet from the community in order to refrain from punishing and excluding them.

Social impact regulation indicates that organized religion’s approach to gender and LGBTQ equality is not monolithic, nor is it necessarily oppositional and escalating as the culture war paradigm posits. In actuality, religious leaders have substantial latitude in applying religious norms to specific cases, and they use it to govern the challenges posed by equality norms in nuanced ways. Concerns about social impact moderate the emergence and nature of the religious objection, thereby shaping conflicts of rights and their trajectory.<sup>20</sup> Using these insights, Section III.C illuminates a wide range of conflicts in relation to education, employment, health benefits, adoption services, and social services, occurring in a range of religions and across various American jurisdictions.

Part IV charts the key implications of the findings. Section IV.A theorizes the findings, offering three perspectives on the reasons that lead organized religion to engage in social impact regulation. The first perspective analyzes social impact regulation as a compromise between preserving religious rules and preserving community members. The second perspective highlights the distinction between intrinsic wrongs and prohibited wrongs which is implicit in social impact regulation. And the third perspective places the phenomenon in a broader socio-legal context that suggests that social impact regulation indicates a transition towards greater acceptance of equality claims. Section IV.B calls on courts to address social impact regulation in the adjudication of religion–equality cases, and offers initial thoughts on how to do so. Finally, Section IV.C offers several insights for policymakers negotiating conflicts between religion and equality.

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19. See Interviews with Leader #9 (May 2014); Leader #13 (June 2014); see also *infra* Section III.A.

20. This is not to argue that social impact factors are the *only* factors shaping the religious response to equality challenges or that they explain the entire variation of religion with respect to equality. See, e.g., Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior? An Empirical Examination*, 67 HASTINGS L.J. 957 (2016) [hereinafter Barak-Corren, *Antidiscrimination Law*] (finding that the legal response to religious objection moderates or intensifies the emergence of further religious objection). Mapping the domain of factors—each with potentially different implications—is a topic for multiple studies.

Notably, the existence of social impact regulation should concern both religious liberty and gender equality advocates, due to its two simultaneous effects. On one hand, social impact regulation narrows individual freedom in religious institutions because it confines nonconformist behavior to certain roles and realms. On the other hand, it moderates the enforcement of religious norms and increases tolerance of perceived sexual nonconformity in religious institutions. A phenomenon that simultaneously confers disadvantages and advantages on protected individuals in religious societies merits substantial normative scrutiny. The Article concludes by calling for further research on the war within religion and its implications for the reconciliation of the conflict between religion and equality. I suggest that integrating social impact regulation into legal doctrine offers an alternative path to the stark opposition between liberty and equality that neither courts nor policymakers previously considered. Adopting this approach is what we ought to do to take these conflicts seriously, as they ought to be taken.

## I. UNDERSTANDING THE CONFLICT BETWEEN RELIGION AND EQUALITY

### A. *The Culture War Paradigm*

In an era characterized by increased social, cultural, and religious diversity, conflicts of norms proliferate. In the United States, these differences in norms and beliefs have shaped what some call two separate and opposing battle camps—two cultures at war. In one camp, argued sociologist James Davison Hunter, are the “traditionalist or orthodox,” seeking “continuity with the ordering principles inherited from the past.”<sup>21</sup> In the other camp are the “progressivists,” whose goal is “the further emancipation of the human spirit and the creation of an inclusive and tolerant world.”<sup>22</sup> Hunter’s influential analysis argues that the two camps are engaged in a multifaceted conflict over the definition of American values and the face of society on a wide range of issues, including abortion, gender relations, sexuality, public education, and church-state issues, among others.<sup>23</sup> In a 2016 study, James Davison Hunter and Carl Desportes Bow-

21. JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR?: A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* 14 (2007).

22. *Id.* at 15.

23. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO CONTROL THE FAMILY, ART, EDUCATION, LAW, AND POLITICS IN AMERICA* 42 (1992) (examining controversies regarding sexual orientation, reproduction, speech, education, and religion’s place in public life and arguing that “the divisions of political consequence today are . . . the result of differing worldviews . . . . [The conflict revolves] around our most fundamental and cherished assumptions about how to order our lives—our own lives and our lives together in this society.”); JAMES DAVISON HUNTER & CARL DESPORTES BOWMAN, *INST. FOR ADVANCED STUDIES IN CULTURE, THE VANISHING CENTER OF AMERICAN DEMOCRACY* 41 (2016), <https://s3.amazonaws.com/iascprod/uploads/pdf/2dc83bd6050a75f3fe9a.pdf> [<https://perma.cc/7AG4-BLMG>].

man report that cultural polarization has increased and intensified along economic and racial lines.<sup>24</sup>

Since the 1960s, one of the central fault lines of the culture war has been the conflict between traditional religious and progressive notions of gender and LGBTQ equality. Indeed, Hunter's exemplar dispatches of conflict depict diametric pairs of a conservative priest versus a homosexual activist and a feminist pro-choice activist versus an Orthodox Jewish rabbi who decided to join Catholics and Evangelicals in fighting against abortions.<sup>25</sup> This alliance is not anecdotal, as Hunter emphasized that the culture wars cut across religions, such that traditional Catholics, Protestants and Jews form ideological and political alliances, and the same is true for progressives in these faith traditions.<sup>26</sup> The notion of a nation-wide cultural-religious war was popularized in 1992 by Republican Pat Buchanan, who declared that "[t]here is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America."<sup>27</sup>

Shifting norms, political realignments, various group behaviors, and legal developments have all worked together as the "culture wars" have evolved. Specifically, the normative conflicts Hunter credits with spurring the culture wars and subsequent polarization—surrounding reproductive rights, family, gender, LGBTQ rights, and others—have evolved inextricably with legal battles and legislation. In particular, the tension between religious liberty and antidiscrimination has formed a focal point of litigation and legislation. One of the earliest manifestations of this tension was the attempt by several religious groups to secure exemptions from desegregation mandates.<sup>28</sup> Similar disputes over the application of antidiscrimination law to religious institutions and businesses have since expanded to clashes over pregnancy and reproduction techniques,<sup>29</sup> gay

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24. HUNTER & BOWMAN, *supra* note 23, at 43 (arguing that the battling poles of the American public have expanded in size). Several previous studies argued that the American public is not in fact as polarized as expected under the culture wars argument. See MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY POPE, *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* (2d ed. 2005) (arguing that voting patterns and popular attitudes on hot-button issues show that the American public is not polarized and largely centric); HUNTER & WOLFE, *supra* note 21 (Wolfe argues similarly to Fiorina and colleagues; Hunter responds with the argument that even if most Americans are not polarized, the culture war exists as a matter of narrative and political discourse).

25. HUNTER, *supra* note 23, at 13.

26. HUNTER & WOLFE, *supra* note 21; HUNTER & BOWMAN, *supra* note 23.

27. Patrick Joseph Buchanan, *Culture War Speech: Address to the Republican National Convention*, VOICES OF DEMOCRACY (Aug. 17, 1992), <http://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/> [<https://perma.cc/2X9U-AE9J>].

28. Minow, *supra* note 1, at 792–94; see also *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (finding that private religious schools that enforce racially discriminatory admissions standards are ineligible for tax-exempt status).

29. See, e.g., Evan Bleier, *Teachers Fired from Massachusetts Catholic School for Out-of-Wedlock Pregnancy*, UNITED PRESS INT'L (Dec. 9, 2013, 2:56 PM), <http://>

rights,<sup>30</sup> and access to contraceptives.<sup>31</sup> For example, numerous religious groups use “moral codes” that either arguably or directly prohibit employees and students from having sex outside of marriage, pursuing in vitro fertilization, living a homosexual “lifestyle,” or publicly supporting any of those behaviors.<sup>32</sup> Today, religion–equality conflicts arise in a variety of settings spanning employment, education, and commerce, for-profit and not-for-profit organizations.<sup>33</sup>

The Supreme Court, legislatures, administrative bodies, and lower courts have responded to these tensions with a patchwork and sometimes conflicting system of accommodations and protections. At the national

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[www.upi.com/Odd\\_News/2013/12/09/Teachers-fired-from-Massachusetts-Catholic-school-for-out-of-wedlock-pregnancy/1321386618996/](http://www.upi.com/Odd_News/2013/12/09/Teachers-fired-from-Massachusetts-Catholic-school-for-out-of-wedlock-pregnancy/1321386618996/) [https://perma.cc/CH9D-RE49]; Laura Hibbard, *Cathy Samford, Texas Teacher, Fired for Out-of-Wedlock Pregnancy*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/04/12/cathy-samford-teacher-fired-for-unwed-pregnancy\\_n\\_1420986.html](http://www.huffingtonpost.com/2012/04/12/cathy-samford-teacher-fired-for-unwed-pregnancy_n_1420986.html) [https://perma.cc/HYL5-CS7F] (last updated Apr. 12, 2012).

30. *See, e.g.*, *Woodard v. Jupiter Christian Sch., Inc.*, 913 So. 2d 1188 (Fla. Dist. Ct. App. 2005) (alleging that a gay student was expelled after his teacher confronted him about his sexual orientation); *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757 (W.D. Ky. 2001), *aff'd in part, rev'd in part*, 579 F.3d 722 (6th Cir. 2009) (discussing action brought by a lesbian therapist dismissed from employment in a Southern Baptist home after a picture of her with her girlfriend was exhibited without her knowledge).

31. *See infra* note 46.

32. Susan Candiotti & Chris Welch, *A Litany of ‘Thou Shall Nots:’ Catholic Teachers Challenge Morality Clause*, CNN (May 31, 2014), <https://edition.cnn.com/2014/05/30/living/catholic-teachers-morality/index.html> [https://perma.cc/G6UM-9VCR] (last updated May 31, 2014); *see also* Zack Ford, *Arkansas Catholic Schools Crack Down on LGBT Students*, THINK PROGRESS (Sept. 12, 2016), <https://thinkprogress.org/arkansas-catholic-lgbt-policy-d91d804532e9/> [https://perma.cc/3MAT-WMCA] (reporting on the Catholic Diocese of Arkansas, which coded prohibitions on LGBTQ activity in its student handbook following legal challenges in an apparent attempt to contract out of antidiscrimination law). While moral clauses are an old practice in religious institutions, the trend towards explicit prohibitions on specific behaviors may be in response to court cases such as *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013), in which the court found a less-detailed morality clause requiring only that the employee “comply with and act consistently in accordance with the state philosophy and teachings of the Roman Catholic Church,” unenforceable, largely due to its ambiguity. *Id.* at \*1 n.1 (internal quotation marks omitted). Attempting to achieve religious autonomy through contract dates back to the nineteenth century. *See* CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* 61–63, 68 (1980) (describing how utopian communities used contract and property laws to construct spaces for their own practices).

33. While most of the cases cited in previous footnotes involve claims arising in employment and education, some private businesses also sought the right to exclude or deny services to LGBTQ people based on religious reasons. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Interim Order—Ruling on Respondents’ Re-Filed Motion for Summary Judgment and Agency’s Cross-Motion for Summary Judgment, In re Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor & Indus. Jan. 29, 2015) (businesses were held liable for discrimination for refusing service to marrying LGBTQ customers for religious reasons).

level, Title VII of the Civil Rights Act permits religious employers to give preferences in hiring to people of shared faith, but it arguably does not permit them to discriminate on the basis of race, sex, or pregnancy, nor does it exempt them from other civil rights laws.<sup>34</sup> Prior to the *Altitude Express, Inc. v. Zarda*<sup>35</sup> decision that interpreted Title VII to prohibit discrimination also on the basis of sexual orientation and gender identity,<sup>36</sup> twenty-two states and D.C. passed legislation to ensure protections exist where Title VII may not reach, prohibiting discrimination based on sexual orientation and gender identity.<sup>37</sup> Legislators have also been active with respect to protecting religious freedom. The Religious Freedom Restoration Act, or RFRA, enacted a high level of scrutiny for laws that restrict religious freedom,<sup>38</sup> and twenty-one states followed with their own RFRA.<sup>39</sup>

The potential tension between these parallel federal and state systems for protection of gender and LGBTQ equality and religious liberty has not yet been resolved by the Supreme Court,<sup>40</sup> which opted in recent years for a series of narrow decisions on this issue. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>41</sup> the Court adjudicated a claim of disability discrimination brought by a “called” church teacher.<sup>42</sup> A unanimous Court decided that churches are free to decide who preaches to their members, notwithstanding any law (the “ministerial exception”).<sup>43</sup> However, the Court took painstaking effort to emphasize that the decision was

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34. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2018).

35. 590 U.S. \_\_ (2020).

36. This decision was announced just before this Article went to press. At this point in time, the decision’s implications for religion–equality conflicts are yet to clarify.

37. One additional state prohibits only discrimination based on sexual orientation; six additional states prohibit only discrimination against public employees on the basis of sexual orientation and gender identity; and four additional states prohibit only discrimination against public employees on the basis of sexual orientation only. *State Maps of Law and Policies*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/employment> [<https://perma.cc/75KN-PZ98>] (last updated May 23, 2020).

38. 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (as applied to states). The RFRA was enacted in response to *Employment Division v. Smith*, to restore the standard of scrutiny that the previous precedent reflected. 494 U.S. 872 (1990).

39. *2015 State Religious Freedom Restoration Legislation*, NAT’L CONF. ST. LEGISLATURES (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx> [<https://perma.cc/N44W-GL8D>].

40. The very acknowledgment of this tension as a live issue is fairly new. As Elizabeth Sepper writes, before *Hobby Lobby* “courts resisted businesses’ claims to religious exemptions . . . even religiously affiliated nonprofit businesses did not win exemptions from employee- and consumer-protective laws, including insurance regulations and antidiscrimination laws.” Elizabeth Sepper, *Reports of Accommodation’s Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 25 (2014).

41. 132 S. Ct. 694 (2012).

42. *Id.* at 699–700.

43. *Id.* at 706.

restricted to the facts of the case, in which the teacher held spiritual responsibilities.<sup>44</sup> In *Burwell v. Hobby Lobby Stores*, the Court granted a religious exemption to closely-held for-profit corporations who refused to provide contraceptive coverage to their employees as part of its health insurance policy.<sup>45</sup> However, the decision was premised on the assurance that the exemption would have “precisely zero” effect on women’s access to contraceptives.<sup>46</sup> In other words, the Court’s majority did not perceive the case as presenting an actual conflict between religious liberty and gender equality; it did emphasize that accommodations must not unduly restrict third-party interests.<sup>47</sup> Two years later, the Court expanded LGBTQ rights in the *Obergefell v. Hodges*<sup>48</sup> decision on marriage equality. The Court alluded to the concern that this expansion might further the friction between LGBTQ equality and religious liberty, but deferred the resolution to a later time.<sup>49</sup> Recently, the Court had an opportunity to resolve the question in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>50</sup> involving a baker who refused to create a wedding cake for a same-sex couple for religious reasons. Again, the Court chose to deflect the broader constitutional questions and issue a narrow decision that focused on the Colorado commission’s arguably hostile treatment of the baker. The Court deliberately chose not to decide whether the baker was allowed to refuse service to the couple.<sup>51</sup>

The deliberate ambiguity on the part of the Supreme Court has resulted in a lack of clear guideline on how courts should apply Title VII and the many state laws that prohibit discrimination on the basis of sex, sexual

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44. *Id.* at 707–09. The “ministerial exception” rule has been applied by lower courts at least since *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), but was recognized by the Supreme Court for the first time in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).

45. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

46. *Id.* at 2760 (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”). A later challenge by religious non-profits did not conclude with a holding. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (vacating and remanding for the parties “to arrive at an approach going forward that accommodates petitioners’ [including various schools] religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”).

47. *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

48. 135 S. Ct. 2584 (2015).

49. *Id.* at 2607.

50. 138 S. Ct. 1719, 1734 (2018); *see also* *Arlene Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (cert. petition granted, judgment vacated and case remanded for further consideration in light of *Masterpiece Cakeshop*).

51. The Court noted that the plaintiff was “entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection,” but did not conclude what the outcome of the case would have been had the Colorado commission not have been found to fail that requirement. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

orientation, and other bases when these laws conflict with religious motives and practices. And indeed, lower courts' positions on these cases diverge by a surprisingly large margin. Some courts apply antidiscrimination law broadly and interpret religious exemptions and moral contracts narrowly,<sup>52</sup> whereas other courts take the inverse approach.<sup>53</sup>

The culture war has become an influential paradigm in the legal analysis of conflicts between religious liberty and gender and LGBTQ equality. It was used to explain both the emergence and contested reception of high-profile cases such as *Hobby Lobby*<sup>54</sup> and *Masterpiece*.<sup>55</sup> The culture war also played a dominant role in the analysis of the public and legal contro-

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52. Such "pro-equality" courts apply the law to all religious employers and service providers, whether individual, for-profit or not-for-profit. Under this view, Title VII's religious exemption does not allow religious employers to escape liability "for discrimination based on race, color, sex or national origin." *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980). Discrimination in hiring and treatment of religious ministers (the "ministerial exception") is allowed. Courts, however, stick to *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), which restricted this exception to the "church-minister relationship" and refrained from "any decision as to other church employees." *Id.* at 555. Therefore, employees who are not ministers (and most are not) are not barred from raising discrimination claims. *See, e.g., Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014) (holding that a lay language arts teacher with no role in religious education is not a minister); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013) (holding that a computer and technology instructor is not a minister). Plaintiffs still need to demonstrate that moral standards are not neutral as religious respondents argue, but discriminatory as is or as applied. *See, e.g., Herx v. Diocese of Fort Wayne-South Bend Inc.*, No. 1:12-CV-122 RLM, 2015 WL 1013783, at \*2 (N.D. Ind. Mar. 9, 2015) (providing evidence that three male employees who were thrown out of a strip club after harassing one of the performers were reprimanded but not fired); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344, 359-60 (E.D.N.Y. 1998) (holding that a private sectarian institution "has the right to employ only teachers who adhere to the school's moral code," but ordering factual determination to see if a neutral policy against premarital sex may be discriminatory as applied as the sexual activities of females are easier to discover).

53. Such "pro-religion" courts interpret religious exemptions broadly. *See, e.g., Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991) (holding that "Congress has exempted religious institutions from much of Title VII's prohibition against employment discrimination on the basis of religion," and rejecting the discrimination claims of a Protestant lay teacher who was dismissed from a Catholic school after failing to remarry pursuant to the "proper canonical process"); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (holding that a communications manager is a minister, barring sex and ethnicity discrimination claim); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 805 (4th Cir. 2000) (holding that the cathedral's director of music ministry and part-time music teacher is a minister, barring sex discrimination claim).

54. Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155-56, 184-89 (2014) [hereinafter Horwitz, *Hobby Lobby*]; NeJamie & Siegel, *Complicity-Based Conscience*, *supra* note 14.

55. Douglas NeJamie & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RE-THINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 187 (Susanna Mancini & Michel Rosenfeld eds., 2018) [hereinafter NeJamie & Siegel, *Transnational Perspective*].

versies that followed the legalization of same-sex marriage, including the conservative faith groups' almost immediate call for exemptions and the refusal of a county registrar to register same-sex marriage following *Obergefell*.<sup>56</sup> The responses of conservative religious leaders to *Obergefell* alone elucidate the phenomenon. Jim Daly, president of Focus on the Family, a conservative Christian advocacy organization, said in response to the decision,

Many people of faith are concerned that this decision will fan the flames of government hostility against individuals, businesses, and religious organizations whose religious convictions prevent them from officiating at, participating in, or celebrating such unions. We've already watched this hostility operate against wedding vendors, military chaplains, and others, and anticipate that today's decision will open the door to an unwelcome escalation of this problem.<sup>57</sup>

Others advocated for a more proactive challenge of the ruling. Professor Robert George, a conservative Catholic, wrote before the decision was released,

The Republican Party, the Republican Congress, and a future Republican President should regard and treat the decision just as the Republican Party, the Republican Congress, and the Republican President—Abraham Lincoln—regarded and treated the *Dred Scott* decision. They should, in other words, treat it as anti-constitutional and illegitimate ruling . . . [t]hey should refuse to treat and regard it as a binding and settled matter. They should challenge it legislatively and give the Supreme Court every opportunity to reverse itself—especially as new justices fill vacancies.<sup>58</sup>

Perhaps best encapsulating culture war discourse was the response of Reverend Donald Armstrong, who considered the possibility that *Obergefell* would ignite another civil war:

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56. Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html> [https://perma.cc/HH9K-7FAK]; see also Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), <https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html> [https://perma.cc/2UAG-3PNK]; Stonestreet, *supra* note 11.

57. Focus on the Family, *Jim Daly Responds to the Supreme Court Ruling*, YOUTUBE (June 26, 2015), [https://www.youtube.com/watch?time\\_continue=51&v=ADMhZrID-ps](https://www.youtube.com/watch?time_continue=51&v=ADMhZrID-ps) [https://perma.cc/4P4Q-V5U9].

58. Roger P. George, *How Republicans Should Respond to a Supreme Court Marriage Ruling*, FIRST THINGS (Mar. 7, 2015), <https://www.firstthings.com/blogs/first-thoughts/2015/03/how-republicans-should-respond-to-a-supreme-court-marriage-ruling> [https://perma.cc/89HP-H8SM].



The church has always stood apart from culture and state to speak truth to both. . . . But will Christians be granted the protections to continue to speak and act according to their faith, or will Christian teaching become hate speech[?] . . . Will the cross become the next Confederate flag?<sup>59</sup>

This pattern of cases and public discourse contributed to a view of the religion–equality conflict as a culture war, in which “there is no common morality to which the competing sides may look; the sides have incommensurable values.”<sup>60</sup> Horwitz, agreeing that the conflict is “over irreconcilable fundamental values,” decries that the debate “is so centered on a stark opposition between liberty and equality that any *tertium quid* is forgotten or ignored.”<sup>61</sup> Ira Lupu observed that “LGBT equality and religious freedom increasingly appear to be on a collision course.”<sup>62</sup> Indeed, the most noticeable insights of the culture-war analyses of the conflict between religion and equality have been that (1) the ideological divide between the two camps is irreconcilable, (2) that religious groups are monolithic and stagnant in their views, and (3) that there exists cause for concern regarding further intensification of the conflict. Despite many other differences, conservative and progressive law professors are united in these assessments.<sup>63</sup>

On one side, progressives view religious conservatives to be constantly seeking new ground for conflict with unflinching determination. For example, NeJaime and Siegel argue in several pieces that claims for religious exemptions from antidiscrimination laws reflect the same effort to preserve traditional gender norms that characterized the religious objection to enacting these laws from the first place, what they call “preservation through transformation.”<sup>64</sup> They describe several religious advocacy groups, thinkers, and pastors—some of which are quoted above—who work to build cross-denominational Catholic and Evangelical coalitions to promote traditional values through lawmaking and litigation.<sup>65</sup> Thus,

59. Stonestreet, *supra* note 11.

60. Cochran & Helfand, *supra* note 12, at 1056, drawing on James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065 (2013).

61. Horwitz, *Against Martyrdom*, *supra* note 13, at 1303. The third alternative that Horwitz advocates for is a notion of legal pluralism that would accommodate religious illiberalism by exempting it from antidiscrimination law.

62. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 1 (2015).

63. On the sociological side, there is actually disagreement on whether there is, in fact, a culture war in America. See *supra* note 24 and accompanying text.

64. NeJaime & Siegel, *Complicity-Based Conscience*, *supra* note 14, at 2552–53. Reiva Siegel first coined this term in a different context in Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996). It was later adopted and expanded in Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012) [hereinafter NeJaime, *Marriage Inequality*] and further developed by NeJaime & Siegel, *Complicity-Based Conscience*, *supra* note 14.

65. NeJaime & Siegel, *Complicity-Based Conscience*, *supra* note 14, at 2544–52.

they argue that religious accommodations “may continue democratic conflict in new forms”<sup>66</sup> and faith claims would escalate in number and significance.<sup>67</sup>

Whereas NeJaime and Siegel primarily focus on how religious exemptions might influence third parties outside the religious community, Caroline Mala Corbin criticizes organized religion’s employment practices, writing that “religious organizations can, and regularly do, deny women the influential position of minister, priest, rabbi, and imam on the grounds that religious doctrine requires such discrimination. Religious organizations whose beliefs do not require discrimination or even forbid it can also assert the ministerial exemption.”<sup>68</sup> Corbin then criticizes religion for broadening the definition of “minister” to include a range of positions and organizations that extend far beyond the traditional clergy, thus broadening the scope of discrimination.<sup>69</sup> Corbin acknowledges that not all religious organizations discriminate on the basis of sex, yet she remains concerned that they would, simply because they can. A similar concern is expressed by NeJaime in his objection to allowing religious individuals and entities to refuse to “treat as valid” same-sex marriages.<sup>70</sup> NeJaime believes that the exemptions for such discriminatory behavior are overly broad and warns that religious individuals would take every opportunity to express condemnation and disapproval of LGBTQ people.<sup>71</sup> Mark Stern is concerned that if there is any religious accommodation, “inevitably, it will soon stretch to restaurants, hotels, movie theaters—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation.”<sup>72</sup>

Without taking any stand regarding the substantive arguments of these scholars,<sup>73</sup> collectively and perhaps inadvertently they portray religious attitudes as antithetical to equality and susceptible to even further escalation. This image is not unique to legal scholarship, and it is exacer-

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66. *Id.* at 2521.

67. *Id.* 2520; *see also* NeJaime & Siegel, *Transnational Perspective*, *supra* note 55.

68. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1968 (2007).

69. *Id.* at 1976–77.

70. NeJaime, *Marriage Inequality*, *supra* note 64.

71. *Id.* at 1231–36.

72. Mark Joseph Stern, *Anti-Gay Segregation May Soon Be Coming to Oregon*, *SLATE* (Feb. 4, 2014), <https://slate.com/human-interest/2014/02/oregon-anti-gay-referendum-the-initiative-is-homophobic-segregation.html> [<https://perma.cc/ZV5N-T67B>].

73. Andrew Koppelman, for example, argues that these concerns are exaggerated. Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 *BROOK. L. REV.* 125, 134–35 (2006). Koppelman relies on mostly anecdotal evidence to back this claim. I am more sympathetic to these concerns after finding in a previous work that religious accommodations, at least in some settings, can in fact expand religious objection. *See* Barak-Corren, *Antidiscrimination Law*, *supra* note 20.

bated in the public arena, where religious conservatives are often referred to “as hateful bigots.”<sup>74</sup>

To be clear, there are high-profile religious activists who match this description and others who work relentlessly to perpetuate the conflict. The problem, however, is that the culture war paradigm enables little to no discussion of religious responses other than objection to antidiscrimination law. And any discussion of religious change refers mostly to the concern that religion will become even *more* discriminatory.<sup>75</sup>

Surprisingly, this analysis persists even in arguments supporting religious liberty. For example, Horwitz is worried, post-*Hobby Lobby*, that the trend towards expanding LGBTQ rights will create new frontiers against religion.<sup>76</sup> In a later piece Horwitz argues that refusals to accommodate religion in this context may “push some religious individuals and communities to become *more* strongly attached to illiberal beliefs and practices,” and even seek martyrdom.<sup>77</sup> Horwitz notes in passing that law “may [also] cause *some* groups, or some members of those groups, to alter their beliefs or conform their conduct to liberal norms of equality and nondiscrimination,”<sup>78</sup> but he does not pursue this idea further. Horwitz’s argument is particularly interesting because it is sensitive to the problematic assumptions underlying the debate. Horwitz describes objections to religious accommodations as rooted in perceptions, which he designates as fears, that religious groups are deeply illiberal organizations that inflict substantial harm on their members and on others.<sup>79</sup> Instead of refuting or complicating these perceptions, Horwitz, in essence, encourages liberals’ fears, warning liberals that by refusing accommodation, they will actually advance illiberalism and realize their most concerning fears.<sup>80</sup>

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74. Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 Nw. J.L. & SOC. POL’Y 260, 267–69 (2010) (describing responses in the public sphere towards conservatives that are quick to accuse them of bigotry, even if they support equal rights for LGBTQ people and/or various compromises regarding marriage).

75. See, e.g., MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 33, 35 (2014) (arguing that accommodations encourage religious “narcissism” and further disobedience); NeJaime, *supra* note 64; NeJaime & Siegel, *Complicity-Based Conscience*, *supra* note 14, at 2544 (arguing that “religious accommodation may extend, rather than resolve, conflict”). It is rare to find analyses that consider the conditions under which religious objection might decline or other forms of religious dynamism, but see Section I.B, *supra*.

76. Horwitz, *Hobby Lobby*, *supra* note 54.

77. Horwitz, *Against Martyrdom*, *supra* note 13, at 1306. In effect, one cannot evaluate the likelihood and magnitude of martyrdom, relative to other responses, without data. In a previous work on the conflict between religion and equality (which Horwitz cites), I find no empirical support for the concern that refusing religious accommodation would cause massive disobedience or erode the rule of law or democratic legitimacy. Barak-Corren, *Antidiscrimination Law*, *supra* note 20.

78. Horwitz, *Against Martyrdom*, *supra* note 13, at 1306.

79. *Id.* at 1311.

80. *Id.* at 1334.

The culture war paradigm captures the intensity of the political and legal battles waged by extreme ideologists who represent opposite cultural worldviews. But, as the next Part demonstrates, the paradigm also overlooks a large part of the religion–equality tension, namely the conflict that takes place *within* conservative religious groups on “one side” of the culture wars. It presents religious reactions to issues of gender and LGBTQ equality as universally antagonistic, whereas in fact, there is substantial diversity even inside the most conservative communities,<sup>81</sup> and substantial dynamism in the religious responses to the conflict.<sup>82</sup> Currently, the law does not sufficiently consider the implications of this variation for the conflict between religion and equality.

#### B. *From a War Between Cultures to a War Within Culture*

There are several important exceptions to the analysis of the religion–equality conflict as a war between cultures. Madhavi Sunder recognizes the existence of “cultural dissent,” or “challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership.”<sup>83</sup> Sunder criticizes the courts for their monolithic view of religion and argues that this approach risks ossifying religious culture in its traditional form.<sup>84</sup> She argues that cultural challenges, many coming from devout women and LGBTQ individuals, should be acknowledged as claims of cultural and religious rights.<sup>85</sup> In sum, Sunder elucidates the diversification of religion at the grassroots while sharing the predominant opinion that religious leadership is rigid and anti-egalitarian.

In contrast, William Eskridge describes the gradual shift favoring egalitarianism in organized religion’s attitudes towards both slavery in the past and homosexuality today.<sup>86</sup> Eskridge proposes that this shift contributed

81. Hunter recognized that the cultural division often falls within churches and religions, and not necessarily between them, although his main focus was on cross-denominational alliances. HUNTER, *supra* note 23, at 140. For more recent data, see PEW RESEARCH CENTER, CHANGING ATTITUDES ON GAY MARRIAGE: PUBLIC OPINION ON SAME-SEX MARRIAGE (2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> [<https://perma.cc/5V7E-N5LC>] (presenting evidence on substantial variation regarding sexuality norms among all large American Christian denominations and across all levels of worship); Barak-Corren, *Antidiscrimination Law*, *supra* note 20 (same).

82. Barak-Corren, *Antidiscrimination Law*, *supra* note 20, at 993–96, 1003–10 (providing evidence from large-scale experiments among U.S. Christians of changes in decisions in response to alternative legal outcomes).

83. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498 (2001).

84. *Id.* at 507 (considering the law’s role in “facilitating or hindering modernization and social change, focusing in particular on how law has become complicit in the backlash project of preserving cultural traditions against change”).

85. *See id.* at 500–01.

86. William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011) (citing Brief of the Alliance of Baptists, et al., Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152331).

to the growth of antidiscrimination protections.<sup>87</sup> Among other examples, Eskridge describes an amicus brief against a Texas law criminalizing sodomy filed by “six denominations and twenty-three gay-affirming groups within other denominations”<sup>88</sup> in *Lawrence v. Texas*.<sup>89</sup> Some of these groups considered homosexual sex a sin, yet believed that criminalizing homosexuality was un-Christian; others did not consider homosexuality a sin at all.<sup>90</sup> Eskridge describes this brief as part of a larger series of intense debates within and between churches about their attitudes regarding sexual orientation.<sup>91</sup> Eskridge points to similar historic processes that changed the approach of all religious denominations towards slavery.<sup>92</sup> His analysis demonstrates that dynamism is reserved not only to progressive denominations, but also characterizes at varying levels even the most conservative denominations.<sup>93</sup>

Robin Fretwell Wilson holds a unique position in this debate. At the descriptive level, she frequently affirms the culture war paradigm by focusing on the opposition between conservative religion and progressive egalitarians.<sup>94</sup> At the political level, however, Wilson seeks to refute the paradigm, believing it is possible to “square faith and sexuality”<sup>95</sup> by enacting LGBTQ discrimination protections that include specific, well-tailored religious exemptions.<sup>96</sup> Wilson’s efforts to achieve compromise are laudable, but they are limited as they do not consider the dynamics within religious groups and the implications of these dynamics for the array of potential solutions.

Crucially, if religion is diverse and dynamic both at the grassroots level, as Sunder claims, and at the leadership level, as Eskridge argues, then the conventional culture war paradigm largely misses the point. The conflict *within* cultures is as deserving of focus as that *between* cultures. Sunder and Eskridge each highlight a different account of religious groups’ positions vis-à-vis equality, but how can these accounts be reconciled? More specifically, what determines the position that organized religion takes towards equality challenges, whether oppositional, as emphasized by Sunder, or tolerant, as emphasized by Eskridge?

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87. *Id.*

88. *Id.* at 705.

89. 539 U.S. 558 (2003).

90. Eskridge, *supra* note 86.

91. *See id.* at 704–05.

92. *Id.*

93. *Id.*

94. Robin Fretwell Wilson, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 *LAW & INEQUALITY* 385 (2016).

95. *Id.*

96. Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 *U.C. DAVIS L. REV.* 703 (2014); Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 *GEO. J. GENDER & L.* 485 (2014).

C. *The War Within Culture: Between Opposition and Tolerance*

A useful starting point in endeavoring to answer this question can be found in Martha Minow's description of contemporary church-state equality conflicts.<sup>97</sup> Minow describes two conflicts that are almost reverse images of one another from start to finish.<sup>98</sup> The first conflict involves a dispute between the Catholic Church and the San Francisco government over health insurance for same-sex partners.<sup>99</sup> The Church initially opposed the city's intention to oblige contracting parties, including the Church, to provide health benefits to same-sex partners.<sup>100</sup> But ultimately, the parties negotiated a solution, which allowed each employee to designate *any* member of the household, regardless of the relationship, to receive health benefits.<sup>101</sup> Justifying the solution, the Archbishop explained that "[w]e would know no more or no less about the employee's relationship with that person than we typically know . . . . What we have done is to prohibit local government from forcing our Catholic agencies to create internal policies that recognize domestic partnerships as a category equivalent to marriage."<sup>102</sup>

In contrast to the compromise achieved in San Francisco is the crisis that evolved in Boston once news broke that Catholic charities were placing children with LGBTQ parents for adoption.<sup>103</sup> As Minow relates, an internal conflict erupted within the Catholic community, with lay Catholics supporting LGBTQ placements and the Catholic leadership objecting and seeking an exemption from antidiscrimination law.<sup>104</sup> The state refused and the Church ceased providing adoption services in Boston.<sup>105</sup>

Minow notes the paradox posed by these contrasting stories of tolerance and opposition and suggests that "attitudes of respect, flexibility, and humility can help generate new answers beyond 'exemption' and 'no exemption' when religious principles and civil rights laws collide."<sup>106</sup> This advice, while sound, is very general. I propose that more specific propositions can be drawn from these cases.

The first fact to note about these contrasting cases is that religious doctrine did not dictate their outcomes. In both cases, the official position of the Catholic Church was and still is opposed to recognition of same-sex marriage and partnerships. Yet in the San Francisco case, the

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97. Minow, *supra* note 1.

98. *Id.* at 829–37 (providing an elaborate account of the two stories, including some intersections between the leading characters).

99. *Id.*

100. *Id.* at 829–30.

101. *Id.* at 830–31.

102. *Id.* at 831.

103. *Id.* at 831–37.

104. *Id.* at 833.

105. *Id.* at 836.

106. *Id.* at 844.

Church was able to reconcile its position with LGBTQ families' demand for equal treatment and in the Boston case it failed to do so. These outcomes were also not a function of the background laws, as both cities prohibited LGBTQ discrimination with no religious exemptions. Neither did the initial status quo play a role in the contrasting outcomes of the two cases. In Boston, the Church, on its own initiative, was already engaged in placing children with LGBTQ parents, yet eventually withdrew from adoptions altogether.<sup>107</sup> In San Francisco, the Church initially refused to provide health benefits to same-sex partners yet ultimately provided them.<sup>108</sup> These reactions demonstrate that the dynamic within religious groups can work both ways. If it was not religious doctrine, legal doctrine, or the initial positions that led to these contrasting outcomes, what can explain the highly antithetical results in these two cases?

The factor proposed here and developed in this Article is the difference between public and private action. Minow notes that "high profile publicity . . . contributed to the failure of accommodation over the adoption policies."<sup>109</sup> Indeed, in Boston, publicity sabotaged the Catholic Charities' low-profile placement of children with LGBTQ parents. But this is only part of the picture. Comparing the two cases suggests that the interplay between public and private had an even stronger influence, because in San Francisco, it was *privacy* that facilitated the provision of health benefits to LGBTQ partners. The San Francisco compromise allowed each employee to designate any member of the household, regardless of the relationship, to receive health benefits. According to the Archbishop's explanation, this framework allowed the Church to "not know" what exactly was "the employee's relationship with that person."<sup>110</sup> Keeping the nature of the relationship private satisfied the Church's interest in avoiding recognition of same-sex relationships as equal to marriage. A rule that links benefits with marriage requires LGBTQ employees to go public and thus requires employers to "know" the sexual identity of the partner. In contrast, a rule that breaks the link between benefits and marriage avoids the dilemma entirely. The fact that a self-imposed privacy mechanism removed the Church's objection to providing benefits to same-sex partners, along with other designated persons, is revealing. Using this mechanism, the Catholic Church was able to acquiesce in LGBTQ equality, similar to fundamentalist churches during the civil rights era that first acquiesced in and then embraced racial equality.<sup>111</sup> Similarly, in Boston, Catholic Charities reported openness to an accommodation in which they could refer certain cases to other state adoption contractors that did place children into same-sex families, so long as they themselves were not responsible for the placements (or overtly aware of them). This would have allowed Cath-

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107. *Id.* at 831–36.

108. *Id.* at 829–31.

109. *Id.* at 838.

110. *Id.* at 831.

111. Eskridge, *supra* note 86, at 678.

olic Charities to continue its adoption work, though it would have represented a step back from direct same-sex placements. However, because the state was uncompromising in its position that all adoption contractors must be willing to place children into same-sex households themselves, this more private solution was never realized. Notably, the way Catholic Charities had been doing the same-sex placements previously followed a very similar logic to the San Francisco accommodation—it placed a child with a “single,” as in unmarried, person and didn’t “interrogate” about the person’s “private sexual life.”<sup>112</sup> Catholic Charities had been cultivating a privatizing solution to this dilemma for a long time—but that solution was jeopardized with publicity.

This Part has argued that the dominant view of the conflict between religion and equality as a war between cultures is incomplete and simplistic and must be refined with the understanding that the conflict is *within* culture as much as it is *between* cultures. This insight raises a crucial question to the negotiation and resolution of these conflicts: what factors determine whether religion takes an oppositional or a tolerant position towards equality challenges? The answer necessarily involves many elements. As the next Part will demonstrate, the Boston/San Francisco contrast is not an anecdote. The distinction between public and private has a broad, systematic, and highly consequential impact on conflicts between religion and equality. This Article will also show that the public/private distinction is part of a broader framework that religious communities employ to regulate cultural challenges, a framework this Article terms *social impact regulation*. Organized religion’s attitude toward gender and LGBTQ equality is not monolithic, nor is it necessarily oppositional. The religious response to equality challenges depends on the anticipated impact of perceived sexual nonconformity on others in the community and on the status of religious norms.

I will now turn to discuss the methodology of the study and its findings regarding how social impact regulation shapes the religious response to equality challenges.<sup>113</sup>

## II. OVERVIEW OF METHODOLOGY

This Part begins, in Section A, by explaining why the dominant focus in the literature on court cases and judicial opinions is insufficient for producing an accurate understanding of the full scope of conflicts between religion and equality. It then proceeds, in Section B, to describe the alternative methodology of this Article that focuses on the actions and decisions of grassroots religious decision makers.

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112. Minow, *supra* note 1, at 834.

113. Notably, this Article does not attempt to map the entire variation in the religious response to equality challenges. It focuses on a central phenomenon, which consists of multiple factors that influence the conflict jointly and separately.



A. *Studying the Conflict from Cases: The Limitations*

The first limitation of studying the conflict from cases is that cases represent only a small fraction of the overall number of disputes. As this Section shows, this general limitation is particularly relevant for equality claims and for claims arising within religious communities. As a result, analyses of the conflict between religion and equality that focus primarily on cases may not represent the majority of disputes in this category.

A long line of work by law and society scholars has established that social disputes are dynamic processes that evolve in phases. Richard Miller and Austin Sarat offered the metaphor of the “dispute pyramid,”<sup>114</sup> to describe the evolution of disputes from injuries starting with claims and confrontations with the injuring party, moving on to the involvement of lawyers, and ending with adjudication.<sup>115</sup> Miller and Sarat define this process as a pyramid because many disputes are dropped at each phase, as claimants settle their claims or choose to withdraw them altogether.<sup>116</sup> The cases that ultimately become lawsuits represent a small fraction of all disputes, and the cases that result in a judicial decision are only a tiny fraction among those.<sup>117</sup> Miller and Sarat, and others, have criticized legal scholarship for overly focusing on adjudication and failing to grasp its limited role in the much broader reality of dispute resolution.<sup>118</sup>

The focus on court cases is particularly problematic in the context of equality claims, where it is particularly likely to lead to biased evaluations of the characteristics of discrimination. A comprehensive study by Ellen Berrey, Robert Nelson, and Laura Beth Nielsen estimated that only a tiny fraction of discrimination grievances evolved into legal complaints and only 6% of court filings ever reach trial.<sup>119</sup> In a previous survey of employment antidiscrimination cases, Peter Siegelman and John Donohue discovered significant differences between published and unpublished cases.<sup>120</sup>

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114. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544–46 (1980).

115. *Id.*; see also Richard L. Abel, William L.F. Felstiner & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980); Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105 (2014).

116. Miller & Sarat, *supra* note 114, at 544–46.

117. *Id.*

118. *Id.* at 565 (“Our research points the way toward yet a further ‘backward’ movement in the sociology of law. Legal realism moved the study of law from an exclusive preoccupation with courts and in so doing helped establish the intellectual respectability of dispute processing and other sociological studies of law . . .”). Notably, studying cases and opinions is crucial to understanding how courts adjudicate cases and what legal arguments fare better in court. The criticism is relevant to questions about the evolution of social conflicts and the impact of law outside the courtroom.

119. BERREY ET AL., *supra* note 18, at 13, 41–42, 47–49 (surveying evidence from multiple sources and estimating the rate of EEOC complaints at 1% of all grievances and that of lawsuits at 3% of all grievances).

120. Siegelman & Donohue III, *supra* note 17.

Published cases had thicker files and more plaintiffs, and were more likely to be class actions, to include allegations of continuous violations, to seek more forms of remedy, to yield larger monetary awards, and to be submitted faster after the injury than unpublished cases.<sup>121</sup> Published cases were also less likely to involve discrimination in firing and more likely to involve retaliation.<sup>122</sup> Studying the conflict between religion and equality only from court cases therefore risks biasing the analysis in all of these dimensions, for example by failing to capture the mechanisms driving discrimination in firing or in single-shot acts of discrimination.

Previous studies did not break down their results by type of employers, such as religious or non-religious, and bias is expected to be even higher in disputes involving religious institutions. Early sociological research on the relationship between religious communities and the law showed that orthodox religious communities tend to avoid litigation and prefer internal dispute settlement mechanisms, such as church tribunals and informal reconciliation.<sup>123</sup> Communal norms and institutions often discourage members from turning to secular courts, filing suit, or even consulting a lawyer, all of which can result in retaliation.<sup>124</sup> Religious communities might also attempt to impose religious norms and prevent the application of state standards through contractual arrangements, such as employment contracts and codebooks that oblige their members to conform to religious norms.<sup>125</sup> As a result of these practices, many conflicts are unlikely to reach the courts and their characteristics remain hidden. If employees believe that as a result of a moral code they signed they have no ground to bring forth a discrimination lawsuit, this subset of grievances will not be represented in the case law. If members of a particular church resolve their conflict internally, the resulting set of solutions will not be represented in the case law. This representation gap is particularly important given, on one hand, the tiny fraction of discrimination grievances that actually become cases, and, on the other hand, evidence on the ubiquity

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121. *Id.*

122. *Id.* at 1150–54.

123. CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1989) (offering an ethnographic study of attitudes toward conflict and law in a predominantly white, middle-class, suburban, and principally Southern Baptist community).

124. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (describing a religious school that dismissed a teacher who alleged disability discrimination after she consulted with a lawyer, arguing that she was obliged to settle disputes under the church internal dispute mechanism).

125. WEISBROD, *supra* note 32, at 61–63, 68 (describing how utopian communities in nineteenth century America used contract and property laws to construct spaces for their own practices). A contemporary example is provided by Zack Ford, *Arkansas Catholic Schools Crack Down on LGBT Students*, THINK PROGRESS (Sept. 12, 2016, 6:54 PM), <https://thinkprogress.org/arkansas-catholic-lgbt-policy-d91d804532e9/> [<https://perma.cc/8FUF-WUHW>] (reporting on the Catholic Diocese of Arkansas that coded prohibitions on LGBTQ activity in its student handbook following legal challenges, in an apparent attempt to contract out of antidiscrimination law).

of conflicts between law and religion. In one study that interviewed Orthodox Jewish leaders, heads of institutions (not activists), on conflicts with the law, I found that more than 70% reported to have personally experienced such conflict and some described it as occurring as frequently as on a bi-weekly basis.<sup>126</sup> The data I discuss below show similar intensity.

In sum, the little we currently know, empirically, on conflicts between religion and equality provides grounds for concern on the accuracy of analyses that draw primarily on court cases. These cases most likely represent a tiny fraction of discrimination grievances *and* a tiny fraction of the conflicts experienced by religious decision-makers.<sup>127</sup> High-profile court cases may resonate with the culture war paradigm as they feature unrelenting religious objectors and uncompromising equality advocates, but the actual picture could have appeared entirely different had we considered the majority of disputes which never reaches the courts.

#### B. *Studying the Conflict from Within*

Due to the limitations of relying on court cases and the scarcity of alternative data on conflicts between religion and equality, it is imperative that constitutional scholars actively engage in collecting data on these conflicts. Court cases are an important starting point for any such analysis—cases can direct us to fertile contexts for research, identify arenas of conflict, and provide initial information on its contours. But they should not be the end point of the inquiry. Naturally, this proposition primarily applies to scholars interested in understanding the causes of conflicts, what factors shape their direction and whether they reach litigation, and how to design policies to govern conflict effectively. Going beyond the case law is less concerning for scholars whose main interest lies in constructing legal doctrine (but see Part V, which charts several doctrinal implications of the findings).

How should data on rights conflicts be collected? There are many viable empirical methods. Some questions could benefit from historical investigation, others from a qualitative, sociological approach. And yet other questions may require quantitative examinations, experimental or other. Importantly, questions regarding the interaction between law and other complex social institutions, including religion, often require a concerted effort of several different studies deploying multiple methods along several points in time.

The present study initiates this effort by conducting a preliminary investigation of the perspective of religious decision-makers on equality chal-

126. Netta Barak-Corren, *Beyond Dissent and Compliance: Religious Decision Makers and Secular Law*, 6 OXF. J.L. & RELIGION 293 (2017) [hereinafter Barak-Corren, *Beyond Dissent*].

127. Additional support for this claim can be derived from my failure to trace a legal record for most media reports on dismissals of LGBTQ or unmarried pregnant people by religious institutions. In most of these reported events, there was no record of a legal proceeding ever being filed.

lenges, an investigation aiming to discern internal factors that potentially shape the religious response to equality challenges. The study therefore focuses on uncovering conflicts that occur within religious institutions and it analyzes how they are regulated, negotiated, and resolved. This research question guided the selection of qualitative fieldwork as the primary method of inquiry. In-depth interviews with grassroots religious leaders are a natural starting point to expose the range of experienced conflicts and the ways these conflicts are handled.

The interviews were conducted with a diverse sample of seventeen Catholic educational leaders,<sup>128</sup> who were recruited using the snowball method<sup>129</sup> and included principals, presidents, superintendents, and education administrators from across the United States, primarily from New England, the Midwest, the South, and the West Mountain region. Roughly half were women. On average, they had twenty-six years of experience working and managing religious institutions. The interview data produced over twenty hours of audio and 400 pages of transcripts, which were then coded and analyzed using the grounded theory approach.<sup>130</sup> The code list was developed and refined through iterative readings to capture patterns and themes in the leaders' discussion of conflict and to track the avenues pursued in tackling conflict. Additional data (mostly discussed in Section II.C, *infra*) was collected from relevant cases, websites, public documents, and Christian media and forums.

Educational institutions were the focus for the sampling because of their central normative function and the amount of conflict that they attract and generate as a result of this function.<sup>131</sup> First, religious communi-

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128. The research was approved by the Harvard Institutional Research Board (#F24214-101). Interview transcripts are on file with the author. The interviews are part of a series of research projects on conflicts between law and religion. A previous project that examined the impact of antidiscrimination remedies on religious behavior was published in Barak-Corren, *Antidiscrimination Law*, *supra* note 20.

129. The snowball method is a common technique used to gain access and study insular populations. See Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141, 152 (1981). The sensitivity of the issues discussed (which included details on potential breaches of law) and the rank of the targeted pool of interviewees required the use of snowball sampling. Prior to that, several attempts were made to recruit religious managers on a broad basis through publicly available contact information, to no avail.

130. BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967). The Dedoose software was used for the coding and analysis. This method has been widely used in similar studies. See, e.g., PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998) (charting the ways people understand law and engage with legal institutions); TOVA HARTMAN HALBERTAL, *APPROPRIATELY SUBVERSIVE: MODERN MOTHERS IN TRADITIONAL RELIGIONS* (2002) (a comparative study of how Catholic and Jewish women reason about faith and feminism).

131. Barak-Corren, *Antidiscrimination Law*, *supra* note 20 (surveying cases and providing qualitative and quantitative experimental evidence on the extent of religious conflict in schools and the impact of antidiscrimination law on the dynamic of conflict). Conflicts have continued to accumulate since then. See *infra* notes

ties view schools as non-state authorities<sup>132</sup> and as strong guardians of religious autonomy. Schools are responsible for inculcating the next generation into the faith, instilling values and norms, and preparing children for life as community members.<sup>133</sup> At the same time, even private religious schools are bound by general antidiscrimination laws as employers and contractors.<sup>134</sup> Inconsistencies between religious commitments and general law are a fertile ground for conflicts.<sup>135</sup>

The focus on Catholic educational institutions was also guided by their particular relevance to conflicts between religion and equality. Religious schools in general, and Catholic schools in particular, have been involved in major legal and social “culture wars” in recent years over their regulation and treatment of women, reproduction, and LGBTQ individuals. Key examples (all of which involve Catholic schools) include the dismissal of pregnant out-of-wedlock teachers,<sup>136</sup> dismissal of LGBTQ teachers and students,<sup>137</sup> and objections to providing contraceptive cover-

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136–137 and accompanying text. Notably, communities may navigate the conflict differently in different contexts (e.g., schools, churches, for-profit corporations) and dilemmas (e.g., LGBTQ issues, unmarried pregnancies, contraceptives).

132. Richard W. Garnett, *Can There Really Be Free Speech in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 59 (2008) (arguing that schools should be permitted to govern themselves without government interference in order to protect the freedom of speech).

133. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 33 (1983) (analyzing Bob Jones University as a normative community that regulates the public and private conduct of its students); Caroline Mala Corbin, *Expanding the Bob Jones Compromise*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 123 (Austin Sarat ed., 2012) (arguing that the *Bob Jones* holding with respect to religious educational institutions should expand to invidious sex discrimination); *see also infra* note 130 and sources cited therein.

134. *See, e.g.*, cases cited *supra*, note 52.

135. *See* Cover, *supra* note 133; *see also* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools Observation*, 60 TEX. L. REV. 259 (1982) (analyzing the tension between religious schools and antidiscrimination tax policy).

136. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (finding dismissal for conception three weeks prior to wedding may proceed to trial); *Hamilton v. Southland Christian Sch., Inc.*, No. 6:10-cv-871-ACC-TBS, 2012 WL 5896367 (M.D. Fla. Sept. 20, 2012) (finding in favor of teacher); *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013); *see also* Dana Liebelson & Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time.*, MOTHER JONES (Feb. 10, 2014), <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/> [<https://perma.cc/SU8N-S63X>] (depicting ten cases of unmarried pregnant women or women who have used artificial insemination who were fired).

137. John Higgins & Lornet Turnbull, *Eastside Catholic Students Rally Around Ousted Vice Principal*, SEATTLE TIMES (Dec. 19, 2013), <http://www.seattletimes.com/seattle-news/eastside-catholic-students-rally-around-ousted-vice-principal/> [<https://perma.cc/DY5P-JKA3>] (Seattle homosexual vice principle was dismissed for mar-

age to employees as part of health insurance policy.<sup>138</sup> Catholic schools were dominant in all of these conflict categories, generating a large volume of disputes relating to LGBTQ and gender equality. Whether as plaintiffs seeking exemptions from governmental health mandates or as respondents to discrimination allegations, the Church has been a major player in the culture wars, alongside other players.<sup>139</sup> Interviewing the leaders of these institutions offered the possibility of learning from individuals who served as the regulators and enforcers of religious norms in practice. Some of these leaders were even involved in litigation of concrete conflicts.

There are advantages and limitations to the focus on Catholic leaders. The unity of doctrine, structure and hierarchy of the Church across the United States enabled the collection of data from a variety of geographical areas (interviewing leaders from the South, North, Midwest, etc.) and legal regimes (interviewing leaders operating under progressive and conservative legal regimes), while keeping the religious and functional characteristics of the interviewees consistent and comparable. This would have been less attainable with Evangelical churches, for example, which are dispersed around the nation and vary in doctrine, structure, and schooling systems. However, the absence of Evangelicals and other denominations from the research is a significant limitation, which I address in Section III.B.3, *infra*, where I discuss evidence of social impact regula-

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rying his same-sex partner; this termination added to a list of more than fifteen cases in about two years in which Christian institutions terminated LGBTQ employees for same-sex marriages or expressing support thereof); *see also* Woodard v. Jupiter Christian Sch., Inc., 913 So. 2d 1188 (Fla. Dist. Ct. App. 2005) (denying appeal of gay student who was expelled after his teacher confronted him about his sexual orientation by using the impact rule); *Miami Teacher Says Catholic School Fired Her for Marrying Woman*, CBS NEWS (Feb. 12, 2018, 10:59 AM), <https://www.cbsnews.com/news/jocelyn-morffi-miami-teacher-fired-catholic-school-marrying-woman/> [<https://perma.cc/A2DN-WDNX>] (lesbian teacher argues she was fired after marrying her partner); Ken Bencomo, *Gay Catholic Teacher Fired for Marrying, Gets Huge Student Support*, HUFFINGTON POST (Aug. 13, 2013, 12:00 PM), [https://www.huffingtonpost.com/2013/08/13/gay-catholic-teacher-fired\\_n\\_3749270.html](https://www.huffingtonpost.com/2013/08/13/gay-catholic-teacher-fired_n_3749270.html) [<https://perma.cc/K5ER-GWJA>] (Los Angeles Catholic school teacher was fired after his marriage to his partner was published in newspapers); Al Fischer, *Gay Music Teacher Fired from Catholic School, Marries Partner in New York*, HUFFINGTON POST, [https://www.huffingtonpost.com/2012/03/11/al-fischer-fired-gay-catholic-music-teacher-wedding\\_n\\_1337482.html](https://www.huffingtonpost.com/2012/03/11/al-fischer-fired-gay-catholic-music-teacher-wedding_n_1337482.html) [<https://perma.cc/L6RN-T6R6>] (last updated Feb. 2, 2016) (gay St. Louis music teacher at a Catholic school was fired after marrying his partner in a civil ceremony in New York).

138. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Abortions and related medical procedures are also hot-button issues. *See Turic v. Holland Hosp., Inc.*, 85 F.3d 1211 (6th Cir. 1996) (holding that dismissing a woman for considering an abortion to protect religious sensibilities of her co-workers is illegal discrimination under Title VII); *Curay-Cramer v. Ursuline Acad., Inc.*, 450 F.3d 130, 132 (3d Cir. 2006) (dismissing a Title VII claim of a Catholic school teacher who was fired after adding her name to a pro-choice advertisement in a local newspaper).

139. Section I.A, *supra*, discusses the patchwork of decisions that culminated from these cases.

tion from additional denominations, including Baptists, Lutherans, adherents of the Alliance Church, and Orthodox Jews.

In keeping with Austin, Sarat, and others,<sup>140</sup> the approach in conducting the interviews was to define conflict broadly, so as to include both controversies that developed into legal cases and controversies that evolved differently. This is one of the important advantages of in-depth qualitative fieldwork in the present context. As various factors within religious communities suppress the evolvment of disputes into conflicts, delving inside religious institutions provides a unique perspective on the reality of conflicts between religion and equality.

It should be noted at the outset that the objective of the qualitative fieldwork was not to generate findings that would be statistically representative or immediately generalizable to other populations.<sup>141</sup> In addition, the interviews cannot answer causal questions and they cannot provide estimates of the magnitude of the effects of the uncovered factors. Rather, the goal of the qualitative study is to offer a rich theoretical understanding of the phenomenon and generate hypotheses that could be quantitatively tested in future work.<sup>142</sup>

Section III.C, *infra*, places the theory of social impact regulation in a broader context and demonstrates how it illuminates a wide range of conflicts in relation to education, employment, health benefits, adoption services, and social services, occurring in a range of religions and across various loci.

### III. GOVERNING THE CONFLICT: THE SOCIAL IMPACT REGULATION OF EQUALITY CHALLENGES

This Part turns to exploring the internal perspectives and practices of religious decision-makers with respect to the conflict between religion and equality. Section III.A describes the conflict as it is experienced by religious leaders: commonplace, agonizing, and occurring both between and within cultures. Section III.B then focuses on the question set forth in Part I: What factors shape the religious response to the conflict and, particularly whether religion responds with opposition or tolerance to equality challenges? I focus on one framework of factors, which I describe as *social impact regulation*.

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140. EWICK & SILBEY, *supra* note 130; Felstiner, Abel & Sarat, *supra* note 115; Miller & Sarat, *supra* note 114.

141. Mario Luis Small, 'How Many Cases Do I Need?: On Science and the Logic of Case Selection in Field-Based Research, 10 ETHNOGRAPHY 5 (2009) (arguing that this question is irrelevant to qualitative research and drawing the distinction between mapping variation—which qualitative research does—and explaining variation, in the sense of quantifying effects and establishing causality—which it does not).

142. I follow up on these hypotheses in a recent working paper that applies a comparative lens to examine the "war within" theory, and social impact regulation in particular, and uses experimental methods to answer questions of causality, magnitude, and generalization, among other questions.

A. *The War, as Experienced from Within Religion*

The big picture that emerges from the accounts of the Catholic leaders—individuals who head institutions and education networks, overseeing and engaging with hundreds of employees, students, and families—is of a conflict, or “war,” that occurs both *between* religious culture and societal culture and *within* religion: within its communities, institutions, values, and even within specific decision-makers. The vast majority of the leaders experienced conflicts between religion and equality as commonplace and “really, really tough,”<sup>143</sup> several using the word “nightmare.”<sup>144</sup> The interviews indicated that conflicts over gender and sexuality were among the primary tensions preoccupying the leaders, and that the most concerning dilemmas (see Table 1) typically involved a choice between tolerating unmarried pregnancies and same-sex relationships and taking adverse action against the perceived nonconformist (usually by terminating employment or education). Sixty-three percent (63%) of the leaders personally dealt with or were concerned about LGBTQ issues, and 75% of them dealt with or were concerned about unmarried pregnancy.<sup>145</sup>

*Table 1: Types and Frequencies of Conflicts Discussed by Religious Leaders*

Conflicts regarding...	Share of concerned leaders
LGBT issues	63%
– LGBT teacher	44%
– LGBT student	19%
– LGBT parent	13%
Pregnancy out of wedlock	75%
– Of a teacher	56%
– Of a student	25%
– Of someone else	13%
Other conflicts	
– The contraception mandate	31%
– Illegal status of migrant students	6%

Note: The table presents the share of leaders who described a specific case or an example of a conflict related to the category (either a past or present case). To provide conservative estimates of the frequency of conflicts, only interviewees who raised the dilemmas independently of the interviewer and/or personally encountered these dilemmas were included. N=17.

143. Interview with Leader #9 (May 2014).

144. Interview with Leader #5 (Apr. 2014); Interview with Leader 13 (June 2014).

145. Additional gender-related conflicts included objections to the contraceptives mandate (some of the leaders I interviewed were involved in litigation against the act themselves or through their institutions).



These frequencies provide evidence of the intensity of the conflict between religion and LGBTQ and gender equality within religious communities. Naturally, the preoccupation with sexuality was reflected in the conflicts that the leaders described and the examples they provided. As a result, many of the following pages deal with the response of religious institutions to conflicts concerning LGBTQ issues and unmarried pregnancy. And the leaders often alluded to the socio-cultural aspect of these conflicts, saying that “Catholic schools are counter-culture”<sup>146</sup> and that “part of the cultural problem, issue, struggle, is that the Church has always lived in a pluralistic world.”<sup>147</sup> The intensity of the conflict was almost a cause for anxiety. Mr. Tobin,<sup>148</sup> the president of a Catholic high school in the Midwest, was particularly apprehensive of the day he would have to deal with a public coming-out of a gay teacher:

There is going to be in [the area] a precedent-setting case, and I think every Catholic school, and this has come up through the Association of Catholic Schools Presidency in the area [refers to the local Catholic Education Association] and in conversation, I think every school hopes that it’s not their school that is the first to see what that precedent will result in, but we all know that we’re facing this same dilemma.<sup>149</sup>

Indeed, most leaders viewed the trend toward equality and antidiscrimination as emerging from the general society, and therefore external in origin—a conflict between liberal culture and Catholic culture. Yet the ideas and values the equality trend brought forth were gradually penetrating religious boundaries, transforming the conflict from external to internal. The values at stake have also shifted from secular ones of equality and non-discrimination to religious values of compassion, forgiveness for sin, evangelism (requiring inclusion), humility (“we are all sinners”), kindness, and love.<sup>150</sup> For example, Ms. Peterson, a principal, had a record of not expelling or dismissing individuals for pregnancy out of wedlock, abortion, or gay relationships.<sup>151</sup> Her philosophy was that, “Although we cannot support the decision that you made, we can support you” and “[w]e believe that God may not love the sin, but he always loves the sinner. And, we can do no less.”<sup>152</sup> One administrator overseeing many school districts

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146. Interview with Leader #5 (Apr. 2014).

147. Interview with Leader #14 (June 2014).

148. Throughout this Article, I use pseudonyms when I quote extensively from the interviews. Otherwise, I provide references to interviewee number.

149. Interview with Leader #13 (June 2014).

150. In previous work, I described in greater length the transformation of the conflict from external to internal and raised hypotheses regarding the relationship between this internalization of conflict and the application of more inclusive policies towards perceived sexual nonconformists. See Barak-Corren, *Antidiscrimination Law*, *supra* note 20, at 984–86.

151. Interview with Leader #8 (May 2014).

152. *Id.*

described “bishops that say, ‘No, we are going to forgive them. They can still teach. They have health insurance. They didn’t have an abortion. That’s a good thing. So we’re going to fully support them.’”<sup>153</sup>

The internalization of the conflict and of equality challenges does not mean that compassion and evangelism were transforming opposition and exclusion to tolerance and inclusion under all circumstances. A dominant consideration that influenced the response to equality challenges was the anticipated social impact of the perceived nonconformity—resulting in social impact regulation, which I describe next.

### B. *Social Impact Regulation*

The response of the educational leaders to the challenges posed by perceived sexual nonconformity systematically varied between opposition and tolerance based on social impact concerns. These concerns were predicated on the belief that normative deviations create a risk that others will follow suit and erode the religious norm. Accordingly, conditions that define the nonconformist’s scope of social impact—specifically, his or her role and sphere of action—guided the application of religious norms to particular conflicts.

Social impact regulation is far from strict enforcement and as a result, it simultaneously increases tolerance and inclusion *and* places limitations on individuals’ ability to express themselves within the community. Section III.B.1 describes the sphere factor; Section III.B.2 describes the role factor; and Section III.B.3 places social impact regulation in a broader context, discussing its implementation in additional settings and by additional denominations.

#### 1. *Sphere as a Dynamic Tool: Privatizing to Avoid Conflict*

The Catholic leaders divided the world into public and private spheres, each ruled by different standards. For the leaders, schools were the prototype of the public sphere: a public enterprise, a common space through which people express and realize their faith. Therefore, religious schools ought to be administered according to the teachings of the Church, and in a way that is publicly observable.

In contrast to the high standards expected in the public sphere, the leaders tended to tolerate sexual nonconformity in the private sphere, as long as the nonconformist continued observing religious norms in the public eye. As principal Peterson put it:

A teacher may never bring public scandal or publicly behave in a way that is contrary to the teachings of the church. . . . And there have been teachers that I know are gay, that have lived very, to the best of my knowledge, celibate lives. They have been nothing but outstanding role models of professionalism and care to our

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153. Interview with Leader #2 (Feb. 2014).

students. I can tell you that, sadly, there have been instances where I have had to let a teacher go. Not because of sexual orientation, or because they were living with a fiancée or engaged in a relationship. *But that they made that public.* You know, I never went witch-hunting to find out how my teachers were living. But if they really made it a public issue, and it became publicly known, then I had no choice.<sup>154</sup>

The view that private nonconformity is tolerable but public nonconformity requires religious enforcement was widely shared. Mr. Jefferson, a superintendent of schools, emphasized that the decision to forego religious enforcement in the private sphere was deliberate:

We do not go unnecessarily prying into our teachers' and administrators' personal lives. We don't want to peek through bedroom windows, and living room windows. *We don't want to know too much.* And we're not going to act on something that we don't know, obviously.<sup>155</sup>

Peterson and Jefferson describe a common feature of the public/private distinction: refraining from knowing, or willful ignorance. In addition, Catholic leaders also created policies intended to *hide* religious nonconformity, thereby making it “private.” That way, the public/private distinction became a dynamic tool that leaders used to turn a prohibited conduct into a permissible conduct, or at least tolerable conduct.

One principal described his policy with respect to same-sex marriage as, “let’s just make sure that an e-mail or an invitation [to the wedding] doesn’t go out to every faculty member . . . that the employee is respectful of the teachings of the church and is not bringing his partner to these events.”<sup>156</sup> As applied to the case of unmarried pregnancy, one administrator explained, “You could put somebody on leave; they could take the person out of the classroom and put them in another position.”<sup>157</sup> These policies were used as alternatives to dismissal—solutions that keep nonconformists in the system.

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154. Interview with Leader #8 (May 2014) (emphasis added).

155. Interview with Leader #17 (July 2014) (emphasis added). Similar statements were made by Leader #5 (Apr 2014); Leader 8 (May 2014); Leader #11 (June 2014); Leader #16 (June 2014).

156. Interview with Leader #13 (June 2014). A policy regulating all Catholic schools in Arkansas also alludes to the distinction in prohibiting students from publicly advocating or expressing same-sex attraction “in such a way as to cause confusion or distraction in the context of Catholic school classes, activities, or events.” DIOCESE OF LITTLE ROCK, ADDENDA TO THE MANUAL OF POLICIES AND REGULATIONS FOR ELEMENTARY AND SECONDARY CATHOLIC SCHOOLS OF ARKANSAS 2, <http://www.lrchs.org/wp-content/uploads/2016/07/Addendum-to-Handbook.pdf> [https://perma.cc/L39C-GQDC] (last visited Apr. 8, 2018).

157. Interview with Leader #5 (Apr. 2014). Additional examples provided by Leader #6 (May 2014); Leader #7 (May 2014); Leader #8 (May 2014); Leader #13 (June 2014).

The application of the public/private distinction is dynamic—it begins with the notion that the school is a public religious sphere, yet continues with the formation of islands of privacy within the public sphere, contained in private discussions between nonconforming individuals and their supervisors.<sup>158</sup> This policy thus clearly resembles “don’t ask, don’t tell,” but its focus is not about the process of communication—as neither asking or telling seem to be the main issue—but about the bottom line publicity of nonconformity. In other words, leaders appeared to craft policies that tolerated nonconformists who “told” them about their nonconformity, as long as they did not make it broadly public.

Why were public/private policies enacted? The interviews shed some light on this question. One major concern underlying the regulation of sexual nonconformity was its potential social impact, and public nonconformity was more worrying on that regard. First, the leaders repeatedly voiced concerns over what students might think and do if news of the nonconformity will spread. As one superintendent said: “To have an educator, somebody who’s forming the moral beliefs of our young, engage in a public act, or speak in direct opposition of the church, is a problem.”<sup>159</sup> Second, public nonconformity required a public response against the violation, otherwise the community might infer that the norm had weakened. As one administrator said: “we don’t want children to think there are no consequences for engaging in sin.”<sup>160</sup> Several educators cited a concern that students would follow a pregnant teacher’s lead and engage in nonmarital sexual relationships.<sup>161</sup> Third, public nonconformity could harm the relationship between the institution and the parents. As Mr. O’Malley said:

Certainly we exist as a private enterprise because people . . . would prefer the private enterprise compared to the public one. And when I choose to send my children to a Catholic school, then my expectations are that the employees there are going to

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158. Many educational leaders suggested similar DADT solutions. Some variation existed regarding the “don’t ask” component. Some supported the prohibition on asking (Leader #11 (June 2014); Leader #15 (June 2014)), others thought schools are entitled to ask (Leader #3 (Mar. 2014); Leader #4 (Mar. 2014); Leader #7 (May 2014); Leader #8 (May 2014)). Notably, DADT-like solutions were one component of social impact regulation, in addition to privatization, role distinctions, role transfers, and more.

159. Interview with Leader #17 (July 2014). I address the significance of the role of the nonconformist in Section III.B, *infra*. Similarly, Tova Hartman Halbertal describes a conversation between a Catholic teacher and her Bishop, who told her: “[w]e can have the biggest argument you’ve ever had in your life. But when we go out there, it has to be a cheery ‘Aye-aye, sir’ . . . we have to present a united front. We teach what the Church teaches.” HALBERTAL, *supra* note 130, at 114. Hartman interprets that the Bishop “did not want to silence her as an individual woman, only as the teacher of Catholic girls.” *Id.*

160. Interview with Leader #9 (May 2014).

161. Interview with Leader #16 (June 2014); Interview with Leader #17 (July 2014).

teach the children the Catholic faith. And they're going to exemplify that in their public life. And when that is in conflict, we're in conflict.<sup>162</sup>

Interestingly, Catholic leaders did not cite canon law or doctrine in any specific manner. Yet their use of the private/public distinction and their particular concern for social impact resonates with several contemporary discussions in the Church. A recent application of public/private distinctions to facilitate the inclusion of sinners in the community appears in the Buenos Aires and Rome guidelines regarding remarried and divorced couples. The Buenos Aires Bishops wrote that

It may be right for eventual access to sacraments to take place *privately*, especially where situations of conflict might arise. But at the same time, we have to accompany our communities in their growing understanding and welcome, without this implying *creating confusion about the teaching of the Church* on the indissoluble marriage.<sup>163</sup>

These guidelines were endorsed by the Pope, and the Rome diocese followed suit, allowing the communion to take place “in a discreet manner,” “but not however in the case in which, for example, [the couple’s] condition is shown off ostentatiously as if it were part of the Christian ideal, etc.”<sup>164</sup> Notably, the public/private distinction is not articulated as a formal rule in these documents; nevertheless, it has guided the development of the Catholic response to challenges of nonconformity and inclusion.

In conclusion, the findings chart a systematic variation in the leaders’ response to and regulation of gender and sexual nonconformity. Catholic leaders drew on the public/private distinction to form their responses to equality challenges, such that the distinction moderated the emergence and escalation of conflict. Social impact concerns were related to the decision to strictly enforce religious norms *and* to the decisions to relax enforcement, tolerate nonconformity, and even actively assist it. Hence, private/public policies served both as a form of risk regulation and as a conditional means of inclusion. Furthermore, the leaders often implicated themselves in the protection of nonconformity through “privatizing”

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162. Interview with Leader #16 (June 2014).

163. *Buenos Aires Bishops’ Guidelines on Amoris Laetitia: Full Text*, CATHOLIC VOICES COMMENT para. 9 (Sept. 18, 2016), <https://cvcomment.org/2016/09/18/buenos-aires-bishops-guidelines-on-amoris-laetitia-full-text/> [https://perma.cc/2R4C-VGRV] (emphasis added).

164. This policy is referred to as “the internal forum” or “foro interno.” The original text in Italian reads “in maniera riservata” and “ma non invece nel caso in cui, ad esempio, viene ostentata la propria condizione come se facesse parte dell’ideale cristiano, ecc.” See “*La Letizia dell’amore: il Cammino Delle famiglie a Roma*”. *Relazione del Cardinale Vicario a Conclusione del Convegno Pastorale Della Diocesi di Roma del 2016* (Oct. 10, 2016), <http://www.gliscritti.it/blog/entry/3884> [https://perma.cc/K998-T2CA].

it or deliberately ignoring it (e.g., by temporarily relocating unmarried pregnant teachers to less public positions, making sure that wedding invitations do not find their way to antagonistic faculty members, or refusing to investigate “allegations” of sexual nonconformity). This practice in particular emphasizes the tension between the normative premise of the leaders—that sexuality norms are binding and that the school has a role in enforcing them—and the path of selective enforcement that they ultimately chose to apply. It is noteworthy that uses of the distinction varied. Some thought that carving a discreet solution would be easier in the LGBTQ case than in the pregnancy case, as principal Scott explained:

Well, it’s one of those things where it’s very hard to hide someone who’s pregnant. But if you were living, you know, you just give me your address, I don’t go to your house as your employer and check who you’re living with. But the same way if someone was having sex out of marriage, I wouldn’t know that unless, there’s no reason as their employer I would find that out unless somehow that were to become public. Yeah, I think if someone was gay it would be easier to hide than a pregnancy in the building.<sup>165</sup>

Another important source of variation was the role of the nonconformist, to which I turn now.

## 2. *Role: Heightened Positions Come with Less Tolerance*

Challenges to the normative order can come from various constituents of the religious community. In recent years, teachers, coaches,<sup>166</sup> cafeteria operators,<sup>167</sup> and students<sup>168</sup> argued that they were discriminated against by religious (often Catholic) schools based on their sexual orientation. These cases suggest that being openly gay and particularly being in a

165. Interview with Leader #11 (June 2014); Interview with Leader #12 (June 2014).

166. See *supra*, note 137. This is not a complete list. Additional episodes are detailed, e.g., in Michael Paulson, *Gay Marriages Confront Catholic School Rules*, N.Y. TIMES (Jan. 22, 2014), <https://www.nytimes.com/2014/01/23/us/gay-marriages-confront-catholic-school-rules.html> [<https://perma.cc/2Q2F-R7AX>].

167. Milton J. Valencia, *Gay Married Man Says Catholic School Rescinded Job Offer*, BOS. GLOBE (Jan. 30, 2014), <https://www3.bostonglobe.com/metro/2014/01/29/dorchester-man-files-discrimination-against-catholic-school-says-lost-job-because-was-gay-married/0KswVITMsOrruEbhsOsOeN/story.html?arc404=true> [<https://perma.cc/3H54-NSHW>].

168. *Gay Teen Wins Fight over Catholic Prom*, CBC NEWS (May 22, 2002, 5:05 PM), <http://www.cbc.ca/news/canada/gay-teen-wins-fight-over-catholic-prom-1.348831> [<https://perma.cc/P3R7-UCP5>] (describing a Catholic school decision that an LGBTQ student is prohibited from bringing a same-sex date to the school prom); Maura Dolan, *School Wins Bias Case Ruling*, L.A. TIMES (Jan. 28, 2009, 12:00 AM), <http://articles.latimes.com/2009/jan/28/local/me-school28> [<https://perma.cc/2KBP-7RFJ>] (describing a case involving a Lutheran school that dismissed two students for having “a bond of intimacy” that was “characteristic of a lesbian relationship”).

same-sex relationship mark the exit sign for LGBTQ individuals. The data suggest a more nuanced answer. In addition to the sphere of nonconformity, the *role* of the nonconformist was relevant to the application and enforcement of religious norms (and, indeed, public allegations by teachers and coaches appear to be more prevalent than cafeteria workers). The common distinction in the data was between teachers and students. Clearly, there are many reasons to differentiate these populations. Firstly, students are young and may be perceived as fragile, and thus in greater need of aid and counsel.<sup>169</sup> Secondly, leaders may perceive students as malleable and “not fully formed,”<sup>170</sup> and thus better candidates for rehabilitation than adult teachers.<sup>171</sup> Lenient treatment might be motivated by hopes to bring students into conformity.<sup>172</sup> Students are also *expected* to deviate from the norms, as this is what students typically do.<sup>173</sup> Finally, schools also depend on the business of students and parents, which may lead them to factor their interests and (perceived) preferences into the enforcement policy.<sup>174</sup>

These are all reasons that can contribute to the distinction between students and teachers. Yet another dimension of the teacher–student distinction is the particular relationship between role and social impact. Specifically, the religious leaders viewed (some) roles as more influential than others and more likely to shape community norms. Teaching in particular was considered as a position of social impact. The Catholic leaders perceived teachers as “role models” who must exemplify the ideal of religious life through good deeds and personal conduct.<sup>175</sup> This power came with stricter regulation, because the leaders believed that teacher nonconformity could confuse students and even inspire the same behavior in students.<sup>176</sup> Superintendent O’Malley elaborated on the social impact concern that was particularly relevant to teachers: “It’s very difficult to expect a student to learn from a person who says that abstinence is the

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169. Interview with Leader #8 (May 2014); Interview with Leader #9 (May 2014).

170. Interview with Leader #9 (May 2014).

171. *Id.*

172. Interview with Leader #17 (July 2014). Preferences for “rehabilitation” over exclusion could be related to the more general interest of the community to retain its members and preserve its integrity. I discuss this explanation in Part V, *infra*.

173. Relatedly, teaching is supposed to guide and correct for errors. Therefore, students who deviate might actually reinforce the system and act within its behavioral norms.

174. Interview with Leader #16 (June 2014).

175. These views were expressed by all leaders and were especially dominant in the interviews with Leader #2 (Feb. 2014); Leader #5 (Apr. 2014); Leader #6 (May 2014); Leader #7 (May 2014); Leader #9 (May 2014); Leader #11 (June 2014); Leader #12 (June 2014); Leader #14 (June 2014); Leader #16 (June 2014).

176. Interviews with Leader #7 (May 2014); Leader #9 (May 2014); Leader #14 (June 2014); Leader #16 (June 2014); Leader #17 (July 2014).

only moral way we can live our lives, and yet they don't practice what they are teaching children."<sup>177</sup>

The regulation of pregnancy out of wedlock exemplifies the role distinction. According to the interviews, when a teacher became pregnant out of wedlock, some consequence typically followed. Teachers were dismissed,<sup>178</sup> put on leave (with or without pay),<sup>179</sup> moved to a back-office position for the duration of the pregnancy,<sup>180</sup> or even encouraged to marry.<sup>181</sup> Students, in contrast, were almost always kept in school and counseled throughout their pregnancy. Ms. Peterson, a retired superintendent and principal, illustrated this point. Referring to teen pregnancy among students, she said:

I had three girls that year that were pregnant. All three of them were permitted to remain in school. . . . And then, I also know that it was around that same time . . . that a student came out to our senior counselor, that she was gay. And our senior counselor worked with her throughout the year. And again, there was no talk of dismissing her.<sup>182</sup>

Yet when Ms. Peterson was asked about the response to a teacher in a similar condition, she clarified that a teacher should “absolutely” be terminated because her job obliges her to “not bring public scandal or to behave in a way that’s contrary to the teachings of the faith.”<sup>183</sup> Opposite reactions to nonconforming teachers and students were commonly shared among the leaders. “One’s a role model, one isn’t”<sup>184</sup>—succinctly captures the thrust of this approach.

The role-based distinction operated similarly, and for the same reasons, in sexual identity cases. The picture emerging from the interviews was that all other things being equal, LGBTQ students were more likely to be kept part of the school community whereas teachers were more likely to be excluded. Mr. Jefferson, a superintendent, justified the decision of another archdiocese to dismiss the vice principal who married his boyfriend in *Zmuda*:

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177. Interview with Leader #16 (June 2014).

178. Interviews with Leader #1 (Feb. 2014); Leader #9 (May 2014); Leader #12 (June 2014); Leader #17 (July 2014).

179. Interviews with Leader #1 (Feb. 2014); Leader #5 (Apr. 2014); Leader #6 (May 2014); Leader #8 (May 2014); Leader #9 (May 2014).

180. Interviews with Leader #6 (May 2014); Leader #7 (May 2014); Leader #17 (July 2014).

181. This was discussed as a desired solution by Leader #8 (May 2014) and Leader #12 (June 2014).

182. Interview with Leader #8 (May 2014); *see also* Interview with Leader #9 (May 2014) (“I don’t know of any Catholic school who will not let a pregnant student attend. They all do, as far as I know.”).

183. Interview with Leader #8 (May 2014).

184. Interview with Leader #9 (May 2014).



To have somebody who is working with young people, particularly in a leadership role, who signed a contract that clearly says that he was asked to support and live up to the teachings of the church. I can see why the archdiocese had to take that step [of dismissing him].<sup>185</sup>

At the same time, Mr. Jefferson's approach to students who come out as LGBTQ was careful and tolerant, as was Ms. Peterson's. He did not hold students to the same normative standards as teachers.<sup>186</sup>

The implications of the role distinction for students often implied a counseling, rehabilitative approach.<sup>187</sup> This approach did not forsake the validity of religious norms, but it altered their application and mode of enforcement. Instead of grounds for punishment and exclusion (as applied to teachers) the norms served as a source of guidance in the case of students. Notably, while leaders were concerned, to some degree, from students' negative influence on one another, they did not see the students' impact as a concern sufficiently strong to require expulsion. It appeared that students were not expected to model the norm and therefore their nonconformity did not trigger the same perceived social risks.<sup>188</sup>

Social impact regulation, in its focus on role, reflects once again a systematic variation in the application of religious norms. A rule that "needs to be enforced" on one category of people is reinterpreted for another. The application of the role rule also varied between leaders. On the expansive side of the role model argument we find leaders, including Ms. Fordham and Ms. Peterson, who did not distinguish between teachers of religious and secular subjects and expanded the role model category to virtually every school employee,<sup>189</sup> and even parents,<sup>190</sup> arguing that who-

185. Mr. Jefferson was affiliated with a different archdiocese than the one that fired Mr. Zmuda and so he was commenting on the case from an outsider's perspective. In his discussions of similar conflicts in his own archdiocese, he referred to the decision-making process in terms of "we" and "our."

186. Interview with Leader #17 (July 2014) ("[I]f you are gay, and even if you are in a homosexual relationship, . . . you're not going to get expelled. There's probably going to be no formal punishment exacted against you.").

187. Interviews with Leader #5 (Apr. 2014); Leader #6 (May 2014); Leader #7 (May 2014); Leader #9 (May 2014); Leader #11 (June 2014); Leader #17 (July 2014).

188. See *supra* note 186 and accompanying text. Note that it is unclear whether this assumption is accurate or not. Students may have considerable influence on their peers, and teachers may exert little influence, depending on the circumstances.

189. Interviews with Leader #8 (May 2014) (describing how the morality clause applies to "every single person who works within our school community"); Leader #9 (May 2014) ("I don't think there's a difference between teachers and other employees. I think they're all pretty much treated the same way. I've not seen differences in my, the schools I've been associated with, if a teacher's assistant or a cafeteria worker became pregnant out of wedlock, she would be treated the same way as a teacher who became pregnant out of wedlock.").

190. Interview with Leader #2 (Feb. 2014) described a pastor that revoked the admission of a child after learning that he had two mothers ("he was not willing to

ever might be posing a risk of social impact should be removed. These accounts did not distinguish, as legal doctrine often does, between employees who hold active religious roles (for example, “called” teachers who lead students in prayer)<sup>191</sup> and employees in back-office positions or lay teachers of secular subjects.<sup>192</sup> On the narrow side of the argument we find leaders who did not subscribe to expansive interpretations of the role model category and allowed LGBTQ parents to enroll children in their institutions.<sup>193</sup> Interestingly, some leaders explicitly noted that sexual nonconformity should not serve as grounds for dismissal in non-educational settings, where employees are not expected to serve as models of religious norms for others to follow.<sup>194</sup>

### 3. *Social Impact Regulation in Context*

The findings from the qualitative fieldwork shed light on the existence of systematic variation in the religious regulation of sexual nonconformity. In contrast to culture war analyses, conservative religious leaders do not rush to secure a license to discriminate whenever they encounter sexual nonconformity in their institutions. They also do not perceive the values involved as necessarily incommensurable. Instead, they attempt to find accommodations on the ground, drawing on distinctions of sphere and role in an attempt to square traditional and liberal norms, often reasoning their actions in terms of compassion, forgiveness, evangelism, and humility.

There are two overlapping concerns about social impact underlying this regulation. First, the leaders believe that normative deviations create a risk that others might follow suit, and therefore conditions that vary the nonconformist’s scope of influence—her role and the sphere in which she acts—are relevant to the application of the norm. Second, the leaders believe that role and sphere create or strengthen an obligation to respond to nonconformity in ways that affirm the religious norm, otherwise its social status could decline.

While both sphere and role distinctions are rooted in concerns that perceived nonconformity might spread, they also allow it to persist. As a

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run events where the two mothers would come. And he just thought that was a bad role model”); the child ultimately enrolled in another Catholic school in town that did accept him.

191. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012) (holding that the ADA does not apply in the case of a “called teacher”).

192. *See, e.g.*, *Hamilton v. Southland Christian Sch. Inc.*, 680 F.3d 1316, 1319–20 (11th Cir. 2012) (holding that antidiscrimination law applies in the case of a lay teacher).

193. Interview with Leader #17 (July 2014) (“[W]e have a policy on the books indicating that parents who are in a same sex relationship are allowed to enroll their students in our schools.”).

194. Interviews with Leader #5 (Apr. 2014); Leader #1 (Feb. 2014); Leader #9 (May 2014); Leader #16 (June 2014).

result, social impact regulation simultaneously narrows the expression of sexual nonconformists and increases tolerance towards sexual nonconformity in religious institutions.

As the remainder of this Part demonstrates, these findings elucidate a phenomenon that appears to exist in a wider context. Indeed, there is evidence to suggest that social impact regulation occurs in additional arenas of conflict and is operated by additional religious groups.

First, social impact regulation is employed in a wide range of contexts, including education, employment, healthcare, adoption services, and social services. Education and employment in educational institutions were discussed in the qualitative fieldwork. The implications of social impact regulation for healthcare are exemplified in the San Francisco controversy.<sup>195</sup> Recall that the Catholic Church and the city entered a dispute regarding the city's intention to oblige its contracting parties to provide health insurance to same-sex partners.<sup>196</sup> The parties managed to bridge their differences only when a privacy-based solution was formed.<sup>197</sup> The ingredients of social impact regulation were all present in this case. Like the educational leaders who did not want "to know too much,"<sup>198</sup> the Archbishop did not want to "know" and erected a wall of privacy that facilitated tolerance *and* avoided the public erosion of the Church's norms.<sup>199</sup> An identical policy, for identical reasons, was adopted by the Catholic Church in Michigan in 2016, in response to marriage equality and pressures to offer health benefits to same-sex partners.<sup>200</sup> Also in Michigan, the agreement was presented as a compromise, "[d]ue to recent changes in federal law . . . [t]he inclusion of the LDA (Legally Domiciled Adults) benefit allows for the MCC health plan to be both legally compliant and consistent with Church teaching."<sup>201</sup> This recent adoption of social impact regulation in the healthcare context shows its continued viability and relevance.

Social impact regulation played the same role, albeit with an opposite outcome, in the Boston adoption services controversy. There, the Church's adoption agencies placed children with same-sex parents as long as this was kept under the radar but ceased to do so after the practice was exposed publicly.<sup>202</sup> The publicity of the information required the Church to clarify its stance regarding same-sex relationships, and the

195. See *supra* Section I.C; *supra* notes 98–102 and specifically Minow, *supra* note 1, at 829–44.

196. Minow, *supra* note 1, at 829–31.

197. *Id.* at 831.

198. Interview with Leader #17 (July 2014).

199. See *id.*

200. Niraj Warikoo, *Catholic Church in Michigan May Expand Health Care to Gay Couples*, DETROIT FREE PRESS (Mar. 4, 2016), <http://www.freep.com/story/news/local/michigan/2016/03/04/catholic-church-michigan-may-expand-health-care-gay-couples/81336744/> [https://perma.cc/8CFV-8QPJ].

201. *Id.*

202. See Minow, *supra* note 1, at 832–38.

Archbishop felt unable to deviate from canon law explicitly.<sup>203</sup> Even so, other dioceses were willing to adopt a referral policy to agencies that placed with same-sex families, seeking to avoid knowledge of concrete placements.<sup>204</sup> However, the Massachusetts government declined this compromise.<sup>205</sup>

The social impact lens also illuminates the chain of events in *Pedreira v. Kentucky Baptist Homes for Children*,<sup>206</sup> which involved an Evangelical institution.<sup>207</sup> Pedreira, a lesbian, was employed at the charity as a therapist.<sup>208</sup> In her job interview, she was informed that her sexual orientation was not a problem, but should be kept discreet.<sup>209</sup> In August 1998, a photograph of Pedreira wearing a t-shirt that read “Isle of Lesbos,” alongside her girlfriend, was exhibited at a local fair unbeknownst to her.<sup>210</sup> The exhibition led to Pedreira’s termination, with the Kentucky Baptist Holmes for Children (KBHC) citing concerns that her employment “was sending the wrong message to kids.”<sup>211</sup> The charity transferred Pedreira to do office work and attempted to help her find another job—common practices among the Catholic leaders in this study.<sup>212</sup> Pedreira, by her account, was hurt and did not want to cooperate with these attempts.<sup>213</sup> Notably, there was no legal prohibition on sexual orientation discrimination applicable to Pedreira’s claim and so her case ultimately failed in court.<sup>214</sup>

*Pedreira* is made of all the ingredients of social impact regulation, but these were never at the forefront of the analysis.<sup>215</sup> In fact, perhaps be-

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203. *See id.*

204. *See id.* at 838.

205. *See id.*

206. 186 F. Supp. 2d 757 (W.D. Ky. 2001), *aff’d in part, rev’d in part*, 579 F.3d 722 (6th Cir. 2009), *cert. denied*, 565 U.S. 935 (2011).

207. *Id.* (dismissing Pedreira’s discrimination claim).

208. MICHAEL L. JONES, *SECOND-HAND STORIES: 15 PORTRAITS OF LOUISVILLE* 122–23 (2006).

209. Minow, *supra* note 1, at 809 (citing Interview with Alice Pedreira by People for the American Way, <http://archives.wbur.org/insideout/documentaries/faith/pop/pedreira.html> [<https://perma.cc/A89A-CC4C>] (last visited May 22, 2020)).

210. *Id.*

211. JONES, *supra* note 208, at 114.

212. *Id.*

213. *Id.*

214. *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722, 728 (6th Cir. 2009), *cert. denied*, 563 U.S. 935 (2011). At the time, Kentucky did not have a state law prohibiting discrimination on the basis of sexual orientation in private employment. Louisville, the locus of events, eventually enacted an ordinance prohibiting discrimination, 1999 Louisville Code § 98.06, today Louisville Metro American Ordinance § 92.06 (2004). Following the Supreme Court’s recent decision in *Zarda*, discussed *supra* note 36, employment sexual orientation discrimination is prohibited nationally.

215. Previous analyses of this case focused on the rights gap between the public and the private sector, see David H. Rosenbloom & Suzanne J. Piotrowski, *Out-*

cause the court was unsure what to make of KBHC's original decision to employ Pedreira despite knowing about her sexual orientation, this fact was entirely omitted from the record.<sup>216</sup> Against the background of this Article, this puzzle is solved as *Pedreira* becomes part of a broader phenomenon that cuts across religions, organizations, services, and employment contexts.

*Pedreira* also draws attention to the deeper implications of the sphere distinction. Pedreira did not publicize her sexuality at work, nor did her co-workers peek through her bedroom windows. Instead, a photographer, a stranger to her, "outed" her. In a somewhat similar case, a teacher in Ohio was dismissed after her same-sex relationship was made public in an obituary.<sup>217</sup> These cases might be rare examples, but they clarify that social impact regulation is not necessarily a function of the nonconformist's conduct. Even if the person and the institution are both interested in the pact of social impact regulation, their success ultimately hinges on the actual state of affairs—a status—whether the parties choose it or not.

The wide reach of social impact regulation is also evident from the range of religions and jurisdictions in which it appears. It is applied by religious institutions in liberal states (e.g., San Francisco and Boston) as well as conservative ones (e.g., Kentucky, Ohio,<sup>218</sup> and Florida<sup>219</sup>) that either enacted or did not enact antidiscrimination prohibitions. It appears in the Catholic church, the Baptist church,<sup>220</sup> the Lutheran

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*sourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADM. 103, 105 (2005), and the question of public funding of and contracting with private entities engaged in discrimination, see Regina N. Kaley, Note, *Can Taxpayers Stand Discrimination: Lack of Standing and the Religious Freedom Restoration Act Permits the Executive Branch to Fund Discrimination Within Religious Organizations*, 49 J. CATHOL. LEG. STUD. 195 (2010); Laura B. Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R. & C.L. L. REV. 389 (2002).

216. *Pedreira*, 579 F.3d at 856 (stating that "the decision to terminate her was made after . . . her lesbian lifestyle became known to KBHC" and emphasizing KBHC's formal policy that "[h]omosexuality is a lifestyle that would prohibit employment"). The court never mentions the fact that her lifestyle actually became known to her employers at KBHC at the time she was employed, not only after the publication of her photo.

217. Meredith Bennett-Smith, *Carla Hale, Gay Teacher, Fired from Catholic High School After Being "Outed" by Mother's Obituary*, HUFFINGTON POST (Apr. 18, 2013), [https://www.huffingtonpost.com/2013/04/18/carla-hale-gay-fired-teacher-catholic-high-school\\_n\\_3103853.html](https://www.huffingtonpost.com/2013/04/18/carla-hale-gay-fired-teacher-catholic-high-school_n_3103853.html) [<https://perma.cc/5QU4-MMTL>] (last updated Feb. 2, 2016) (Ohio lesbian teacher was fired after the name of her female domestic partner was included among the survivors in a newspaper obituary).

218. *Id.*

219. See *infra* note 222. This is of course a partial list. The examples throughout this Part and this Section come from additional states.

220. *Pedreira*, 579 F.3d 722.

church,<sup>221</sup> the Alliance church,<sup>222</sup> and so on. In a previous work, I found widespread use of the sphere and role distinctions—for the same purposes and with the same consequences—by leaders of Orthodox Jewish institutions in Israel.<sup>223</sup> Orthodox Jewish leaders also privatize perceived sexual nonconformity and distinguish between roles for the purposes of mitigating the conflict between religion and equality.<sup>224</sup> Overall, we see evidence of social impact regulation across religions, including in Evangelical and Jewish denominations, and in conservative and progressive legal regimes.

While social impact regulation appears to be woven into the fabric of many conflicts involving equality challenges, it cannot explain the entire variation of the religious response to these challenges. First, some institutions might not take social impact into account and employ a stricter version of the doctrine. In other contexts, social impact regulation could be dormant or hard to detect.

Consider, for example, the behavior of business owners refusing service to same-sex weddings.<sup>225</sup> This is clearly a different context—involving private business owners and for-profit activities, among other distinctions. Social impact regulation could still be relevant to this domain, but its impact may be confounded with other factors. For example, religious business owners might apply sphere distinctions such that they sell or provide services to same-sex couples in private festivities, but not in public events. Consider the florist Barronelle Stutzman, who served Curt Freed and Rob Ingersoll for nine years, including on anniversaries and Valentine’s Days, but refused to arrange their wedding flowers.<sup>226</sup> Stutzman’s behavior ap-

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221. Aviva Shen, *Gay Teen Says School Threatened to Expel Him*, THINK PROGRESS (Feb. 7, 2015, 3:35 PM), <https://thinkprogress.org/gay-teen-says-school-threatened-to-expel-him-36cc089cb2f6/> [https://perma.cc/VN75-PGVW] (reporting on an interaction between a student who posted videos on YouTube about being gay and his principal who instructed him to delete them (thereby returning to “private” state) or leave the school because “[w]e cannot have you promoting a sinful lifestyle on air to the public.” The school’s policy was identical, at least on paper, with respect to promoting bisexual activity).

222. *Same-Sex Couple’s Kids Denied Enrollment into Christian Preschool*, NBC2 (Jan. 6, 2016, 11:00 PM), <http://www.nbc-2.com/story/30904823/same-sex-couples-kids-denied-enrollment-into-christian-preschool> [https://perma.cc/E7VH-NM8W] (reporting the refusal of a Florida branch to enroll the children of a same-sex family in preschool). The principal allowed their admission at first but then denied it, and the pastor cited social impact concerns: “[f]or us to have two men coming every day, we feel like *it would adversely affect the other kids*.” *Id.* (emphasis added)).

223. See Barak-Corren, *Beyond Dissent*, *supra* note 126.

224. *Id.* at 306–11 (describing findings from in-depth interviews with forty-one Orthodox leaders and discussing their use of the sphere and role distinction as withdrawal of religious normativity from arenas of conflict with the law).

225. See, e.g., *Masterpiece Cakeshop, LTD v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (regarding a baker who refused to create a wedding cake for a gay couple); *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (regarding a florist who refused to create flower arrangements for a gay wedding).

226. See *Washington v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1210–11 (Wash. 2019). Ms. Stutzman also argued that she hires LGBTQ employees and serves

pears to be consistent with a distinction between private and public events. Furthermore, the prism of social impact regulation provides a theoretical explanation to the emergence of wedding disputes as a central category of religion–equality conflicts. The dominance of wedding conflicts becomes predictable once we appreciate the importance of sphere considerations and the inherently public nature of weddings. Because there is no obvious way to privatize a wedding, avoiding conflict in these cases becomes more difficult—and wedding conflicts proliferate.

At the same time, and for the same reason, it is also difficult to prove the theory of social impact regulation in the context of weddings. This is because weddings do not have a clearly equivalent *private counterfactual* that would enable the examination of whether sphere considerations actually influence service refusal. Although a couple’s anniversary could be celebrated privately, it differs from a wedding along additional, non-sphere dimensions. For example, Stutzman also argued that her level of involvement would have been higher in a wedding than in other celebrations.<sup>227</sup> Similarly, baker Jack Phillips argued that he would willingly sell off-the-shelf products to same-sex weddings but would not create custom messages in relation to same-sex marriage because it requires his personal involvement.<sup>228</sup> Distinctions based on the level of involvement, intimacy, or creativity invested in the product or service, and their potential role in moderating religion–equality conflicts, could be studied in future research.

The variation of social impact regulation between legal contexts is expected, as no single factor ever explains the entire variation in human behavior, even in a specific context.<sup>229</sup> Nevertheless, social patterns are important for legal analysis and often have substantial normative implications. The next Part turns to evaluate these implications.

#### IV. EXPLANATIONS AND IMPLICATIONS

After establishing social impact regulation as a central influence on the religious response to equality challenges, we can turn to evaluate this phenomenon in relation to the debate on religion and equality. I will address two questions in particular. First, what explains social impact regulation and why is it adopted by religious communities? Second, how can social impact regulation inform legal and political debates on religion and equality?

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LGBTQ customers more broadly. *Id.* at 1211–12; *see also* Petition for a Writ of Certiorari at 1–2, *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

227. *Arlene’s Flowers Inc.*, 441 P.3d at 488–89.

228. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring).

229. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991).

A. *What Explains Social Impact Regulation?*

Social impact regulation is not readily explainable by common theories of social control. First, while social impact regulation could be described as a form of selective enforcement, it departs from previous models of selective enforcement. This is because the selection is not founded only on a sense of justice and compassion,<sup>230</sup> efficiency considerations,<sup>231</sup> scarcity of resources,<sup>232</sup> or preferential treatment of a favored group of gender or race.<sup>233</sup> Rather, as I showed in this Article, social impact regulation operates on specific distinctions of sphere and role. In addition, selective enforcement is an awkward framework to apply to social impact regulation, because the pertinent rule-makers—the individuals applying social impact regulation—seem to feel very much responsible to uphold the norms and typically consider sexual nonconformity as a sin and fear that it might spread to others in their community.

It is also difficult to explain social impact regulation as a social deterrence model. Social deterrence models predict that enforcement bodies would supplant actual sanctions for threats of sanction and cultivate fears to deter noncompliance.<sup>234</sup> While the qualitative findings cannot attest to the likely possibility that nonconformists in religious communities fear sanctions, the religious leaders in the study did not show signs of intentionally cultivating such fears. In fact, they actively *assisted* nonconformists in escaping sanctions.

Why, then, do religious institutions apply social impact regulation? I consider three potential explanations (or causes). Each explanation offers a different interpretation of the phenomenon and yields insight regarding the modes by which rights conflicts could be resolved. The explanations also illustrate the inadequacy of the culture war paradigm to explain the variation and dynamism that were documented throughout this Article.

1. *Social Impact Regulation as a Compromise*

The first explanation for why religious institutions apply social impact regulation is that, in some cases, the costs of conflict are greater than the costs of tolerance. If this is the case, religious leaders might be willing to compromise religious normativity to reduce or avoid conflict. The leaders' descriptions of the conflict as “really, really tough,”<sup>235</sup> a “PR

230. Stephen A. Schiller, *More Light on a Low Visibility Function: The Selective Enforcement of Laws (Part 2)*, 2 POLICE L. Q. 20, 24–29 (1972).

231. *Id.* at 30–31.

232. *Id.* at 20.

233. Douglas A. Smith & Christy A. Visher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOC. PROBS. 167, 169 (1981).

234. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); see also CHARLES R. TITTLE, SANCTIONS AND SOCIAL DEVIANCE?: THE QUESTIONS OF DETERRENCE (1980).

235. Interview with Leader #9 (May 2014).



nightmare,”<sup>236</sup> and a “political nightmare”<sup>237</sup> disclose the personal costs of the conflict. Mr. Smith, a high-ranking administrator who advises Catholic schools across the nation, elaborated on both the personal and social costs from the administrator’s perspective:

Bishops don’t want to be involved with this either. When these kinds of matters emerge, it’s very difficult because there is human implications to it. And the other part of it of course, is the whole political implication. Meaning, typically if these employees have been effective in their roles, whether as a teacher, as a principal, or [as] an administrator, they have a history of working with kids and families and people become very attached to these folks and become very loyal to them. And so, when those decisions need to be made people seem to rally. . . . Rally against the school, and the church’s position. And so what you have, clearly, what you have is an administrator that’s personally conflicted. Trying to do what’s right from the perspectives of the church, and what the teachings are from the church. Then maybe have this kind of human emotional side to it. So they’re dealing with their own personal conflict, if you will.<sup>238</sup>

These accounts describe the conflict as an impossible choice, one that even bishops seek to avoid, involving a competition between religious doctrine, political pressures, and personal emotions for the nonconformists.

Onerous factors pulling in opposite directions invite a compromise. Distinctions of sphere and role might have emerged as a solution because they provide a middle way. On one hand, they preserve religious order at the institutional and formal level; the religious norm remains intact and is publicly observed. On the other hand, the distinctions preserve nonconformists as part of the community, avoid the political conflict, and maintain good terms with the law (at least as long as they succeed in preventing conflict). Social impact regulation is thus capable of sustaining both community *norms* and community *members*.

The extent to which this compromise would be adopted by particular institutions may depend on multiple factors, including the existence or absence of legal pressure. The findings from the interviews indicate that social impact regulation is often applied without a threat of lawsuit. It also appears in regimes that exempt religious institutions entirely from antidiscrimination law.<sup>239</sup> Yet there are also cases that exemplify its emergence in response to direct legal pressure. The San Francisco agreement was justified by the Archbishop as a compromise needed “to prohibit local gov-

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236. Interview with Leader #13 (June 2014).

237. Interview with Leader #5 (Apr. 2014).

238. Interview with Leader #10 (May 2014).

239. *See, e.g.,* *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722, 762 (6th Cir. 2009).

ernment from forcing our Catholic agencies” to recognize domestic partnerships.<sup>240</sup> An identical policy was adopted by the Church in Michigan in 2016 in response to changes in the law and pressures to offer health benefits to same-sex partners. The San Francisco and Michigan agreements demonstrate the direct use of social impact regulation in the construction of compromises, not only with respect to singular cases (as in decisions about specific employees or students) but also with respect to general policy problems.

## 2. *Social Impact Regulation as a Distinction Between Wrongs*

A second potential explanation for the religious willingness to tolerate sexual nonconformity under social impact regulation is rooted in the common distinction in ethics and law between two types of wrongs: *malum prohibitum* (or *mala prohibita*)—wrong (only) because it is prohibited—and *malum in se*—wrong in itself.<sup>241</sup> The first kind of wrong involves a behavior that is not inherently immoral, but becomes wrong by its prohibition. For example, there is nothing inherently wrong in crossing the road on red or in driving above the speed limit. These behaviors are made wrongs by the laws that prohibited them in the pursuit of external goals. The contrasting example is taking a man’s life. This is a moral wrong in itself.

Same-sex relationships and out-of-wedlock pregnancies were clearly considered wrong by the Catholic leaders. But what kind of wrong? One possibility is that these wrongs are considered as *mala in se*, i.e., immoral and sinful in their own right. But if same-sex relationships and out-of-wedlock pregnancies had been perceived as *mala in se*, sphere and role should not have mattered much. Consider murder, generally perceived as *malum in se*, as the counterfactual. Tolerating murder in private would seem outrageous and unjustifiable to most people, regardless of the official response to public murder. It is difficult to imagine the religious leaders comfortably defending private murder.

It therefore seems unlikely that same-sex and unmarried relationships are a “wrong” of the same type as murder. Social impact regulation suggests that leaders evaluate these perceived nonconformities, even implicitly, as more similar to *mala prohibita*. As Mark Davis notes, one of the characteristics of *mala prohibita* offences—among which he lists homosexuality—is that society particularly objects to their public manifestations, but not so much to their occurrence behind closed doors.<sup>242</sup> Consequently,

240. Minow, *supra* note 1, at 832.

241. BLACK’S LAW DICTIONARY 959–60 (6th ed. 1990).

242. Mark S. Davis, *Crimes mala in se: An Equity-Based Definition*, 17 CRIM. JUST. POL’Y REV. 270 (2006). I elaborate on anti-sodomy laws in the next section. See Section V.A.3, *infra*. Notably, I do not suggest that the leaders believed that religious doctrine referred to these conducts as *mala prohibita*, but rather that the leaders themselves were not necessarily committed to the idea that unmarried pregnancy and same-sex relationships are intrinsically wrong. Under this explanation, the scripture guided their judgments through its legal authority, not necessa-

the leaders' application of social impact regulation discloses a perception which resembles the common perception of traffic laws: crossing the street on red is not intrinsically wrong but should nevertheless be prohibited for safety purposes. Accordingly, and analogous to the sphere distinction, most people would consider red-light crossing to be significantly less harmful on an empty street—when no one sees it or is harmed by it. At the same time, and analogous to the role distinction, while many would excuse ordinary folks in such circumstances, fewer would absolve policemen in the same way. People typically believe that policemen must always follow the law, not because traffic offences are intrinsically wrong, but because the police are expected to model compliance.

The Catholic Charities placement of children with same-sex couples in Boston over two decades<sup>243</sup> seems to exemplify this distinction. This setting does not lend itself easily to the compromise explanation. Adoptive same-sex couples are not longtime members of the community, whose termination would become immediately known and upsetting for many, but strangers, whose interaction with the charities could conclude with a single encounter and template rejection. Nevertheless, Catholic Charities of Boston placed children with same-sex couples voluntarily and in the absence of any direct legal challenge or media exposure. This record does not seem to reflect a compromise, but perhaps a perception that same-sex parenting is not inherently immoral and thus could be permitted in some circumstances. The refusal of the Church to continue with this practice after it became public is also consistent with a distinction between wrongs; while the nature of the wrong could justify a lenient approach, it is not a ground to repeal a law.<sup>244</sup>

Understanding social impact regulation as a distinction between wrongs is not necessarily an alternative to understanding it as a compromise. The two explanations nuance each other. First, the distinction-between-wrongs analysis explains *why* compromise is possible; if the subject of equality challenges were considered *mala in se*, it is unlikely that a compromise could have been achieved, regardless of the benefits. Second, the distinction-between-wrongs analysis can highlight *what* compromises are

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rily its moral persuasion. I thank Rick Garnett for insightful feedback on this point.

243. Minow, *supra* note 1, at 831–37.

244. Other distinctions between norms are probably at work. See, e.g., Barak-Corren, *Antidiscrimination Law*, *supra* note 20 (documenting a distinction between the wrong itself and having a relationship of sorts (e.g., employment) with someone who committed the wrong). Drawing on a large-scale survey (N=1,941) of U.S. Christians, I found that 46% of the sample believed that unwed pregnancy is religiously forbidden as compared with 36% who believed that *employing* an unwed pregnant teacher is religiously forbidden. *Id.* at 1004 n.142. Differences in beliefs were correlated with decision-making patterns in that study. When presented with a scenario of a religious school principal who deliberated whether to dismiss an unwed pregnant teacher, 35% of those who thought that unwed pregnancy is religiously forbidden decided to dismiss the teacher, versus 47% of those who thought that employing such a teacher is religiously forbidden. *Id.* at 1004–05, 1004 n.142.

possible. Requiring religious communities to “repeal” religious norms is not likely to yield a compromise. But redefining categories in ways that avoid such requirements—e.g., the legally domiciled adult category—can harness social impact regulation to break through the impasse. Third, the distinction-between-wrongs analysis serves as a reminder that social impact regulation is not only a compromise in response to external pressures, but also an internal mode of regulation that could be applied without direct legal or political pressure (as was documented throughout this Article).

I now turn to a third explanation of social impact regulation, one that is not pragmatic or normative, but rather sociological.

### 3. *Social Impact Regulation as a Bridge to Acceptance*

A third explanation for social impact regulation is that it is an intermediate phase between the past ban and future acceptance of a community’s presently condemned conduct. The evolution of religious accommodations for racial segregation illustrates such a trajectory. After the Supreme Court decided conclusively against school segregation in *Brown v. Board of Education*,<sup>245</sup> it allowed private religious schools to continue the practice. However, a decade or so later in *Green v. Kennedy*,<sup>246</sup> the Court ordered the revocation of the tax-exempt status of private schools that remained segregated, regardless of religious reasons.<sup>247</sup> However, many institutions continued to enforce segregationist policies with slight compromises aimed at evading the regulation. For example, a school might admit only married black students (so as to reduce the likelihood of intermarriage) or admit single black students but enforce non-interracial dating policies.<sup>248</sup> It wasn’t until the 1980s when the Court decided in *Bob Jones University v. United States*<sup>249</sup> that religiously-motivated segregation in private educational settings, including in partial form, warranted a removal of tax-exempt benefits. The *Bob Jones* decision relied on changes in American society more than on legal doctrine, suggesting that as the country’s social norms liberalized, the law had to follow. Since then, the issue of tax-exempt status to religious segregationist organiza-

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245. 347 U.S. 483 (1954).

246. 309 F. Supp. 1127 (1970).

247. *Id.* at 1131.

248. Bob Jones University is the most well-known example of such schools. See Justin Taylor, *Is Segregation Scriptural? A Radio Address from Bob Jones on Easter of 1960*, GOSPEL COALITION (July 26, 2016) <https://www.thegospelcoalition.org/blogs/evangelical-history/is-segregation-scriptural-a-radio-address-from-bob-jones-on-easter-of-1960/> [<https://perma.cc/23AK-UDXH>]. Bob Jones himself argued that race-based segregation is mandated by the Bible. *Id.* Notably, Jones did not argue that some races were superior or inferior to others, but simply that the Bible prohibited their mixing. *Id.*

249. 461 U.S. 574 (1983).

tions has become “closed,” in keeping with the strong social mores regarding race relations.<sup>250</sup>

A more recent development, and one which is directly relevant to social impact regulation, is the transformation of attitudes towards homosexuality and same-sex relationships in the last century. Since the Revolutionary War, homosexual service members were considered a risk to the American military and were disqualified, hunted, prosecuted, and discharged.<sup>251</sup> In 1993, a “don’t ask, don’t tell” (DADT) policy—in effect, a public/private distinction—was introduced as a compromise between activists and traditionalists.<sup>252</sup> In 2010, DADT made way to full inclusion of publicly open LGBTQ individuals in the military.<sup>253</sup> During this long period, transitions also occurred outside the military. What began as a felony—homosexual conduct was prohibited under the penal codes of many American states—became protected and decriminalized under conditions of privacy in the landmark *Lawrence* decision, which emphasized that “adults may choose to enter upon this relationship in the confines of their homes and their own private lives.”<sup>254</sup> State and local governments began enacting antidiscrimination protections for LGBTQ individuals and recognizing same-sex marriage; in 2016, same-sex marriage became the law of the land.<sup>255</sup>

If these historical processes have any relevance to social impact regulation as applied by conservative religious groups today, they suggest that social impact regulation could be a phase that precedes broader acceptance and equality, as occurred with respect to race and religion (a process that included renewed interpretations of biblical texts that previously were believed to be mandating segregation<sup>256</sup>); and as occurred with respect to societal and legal attitudes towards sexual orientation (a process which is still ongoing).

The time trend seems to support this hypothesis. Support for same-sex marriage is steadily growing among all religious sects, particularly

250. Minow, *supra* note 1, at 799–803. Bob Jones University repealed its segregationist policy in 2000 and apologized for its misrepresentation of the word of God. Taylor, *supra* note 248.

251. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II 9–14* (2010).

252. *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 8* (Gregory M. Herek et al. eds. 1996).

253. President Barack Obama signed the DADT Repeal Act in December 2010, pending military certification of readiness which came in July 2011. The effective end date of the policy was September 20, 2011. Don’t Ask, Don’t Tell Repeal Act of 2010, 111 Pub. L. 321 § 1 (2010); Department of Defense, *Repeal of “Don’t Ask, Don’t Tell” (DADT): Quick Reference Guide* (Oct. 28, 2011), [http://archive.defense.gov/home/features/2010/0610\\_dadt/Quick\\_Reference\\_Guide\\_Repeal\\_of\\_DADT\\_APPROVED.pdf](http://archive.defense.gov/home/features/2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_APPROVED.pdf) [<https://perma.cc/ENG4-M4X3>].

254. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

255. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

256. *Supra* note 248.

among younger generations.<sup>257</sup> However, it is important to note that liberalization is not a necessary consequence of social impact regulation. Jewish communities applied the sphere distinction to Jews who did not follow traditional Sabbath observance rules for centuries, without resulting in public normalization of Sabbath desecration (although the meaning of observance has changed throughout the years). Whether social impact regulation is part of a liberalization process is therefore an open question. Some religious leaders noted that their communities were changing, while others were more skeptical of whether formal change is likely to occur<sup>258</sup> Yet even if social impact regulation does not predict a nearing change, it may still be the case that any such change first requires a limited form of acceptance to emerge.

As noted above, the three explanations to social impact regulation are not mutually exclusive. Compromise could be a phase to something else and normative distinctions can emerge in response to social change. While none of these explanations provide a single conclusive answer, each of them unsettles the “ugly picture” of the culture wars paradigm as applied to religion–equality conflicts, which is dominated by irreconcilable values, fears of escalation, and collision courses.<sup>259</sup> In contrast, social impact regulation draws a picture composed of compromise, nuanced distinctions, liberalization, or all of the above. These two portraits of conservative religion—the belligerent and the struggling—coexist side by side. As religion struggles with finding nuanced responses to equality challenges, law needs to begin acknowledging these additional aspects of the religious response to the conflict and develop a normative framework that takes these aspects into account.

## B. *How Social Impact Regulation Informs Law and Politics*

### 1. *The Adjudication of Religious Claims*

Now that we have a more expansive and nuanced understanding of the conflict between religion and equality, it is time to consider how the war within religion could bear on the resolution of such conflicts. The analysis will naturally focus on social impact regulation as it is the central practice discussed in this Article, but it should be noted that other forms of internal decision-making could influence doctrine in additional ways.

For the purposes of the discussion, let us assume the typical case in which a court is asked to evaluate a discrimination claim brought against a religious organization that arguably acted on religious reasons. As social

257. PEW RESEARCH CTR., *supra* note 81; Caryle Murphy, *Most U.S. Christian Groups Grow More Accepting of Homosexuality*, PEW RES. CTR. (Dec. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/12/18/most-u-s-christian-groups-grow-more-accepting-of-homosexuality/> [https://perma.cc/Y29Y-BNQF].

258. Interview with Leader #5 (Apr. 2014) (“I don’t think the doctrine of organized religion is going to change. Not in my lifetime.”).

259. *See supra* notes 21–80 and accompanying text.

impact regulation has never been formally articulated, conceptualized, or discussed by the courts, there is no clear answer as to how, if at all, courts should consider it in the adjudication of such disputes. I will briefly review and discuss three potential legal approaches to social impact regulation that could be applied in these cases.

The first approach is to *demand the application of social impact regulation* whenever it increases inclusion and mitigates the conflict between religion and equality. To elaborate on what such pro-social impact regulation (pro-SIR) approach might entail, we can consider the decision of the European Court of Human Rights (ECHR) in *Schüth v. Germany*<sup>260</sup> as a stimulating example.<sup>261</sup> Mr. Schüth, the head musician at a Catholic parish in Germany, was dismissed for engaging in an extramarital relationship.<sup>262</sup> Mr. Schüth had publicly separated from his wife several years before the event, but the couple did not divorce.<sup>263</sup> The dismissal occurred after Mr. Schüth's children had told people at their kindergarten that their father was going to have another child.<sup>264</sup> The ECHR accepted Mr. Schüth's application, noting that Schüth kept his nonconformity private, did not publicly challenge the stances of the Catholic Church, and that the case did not receive media coverage.<sup>265</sup> The ECHR decision is rooted in the assertion that the Church could have tolerated Schüth's behavior, yet chose not to do so; therefore, the termination is unjustified. *Schüth* illustrates a model that scrutinizes the necessity of religious opposition to equality challenges and examines whether exclusion could have been avoided using social impact regulation.

Therefore, the model provides a heightened level of protection and inclusion to individuals within conservative religious groups and does so with what seems like minimal intervention in religious autonomy. The pro-SIR approach draws on a distinction which is already accepted and operated by the group and simply holds the group accountable to it. It does not impose a foreign normative standard on the group or force the group to endorse norms to which it objects. In cases litigated under a federal or state RFRA, where the government is prohibited from "substan-

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260. *Schüth v. Germany*, Cour Européenne Dse Droits De L'Homme [ECHR] [European Court of Human Rights] Sept. 23, 2010, Application. No. 1620/03 (Ger.).

261. *Id.*

262. *Id.* at ¶¶ 7, 13.

263. *Id.* at ¶ 11.

264. *Id.* at ¶ 12. *Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009), presents a similar factual background. However, perhaps because discrimination on the basis of sexual orientation was not prohibited in Kentucky at the time of Pedreira's termination, the case did not bring these facts to bear on its decision.

265. *Schüth*, ECHR at ¶ 72.

tially burden[ing] a person's exercise of religion,"<sup>266</sup> the pro-SIR approach can be viewed as imposing no "substantial" burden on religion.<sup>267</sup>

Alternatively, even if the burden is held to be substantial, the pro-SIR approach still may be the "least restrictive means" of furthering the compelling governmental interest in non-discrimination.<sup>268</sup> First, the approach is a form of religious accommodation that is crafted from the group's own tools to accommodate the conflict. Furthermore, sphere and role distinctions are not foreign to law, and are specifically applied via other rules to the resolution of conflicts between law and religion.<sup>269</sup> A dominant example is the "ministerial exception," a role-based distinction that provides religious institutions with the liberty to employ their ministers but holds them accountable to general law with respect to other employees. Designing a similar rule based on the sphere distinction is compatible with existing doctrine.<sup>270</sup>

At the same time, a pro-SIR approach raises several considerations that could vary its appeal for different legal regimes. In regimes that construe religious autonomy broadly and weigh it heavily, the attempt to probe into religious practices and derive rules that would bind religious claimants might be tantamount to undue interference with religious autonomy.<sup>271</sup> In contrast, in regimes that construe religious autonomy narrowly and place a heavy weight on non-discrimination, a social impact rule

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266. 42 U.S.C. § 2000bb(a)–(b) (2018) (unless the government demonstrates a compelling governmental interest and that the burden applied is the least restrictive means of furthering that interest).

267. See Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1247–53 (2017) (analyzing the elements of the substantial burden test).

268. 42 U.S.C. § 2000bb(a)–(b) (2018) (providing that the burden on religion should be the least restrictive means of furthering the compelling government interest).

269. John Rawls, *Political Liberalism*, in OXFORD HANDBOOK OF CLASSICS IN CONTEMPORARY POLITICAL THEORY 4 (rev. paperback ed. 1996) (arguing, as part of the idea of public reason, that the divide is essential to create an "overlapping consensus" in society).

270. The literature on the ministerial exemption also tied it to sphere-related ideas, albeit in the liberal notion of religion as a private association. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1311–13 (1994) (contending that "ideas about privacy" and "private association" support the right of religious organizations to select their leaders); James Oleske, *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 690, 723 (2019) ("Another justification for the ministerial exception is that it flows naturally from the broader public[-]private distinction embodied in constitutional doctrine . . .").

271. In general, American courts have been reluctant to develop tests that would require—or give the appearance of requiring—an evaluation of religious beliefs and practices. See Anna Su, *Judging Religious Sincerity*, 5 OXF. J. L. & RELIGION 28 (2016) (discussing the drawbacks of the highly deferential sincerity test adopted by courts); see also Marc O. DeGirolami, *Religious Accommodation, Religious Tradition, and Political Polarization*, 20 LEWIS & CLARK L. REV. 1127, 1132 (2017) (arguing that, "The refusal of courts to make any serious inquiry into the nature of the asserted religious burden has encouraged increasingly bizarre, aggressive, self-indulgent, ephemeral, and scattershot assertions of religious freedom.").



could be deemed insufficient and problematic in its own right. This is because social impact regulation ultimately restricts the ability of individuals to express themselves freely on the basis of their gender or sexual orientation and confines them to limited spheres and roles.<sup>272</sup> Pro-equality regimes might also worry that conferring institutional legitimacy on social impact regulation might entrench these limitations and detract from the prospect of achieving complete equality. This analysis suggests that the obligatory approach to social impact regulation would be less appealing to regimes that take an absolutist approach towards either religious liberty or gender equality and more appealing to regimes that are committed to balancing the two rights.

The second potential approach is to *reject the application of social impact regulation* and interpret it as a sign of inconsistency. Under this approach, a religion that selectively enforces its norms indicates inconsistency, which could either count as insincerity or as plain discrimination. Several courts adopted the view that selective enforcement undermines the religious argument. Specifically in the context of unmarried pregnancy, institutions that enforced the rule against extramarital sex based on the visibility of pregnancy were found to discriminate against women (other publicity or privacy policies were not discussed in these cases).<sup>273</sup> The flipside of this

272. See generally CATHERINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 191–92 (1989) (criticizing the public/private divide and notions of privacy generally, and family privacy in particular, as the marker of women’s subordination and oppression). Support for the idea that the public/private divide can be harmful, albeit from a different perspective, can be found in Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992) (criticizing the allocation of religious activity to the private realm as reductive and hostile towards religion); cf. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (arguing that the feminist perspective fails to acknowledge privacy as a desirable source of individual protection from public and social scrutiny).

273. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 667 (6th Cir. 2000) (permitting the case of an unmarried pregnant teacher to proceed to trial, holding that the school could not “use the mere observation or knowledge of pregnancy as its sole method of detecting violations of its premarital sex policy” without violating Title VII); *Vigars v. Valley Christian Ctr. of Dublin*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (permitting the claim to proceed to trial, reasoning that “women would be subject to termination for something that men would not be, and that is sex discrimination”). This approach has been applied to other rules and forms of selective enforcement. See, e.g., *EEOC v. Miss. Coll.*, 626 F.2d 477, 485–86 (5th Cir. 1980) (explaining that the Baptist college’s argument would fail if the plaintiff would show evidence that the proclaimed Baptist hiring policy was selectively enforced); *Herx v. Diocese of Fort Wayne-South Bend Inc.*, No. 1:12-CV-122 RLM, 2015 WL 1013783 (N.D. Ind. Mar. 9, 2015) (a petition to set aside a jury verdict that accepted the discrimination claim of a married teacher, fired for IVF treatments, who showed that three male employees who were thrown out of a strip club after harassing one of the performers were reprimanded but not fired; the judge holds that this evidence is admissible and has “probative value as the only instance (as far as this record showed) in which a male employee’s conduct was known to the diocese as potentially running afoul of the “morals clause””; elsewhere, the decision describes the diocese’s policy as a “don’t ask, don’t tell” rule that discriminates against women because of the visibility of pregnancy).

reasoning is *Boyd v. Harding Academy of Memphis, Inc.*,<sup>274</sup> in which a religious college successfully defended against a discrimination claim after its president testified about conducting active investigations into the conduct of both men and women and dismissing all employees who engaged in unmarried sex without regard to their sex and the visibility of their conduct.<sup>275</sup> Extrapolating from these decisions to the broader phenomenon of social impact regulation suggests an anti-social impact regulation (anti-SIR) approach. This approach would view social impact regulation as a sign of inconsistency in the application of religious norms and would require religious institutions to strictly enforce their rules to prevail in court.

The anti-SIR model raises several issues. First, it does not seem to improve on the first model in terms of reducing the burden on religion. On the contrary, whereas the pro-SIR model built on social impact regulation and legitimated its application, the anti-SIR model turns social impact regulation against religious groups and delegitimizes the policy entirely. A second issue is that the antagonistic approach to social impact regulation appears rooted in consistency requirements, although it is not clear that courts are allowed to consider the consistency of religious beliefs and practices under current precedent. In *Thomas v. Review Board of the Indiana Employment Security Division*,<sup>276</sup> the Supreme Court explicitly decided that a free exercise claim “is not to turn upon judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”<sup>277</sup> The Court further clarified that “[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with . . . clarity and precision.”<sup>278</sup> However, courts, including the Supreme Court, often deviate from this precedent, in practice if not explicitly, and attribute evidentiary value to signs of consistency or inconsistency.<sup>279</sup> As several commentators noted, examining religious consis-

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274. 88 F.3d 410, 414–15 (6th Cir. 1996) (affirming the district court’s decision to dismiss the claim).

275. *Id.* at 412; see also Wilson, *supra* note 96, at 448–52 (reaching a similar conclusion in her analysis of these and other cases).

276. 450 U.S. 707 (1981).

277. *Id.* at 714.

278. *Id.* at 715.

279. See, e.g., *supra* notes 273–74; Oleske, *supra* note 270, at 717–19 (describing the Court’s paradoxical disavowal of evaluations of religious belief and practice in *Thomas* and almost simultaneous discussion of the relationship of the Amish religion to American history, suggesting the Court has not been able to fully comply with its own rule). *Burwell v. Hobby Lobby* also provides an interesting example of this phenomenon. 134 S. Ct. 2751, 2766 (2014). The decision details the consistency of the plaintiff’s religious practices—in addition to refusing to provide contraceptives, the store also closes on Sundays, contributes profits to Christian charities, and refuses to engage in profitable transactions that “facilitate or promote alcohol use,”—in spite of the formal irrelevance of such information. *Id.* at 2766.

tency may be required to evaluate the sincerity of religious claims, and therefore is justified.<sup>280</sup> Yet even if courts are justified in analyzing religious consistency, it does not necessarily entail an antagonistic approach to social impact regulation. Consistency is an evasive concept which requires careful and thoughtful applications. Like equality, which applies only if two people are similarly situated, consistency should only be evaluated if two decisions are similarly situated. And it is not clear that decisions that vary in their sphere and role attributes are similarly situated: sphere and role are reasoned distinctions that fit within the practice of religious communities more generally<sup>281</sup> and could be applied consistently across bases of discrimination. Under this analysis, the anti-SIR model is wrong to the extent it equates social impact regulation with inconsistency and rejects its practice because of this assessment.

The anti-SIR model is also less likely than the pro-SIR model to improve the protection of individuals within groups. Instead of requiring religious institutions to find inclusive solutions and tolerate private violations of religious norms, the anti-SIR approach incentivizes religious institutions to intrude into the private lives of employees, make all non-conformities public, and strictly enforce religious norms to secure a legal exemption.<sup>282</sup> The anti-SIR model is therefore problematic from both religious and equality perspectives.

Between these two poles we may consider a third approach to social impact regulation, one that would not automatically require or penalize its application. Instead, such a model could take into account an institution's previous record in handling equality challenges and examine whether the record indicates a pattern of discrimination (for example, only women lose their job for unmarried relationships) or a pattern of inclusive regulation that effectively accommodates individuals (some forms of social impact regulation could fit into this category). Importantly, the interim model would attribute positive—not negative—value to selective enforcement, if shown to be part of an institutional policy that seeks to self-accommodate the tension with equality norms. Under this model, religious institutions should be allowed to bring evidence on how they previously dealt with equality challenges and establish their track-record of social impact regulation or other forms of inclusive policy with facts. A religious

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280. Chapman, *supra* note 267, at 1234 (stating that “The most powerful evidence of religious insincerity may be evidence that claimants have stated or acted inconsistently with their alleged religious beliefs” but urging that “[c]ourts should be thoughtful about how they evaluate evidence of inconsistent conduct or statements, though. People change over time. Their religious beliefs change.”); DeGirolami, *supra* note 271, at 1134 (raising similar concerns that internal and community-level consistency is not available for courts to evaluate when determining substantial burden or sincerity analyses).

281. Chapman suggests that courts should consider community fit evidence, not as dispositive of sincerity, but as another indication thereof. Chapman, *supra* note 267, at 1239.

282. *See, e.g., Boyd v. Harding Acad. of Memphis*, 88 F.3d 410 (6th Cir. 1996).

organization that provides substantial and compelling evidence that its policy effectively included protected individuals in (say) 80% of the cases, and turns to the court to seek exemptions in the remaining 20% that it cannot accommodate on its own (in its view), should not be disfavored compared to an organization that externalizes the costs of faith on others in 100% of the conflicts. If anything, the self-accommodating organization should be favored.

The interim model has advantages with respect to both the pro-SIR and anti-SIR models. It avoids the pitfalls of the anti-SIR model by rejecting the problematic inconsistency argument; and by setting the incentives straight for increased non-discrimination protection. It also improves on the pro-SIR model by relaxing the requirement to apply social impact regulation and replacing it with a more flexible rule that weighs social impact regulation as one factor, without making it the dispositive factor in the case. In addition, there is an advantage in crafting a legal rule that encourages the parties to embrace nuanced positions, particularly in the context of a political culture war, where individual cases too often become the poster of a socio-legal battle and erroneously come to represent the entire camp.<sup>283</sup>

At the same time, the equality concerns that were raised against the pro-SIR model apply with similar force for the interim model. The interim model does not offer full protection to individuals and, alongside its inclusiveness gains, it also has discriminatory drawbacks. As Section IV.A *supra* concluded, it is difficult to evaluate the implications of social impact regulation to the future trajectory of the conflict between religion and equality. Accordingly, different regimes could be more or less inclined to apply the interim social impact regulation rule, depending on the relative value they attribute to LGBTQ and gender equality and religious liberty.

This Section presented three normative models to incorporate social impact regulation in the adjudication of religion–equality conflicts. Each of these models has advantages and disadvantages. Notably, I do not intend to settle the choice in any of these models in this Article. I also expect that additional models could be generated and I would welcome their discussion. My aim was to demonstrate the significance of incorporating social impact regulation into legal analysis and the potential effects of such doctrinal change. The reality is that social impact distinctions are present in many of the cases—from Alice Pedreira, the therapist fired for a photograph, to the gay student prohibited from posting on YouTube<sup>284</sup>—yet they have not been systematically explored or theorized as part of a general phenomenon. Understanding religion–equality conflicts against the background of this Article requires courts to consider the normative questions that social impact regulation raises.

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283. See *supra* Section I.A.

284. *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722 (6th Cir. 2009); Shen, *supra* note 221.

2. *The Negotiation of Solutions and Accommodations*

In addition to informing the adjudication of conflicts, social impact regulation can also inform political negotiators, including governors, mayors, and city administrators, seeking to reconcile conflicts between religion and equality. To achieve successful solutions, these actors must understand the conflicts they negotiate. In general, this means that negotiators should nuance their assumptions regarding the culture war paradigm and assume instead that religious groups are diverse, that religious leaders have substantial latitude in the application of religious rules, and that religion is dynamic and evolves with and in response to other social processes. Hence, negotiators should actively search for information about these aspects of their negotiating partner and how they reflect in religious institutions and practices. Such information could highlight points of potential compromise and areas ripe for agreement.

More specifically, negotiators should embrace two important lessons. First, the stringency of the norm should be separated from the flexibility of its enforcement. Often, normative stringency leads to the conclusion that exemptions are required. In culture war terms, if culture A believes in marriage equality and culture B opposes same-sex marriage, the outcome is assumed to be either an exemption or a conflict, as there is no middle ground.<sup>285</sup> Yet this Article reveals that the high stringency of the norm against same-sex relationships does not imply zero latitude in the application of this norm. In practice, the religious response to same-sex relationships (among other equality challenges) varies systematically based on social impact regulation, or conditions that are *independent* from the norm. Negotiators should embrace the gap between the norm and its enforcement because it opens a space for creative solutions and potential compromise.

Second, negotiators should be cognizant of the portfolio of strategies that is available to them through social impact regulation. For example, if the policy goal includes expanding healthcare or workplace benefits, policymakers need not necessarily enter conflicts regarding same-sex marriage; instead, they could exploit the sphere distinction and redefine categories (e.g., replace “spouse” with “legally domiciled adult”). In addition, policymakers could strengthen privacy protections. For example, schools and employers could be prohibited from collecting information on personal status, such that the status of a teacher or student—married or not, and to whom—would not be actionable. Such policy can bolster the ability of religious leaders to resist internal pressures to conduct investigations

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285. See Koppelman, *supra* note 73, at 139 (arguing that religious exemptions are necessary due to the stringent religious opposition to homosexuality); Horwitz, *Against Martyrdom*, *supra* note 13 (arguing that exemptions are needed because the values are incommensurable).

and assist religious leaders looking to avoid learning information that might lead to a conflict in their institution.<sup>286</sup>

More generally, the search for solutions can benefit from tracing and drawing on bridging values, including compassion and humility, and policy goals, such as access to health care for all or caring for families and children in need. Emphasizing cultural points of overlap and agreement in religion–equality conflicts can motivate and create the will necessary to achieve solutions. While these tools should not be expected to succeed in all cases, they expand the narrow portfolio that serves negotiators today, which is composed primarily of exemption and coercion.<sup>287</sup>

#### CONCLUSION

This Article has three primary contributions. First, it modifies the dominant view of the conflict between religion and equality as a war *between* cultures, with an elaborate, wider and deeper understanding of the conflict as occurring also *within* culture. Following this approach, and focusing on the Catholic case study, I investigated several of the conditions under which organized religion takes an oppositional or tolerant position towards equality challenges. This examination demonstrated that the response of religious actors to gender and LGBTQ equality is far from monolithic and is not necessarily oppositional, even among leaders whose moral worldviews reject non-traditional sexuality and gender norms.

Based on these results, I argue that the current debate must change. Current accounts of the state of the religion–equality conflict do not sufficiently consider the internal struggle within religion to accommodate perceived sexual nonconformity, a struggle that mitigates the conflict substantially even if it does not resolve it entirely. Critiques of religious accommodations worry about further escalation of religious objection, which will result in additional discrimination of third parties and extend social conflict. These concerns are extremely important, yet to evaluate them we need to observe not only the present state of the war between cultures, but also the war within culture; not only the vocal organizations and pastors who promise a war, but also the practice of grassroots organizations, pertinent decision-makers, markets, and communities within which conflicts occur on a frequent basis. This Article creates a more complete and nuanced account of religion–equality conflicts that requires scholars to pause and reassess their current analyses and predictions.

Second, this Article opens the door to a new research agenda, dedicated to exploring on-the-ground, out-of-the-courtroom processes and their implications for the reconciliation of religion–equality conflicts. In particular, additional empirical research is needed on the broader effects of social impact regulation: to what extent does social impact regulation

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286. *Supra* note 155.

287. *See, e.g.*, Wilson, *supra* note 96; Horwitz, Hobby Lobby, *supra* note 54; Nejaime & Siegel, *Complicity-Based Conscience*, *supra* note 14.

influence decisions in real time, causally shaping behavior? What is the relative effect of sphere and role and how do they interact in shaping decisions? To what extent does social impact regulation emerge in response to legal developments or independent from them? How does the litigation of a dispute influence the application of social impact regulation and the policy's ability to mitigate the conflict? Does social impact regulation generalize to additional religions, and to additional countries? How do individuals subject to social impact regulation perceive it and the effect it has on their lives?<sup>288</sup> How do modes of regulation of grassroots organizations intersect with political movements, if at all?

Finally, this Article contributes to the search after solutions to the conflict. Courts now need to consider new questions of law, and governments and organizations may draw on additional tools to reduce and solve conflict. Integrating social impact regulation into legal doctrine offers a "*tertium quid*"<sup>289</sup> to the stark opposition between liberty and equality that neither courts nor policymakers previously considered.

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288. We can hypothesize that their responses might be mixed. *See, e.g.*, Robbee Wedow et al., "I'm Gay and I'm Catholic": *Negotiating Two Complex Identities at a Catholic University*, 78 SOC. RELIGION 289 (2017) (reporting a study of gay and lesbian students at a Catholic university that found different modes in which students negotiated their religious and sexual identities; some students embraced both identities, others rejected either the sexual or the religious identity, and yet others were uncertain).

289. Returning to Horwitz's decay of the state of the culture wars and the failure of the present discourse to generate legal solutions to the conflict. *See* Horwitz, *Against Martyrdom*, *supra* note 13.