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

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ABSTRACT

In the recent culture wars, traditionalists and progressives have clashed over dueling conceptions of family, sexuality and religion—manifested in debates over abortion, contraception, and same-sex marriage. Caught in this conflict has been a political and cultural reassessment of religious liberty; a doctrine originally seen as necessary to protect faith commitments from majoritarian persecution, the public salience of religious liberty has waned as it has clashed with the rights of women and LGBT people. And these evolving commitments to dueling rights have triggered religious, political and ideological realignments, generating new alliances across political and faith communities.

In this new environment, both popular and academic press have turned to the place of the American Jewish community within these culture wars over religious liberty. Given its status as one of America’s prototypical religious minorities—historically committed to both religious and minority rights—both sides of the culture wars have sought to claim the Jews as their own, and to paint those who disagree as distorting the true commitments of the American Jewish community on religious liberty. And yet, the history of Jewish advocacy around religious liberty presents a far more complicated picture. This Article aims to paint that picture by examining amicus curiae (“friend of the court”) briefs filed by Jewish institutions before the Supreme Court in religious liberty cases. In so doing, it tells a very different story: one of community consensus that has historically aligned with traditionalists on questions of religious liberty; but one that has now—with the onset of the culture wars—become far more divided over the core commitments of religious accommodation. In turn, this new disensus over religious liberty has opened the possibility of a new Jewish approach to religious liberty—one that is far more uncertain and multifaceted.

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I. INTRODUCTION

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

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

Central to Hunter’s contentions was a secondary claim that these culture wars triggered new cross-cutting alliances between traditionalists within various faith communities. In Hunter’s words, historical divisions between, for example, Catholics, Protestants and Jews had morphed whereby “[t]he orthodox traditions in these faiths now have much more in common with each other than they do with progressives in their own faith traditions, and

1 JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 64 (1991)
2 JAMES DAVIDSON HUNTER, The Enduring Culture War, in IS THERE A CULTURE WAR 13 (2006).
4 Political Polarization in the American Public, PEW RESEARCH CENTER (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public. However, as Steven Smith notes, Hunter himself made more modest claims about the penetration of these culture wars into widespread American consciousness. See STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC 264 (2018).
vice versa.”⁵ Indeed, a recent Pew Research Center survey provided an important example of this phenomenon: American Jews. According to the study, which asked about frequency of attendance at religious services, attitudes about homosexuality and the percentage of registered Republicans, Orthodox Jews resembled evangelical Christians far more than other Jewish denominations, such as Conservative and Reform Jews.⁶

Recognizing that American Jewish denominations increasingly diverged in their political and religious attitudes raised important questions about how American Jews might intervene in the ongoing culture wars—and, in particular, recent legal debates over what might be the most salient culture-war controversy: the appropriate scope of religious liberty. Over the past decade, contestation over the scope of religious liberty reached an apex as it came into conflict with other deeply held social values, such as same-sex marriage and contraception.⁷ And as these questions increasingly found their way to the Supreme Court—in cases such as Burwell v. Hobby Lobby and Masterpiece Cakeshop v. Colorado Civil Rights Commission—“the rapid changes and reversals of view [] have thrown one of the central aspects of the American church-state settlement into question.”⁸

As these debates over religious liberty persisted, commentary turned to the denominational divide within the American Jewish community. Did the realignment of faith communities predicted by Hunter hold true for Jewish approaches to the frontline, so to speak, of the contemporary culture wars? The standard answer has been a yes—but a yes of a certain kind. Conservative and Reform Jews supported the government’s authority to require employers to provide contraception⁹ as well as to apply the demands

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⁵ HUNTER, supra note 2, at 16.
⁸ Id. at 158.
⁹ See Central Conference of American Rabbis Resolution on State Religious Freedom Restoration Acts, CARR (May 6, 2015), https://www.ccar.net/ccar-resolutions/ccar-resolution-state-religious-freedom-restoration/ (resolving that the CCAR “[d]eplores the Supreme Court’s interpretation of federal RFRA in Hobby Lobby, which extended religious freedom rights to at least some corporations”); Rabbinical Assembly Expresses Grave Concerns over Hobby Lobby decision, RABBINICAL ASSEMBLY, https://www.rabbinicalassembly.org/story/rabbinical-assembly-expresses-grave-concern-over-hobby-lobby-decision (last visited Dec. 14, 2018) (“To the extent that any Justice on the court intended today’s decision to be read as justifying a denial of access to women’s contraceptive choices based on employers’ religious beliefs, we categorically reject that interpretation.”).
of anti-discrimination law over and above claims for religious exemptions to such requirements. By contrast, the institutions of American Orthodox Judaism have generally sided with the religious liberty claimants even when doing so comes at the potential expense of anti-discrimination law and the needs for cost-free contraception.

But many of the popular claims about this realignment have not only identified this denominational split, but have also argued that it represented a contortion—if not outright perversion—of the historical approach of the Jewish community on questions of religious liberty. Thus, the denominational divergence was, according to such accounts, the result of a rightward shift within the institutions of Orthodox Judaism that had increasingly embraced a broad view of religious exemptions that are legally due to faith communities. For example, Rabbi Jill Jacobs, executive director of the Jewish human rights organization T’ruah, penned an op-ed in the Jewish Daily Forward titled “Why Are Orthodox organizations embracing Christian values?” and two weeks later, Batya Ungar Sargon, opinion editor of the Forward, titled a news column, asking “Are Orthodox

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Jews assimilating to the Christian right?" \(^{13}\) The implied answer to both questions: yes. Importantly, the evidence for both authors focused primarily on Orthodox Jewish advocacy for religious exemptions from government regulation. Jacobs pressed this view, criticizing the Union of Orthodox Jewish Congregations of America, one of the largest umbrella organizations of American Orthodox Judaism, for "voic[ing] its support for religious exemptions for employers who refuse to provide birth control as part of their health care plan." \(^{14}\) Ungar Sargon described this same shift by highlighting religious liberty disputes as providing "another layer of tissue connecting Orthodox Jews with the Christian right." \(^{15}\)

Moreover, the laments over this purported rightward shift within Orthodox Judaism have had a sense of urgency—urgency that flowed from recent demographic trends. Recent polls have identified not only a denominational divergence within the American Jewish community, but also a fundamental shift in demographics. For example, in 2013, the Pew Research Center released a report titled *A Portrait of Jewish Americans*, \(^{16}\) which—summarized in the words of one expert—painted a picture where "[t]he Orthodox population . . . is exploding. The non-Orthodox is in sharp decline." \(^{17}\) While Orthodox Jews currently make up only 10% of the total American Jewish population—with Reform Jews making up 35% and Conservative Jews making up 18% \(^{18}\)—trends point to that number rising significantly in coming years. For example, among American Jews aged 0-17, 27% are Orthodox; the birth rate among American Orthodox Jews is 4.1 children per family; Orthodox Jews marry much younger than their non-Orthodox counter-parts; only 2% of Orthodox Jews marry outside of the


\(^{15}\) See Ungar-Sargon, supra note Error! Bookmark not defined..

\(^{16}\) See Portrait, supra note 6.


\(^{18}\) See Portrait, supra note 6 at 10.
Jewish community; and 69% of Orthodox Jews are members of a congregation. Accordingly, if Orthodox Jews were truly deviating from the historical Jewish approach to religious liberty, that trend would have a growing impact on the so-called Jewish voice in coming years as Orthodox Judaism secured a larger and larger share of the Jewish demographic. In turn, criticism of Orthodox Jewish institutions has entailed a secondary claim; in the coming decades, the dominant stance within American Judaism on questions of religious liberty would look far more like that of Evangelical Christians. As a result, this stance would deviate from the professed traditional Jewish approach, and move the Jewish community on to the traditionalist side of the ledger with respect to the religious liberty debates at the center of the culture wars.

Not surprisingly, given the continued contestation over denominational and religious realignment, questions surrounding the appropriate place of American Jews within the broader culture wars have persisted—most recently in debate over one of the central theses of Steven Smith’s recent book, *Pagans and Christians in the City: Culture Wars from the Tiber to the Potomac.* Adopting much of the Hunter framework, Smith’s extraordinary work—extraordinary in both intellectual breadth and analytical incisiveness—seeks to reframe recent culture-war debates as not a clash between religion and secularism, but as a clash between two views of the sacred: modern paganism and proto-typical faith-communities. In Smith’s words, “Pagan religion locates the sacred within this world. In that way, paganism can consecrate the world from within: it is religiosity relative to an *immanent* sacred. Judaism and Christianity, by contrast, reflect a *transcendent* religiosity; they place the sacred, ultimately *outside* the world . . . .” In this way, Smith argues that both sides in the ongoing culture wars—both progressives and traditionalists—maintain their own views of the sacred. Both are, so to speak, religious.

On this account, the core difference between the warring combatants in the culture wars flows not from which side believes in the sacred, but which is willing to allow for the possibility of a transcendent or otherworldly vision of the sacred. According to Smith, progressives—who he characterizes as modern pagans—resist extending religious accommodations to anti-discrimination contexts because they “decline[] to

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20 See SMITH, supra note 4.

afford respect to [transcendent] reasons.”\textsuperscript{22} The goal, he believes, is an attempt to reconstitute the ancient Roman city to replace the Christian city—to ensure that political and social life is animated by an immanent religiosity that can provide a sense of community to all citizens and not just the faithful.\textsuperscript{23}

Given its breadth and depth, Smith’s extended argument has made its way into the public debate, with Ross Douthat exploring Smith’s thesis and its implications in an opinion piece in the New York Times titled “The Return of Paganism.”\textsuperscript{24} Picking up on one of the central themes of Smith’s work, Douthat wonders whether the standard “secularization story misses the mark and that instead civilization, instead of becoming increasingly secular, is in the process of creating a new form of religious life that combines paganism and civil religion into a post-Christian society. Smith, however, in exploring this question, answers in the negative; he ultimately concludes that modern paganism simply lacks the internal resources to generate the solidarity necessary to build that sort of political community.\textsuperscript{25}

And yet one of the challenging features of Smith’s narrative—indeed, one that is replicated as his work has entered the public discourse—is that it marginalizes the role of Jews. This is not to say that Smith does not discuss Jews or Jewish thought on core matters; he certainly does and at great length.\textsuperscript{26} Moreover, in reframing the culture wars as a clash between modern pagans and the Christian city, Smith does often place Jews within the “Christian city”—at times, by referencing “devout Jews” as standing alongside traditionalists.\textsuperscript{27} But, as argued by Richard Schragger and Micah Schwartzman in an essay titled Jews Not Pagans, Smith’s dichotomy of Christians and pagans “erases Jews as having any distinct identity.”\textsuperscript{28} Like the contemporary criticism of Orthodox Jewish institutions described above, Schragger and Schwartzman worry that for Smith, Jews serve as simply a footnote to the Christian narrative on church-state questions, all-too often

\textsuperscript{22} Id. at 339.
\textsuperscript{23} Id. at 344–79.
\textsuperscript{24} Ross Douthat, The Return of Paganism, N.Y. TIMES (Dec. 12, 2018), at https://www.nytimes.com/2018/12/12/opinion/christianity-paganism-america.html?fbclid=IwAR0AHISXVUImAByoXwMZIYqTNomXEtCgTJgn32JzrOc0nYAgMPtK_X16GE.
\textsuperscript{25} Id.
\textsuperscript{26} See, e.g., id. at 31–33 (ultimate meaning); 108–16 (transcendent nature of the sacred).
\textsuperscript{27} See id. at 13, 248, 276 (referencing devout Jews as part of the traditionalist alliance).
viewed synonymously with a Christian traditionalist agenda. Accordingly, Schragger and Schwartzman argue that Smith’s dichotomy is fundamentally flawed—and to see how, they point to the historical commitments of the American Jewish community as providing a “powerful counter-example.”

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

Ultimately, Jewish advocacy on behalf of an absolutist version of separationism derived not from fidelity to modern paganism, but from the experience of minority status, religious oppression and political exclusion.

That Schragger and Schwartman would object so vociferously to any conflation of Jews with Christians is far from surprising. As a historical matter, American Jewish institutions have long played an outsized role in church-state litigation, particularly with respect to debates over the meaning of the Establishment Clause. For example, from 1969 to 1989, the institutions related to the Jewish community filed more amicus briefs before

29 Id. at *2.
30 Id. at *2.
31 Id. at *12.
32 Id. at 13.
33 See generally Gregg Ivers, To Build a Wall: American Jews and the Separation of Church and State (1995). Maybe the most well-known advocate of absolute separationism was Leo Pfeffer. See id. at 28; Leo Pfeffer: Apostle of Strict Separationism, Religion and State in the American Jewish Experience 233-34 (Sarna & Dalin eds. 1997); see also Leo Pfeffer, Church, State and Freedom 149–83 (1969).
34 Schragger & Schwartzman, supra note 28, at *14.
35 See Jonathan D. Sarna, American Jews and Church-State Relations: The Search for ‘Equal Footing,’ in Religion and State in the American Jewish Experience 1, 12–16 (Sarna & Dalin eds. 1997); Naomi W. Cohen, Jews in Christian America: The Pursuit of Religious Equality 128 (1992) (“Some Americans may not have understood the vehemence of the Jewish response to those church-state issues, but even in postwar America the memory of disabilities at the hands of Christian majorities could not easily be shrugged off.”).
the Supreme Court in church-state cases than any other faith community. Indeed, during the mid to late 20th century, Jewish organizations—in particular the American Jewish Congress under the leadership of renowned constitutional scholar and lawyer Leo Pfeffer—likely impacted the course of Establishment Clause jurisprudence more than any other organization. As noted in 1992 by Gregg Ivers, “[t]hat Jewish organizations intervene more often in church-state litigation and find more resonance in the wall of separation metaphor than other religious denominations is consistent with the unparalleled security that the constitutional principles of disestablishment has provided Jews in the United States.” As a result, to subsume Jews within a broader traditionalist framework when it comes to questions of church and state neglects the unique—and important—role of the American Jewish community in the evolution of legal doctrine surrounding such dilemmas.

But while the history of American Jewish advocacy on behalf of disestablishment does provide an important correction to Smith’s thesis, especially as it pertains to his discussion of contemporary controversies surrounding religious displays, it does somewhat miss one of the central features of Smith’s argument. Smith is certainly aware that his overarching argument submerges some of the uniquely Jewish concerns in the clash

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37 For a history of the remarkable impact of the “big three” of Jewish organizations—the American Jewish Congress, the American Jewish Committee and the Anti-Defamation League—on the history of church-state separation, see IVERS, supra note 33.
38 Ivers, supra note 36, at 256.
40 See SMITH, supra note 21, at 267–82.
between pagans and the Christian city.\footnote{id at 272 (“Religious minorities may, to be sure, feel like political ‘outsiders’ by virtue of their minority status, with the attendant political disadvantages and discomforts that minority status may sometimes entail.”); see also id. at 206-07 (“The depiction of Christianity in particular as intolerant, usually in cruder and less discriminating terms, is pervasive in Western culture. . . . These accusations have their historical bases. There were of course the Crusades, and the inquisitions (and one critical reader urges that these should be mentioned more frequently and underscored in these pages).”)} However, his views of the culture wars appear more driven by clashes over religious freedom—and specifically the free exercise of religion—than disestablishment.\footnote{id at 304 (noting that the chapter on “religious freedom” focuses primarily on the second of “theme” of “accommodation,” which “is often tied to [First] amendment’s free exercise clause (‘. . . or prohibiting the free exercise thereof’”).} As Smith notes, “[t]he contemporary fight over religious freedom is one battleground—a central one, as it happens—in the larger and essentially religious struggle to define and constitute America.”\footnote{id at 302-03.} Thus, while Schragger and Schwartzman may have good reason to contest Smith’s dichotomy in principle—to use their words, to argue that “[t]he choice of society is not binary: Christian or Pagan? It is ternary: Christian or Pagan or Jew?”—their secondary historical claim about the American Jewish experience is somewhat more fraught. In turn, to the extent they hope to advance a historical claim—that the history of American Jewish advocacy “provides a powerful counter-example”\footnote{Schragger & Schwartzman, supra note 28, at *2.} to Smith’s dichotomy, thereby supporting the claim “Jews are not pagans, nor are they Christians . . . in the context of debates about religious freedom”—their failure to consider what the unique Jewish approach has (or approaches have) been to questions of religious liberty and religious accommodation leaves us with an incomplete picture. That is, to what extent, when it has come to questions of religious liberty, has Smith’s dichotomy held true because the Jewish voice on such issues aligned with Christian traditionalists?

This is an important oversight given that clashes over religious liberty—and in turn, religious accommodations—have, in many ways, been at the epicenter of the broader culture wars. As described above, because the culture wars have coincided with demographic and political shifts within the American Jewish community, much is at stake in identifying the, so to speak, Jewish take—or takes—on the religious accommodationist project. That is, to what extent has the American Jewish community advocated for the law to accommodate religious demands by providing exemptions from laws that impinge on religious practice and conduct?

\footnote{id at 2.}
Identifying such a “Jewish take” is both a retrospective and prospective endeavor. It first requires recounting the historical approach of the American Jewish community: has the American Jewish community historically aligned itself on question of religious accommodations with traditionalists—to use Smith’s frame, on matters of religious liberty, has the Jewish community aligned itself with the Christian city? Or, alternatively, might we extend the contentions of Schragger and Schwartzman to the religious liberty context and conclude that the historical approach of the American Jewish community represents a third way—neither Christian nor pagan—one that is both derived from traditionalist commitments, but ultimately aligned with progressivist conclusions.

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

Providing an answer to these questions is a significant historical undertaking. The coming pages serve as a first step in such a project by exploring the history of Jewish institutional amicus curiae briefs (or amicus briefs) in religious liberty litigation before the Supreme Court.46 Supreme Court rules allow third parties to file a brief as an amicus curiae—that is, “friend of the Court”—with the stated objective of such an option so as to “bring[] to the attention of the Court relevant matter not already brought to

46 As described below, by assessing amicus briefs in religious liberty litigation—and the dissensus surrounding these cases—this Article focuses on cases that revolve primarily around the Free Exercise Clause. This is not only because the Free Exercise Clause more directly addresses questions of religious liberty, but because there is robust scholarship both surrounding American Jewish institutional advocacy on Establishment Clause litigation, see infra note 53 (collecting sources), as well as on the dissensus among American Jewish institutions with respect to church-state separation. See Jack Wertheimer, The Debate over State Aid to Religious Schools, in JEWS AND THE AMERICAN PUBLIC SQUARE 217 (Mittleman, Licht & Sarna eds. 2002); RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 245-269 (Sarna & Dalin eds. 1997) (describing the growing criticism the 1950s and 1960s of the prevailing Jewish institutional approach to church-state separation).
its attention by the parties.”47 While the first recorded appearance of an amicus brief before the Supreme Court was in 1821,48 it has been in relatively recent decades that the use of such briefs has exploded on the Supreme Court’s docket.49 Third-parties increasingly use such briefs to accomplish a range of objectives—with a range of audiences in mind. While organizations frequently draft amicus briefs in order to influence the Supreme Court and thereby alter the outcome of a case,50 scholars have noted that the “real audience for amicus briefs” is often “the membership of the group sponsoring the brief.”51 Thus, organizations can benefit from credibility if cited by the Court, but they can also signal leadership and dedication to core institutional principles to their membership by the mere act of filing.52

47 See Sup. Ct. R. 37(1).
49 While studies of amicus brief filings differ on the extent of the increase, they have generally found that there has been an increase—with more recent studies identifying even higher rates of increase. Kearney & Merrill, supra note 48 at 752 (“The Court received some 4907 amicus briefs in the last decade (1986-1995), as opposed to 531 briefs in the first decade (1946-1955)—an increase of more than 800%.’’); Karen O’Connor & Lee Epstein, Amicus Curiae Participation in U.S. Supreme Court Litigation An Appraisal of Hakman’s “Folklore,” 16 Law & Soc. Rev. 311, 315 (1981-82) (“[I]nterest group amicus participation in noncommercial cases before the Supreme Court was nearly nonexistent until World War II, that it rose significantly after the war, and that it then accelerated rapidly in the late 1960s and 1970s.”); see also Nathan Hakman, Lobbying the Supreme Court—An Appraisal of “Political Science Folklore,” 35 Fordham L. Rev. 15 (1966) (identifying only a modest increase in amicus brief filings).
50 The extent to which amicus briefs are successful in influencing outcomes in Supreme Court litigation is a matter of some significant study with scholars largely agreeing that amicus briefs do influence the Court, but disagreeing on the degree of influence. See, e.g., Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content, 49 Law & Soc’y Rev. 917 (2015); Paul M. Collins, Jr. Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 Law & Soc’y Rev. 807 (2004); Kearney & Merrill, supra note 48.
51 Kearney & Merrill, supra note 48 at 825.
52 See, e.g., Kearney & Merrill, supra note 48 at 825 (“Citation or quotation of a brief in the official Reports of the United States Supreme Court can lend legitimacy to a group, and may be used by the group in its publicity efforts to create the impression that it has “access” to or “influence” with the Court. Interest groups can use this impression to obtain new members and contributions. Even if the group's briefs are never cited, the brief can be distributed to members and others as evidence that the group's leadership is diligently pursuing its members' interests in high places. No doubt emulation enters into the picture here as well.”); Lee Epstein, Interest Group Litigation During the Rehnquist Court Era, 9
Drawing conclusions from the history of *amicus* briefs filed by Jewish institutions before the Supreme Court in religious liberty cases has some drawbacks. First, individual institutions do not file briefs in each and every religious liberty case before the Supreme Court, leaving the record incomplete at times. Second, limiting our purview to religious liberty cases is itself somewhat fraught; the two religion clauses are often intertwined in complicated ways and therefore only focusing on Free Exercise cases does not provide a full picture. Third, *amicus* briefs, by their nature as documents of legal advocacy, take—at least to some extent—the law at any point in time as given; thus, using them to identify historical trends and evolutions can be difficult, given that filing organizations are always updating the manner in which they press their claims based upon changes in legal doctrine. And fourth, *amicus* briefs are certainly only a small piece of the historical record capturing how the American Jewish community approached questions of religious liberty. A full history would certainly involve mining other sources to develop a broader historical record, including *amicus* briefs in lower court cases.

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

J. L. & Pol., 639, 660, 675-76 (1993) (identifying importance of “organizational maintenance,” such as “keeping members satisfied,” to the decision of organizations to file *amicus* briefs).

I have excluded from this Article discussion of Jewish institutional intervention in cases that primarily revolve around the Establishment Clause even as they represent an important element of the broader story around Jewish institutional advocacy with respect to religious liberty. This is largely because there is already a rich body of scholarship discussed and analyzing those cases. *See generally Gregg Ivers, To Build a Wall: American Jews and the Separation of Church and State* (1995); Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (1992); Jonathan D. Sarna, *American Jews and Church-State Relations: The Search for 'Equal Footing,' in Religion and State in the American Jewish Experience* 1 (Sarna & Dalin eds. 1997).
All told, there *amicus* briefs before the Supreme Court paint a picture of three broad stages of Jewish institutional response to religious liberty cases. In the first stage, discussed in Part II, Jewish institutions manifest broad consensus over religious liberty and support for religious accommodations. In so doing, Jewish institutions file briefs supporting the traditional doctrinal framework—the one applicable in the pre-*Smith* era\(^{54}\)—that protects against government substantially burdening religious exercise unless doing so is the least restrictive means for advancing a compelling government interest.\(^{55}\) In the second stage, discussed in Part III, Jewish institutions largely retained consensus over these fundamentals of free exercise doctrine, but they begin to splinter over how to apply limiting principles to free exercise claims. Thus, in the 1980s, some Jewish institutions—while almost uniformly supporting claims asserting the existence of a burden on religious exercise—began to also support limitations on religious liberty flowing from external constraints, such as either Establishment Clause concerns or the compelling nature of implicated government interests.\(^{56}\) Accordingly, Jewish institutions experience a period of broad consensus over the applicable legal framework for evaluating religious liberty claims, but institutional dissensus crept in with respect to where to draw the line at the outer limits of the doctrine. In the third and current stage, discussed in Part IV, Jewish institutions begin, largely for the first time, to file briefs challenging the very existence of religious liberty claims or the sufficiency of religious burdens. Indeed, as part of the culture wars, some Jewish institutions began to wonder not only what it means to limit the right to free exercise, but whether the right itself has even been triggered.\(^{57}\) Importantly, the dissensus over the very viability of religious liberty claims manifests not only between, progressivist and traditionalist Jewish institutions, to use Hunter’s dichotomy, but also among traditionalist institutions themselves.

This overall trajectory indicates that views on religious liberty within the American Jewish community originally aligned, to again use Hunter’s contemporary categories, with views associated with traditionalists. However, over time, many Jewish institutions—not surprisingly, those more typically those with more progressivist leanings—have gravitated towards responses now more closely associated with progressives. They are increasingly willing to challenge not only the limits on religious liberty, but also on the viability of certain categories of religious liberty claims.

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\(^{54}\) See Part IV(a).

\(^{55}\) See Part II.

\(^{56}\) See Part III.

\(^{57}\) See Part IV.
themselves. As a result, dissensus among Jewish institutions has grown greater with each passing phase. Moreover, while this shift is taking place primarily among more historically progressive organizations, some traditionalist have also followed this trend; accordingly some more modest degree of dissensus has begun to creep in among traditionalist institutions as well. As a result, this overall trajectory makes it difficult to think of Jewish institutions as having, in its initial phases, provided a third way with respect to religious liberty. However, as Jewish institutions—encountering the increasingly complex and multifaceted religious liberty claims of the culture wars—have migrated towards more progressivist views on religious liberty, the possibility that Jewish institutions might in fact embrace something akin to a third way—one that is, to use Schragger and Schwartman’s phrase, “neither Christian, nor pagan”—has become more and more likely.

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

58 See supra note 28, at *11.
59 For a discussion of some of the central evolutions and inversions in the religious liberty story, see Part IV(a).
60 A complete picture of how these categories have played out in the religious liberty context would entail a similar study on the evolution of advocacy within other interested groups and, in particular, with the broader American Christian community. However, that investigation is beyond the scope of this more limited project.
II. JEWS AND THE RELIGIOUS LIBERTY CONSENSUS

Attempting to identify the dominant Jewish approach to questions of religious liberty is an inherently fraught endeavor, and certainly no article can capture entirety of this rich and complex story. Indeed, much has already been written with respect to the history of Jewish engagement with questions revolving around the Establishment Clause of the First Amendment, including attendant questions of church-state separation.\(^{61}\) This is far from surprising given that American Jewish institutions played a pivotal role in the litigation around such issues in the mid to late 20\(^{th}\) century, influencing the trajectory of Establishment Clause doctrine for decades.\(^{62}\)

At the same time, scholars have spent less time evaluating how these same Jewish institutions intervened in litigation over the Free Exercise Clause—cases that deal more directly with religious liberty issues.\(^{63}\) This is true even as *amicus* briefs filed by such organizations before the Supreme Court provide a useful and ready window into how the primary institutional arms of American Judaism approached religious liberty questions. Indeed, one of the interesting facets of the history of American Jewish institutional intervention in questions of religious liberty is the relative consensus around religious liberty issues, at least in contrast to the complexities that typified internal Jewish debates over issues of separationism.\(^ {64}\)

The intervention of Jewish institutions in Supreme Court church-state litigation through the public filing of *amicus* briefs is somewhat recent, becoming prolific in the 1940s.\(^ {65}\) Scholars and advocates have often divided the Jewish institutions that have frequently advocated through *amicus* briefs into the broad, even if imperfect, categories of secular and religious.\(^ {66}\) The primary “secular” organizations filing briefs before the Court, often referred to as the “big 3,” included the American Jewish Congress (AJCongress), the American Jewish Committee (AJCommittee)

\(^{61}\) See, e.g., COHEN, supra note 35; IVERS, supra note 33, at 205–06; Sarna, *supra* note 35, at 1.

\(^{62}\) See COHEN, supra note 35 at 123–40; IVERS, *supra* note 33, at 66–189.

\(^{63}\) To be sure, separating between Free Exercise and Establishment Clause cases is no easy task. In the words of Leo Pfeffer, “there is rarely a case involving one of the religion clauses that does not at the same time involve the other.” Leo Pfeffer, *Amici in Church-State Litigation*, 44 L. & CONTEMP. PROBS. 83, 94 (1981).

\(^{64}\) See supra note 61 and accompanying text.

\(^{65}\) Pfeffer, *supra* note 63, at 84–85.

\(^{66}\) Id. at 84–86; see also COHEN, *supra* note 35, at 126–27 (describing the trend of secularization within the “big 3” as the organizations professionalized).
and the Anti-Defamation League (ADL). While the three organizations, all founded in the early 20th century, initially served as “social service agencies” for Jews, they evolved over the mid-20th century into “powerful ethnic defense organizations determined to vindicate their civil rights through all available vehicles of organized advocacy.”

Another important amicus participant has been the Jewish Council for Public Affairs (JCPA), a national umbrella organization for “125 local Jewish Community Relations Councils, and 16 national Jewish agencies.” Originally called the National Community Relations Advisory Council (NCRAC), it then changed its name in 1971 to the National Jewish Community Relations Advisory Council, finally switching to the JCPA in 1997. The JCPA currently describes its mandate as “to advance the interests of the Jewish people; support Israel’s quest for peace and security; to promote a just American society; and advocate for Human Rights around the world.” Finally, the National Council for Jewish Women (NCJW), founded in 1893, has also participated in a number of religious liberty amicus briefs. Describing itself as the “first and most progressive Jewish women’s organization in the United States,” the NCJW characterizes its historical mission as “dedicated to improving the quality of life for women, children, and families, and to safeguarding individual rights and freedoms both in the U.S. and Israel.”

In terms of “religious” Jewish organizations, frequent amicus brief contributors have historically included the Synagogue Council of America, an interdenominational rabbinic umbrella organization that ultimately disbanded in 1994; the Central Conference of American Rabbis (CCAR), which serves as the primary voice of the Reform Jewish rabbinate and aims to, among other goals, “[a]mplify the voice of the Reform Rabbinate in

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67 Ivers, supra note 33, at 34–65; Cohen, supra note 35 at 123.
68 Ivers, supra note 33, at 64.
71 See infra note 69.
72 For a general history of the NCJW, see Faith Rogow, Gone to Another Meeting: The National Council of Jewish Women, 1893-1993 (2005).
the Reform Movement, the Jewish community, and the world in which we live; the Union of Orthodox Jewish Congregations (OU)—the umbrella organization of centrist American Orthodox Judaism—which maintains an advocacy center that serves at “the non-partisan public policy arm of the nation’s largest Orthodox Jewish organization, representing nearly 1,000 congregations nationwide, and leads the OU’s advocacy efforts in Washington, DC, and state capitals”; the Union for Reform Judaism (URJ), previously referred to as the Union of American Hebrew Congregations, which serves as “the umbrella organization for North American Reform Judaism,” including 35 communities across the United States, over 900 congregations, —and over 1 million affiliated members in the United States and Canada; the Rabbinical Council of America (RCA), an Orthodox rabbinical organization affiliated with the OU; and the Jewish Committee on Law and Public Affairs (COLPA), an organization founded in 1965 to “defend the interests of Orthodox Jews in church-state matters.”

While this collection of organizations has long disagreed over how the American Jewish community ought to debate questions of disestablishment and separationism, their official positions from the 1960s through the early 1990s—as captured in amicus briefs before the Supreme Court—

76 About the OU, ORTHODOX UNION, https://www.ou.org/about/ (last visited Dec. 14, 2018).
77 Reform Judaism Group Decides to Update Name, WASH. POST, page B8 (Nov. 8, 2003).
82 See RELIGION AND STATE IN THE AMERICAN JEWISH 261–64 (Sarna & Dalin eds. 1997) (describing the “Rise of COLPA”), see also THE LEGAL ARM OF OBSERVANT JEWRY, JEWISH LAW, http://www.jlaw.com/LawPolicy/colpa.html (last visited Dec. 14, 2018) (describing itself as the “legal arm of observant Jewry,” and stating that it “has been responsible for the enactment of over twenty major pieces of federal and state legislation and scores of amendments and administrative regulations which have dramatically improved the ‘quality of life’ for observant Jews throughout the United States”).
83 See, e.g., Sarna, supra note 35, at 47; David G. Dalin, JEWISH CRITICS OF STRICT SEPARATIONISM, in JEWS AND THE AMERICAN PUBLIC SQUARE 291 (Mittleman, Licht & Sarna eds. 2002); see also supra note 61 and accompanying text.
largely demonstrated significant consensus over the proper approach to religious liberty. The earliest manifestation before the Supreme Court of this consensus dates back to the twin Sunday Closing Law cases of 1961: 

*Braunfeld v. Brown*\(^{84}\) and *Gallagher v. Crown Kosher Super Market*.\(^{85}\)

Both cases considered the claims of Orthodox Jewish merchants who argued that Sunday-closing laws were unconstitutional under the religion clauses of the First Amendment. These twin cases implicated both the Establishment Clause and the Free Exercise Clause. As a result, much of the dissensus that animated Jewish institutional views on the best way to approach questions of separationism manifested itself in the Sunday Closing Law cases.\(^{86}\)

Notwithstanding those divisions, Jewish institutions were united in their view that Sunday Closing Laws violated the Free Exercise Clause by placing Sabbath-observing merchants at a “serious economic disadvantage,”\(^{87}\) because, in keeping with Jewish law, they already closed their stores on Saturday. Thus, the *amicus* brief jointly submitted by the NCRAC and the SCA—the two large umbrella organizations of American Jewry representing both secular and religious institutions—emphasized in the statement of interest that “[e]nforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of their civil, religious and economic rights and imposes a heavy burden upon their adherence to their religious beliefs.”\(^{88}\)

Following up on this opening salvo, the brief argued that Sunday Closing Laws violated the Free Exercise Clause of the First Amendment because “[r]equiring such a person to abstain from engaging in his trade or business two days each week whereas his Sunday observing competitor is required to abstain only one day a week obviously imposes upon the former a competitive disadvantage and thus penalizes him for adhering to his religious beliefs.”\(^{89}\) Importantly, this remained true even though the claimed burden was indirect: “Nor, we submit, is it material that the economic sanction is indirect rather than direct . . . . The decisions of this


\(^{86}\) *See* COHEN, supra note 35, at 214–28 (describing division over whether Jewish institutions should advocate for the wholesale rejection of Sunday Closing Laws as violating the Establishment Clause or whether they should pursue the more modest objective of simply seeking religious exemptions from such laws).

\(^{87}\) *Braunfeld*, 366 U.S. at 602.


\(^{89}\) *Id.* at *25.
Court make no distinction between indirect and direct economic sanctions on the exercise of a right guaranteed by the First Amendment, so long as the causal connection is clear.\footnote{90}

Similarly, the amicus brief submitted by the AJC and ADL argued that Sunday Closing Laws violated the religion clauses—both of which had, as their ultimate purpose, “to assure religious freedom.”\footnote{91} While the AJC/ADL brief focused on the disestablishment concern presented by the Sunday Closing Laws, it also characterized such laws as tantamount to economic coercion: “[A Sunday Closing Law] also places an economic penalty upon Jews and upon those Christian denominations that observe Saturday as the Sabbath, to the prejudice of the latter groups.”\footnote{92}

The Supreme Court rejected the claim, explaining that the laws did not violate the Free Exercise Clause because they simply made the Sabbatarian “religious beliefs more expensive.”\footnote{93} That being said, the Court also noted in passing that government may not impose an incidental and indirect burden on religious conduct where “the State may accomplish its purpose by means which do not impose such a burden,”\footnote{94} a comment that ultimately morphed into the broader protections afforded religious conduct in subsequent Supreme Court cases.\footnote{95}

Indeed, in the next Free Exercise case before the Supreme Court, \textit{Sherbert v. Verner}\footnote{96}, Jewish organizations were again unified in their support of the Free Exercise claim at stake. In \textit{Sherbert}, the Supreme Court addressed the claims of a South Carolina Seventh-day Adventist who, having been terminated for refusing to work on Saturday, was denied unemployment benefits.\footnote{97} Sherbert argued that withholding her

\footnotesize{\textit{Id.} at *27.}
\footnotesize{\textit{Id.} at *30.}
\footnotesize{Braunfeld v. Brown, 366 U.S. 599, 605 (1961).}
\footnotesize{\textit{Id.} at 607.}
\footnotesize{Sherbert v. Verner, 374 U.S. 398 (1963).}
\footnotesize{Brief of Appellant at 7, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526), 1963 WL 105527, at *7.}
unemployment benefits on account of her refusal to work on her Sabbath constituted a violation of her Free Exercise rights.\(^98\)

Jewish groups, not surprisingly, agreed. The ADL and the AJCommittee, along with the ACLU, filed an amicus brief declaring that they “believe[d] that freedom of religion is a basic right of every American and that it must be defended against all attempts at abridgment.”\(^99\) Accordingly, the brief outlined how the denial of unemployment benefits violated the Free Exercise Clause:

Appellant, because of her religious beliefs, was deprived of a statutory right and economic benefit, available generally to citizens of South Carolina. That imposed an economic disadvantage upon her solely because of her religious convictions and her conduct in accordance with such convictions. Thus, as in the cases involving taxes on the exercise of religious beliefs, the individual is disadvantaged because he suffers a monetary loss imposed on him solely because of his religion.\(^100\)

This same approach was also at the center of the brief filed jointly by the AJCongress, SCA, the Jewish Labor Committee and the Jewish War Veterans: “A statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions does not labor on Saturdays deprives him of free exercise of his religion.”\(^101\) Moreover, the fact that the burden was, in some manner of speaking, indirect should not change the Court’s analysis:

Only in the narrowest and most unrealistic sense can it be said that the State of South Carolina is not forcing the appellant to violate her Sabbath. An unemployed worker, without a source of livelihood, can hardly be said to be exercising full freedom of choice. While the compulsion may be indirect, it is quite substantial.\(^102\)

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\(^98\) Id. at 21–22.


\(^100\) Id. at 12.


\(^102\) Id. at 7. It is worth noting that in their jointly filed brief, the AJCommittee and ADL argued that the claims of burden in Sherbert were more direct than the claims in
The Court ultimately agreed, holding that a law may not impose an “incidental burden on the free exercise of appellant’s religion” unless that burden can be justified by a “compelling state interest,”103 thereby making the substantial-burden standard an explicit centerpiece of its free exercise doctrine.104

Many Jewish groups similarly lined up to support claims for religious accommodation in the Court’s next landmark religious liberty case, Wisconsin v. Yoder.105 In Yoder, the Court addressed whether Wisconsin’s compulsory education law infringed on the free exercise rights of Amish parents who, in accordance with their religious beliefs, refused to send their children to public school beyond eighth grade.106 Filing an amicus brief supporting Yoder, the SCA and the AJCongress expressed their “strong interest in religious freedom and in a religiously and culturally pluralistic America.”107 Accordingly, they endorsed the religious accommodation approach outlined in Sherbert, arguing that:

The applicable principle in resolving the clash of competing interests in these cases is based upon a recognition that the freedoms secured by the First Amendment are our most precious heritage as a nation. It is because of this recognition that, when our courts consider the validity of legislation regulating rights secured by the Amendment, they do not apply the usual strong presumption of constitutionality applicable to other types of legislation.108

Similarly, COLPA filed an amicus brief, encouraging the court to adopt Sherbert’s compelling government interest test and to conclude that such compelling interests did not exist to support application of Wisconsin’s compulsory education law against the Amish.109 Indeed, COPLA’s amicus brief expressed an underlying worry that government regulation of minority

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104 Id.
106 Id. at 235–36.
108 Id. at *9.
religious practices often stemmed from an undercurrent of religious discrimination: “We believe that it is important, at this time in the nation’s history, that this Court reaffirm that principle [of religious liberty] and thereby stem an alarming and ever-increasing tide of private and governmental hostility to, and discrimination against, religious nonconformists.”\textsuperscript{110}

Thus, all Jewish organizations that filed \textit{amicus} briefs in \textit{Yoder} lined up in favor of granting a constitutionally mandated religious accommodation, arguing that no compelling government interest existed to justify the burden imposed by Wisconsin’s compulsory education law.\textsuperscript{111} The court ultimately agreed, concluding that “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”\textsuperscript{112}

In this way, Jewish advocacy in the few landmark free exercise cases of the 1960s and 1970s highlighted their commitment to the accommodationist project—that is, a commitment to protecting against substantial burdens on religious exercise in the absence of a compelling government interest. Indeed, it was a communal commitment to the importance of “religious and culturally pluralistic” America that led organizations to advocate for “freedom of religion” as a “basic right of every American” that had to be “defended against all attempts at abridgment.”\textsuperscript{113} In so doing, these organizations embraced a doctrinal framework that protected government burdens on religious exercise even where those burdens were somewhat indirect. And they encouraged the Court to override such burdens only where the government could demonstrate the existence of some compelling government interest for doing so—a threshold that these organizations, at least in the cases presented, refused to concede the government had met. In turn, Jewish institutions, in order to support this overall framework for addressing of religious liberty claims, filed \textit{amicus} briefs both in cases that implicated the religious practices of the Jewish community as well as in cases that implicated the religious practices of other faith communities.

\textsuperscript{110} \textit{Id.} at 2.
\textsuperscript{111} \textit{See supra} notes 107–110.
\textsuperscript{113} \textit{See supra} notes 99, 107 and accompanying text.
III. RELIGIOUS LIBERTY DISSENSUS, PHASE I: EMPLOYMENT LAW AND ANTI-DISCRIMINATION NORMS

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

In the 1960s and 1970s, this uniform response found ready supporters across the Jewish institutional landscape.

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

This outsized role is far from surprising given the levels of discrimination encountered by Jews prior to the enactment of federal civil rights laws. For example, according to a 1957 study, nearly 23% of resort hotels discriminated against Jews; and a number of employment surveys from the 1950’s determined that rates of religious discrimination against

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115 See The RAC and the Civil Rights Movement, supra note 114.

Jews hovered around 20%. As a result, while American Jewish institutions were unanimous in their endorsement of the religious accommodation project, they were far more conflicted about how to respond to cases where religious individuals and groups sought religious exemptions from anti-discrimination laws and religious accommodations in the face of anti-discrimination norms. Ultimately, such cases brought two overarching commitments into conflict, complicating the otherwise cemented consensus over the religious accommodationist project. And this ambivalence, maybe not surprisingly, was particularly manifest in Supreme Court litigation related to various forms of employment benefits and discrimination.

In this first phase of communal dissensus, division between Jewish organizations over religious liberty claims before the Supreme Court split into two categories. The first related to whether broad statutory exemptions intended to protect religious practice or observance violated the Establishment Clause by providing impermissible benefits on the basis of religion. The second related to balancing the claims of religious liberty against other important government interests, including anti-discrimination norms. However, without diminishing the importance and impact of this first phase of dissensus, there was minimal division among Jewish organizations beyond these two broad categories. Absent extreme Establishment Clause worries and concerns over the government’s ability to promote its compelling interest in anti-discrimination norms, Jewish organizations retained a broad consensus over the religious accommodation project from the late 1970’s through the beginning of the 21st century.

A. Religious Liberty and Establishment Clause Constraints in Employment Law

The first Supreme Court case that raised questions about the relationship between religious accommodation and employment discrimination garnered a high degree of consensus within the American Jewish community. In 1977, the Supreme Court addressed TWA v. Hardison—a case of an

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117 See generally Lois Waldman, Employment Discrimination Against Jews in the United States—1955, 18 JEWISH SOCIAL STUD. 208 (1956). Interestingly, some worried that these forms of discrimination also arose within the Jewish community. See Charles S. Liebman, Orthodoxy in American Jewish Life, in AMERICAN JEWISH BOOK YEAR 21, 91 (1965) (“Many Orthodox Jews have been personally as well as intellectually and emotionally alienated from the non-Orthodox world through employment discrimination. Instances of observant Jews who have been denied employment in Jewish federation-supported institutions or national Jewish organizations because they are Sabbath and holiday observers are legion.”).
employee, Larry Hardison, who claimed that TWA violated his rights under Title VII for failing to accommodate his religious observance of the Sabbath.\textsuperscript{118} TWA responded on multiple fronts, first arguing that their failure to accommodate Hardison was simply the result of following the collectively-bargained seniority system for selecting work shifts, and that its failure to circumvent that seniority system did not constitute impermissible religious discrimination.\textsuperscript{119}

But TWA did not stop there. It also argued that the religious accommodation requirement of Title VII violated the neutrality demanded by the Establishment Clause.\textsuperscript{120} Such an argument, of course, had the potential to find a ready home within the halls of American Jewish organizations who had long pressed Establishment Clause arguments before the Supreme Court.\textsuperscript{121} Yet, at least in this early stage, an extraordinarily broad range of Jewish organizations—including the AJCommittee, AJCongress, ADL and the official rabbinic organizations of Reform, Conservative and Orthodox Judaism—joined an \textit{amicus} brief, emphatically contesting TWA’s Establishment Clause challenge and doing so on two fronts. The first argument focused on the core of the Establishment Clause inquiry, arguing that the religious accommodation provision of Title VII had a secular purpose, did not advance or inhibit religion, and did not require excessive government entanglement with religion.\textsuperscript{122} That argument, however, was followed by a second that emphasized the Free Exercise Clause, contending that under the Necessary and Proper Clause, Congress had the authority to enact the religious accommodation provision of Title VII in order to “carry out the provisions of the Free Exercise Clause.”\textsuperscript{123} In making this argument, the brief leveraged prior free exercise case law, such as \textit{Sherbert} and \textit{Yoder}, and then emphasized that America’s long-standing commitment to religious freedom demanded that the Court allow Congress to ensure that religious employees would receive accommodation of their practices: “[T]his Court in the case at bar must protect respondent Hardison from the needless requirement of choosing between gainful employment and following the religious dictates of his conscience. To do less would be to deny the principle of religious liberty

\textsuperscript{120} \textit{Id.} at *19–20.
\textsuperscript{121} \textit{See supra} notes 88–112 and accompanying text.
\textsuperscript{123} \textit{See Brief for Central Council of America Rabbis, supra} note 122, at *23–29.
which drew the earliest settlers to our shores.”124 Tracking similar themes, COLPA filed a brief on behalf of a number of Orthodox Jewish organizations;125 by special leave of the Court, it also represented these groups at oral argument.126 In so doing, it argued that, in providing “special protection for religious liberty,” Title VII did not violate the Establishment Clause because “when Congress acts reasonably to shield religion and those who practice it from the effects of governmental or private action that would, absent such legislation, have the effect of infringing religious belief or practice.”127

The Court’s holding, without significant discussion, ultimately refrained from striking down the religious accommodation provisions of Title VII on Establishment Clause grounds. However, the Court did find in favor of TWA on other grounds, concluding that Title VII did not require circumventing the existing seniority system, which would have placed more than a de minimis burden on TWA. As the Court explained, “[T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment.”128 At this point, with respect to Establishment Clause limitations on religious accommodations, the Court and Jewish institutional advocates remained largely aligned.

But the American Jewish consensus on how to address religious claims for accommodation within the prevailing Title VII framework would soon begin to splinter around the edges of the doctrine. In the 1985 case, Estate of Thornton v. Caldor, the Supreme Court addressed an Establishment Clause challenge to a Connecticut statute which provided, in part, that “No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee’s refusal to work on his Sabbath shall not constitute grounds for his dismissal.”129 In contrast to its decision in Hardison, the Court

124 Id. at *29.
embraced this Establishment Clause argument, concluding that the “absolute and unqualified right” granted by the statute “imposes on employers and employees an absolute duty to conform”\textsuperscript{130} to the asserted religious observances; and that this “unyielding weighting in favor of Sabbath observers over all other interests” had “a primary effect that impermissibly advances a particular religious practice.”\textsuperscript{131}

This “unyielding” quality of the statute was not only central to the Court’s opinion,\textsuperscript{132} but it also, even if ever so slightly, split the response of American Jewish institutions. Attorneys from both COLPA and the AJCongress represented the petitioner in the case, arguing for the constitutionality of the statute.\textsuperscript{133} The ADL filed an \textit{amicus} brief supporting Connecticut’s statute, concluding that it not only satisfied the requirements of the Establishment Clause’s \textit{Lemon} test—secular purpose, neither advance, nor inhibit religion and lack excessive entanglement—but that, like in \textit{Hardison}, the statute was justified on account of the state’s “legitimate interest in protecting the free exercise rights of its citizens.”\textsuperscript{134} By contrast, the AJCommittee, filing a brief jointly with the ACLU, struck a more ambivalent tone in describing the case as addressing a “sensitive and difficult issue.”\textsuperscript{135} While arguing that the Court should reverse the lower court’s decision finding that the statute violated the Establishment Clause, the brief encouraged the Court to remand the case for additional factual findings, and conceded that, contrary to the religious accommodation requirements at issue in \textit{TWA v. Hardison}, “an absolute statutory command that a private employer defer to the religious interests of employees regardless of the cost to the employer or consequences to other employees would be capable of unconstitutional applications under both the Establishment and Due Process Clauses.”\textsuperscript{136}

\textsuperscript{130} \textit{Id.} at 709.
\textsuperscript{131} \textit{Id.} at 710.
\textsuperscript{132} \textit{Id.}; \textit{see also id.} at 711–12 (O’Connor, J. concurring) (expressing the difference between the Connecticut statute and the religious accommodation requirements of Title VII and citing \textit{Hardison}).
\textsuperscript{133} \textit{See Brief for Petitioner, Estate of Thorton v. Caldor, Inc, 472 U.S. 703 (1985) (No. 472 U.S. 703), 1984 WL 566029 (including as attorneys for petitioner Nathan Lewin as well as Dennis Rapps of COLPA and Marc Stern of the AJCongress).}
\textsuperscript{135} \textit{Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, Estate of Thorton v. Caldor, Inc, 472 U.S. 703 (1985) (No. 472 U.S. 703), 1984 WL 566040, at *5.}
\textsuperscript{136} \textit{Id.}
Divisions among American Jewish institutions became even more pronounced when the Supreme Court addressed the constitutionality of §702 of Title VII, which granted an exemption to religious organizations from the general prohibition against employment discrimination on the basis of religion. The particular case, *Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, involved the termination of an employee, Arthur Mayson, from the Deseret Gymnasium, a non-profit facility, open to the public and run under the auspices of entities associated with Church of Jesus Christ of Latter-Day Saints. The grounds for the termination were Mayson’s failure to secure a “temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples.” When Mayson filed suit, alleging impermissible employment discrimination on the basis of religion, his former employer asserted that it was shielded by § 702 of Title VII, which excluded from liability “any religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” And in response, Mayson contended that § 702, if applied to allow religious employers to assert religious grounds for discrimination in hiring for even nonreligious jobs, would violate the Establishment Clause.

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

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139 Id.
139 Id. at 329 n.1 (quoting text of §702).
140 Id. at 331.
The Constitution prohibits not only the reality of government support for religion, but also the appearance of such support. However, in evaluating whether the appearance of endorsement exists, it is necessary to bear in mind the values that the Free Exercise Clause protects . . . . The American political tradition recognizes that the quid pro quo of the ban on establishments of religion is the relative freedom of churches from regulation. Church exemptions are quite common in American law for just this reason.143

Similarly, COLPA argued that “[t]he Establishment Clause permits Congress to protect the free exercise of religion by granting statutory exemptions that provide ‘breathing space’ to religious institutions.”144

However, the ADL disagreed, concluding that § 702 of Title VII “has the primary effect of advancing religion and thereby fail[ed]” under the Lemon test.145 In taking a stand against a statutory exemption for religious institutions, the ADL’s brief stands out for two reasons. First is the brief’s reliance on the Court’s “unyielding weighting” argument in Estate of Thornton v. Caldor146—an argument the ADL had rejected in the amicus brief it filed in Caldor only a few years prior.147 Second, the ADL’s brief—in arguing in favor of striking down § 702—spent significant effort identifying robust statutory and constitutional protections available to religious institutions, thereby attempting to allay concerns that striking down § 702 would leave religious institutions open to significant exposure for liability under Title VII. On the statutory side, the ADL argued that even without § 702, Title VII shielded religious organizations from liability

143 Brief for the American Jewish Congress, supra note 142, at xiii–iv (emphasis in the original).
144 Brief for the National Jewish Commission on Law and Public Affairs, supra note 142, at *4.
146 See Brief for the Anti-Defamation League of B’nai B’rith, supra note 145, at *5–6.
147 See, e.g., Brief for Anti-Defamation League, supra note 134, at *2 (“We believe that legislative attempts to reasonably accommodate the religious beliefs of all citizens are in accord with the principles of religious freedom upon which this nation was founded and are consistent with the strictures of the religion clauses of the First Amendment.”).
when terminating employees on religious grounds, so long as those religious grounds represented a bona fide occupational qualification.\footnote{148 See Brief for the Anti-Defamation League of B’nai B’rith, supra note 145, at *14–15.}

Moreover, according to the ADL, Title VII was not, even as a statutory matter, intended to “apply to the relationship between a church and its ministers or minister-like personnel.”\footnote{149 Id. at *15.} As a result, the ADL concluded that “Title VII does not apply to discrimination by a religious organization within two of its most important spheres of religious activity—the hiring and supervision of ministers and minister-like employees, and the operation of religious schools—or in any setting where the religion of an employee is a \textit{bona fide} occupational qualification.”\footnote{150 Id.}

The ADL, however, did not stop there. In outlining the protections afforded religious institutions with respect to religious-based employment, the ADL argued that the Free Exercise Clause provided broad protections as well, noting that the Supreme Court had “long barred governmental attempts to interfere with religious doctrine or internal church affairs.”\footnote{151 Id.} Combining those protections with other First Amendment protections would “provide a potent defense for any religious organization when a Title VII claim threatens to interfere with its fundamental religious liberty to establish doctrine, provide religious education, choose its ministers, or manage its internal religious affairs.”\footnote{152 Id.} Furthermore, claimants faced with the requirements of Title VII could also avail themselves of standard free exercise protections “if that regulation threatens to create a burden upon the conscientious exercise of religious duty,”\footnote{153 Id. at *16.} given that a “religious organization may assert a claim for free exercise exemption on behalf of its individual members, or on the basis of its own rights.”\footnote{154 Id. at *16 n.8.}

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

That being said, in the view of the ADL, none of these free exercise protections were relevant the facts of Amos. Terminating Mayson, “a gymnasium building engineer,” could not be justified neither by the
prohibition “barring interference in the relationship between a church and its ministers or minister-like employees” nor by an assertion that religion was a bona fide occupational qualification.\textsuperscript{155} Moreover, because Maysom’s duties were “purely secular” and the gymnasium’s activities neither included any “religious ritual” nor any attempt to “teach[] or spread[] the Mormon Church’s religious beliefs or practices,” the ADL concluded that no free exercise protections were relevant.\textsuperscript{156} Indeed, the complete absence of religious responsibilities or religious activities led the ADL to conclude that denying the applicability of free exercise protections did not require the court to impermissibly “inject itself into the Church's internal affairs,” nor “interfere[] in any way with the religious doctrine or internal affairs of the Church.”\textsuperscript{157} Thus, the ADL concluded, Maysom’s suit should proceed uninhibited by statutory or constitutional bars to liability.

The ADL’s brief in \textit{Amos} represents the outer boundary of Jewish institutional dissensus in this second phase of Jewish advocacy around religious liberty before the Court. And yet even in taking this relatively aggressive stance encouraging the Court to strike down employment protections for religious institutions, the ADL still affirmed robust protections when it came to conduct and activity more central to mission of religious institutions. Moreover, this gentle shift away from a full-throated defense of religious exemptions in employment law—likely triggered by increasingly complex cases related to the relative burdens borne in clashes between employment discrimination and religious observance—did not undermine the underlying consensus over the constitutionality of religious accommodation more broadly. Indeed, during this very time period, Jewish institutions remained unanimous in cases that largely tracked the original facts of \textit{Shebert v. Verner}. Thus, in the 1987 case \textit{Hobbie v. Unemployment Appeals Commission},\textsuperscript{158} the ADL, AJCommittee and AJCongress all sided with the Appellant, concluding that the state’s failure to provide unemployment benefits violated the Free Exercise Clause—and that providing an exemption from the standard rules governing unemployment benefits did not violate the Establishment Clause.\textsuperscript{159} Similarly, in \textit{Thomas v. Review Board}, the AJCongress stated that disqualification of the

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\begin{enumerate}
\item \textsuperscript{155} Id. at *17.
\item \textsuperscript{156} Id. at *18.
\item \textsuperscript{157} Id. at *19.
\item \textsuperscript{158} 480 U.S. 136 (1987).
\end{enumerate}
petitioner from unemployment benefits violated the Free Exercise Clause, emphasizing that, like in Shebert, “[w]hile the compulsion may be indirect, the infringement of free exercise rights is nonetheless substantial.”\footnote{160} And, “[s]ince it is justified by no compelling state interest, it violates the First Amendment.”\footnote{161} The Jewish Peace Fellowship, the only other Jewish organization to file a brief in \textit{Thomas}, advanced a parallel argument. Authored by Leo Pfeffer, the brief argued that “[a] statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions will not engage in the manufacture of arms deprives him of free exercise of his religion.”\footnote{162} 

And in \textit{Employment Division v. Smith}, the AJCongress—the only Jewish organization to file a brief in that case—once again advanced this familiar free exercise argument, arguing that, absent proof of a compelling government interest, denial of employment benefits violated the Free Exercise Clause.\footnote{163} Explaining its particular interest in the case, the AJCongress reiterated its core mission: “[a]s an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of religion. In particular, AJCongress seeks to ensure that the religious practices of minority religions are not burdened or prohibited absent compelling justification.”\footnote{164} 

\textbf{B. Religious Liberty and Clashes with Compelling Government Interests}

Jewish institutional responses to Supreme Court religious liberty cases in the 1980s outside the employment context followed a somewhat similar script. On the one hand, consensus remained with respect to the fundamentals of the religious accommodation agenda—that is, the importance of protecting against substantial burdens on religious exercise in the absence of a compelling government interest. At the same time, Jewish institutional responses to cases that raised questions about the scope of

\footnote{161} Id. 
\footnote{164} Id. at *xiv.
those protections received more varied reactions, with different organizations drawing the line in different places. Ultimately, Jewish institutional did not harbor concerns with the fundamental objectives of the religious accommodationist agenda; instead, to the extent they exhibited concerns, it flowed from the increasing number of instances where anti-discrimination norms tangled with claims for religious exemptions or accommodations.

The two best examples of this phenomenon may be two landmark religious liberty cases from the 1980’s: Bob Jones University v. United States165 and Goldman v. Weinberger.166 In Bob Jones, the Supreme Court addressed an IRS decision withdrawing tax-exempt status from Bob Jones University on account of the university’s policy prohibiting interracial dating.167 Bob Jones University argued that withdrawal of their tax-exempt status violated its free exercise rights—a claim that the Supreme Court, in an 8-1 decision, ultimately rejected.168 In the Court’s view, the government had an “overriding interest in eradicating racial discrimination in education” and “[t]hat governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”169

By contrast to the Supreme Court’s near unanimity, Jewish organizations were far more divided over the appropriate outcome. Both the ADL and the AJCommittee sided with the IRS, arguing that revoking tax-exempt status did not violate the requirements of the Free Exercise Clause because the government interest at stake was compelling. Thus, the ADL asserted that “the governmental interest in eradicating racial discrimination is among the most compelling in our society today.”170 The AJCommittee, filing a joint brief with the ACLU, pressed the argument even further, contending that pursuant to the Fifth Amendment, there exists a “compelling, constitutionally mandated national interest in eliminating all government support for race discrimination in all schools”.171 In turn, the

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168 Id. at 604.
169 Id.
170 Motion for Leave to File Brief and Brief for the Anti-Defamation League of B’nai B’rith as Amicus Curiae Supporting Respondents at *33, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (No. 81–3, 81–1).
171 Brief for the American Civil Liberties Union & the American Jewish Committee as Amicus Curiae Supporting Respondents at 10, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Nos. 81-1, 81-3) (emphasis in original).
existence of this compelling government interest also jettisoned any
possible free exercise claim: “the I.R.S. rule . . . must be upheld since the
conduct at which it is aimed—government support of racially
discriminatory schools—poses uniquely substantial threats to our social
fabric. The compelling national interest in eliminating such government
support . . . has expressly been held to override free exercise claims.”172

COLPA, on the other hand, weighed in on the side of Bob Jones
University, filing a brief that represented a wide range of Orthodox Jewish
organizations.173 While emphasizing that racial discrimination in education
violates Jewish religious principles, COLPA nonetheless argued that
withdrawing tax-exempt status because of an institution’s religious
commitments and practices would violate the First Amendment:

The purpose of the First Amendment is to protect minorities
from the tyranny of the majority. . . . Th[is] purpose of the
First Amendment and its limitation on the powers of the
majority would be frustrated if tax exemption and, with it,

economic viability, could be granted to or withheld from the
minority by the majority merely because the minority, in
pursuit of its religious rights, refuses to conform to the social
practices of the majority. If the majority could so behave,
the First Amendment would be meaningless.174

Given the stakes, COLPA also concluded that no compelling government
interest justified overriding Bob Jones’s free exercise rights, as none of “the
acts of the petitioners herein constituted crimes or otherwise violated
specific laws.”175

Maybe the most noteworthy Jewish institutional reaction—or non-
reaction—to Bob Jones was the decision of the AJCongress not to file or
join an amicus brief. While typically it is difficult to read too much into the
failure of an organization to file an amicus brief, Marc Stern, then a member
of the legal staff of the AJCongress’s Commission on Law and Social

172 Id. at 42.
173 Brief for the National Jewish Commission on Law and Public Affairs as Amicus
(No. 81–3, 81–1) (including Agudath Israel of America, National Council of Young Israel,
Rabbinical Council of America, Torah Umesorah, National Society of Hebrew Day
Schools, and Union of Orthodox Jewish Congregations of America).
174 Id. at *6–7.
175 Id. at *10.
Action (CLSA), has described the internal decision-making calculus as follows:

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

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

While not particularly surprising, this split in Bob Jones stood in stark contrast to Jewish institutional responses to Goldman v. Weinberger. In Goldman, the Supreme Court addressed the free exercise claims of Simcha Goldman, an Orthodox Jewish Air Force officer, who argued that the Air Force had violated his free exercise rights by applying its regulation against the wearing of headgear to prohibit him from wearing a yarmulke. Jewish organizations all lined up to support Goldman, each arguing that the military lacked a compelling government interest to justify abridging the free exercise rights at stake. COLPA served as part of the legal team representing Goldman. The AJCommittee argued that “[o]n the facts of this case, in which the wearing of a yarmulke was unchallenged for several years, the military’s interest in enforcement of its regulations, merely for the sake of enforcement, does not constitute a state interest of the necessary magnitude to justify abridgment of a serviceman’s free exercise rights.”

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

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176 See Ivers, supra note 33, at 205–06 (quoting Stern).
177 Cohen, supra note 35, at 125 (describing how the AJCongress, by the mid-20th century, had cultivated reputation for “rashness—the eagerness . . . to hold forth publicly on sensitive issues and its uncompromising defense of strict separationism”).
179 Id. at 504.
180 Brief for Petitioner, Goldman v. Weinberger, 475 U.S. 503 (1986) (No. 84-1097), 1985 WL 669072 (including Dennis Rapps of COLPA as well as Nathan Lewin and David Butler, as attorneys for Goldman).
The free exercise cases, in short, convincingly testify to the weighty concerns implicated when government impinges on matters of religious conscience. There can be no doubt that, in the civilian context, petitioner’s right to wear a yarmulke—a religious article obviously posing no threat to public safety, peace or order—could not be proscribed or subjected to regulation.\footnote{\textit{Brief for the Anti-Defamation League of B’nai B’rith Supporting Petitioner, Goldman v. Weinberger, 475 U.S. 503 (1986) (No. 84-1097), 1985 WL 669070, at *9 (citations omitted).}}

And in a joint brief, the AJCongress and the SCA—along with the ACLU—added their voices to the institutional chorus supporting Goldman, describing the broader issue at stake as “whether an Orthodox Jew who wishes to serve his country is unwelcome in the Air Force.”\footnote{\textit{Brief for the American Jewish Congress et al. as Amicus Curiae Supporting Petitioner, Goldman v. Weinberger, 475 U.S. 503 (1986) (No. 84-1097), 1985 WL 669074, at *3.}} In turn, the brief focused on the “unbroken line of cases” reaffirming that “government may burden religious liberty only when such a burden ‘is essential to accomplish an overriding governmental interest,’”\footnote{\textit{Id. at *12.}} a requirement \textit{amici} believed was wholly unsatisfied given the facts of the case.

There is no doubt that the particular Jewish interest at stake in \textit{Goldman}, as opposed to that in \textit{Bob Jones}, played an important role in the uniformly supportive Jewish institutional response to the free exercise claim—a position ultimately rejected by the Supreme Court, which deferred to the Air Force’s judgment that the important values of military hierarchy imparted by uniform dress constituted sufficient justification to override Goldman’s claims.\footnote{475 U.S. 503, 509–10 (1986). To be sure, in 1987, Congress—adopting legislation drafted by Goldman’s attorney, Nathan Lewin of COLPA—modified that military’s dress code to largely permit the wearing of a yarmulke. \textit{See} 10 U.S.C. §774(a) (“Except as provided under subsection (b), a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force.”); RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 279 (Sarna & Dalin eds. 1997).} That being said, the doctrinal distinction, by and large, embraced by Jewish institutions in both cases focused on the very different government interests at stake in the two cases. For the most part, Jewish institutions that supported the free exercise claim in \textit{Goldman} viewed the military’s interest as far weaker than the IRS’s interest in eradicating racial discrimination in higher education. The AJCommittee captured this difference in a footnote of the \textit{amicus} brief it submitted in \textit{Goldman}, explaining that the government does retain the right to override
religious liberty claims where “the conduct in question assaults one of the most fundamental bedrock values of our society or legal order” and citing *Bob Jones* as an example.\(^{186}\)

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

Accordingly, in other 1980s free exercise cases where governmental claims for the existence of compelling government interest were relatively weak or non-existent, Jewish institutions lined up in support of religious liberty claimants. Examples include the AJCongress’s brief in *McDaniel v. Paty*, signed along with numerous other organizations, which argued that Tennessee’s constitution prohibiting ministers to seats in the state legislature violated the Free Exercise Clause.\(^{187}\) Similarly, in *O’Lone v. Estate of Shabbaz*, the AJCongress and SCA filed a brief supporting the free exercise claim of Muslim inmates, arguing that the traditional substantial burden framework should be applied to the prison’s failure to permit attendance at Jumu’ah, a Friday afternoon congregational service.\(^{188}\) And the brief filed by the AJCongress and the NJCRAC in *Hernandez v. Commissioner* supported the Church of Scientology’s claim that denying tax deductions for participating in “auditing” sessions, intended to promote spiritual engagement and awareness, violated the Free Exercise Clause.\(^{189}\)

In both cases, all Jewish institutions filing *amicus* briefs sided with religious

\(^{186}\) Brief for the American Jewish Committee, *supra* note 181, at fn. 2.


liberty claimants, thereby promoting the application of the prevailing free exercise doctrine.

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

In their filings, Jewish institutions argued against this conclusion, emphasizing both that the burdens in Lyng ought to qualify for free exercise protection and that the purported compelling government interest was insufficient to justify this incursion into the rights of those affected by the government’s conduct. The AJCongress filed an amicus brief encouraging the Court to decline the persistent attempts by the government to “water down the content of this compelling interest requirement,” and also supporting the substantial burden claim by emphasizing that “territory can be sanctified, that places used by generations of believers for ritual purposes have special holiness and special conduciveness for prayer”—all of which were threatened by the government’s road-building plans. The AJCommittee also filed an amicus brief, arguing that the Free Exercise Clause protected “the right of traditional site-specific religious practices to constitutional protection”—a right it believed had been “already accorded

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191 Id. at 441–42.
192 Id at 449.
193 Id. at 468 (Brennan, J. dissenting) (“Ultimately, the Court’s coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance.”).
195 Id. at *23.
to more mainstream beliefs.” In turn, the AJCommittee reiterated that, under its view of the prevailing doctrine, the existence of this free exercise right required the government to provide a compelling government interest to justify its actions, which it failed to do. In this way, both the AJCongress and AJCommittee sought in Lyng to stave off both changes to the substantial burden doctrine, and expansions of what might qualify as a compelling government interest justifying a substantial burden on religious exercise.

The one exception to this overall trend prior to the more recent “culture war” cases take us back to Bob Jones. Although the dominant theme of the briefs filed by the ADL and the AJCommittee focused on the government’s compelling government interest in eradicating racial discrimination, both included secondary or tertiary arguments that focused on the quality of the burden on religious exercise. For example, towards the end of its amicus brief, the ADL noted that IRS’s withdrawal of tax-exempt status did not “directly prohibit the actual practices of religious beliefs, as would a statute banning polygamy. Petitioners remain free to teach their doctrines about the separation of the races. Their members individually may still conduct their private affairs in a manner consistent with the teachings of their religion.” While this argument does appear to take issue with the degree of the burden on Bob Jones University, the ADL quickly cabined this argument as, apparently, merely speaking to whether the IRS had employed the least-restrictive means in response to the Bob Jones policy, as opposed to deploying a full-throated argument casting doubt on whether the religious exercise in question was deserving of protection. Thus, the brief argued, “terminating the grant of tax benefits to petitioners is the least restrictive way in which the government could end its involvement with practices that it could not constitutionally engage in itself.”

By contrast, the AJCommittee’s brief in Bob Jones did in fact contest the very existence of a substantial burden. The AJCommittee argued that the IRS’s withdrawal of tax-exempt status, “[i]n stark contrast with cases where this Court has sustained free exercise claims” did not involve “the outright governmental ban on any religious belief or practice, nor the

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197 Id. at *13–16.
198 Motion for Leave to File Brief and Brief for the Anti-Defamation League of B’nai B’rith as Amicus Curiae Supporting Respondents at *34, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Nos. 81-1, 81-3).
199 Id.
requirement that, in order to receive a government benefit, petitioners abandon and religious belief or practice.” In supporting this claim, the AJCommittee emphasized that the “I.R.S. rule did not directly compel petitioners, under threat of criminal or civil sanctions, to embrace any repugnant religious belief or to abandon any religiously motivated practice.” In making this claim, the AJCommittee characterized the university’s religious claims somewhat narrowly; in its view, Bob Jones was only committed to “eschew[ing] interracial marriages and dating relationships; Bob Jones d[id] not assert any religious duty to shun racially integrated schools.” By narrowly cabining Bob Jones’s asserted “religious duty,” the AJCommittee argued that the IRS’s determination had not, in fact, burdened religious exercise. Although this claim had less to do with a narrow construction of what qualifies for the legal category of a burden—that is, it focused more on the factual assertion of Bob Jones—the AJCommittee’s brief in Bob Jones is noteworthy in its willingness to challenge a religious liberty claim based on the nature of the burden on religious exercise. In so doing, the AJCommittee stepped beyond what other Jewish institutions were willing to argue—at least in the first phase of Jewish institutional dissensus over religious liberty.

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

We began our exploration of Jewish institutional advocacy before the Court by wondering whether we could speak coherently about a Jewish view on religious liberty, and whether that view aligned with Hunter’s contemporary categories of traditionalists and progressives. Identifying the content and trajectory of Jewish religious liberty amicus briefs could shed light on whether Jew institutions had provided a third way that, to use Schragger and Schwartzman’s phrase, was neither pagan nor Christian in the same way as they had when it came to the Establishment Clause. In this way, the story of Jewish amicus briefs might help determine to what extent, when it came to questions of religious liberty, Jews aligned themselves with—or were outsiders to—Smith’s image of the Christian city.

As described above, in the 1960s and 1970s, Jewish institutions took largely traditionalist approaches to free exercise doctrine, embracing the substantial burden framework for analyzing religious liberty claims. These

200 Brief for the American Civil Liberties Union & the American Jewish Committee as Amicus Curiae Supporting Respondents at *35–36, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Nos. 81-1, 81-3).
201 Id. at *36.
202 Id. at *37.
early views were therefore far from idiosyncratic, falling in line with standard conceptions of traditionalist approaches to religious liberty. Indeed, such views would find a ready home in Smith’s Christian city.

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

The prevailing doctrinal equilibrium, however, would not last as Jewish institution began responding to religious liberty at the heart of the culture wars. This transformation from predominant consensus to dissensus began, in many ways, with the Supreme Court’s landmark 1990 decision, Employment Division v. Smith. In contrast to prior cases, the Court held in Smith that the denial of claimants’ unemployment benefits was not entitled to constitutional protection under the Free Exercise Clause. Instead, the Court held that the Free Exercise Clause only protects against laws that target or discriminate against religion. More precisely, the Free Exercise Clause does not provide any protection against laws that are “facially neutral” and “generally applicable”—that is, those that have legitimate secular objectives and only unintentionally burden religion.

The Supreme Court’s interpretation of the Free Exercise Clause represented a departure from prior Supreme Court precedent. The free

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205 Id. at 878.
206 For commentary soon after the Smith decision, see Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109 (1990); William P.
exercise doctrine prior to *Smith*, one embraced by Jewish institutions in their *amicus* briefs. Afforded far broader religious liberty protections, requiring courts to grant exemptions from laws that substantially burdened religiously motivated conduct unless applying the law was necessary to achieve a compelling government interest. In *Smith*, the Court discarded this more protective framework, only providing constitutional protection against laws that targeted religiously motivated conduct. And, in turn, this shift in doctrine began a far longer process of legal evolution—from *Smith* to the Religious Freedom Restoration Act and then ultimately to the current debates at the heart of the contemporary culture wars.

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

Though in *Smith* the Court eliminated the constitutional requirement to provide exemptions from incidental burdens on religious exercise, it still believed it had left those seeking religious accommodations with a viable alternative: namely, petitioning the legislature. Thus, those seeking exemptions could still look to their legislature to incorporate a religious exemption into the relevant law. But this alternative legislative strategy provided cold comfort to critics of *Smith*. Petitioning a legislature might serve as a viable alternative for more well-established and better-organized religious communities. Minority religious communities, however, would be far less likely to secure the legislative exemptions necessary to protect their less familiar religious practices from legal burdens.

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207 See supra Parts II & III.


209 See, e.g., Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENTARY 7, 45 (1996) (“In *Smith*, the Court drastically reduced the protection the Free Exercise Clause provided to religious minorities by limiting the application of this constitutional provision to only those laws that deliberately and exclusively burden religious practices. Neutral laws of general applicability cannot violate the Free Exercise Clause under this analysis regardless of how debilitating they may be to the ability of individuals to obey the tenets of their faith.”).

210 *Smith*, 494 US at 890.

211 See Id. at 902 (Blackmun, J. dissenting) (“[T]he Court today suggests that the disfavoring of minority religions is an ‘unavoidable consequence’ under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact
These worries formed the primary catalyst behind the Religious Freedom Restoration Act ("RFRA"),\(^{212}\) which aimed, as a matter of federal legislation, to undo \textit{Smith} and restore the prior applicable free exercise standard. Enacted into law in 1993,\(^{213}\) RFRA prohibits laws that substantially burden a person’s religious exercise unless imposing that burden is necessary to achieve a compelling government interest.\(^{214}\) Given that religious minorities are comprised of a relatively small number of adherents and therefore are less likely to successfully petition a

majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses and the Amish.”).

\(^{212}\) See, e.g., \textit{Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the H. Comm. on the Judiciary}, 101st Cong. 24 (1990) [hereinafter \textit{Hearing on RFRA}] (statement of Rep. Lamar Smith ) (“The free exercise of religion is one right that separates at free nation from a totalitarian, suppressive regime. For over 40 years we have condemned communist countries for their official atheism and persecution of religious minorities and during World War II we fought to end the Holocaust. We have to practice what we preach.”); \textit{id.} at 34 (Statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Counselor of Churches) (“It is only the unconventional practices of minorities and non-conforming individuals that put the guarantees of the Bill of Rights to the test. And now the court has abandoned the very test it had long enunciated to protect the free exercise of religion.”). The secondary literature is replete with criticism of \textit{Smith} highlighting the particular challenge it posed to religious minorities. \textit{See, e.g.}, McConnell, supra note 206, at (“Prior to \textit{Smith}, the Free Exercise Clause functioned as a corrective for [the] bias [against minority religions], allowing the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process. The Free Exercise Clause, prior to \textit{Smith}, was an equalizer.”); Steven H. Shiffrin, \textit{The Pluralistic Foundations of the Religion Clauses}, 90 CORNELL L. REV. 9, 32 (2004) (“The Smith case thus reeks of insensitivity to the plight of a religious minority.”); Kent Greenawalt, \textit{Religion and the Rehnquist Court}, 99 NW. U. L. REV. 145, 155 (2004) (“The rule of Smith risks legislative indifference to the plight of unfamiliar minority religions.”); Douglas Laycock, \textit{The Religious Freedom Restoration Act}, 1993 B.Y.U. L. REV. 221, 224 (“Formally neutral laws can lead to persecution for a simple reason: Once government demands that religious minorities conform their behavior to secular standards, there is no logical stopping point to that demand. Conscientious resistance by religious minorities sometimes inspires respectful tolerance and exemptions, but sometimes it inspires religious hatred and determined, systematic efforts to suppress the religious minority.”); Kathleen M. Sullivan, \textit{Religion and Liberal Democracy}, 59 U. CHI. L. REV. 195, 216 (1992) (describing the “big flaw” of \textit{Smith} as “entrench[ing] patterns of de facto discrimination against minority religions”).


it is far from surprising that numerous Jewish organizations joined the Coalition for the Free Exercise of Religion that supported RFRA legislation before Congress. This united a wide-range of Jewish organizations under the Coalition’s umbrella, ultimately including the Agudath Israel of America, the AJCommittee, AJCongress, ADL, Central Conference of American Rabbis, Council of Jewish Federations, Federation of Reconstructionist Congregations and Havurot, National Council for Jewish Women, COLPA, RCA, OU, and United Synagogue of Conservative Judaism. In a statement submitted to the House of Representatives’ Subcommittee on Civil and Constitutional Rights, the American Jewish Congress emphasized this concern for religious minorities post-Smith:

Some may question why federal legislation to undo Smith is considered so essential. But that is to underestimate the role of courts in protecting religious minorities. . . . [W]ithout a legal basis for a religious claim, religious adherents have no protection against the most capricious acts of government. All religious minorities must be alarmed when the courts are stripped of the power to require government to accommodate those religious practices, to use Justice Scalia’s words, “not widely engaged in.”

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

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


217 *See Hearing on RFRA, supra* note 212, at 66–67 (Statement of the American Jewish Congress).

218 *Id.* at 69–70 (Statement of the Anti-Defamation League).
troubling—and potentially devastating—consequences of Smith quickly led to RFRA’s enactment.

This continued consensus spilled over into the amicus briefs filed by Jewish institutions. In *Church of Lukumi Babalu Aye v. City of Hialeah*—the first post-Smith free exercise case before the Court—Jewish groups lined up to support the petitioners with near unanimity.\(^{219}\) The petitioners were members of a Santerian church who claimed that the City of Hialeah had issued discriminatory regulations prohibiting their ritual sacrifice of animals.\(^ {220}\) The AJCongress, AJCommittee and ADL all signed on to a brief that argued the regulations in question violated the Free Exercise Clause “because they are specifically directed at a religious practice.”\(^ {221}\) The brief, while not expressly asking the Court to overturn its decision in Smith, did state that “religious and civil liberties communities, across the spectrum of theological and political opinion, are united in the conviction that Smith was wrongly decided.”\(^ {222}\) Specifically, these groups argued that Smith “radically diminished the substantive liberty of each American to worship in the manner and season most agreeable to the dictates of his own conscience, subject only to the overriding responsibility of the state to maintain public peace and safety.”\(^ {223}\)

Similarly, COLPA filed a brief on behalf of numerous Orthodox Jewish organizations—including the Agudath Israel, OU, and RCA—arguing that the city’s regulation violated the Free Exercise Clause even under the new Smith standard because the regulations were “directed against religious practice.”\(^ {224}\) The brief then expressed broader worries about how Smith “elevate[d] form over substance,” noting that “[h]ad Hialeah more cleverly drafted its Resolutions and Ordinances . . . its legislation could have passed constitutional muster under Smith.”\(^ {225}\)

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\(^{222}\) *Id.* at *16–17.

\(^{223}\) *Id.*


\(^{225}\) *Id.* at *12–13.
Moreover, when the Supreme Court considered a challenge to RFRA’s constitutionality, Jewish organizations lined up to support RFRA either under the Coalition for Free Exercise of Religion’s umbrella or on an individual basis. Ultimately, the Supreme Court rejected this view and invalidated RFRA’s applicability to state law as beyond Congress’s constitutional authority. In response, many states enacted their own versions of RFRA or, in some instances, interpreted state constitutional provisions so that the provisions provided analogous RFRA protections against state law. In this way, the RFRA initiative—joined by Jewish institutions—undid what it perceived as significant damage to religious liberty and ensured that the pre-Smith framework remained applicable not only on the federal level, but in a large number of states as well.

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

229 Flores, 521 US at 511.
231 Id.
233 Id.
had dwindled.\textsuperscript{234} That notwithstanding, Congress still bolstered religious liberty efforts in 2000 by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA),\textsuperscript{235} which extended the federal RFRA framework to “land use regulation”\textsuperscript{236} and “persons[s] residing in or confined to an institution.”\textsuperscript{237}

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

For example, \textit{amicus} briefs filed by Jewish institutions in \textit{Locke v. Davey}\textsuperscript{238} split over whether Washington State violated the Free Exercise Clause by excluding individuals pursuing a degree in devotional theology from its state scholarship for post-secondary school. Jewish institutional positions tracked typical views on the interaction between the Free Exercise and Establishment Clauses. The ADL, along with the JCPA and a number of other Jewish organizations, filed a brief supporting the State of Washington, arguing that the exclusion in the scholarship program “protects the religious exercise rights of all [Washington’s] citizens by providing greater anti-establishment protections than [] the United States

\begin{footnotesize}
\footnotetext[234]{In 1998, the Coalition for Free Exercise of Religion still retained its broad consensus. \textit{See Religious Liberty Protection Act of 199: Hearing on S. 2148 Before the S. Comm. on the Judiciary}, 105th Cong. 305 (1998) (Memorandum to Members of Congress from the Coalition for the Free Exercise of Religion, including list of members). However, by 1999, far fewer institutions joined a letter to Orrin Hatch from the Religious Liberty Protection Act Leadership Group, encouraging Congress to move forward with RLUIPA as opposed to the Religious Liberty Protection Act. \textit{See supra} note 232 at 829-30 n.146 (listing organizations signing the letter to Orrin Hatch).}
\footnotetext[236]{§ 2000cc(a)(1).}
\footnotetext[237]{§ 2000cc-1(a).}
\footnotetext[238]{540 U.S. 712 (2004).}
\end{footnotesize}
Advancing parallel disestablishment arguments, the AJCongress advanced the claim, ultimately adopted by the Court, that “[t]here is ‘play in the joints,’ interstitially, for legislators to widen or contract the gap between religion and state without violating the Free Exercise Clause, precisely as the legislature may expand the scope of religious accommodation without violating the Establishment Clause.”

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

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

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contending that “[e]xemptions do not support religion in any way that was ever part of an establishment of religion. Properly administered, exemptions are substantively neutral.”244 And the AJCongress, among others, served as counsel for the petitioners, arguing to uphold their rights under RLUIPA.245

Only two years later, the Supreme Court addressed yet another RFRA challenge—this time, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, a case that involved a religious sect that received communion via the drinking of a sacramental tea, which included a hallucinogen prohibited under federal law.246 The sect sued for protection under RFRA—a claim supported by Jewish institution’s filing amicus briefs. Thus, a number of Jewish institutions—including the AJCongress, AJCommittee, ADL, and JCPA—all joined an amicus brief supporting, once again, the constitutionality of RFRA.247 Another brief, joined by the Agudath Israel and the Union for Reform Judaism, contested the government’s claim that it could satisfy the “compelling government interest” required by RFRA and thereby justify its refusal to allow use of the sacramental tea.248

B. Culture Wars and the New Jewish Dissensus

After 2006, consensus among Jewish institutions in the briefing before the Supreme Court on religious liberty claims, tracking the dissensus of the late 1990s over religious liberty legislative initiatives,249 would be increasingly hard to come by. As foreshadowed at the end of the 1990s, much of this growing division coincides with the “culture wars,” in which the broader religious liberty consensus—and consensus around RFRA—dissipated. Indeed, criticism grew as the narrative around RFRA—


[249] See supra notes 232-234 and accompanying text.
originally viewed as protecting vulnerable and politically marginalized religious minorities—became increasingly seen as a statutory tool to discriminate against other vulnerable groups such as women and members of the LGBT community. Maybe the clearest statement of this worry came from Louise Melling, deputy legal director of the ACLU, in a 2015 op-ed in The Washington Post. In Melling’s words, RFRA was “initially passed to protect the exercise of religious belief, including by vulnerable religious minorities.”

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

This rationale captures the stakes in the culture wars—a clash built upon two primary shifts in social reality. The first was the increasingly rapid social change with respect to “sexual norms” or “sexual morality,” including views on abortion, contraception and—maybe most importantly—same-sex marriage. The second was the locking of swords on issues surrounding sexual morality through the assertion of “complicity claims”—that is, “faith claims about how to live in community with others

251 Id.
255 Paul Horwitz, Comment: The Hobby Lobby Moment, 128 HARV. L. REV. 154, 160–61 (2014) (“This legal contestation has been accompanied by—indeed, may be driven by—significant social dissensus. Although Hobby Lobby itself involves a controversial social issue—the status of women’s reproductive rights—much of the reason for the shift in views on accommodation involves another contested field in the American culture wars: the status of gay rights and same-sex marriage.”).
who do not share the claimant’s beliefs, and whose lawful conduct the person of faith believes to be sinful.”

Together, these two social shifts have led to an increasing number of clashes between religious individuals and the law; accordingly, many religious individuals maintain traditional views about sexual morality, and therefore refuse to abide by laws they view as requiring participation in or support of conduct that embraces an alternate view of sexual morality.

Maybe the two most well-known instances of these conflicts have been conflicts over the so-called “contraception mandate” and conflicts over public accommodations laws. Conflict in the former category began when many for-profit employers were required, pursuant to the Affordable Care Act’s contraception mandate, to provide employees health insurance that covered FDA-approved contraceptives or face significant penalties.

A wide range of religiously motivated for-profit institutions brought suit against the mandate, arguing that providing employees with insurance coverage for contraception made them complicit in conduct they believe to be sinful—in other words, complying with the mandate required them to violate their religious consciences. Because religious for-profit institutions were not exempted from the mandate, these institutions asserted religious liberty claims pursuant to RFRA.

The latter category of complicity-claim conflicts includes a series of cases where religiously motivated businesses—including a baker, a florist, and a photographer—have clashed with prevailing antidiscrimination laws by refusing to provide their services at same-sex weddings and commitment ceremonies. In those cases, the vendors argued that, as religiously

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257 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60 (2014). But see Marty Lederman, *Hobby Lobby Part III—There is No “Employer Mandate”*, BALKINAZATION (Dec. 16, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html (arguing that employers are not mandated to provide contraception and have other alternatives such as not providing an employee health-care plan).


motivated individuals, their right to religious liberty was abridged by the prevailing public-accommodations laws—laws that prohibited them, via their commercial enterprises, from discriminating on the basis of sexual orientation in the provision of services, notwithstanding the fact they believed that providing services at a same-sex wedding ceremony violated their religious consciences.261

Not surprisingly, as these disputes unfolded,262 the narrative surrounding religious liberty began to change with a growing perception that religious liberty increasingly stood at odds with either women’s health or same-sex marriage. Accordingly, some viewed the doctrinal tools of religious liberty—such as RFRA and the Free Exercise Clause—as the tools of discrimination rather than shields to prevent discrimination.263

This shift in perception was not without consequences. Maybe nowhere has it been more evident than in recent clashes over attempts by state legislatures to enact new versions of RFRA. And of these clashes, the conflict surrounding Indiana’s attempt to enact a new RFRA in 2015 stands out for its relentlessness.264 While many states maintained similar statutes, the petition for certiorari, vacating the Washington Supreme Court’s opinion denying the florist’s Free Exercise claims and remanding for further consideration in light of Masterpiece Cakeshop; Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014) (rejecting RFRA defense in a case dealing with a photographer).

261 See id.

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


the national backlash against Indiana’s attempt to do so was swift, overwhelming, and ubiquitous. Actors, CEOs, athletes, pop stars, and politicians all decried Indiana’s new “religious liberty law,” characterizing it as driven by antigay discrimination. Much of this perception was the result of the timing; the legislature’s attempt to enact a state RFRA in Indiana came as debate over the public accommodations cases worked their way through the legal system. Indeed, some supporters of the Indiana bill claimed the new legislation was needed to protect business owners from liability under anti-discrimination laws, leading to the rank condemnation of the law across the United States. The Indiana legislature hurriedly amended the law in an attempt to quell the growing outrage.

Indiana has turned out to be just the beginning. Other states have also introduced bills with new wrinkles to the RFRA framework, many

267 See, e.g., Sandhya Somashekhar, Christian Activists: Indiana law Tried to Shield Companies Against Gay Marriage, WASH. POST (Apr. 3, 2015), at https://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89_story.html?utm_term=.3c3249952e58; Jeremy Diamond, Indiana’s Religious Freedom Law: What You Need to Know, CNN.COM (Mar. 29, 2015), https://www.cnn.com/2015/03/27/politics/indiana-religious-freedom-explainer/index.html (“[S]tanding behind with Pence as he signed the bill were several socially conservative lobbyists, the ones who pushed for the law and are fiercely opposed to same-sex marriage. One of those lobbyists, Eric Miller, explicitly wrote on his website that the law would protect businesses from participating in ‘homosexual marriage.’”).
269 Indiana is not the only state to face significant backlash of late when attempting to enact or modify a state RFRA. See, e.g., Tamara Audi, Arizona Vetoes Religious Bill Criticized as Anti-Gay, WALL ST. J. (Feb. 27, 2014), www.wsj.com/articles/SB10001424052702304255604579407784144050074; Laura Meckler & Ana Campoy, Arkansas Governor Call for Change to “Religious Freedom” Bill, WALL ST. J. (Apr. 1, 2015), www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religious-freedom-bill-1427904740.
of which have similarly faced significant criticism. In light of that criticism, some of these bills have been amended\textsuperscript{271} and some vetoed.\textsuperscript{272}

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

Instead, Jewish institutions have responded to culture war litigation over religious liberty by making new types of arguments that not only encourage limits on the pre-\textit{Smith} substantial burden framework, but also raise increasing skepticism of the asserted religious liberty claims themselves. Maybe even more remarkable is that, notwithstanding some commentary to the contrary,\textsuperscript{273} these shifts towards a more progressive agenda have occurred across the political spectrum of Jewish institutions—including some of the very institutions perceived as shifting towards more


\textsuperscript{273} \textit{See supra} notes 11–15 and accompanying text.
traditionalist views. In this way, the morphing positions of various Jewish institutions has increased the scope and depth of dissensus over religious liberty while simultaneously opening the possibility of alternative approaches to religious liberty issues that might be seen as, to use the now familiar frame, neither Christian nor pagan. Below, I highlight these shifts by considering the amicus briefs in three key areas of culture war litigation before the Supreme Court.


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

Briefing from the parties emphasized the high constitutional stakes facing the Court. While lower courts had long adopted the ministerial exception as a doctrinal outgrowth of the religion clauses, Perich and the EEOC encouraged the Court to adopt a new constitutional approach: that whatever protections were afforded religious institutions by the First Amendment stemmed from the freedom of association and not from the religion clauses. Thus, as characterized by the Court, “[t]he EEOC and

\[\text{Id.}\]
\[\text{Hosanna-Tabor Evangelical Lutheran Church \& Sch. v. EEOC, 565 U.S. 171 (2012).}\]
\[\text{Id. at 178–79.}\]
\[\text{Id. at 177 (differentiating “called teachers”—teachers “called to their vocation by God through a congregation”—from “contract teachers”—teachers “appointed by the school board without a vote of the congregation”).}\]
\[\text{Id. at 180.}\]
\[\text{Id. at 188 \& n.2 (“[T]he Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.”).}\]
\[\text{See Transcript of Oral Argument at 37, Hosanna-Tabor Evangelical Lutheran Church \& Sch. v. EEOC, 565 U.S. 171 (2012) (No. 10-553) (“We don’t see that line of}\]
Perich . . . see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.”

The Court, in a unanimous decision, rejected this claim, finding for the employer and reasserting that the religion clauses served as the proper constitutional home for the ministerial exception.

Not surprisingly, a variety of Jewish institutions filed amicus briefs supporting the church-operated school. COLPA filed a brief representing a range of Orthodox Jewish institutions and endorsing a broad application of the ministerial exception because “controversies between religious institutions and their present or former employees should be considered and determined by religious authorities applying the principles that govern the faith.”

The brief further stated that limiting application of the exception based upon the “primary duties” of the employee violated the strictures of the religion clauses. The OU filed an amicus brief as well, which unequivocally supported the church-operated school: “The church has the right to select its ministers, and when the dispute is between the church and the church member who seeks to serve in ministry, there is no occasion—no justification whatsoever—for the state to become involved.”

But some of the other amicus interventions struck a different note. The AJCommittee and the Union for Reform Judaism filed a brief that...
supported\textsuperscript{286} the church-operated school albeit in a more limited fashion. The brief argued that the lower court’s erred when it failed to classify Perich as a minister based upon a quantitative assessment—that is, “based on arbitrary factors such as the comparative quantity of time spent on activities the court deems ‘religious’”\textsuperscript{287}—as opposed to a qualitative assessment that is “holistic, objectively examining the nature of the position and the particular employee’s function within the religious organization.”\textsuperscript{288} This assessment stood in contrast to COLPA and the OU, which had advocated for far broader application of the ministerial exception than a “primary duties” approach would allow.\textsuperscript{289}

Moreover, a number of Jewish institutions filed briefs in favor of Perich. This included the National Council for Jewish Women, which joined the ACLU and other organizations;\textsuperscript{290} the Jewish Board of Advocates for

\textsuperscript{286} It is worth noting that the American Jewish Congress closed in 2010—an event triggered by its significant endowment exposure to the Bernie Madoff Ponzi scheme. Jacob Berkman, \textit{American Jewish Congress Closes After 88 Years of Human Rights Work}, \textit{JEWISH CHRONICLE} (July 29, 2010), \url{http://www.jewishchronicle.org/2010/07/29/american-jewish-congress-closes-after-88-years-of-human-rights-work/}. Marc Stern, General Counsel from 1999 until the AJCongress’s closure, subsequently became the Associate General Counsel at the AJCommittee in 2010. Am. Jewish Comm., Marc Stern Named AJC Associate General Counsel, CISION (Aug. 2, 2010), \url{https://www.prnewswire.com/news-releases/marc-stern-named-ajc-associate-general-counsel-99774564.html}.

\textsuperscript{287} Brief for the American Jewish Committee and the Union for Reform Judaism as Amicus Curiae Supporting Petitioner at 2, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 2470842, at *2.

\textsuperscript{288} \textit{Id.} at 3.

\textsuperscript{289} See Brief for the National Jewish Commission on Law and Public Affairs, \textit{supra} note 283, at 2 (“This principle extends beyond employment controversies with employees whose ‘primary duties’ are religious. It includes all claims made by or against any employee whose duties relate in any manner to the religious doctrine or teaching of his or her employer, particularly if, as is true of Jewish institutions, a meaningful internal religious remedy is available to the plaintiff.”); Brief for the United States Conference of Catholic Bishops, \textit{supra} note 285, at 5 (“But this case illustrates the flaw in the ‘primary duties’ formulation: the Court of Appeals decided that a ‘called’ teacher of religion, who also led students in prayer three times a day, could nonetheless challenge her termination because these duties were not ‘primary’—too many other ‘secular’ duties were also part of her job. In amici’s view, the church must have the right, free from state interference, to select those engaged in church governance, worship, teaching or other related functions, regardless of whether they have other duties as well.”).

Children, which joined other victims’ rights groups; and the Society for Humanistic Judaism, which joined other secular, humanist and atheist organizations. But maybe the most noteworthy amicus brief filed by a Jewish institution supporting Perich was that submitted by the ADL. In setting up the argument in its brief, the ADL noted that evaluating an application of the ministerial exception brought two of its principal commitments into tension. On the one hand, the “ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause,” and “a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse;” on the other hand, the “ADL is a fervent advocate of the enforcement of anti-discrimination laws that aim to eradicate discrimination.”

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

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

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294 Id. at 3.
295 Id. at 5–6.
296 Id. at 6.
On this count, it may be worth contrasting the ADL’s brief in *Hosanna-Tabor* with its brief in *Amos*, discussed at length above.\(^{297}\) In *Amos*, the ADL supported striking down § 702 of Title VII, which provided a statutory exemption to religious organizations, on Establishment Clause grounds.\(^ {298}\) Accordingly, the ADL’s brief constituted somewhat of an outlier in the broader scheme of Jewish institutional *amicus* briefs filed in the 1980’s. Even so, the ADL’s position in *Amos* was predicated on the important free exercise protections that would still redound to religious organizations’ benefit in the absence of § 702. Thus, in *Amos*, the ADL took the position that the prohibition of Title VII would not apply to a religious organization in the “the hiring and supervision of ministers and minister-like employees” or “the operation of religious schools.”\(^ {299}\) Indeed, the reasons why the ADL argued that the Free Exercise Clause did not shield the employer from the Title VII claims in *Amos* were closely tied to the fact that the employee’s duties were “purely secular” and the employer’s activities neither included any “religious ritual” nor any attempt to “teach[] or spread[] the Mormon Church’s religious beliefs or practices.”\(^ {300}\) This absence guaranteed that enforcing Title VII avoided constitutionally prohibited religious inquiries—ensuring that the Court would not impermissibly “interfere[] in any way with the religious doctrine or internal affairs of the Church.”\(^ {301}\)

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

To be sure, this is not to say that the ADL’s brief in *Hosanna-Tabor* contradicted its brief in *Amos*—far from it. But the ADL’s brief in *Amos* represented an outlier in terms of Jewish institutional willingness to strike down statutory provisions protective of religious institutional employment.

\(^{297}\) See *supra* notes 145–157 and accompanying text.

\(^{298}\) *Id.*


\(^{300}\) *Id.* at *18.

\(^{301}\) *Id.* at *19.
practices. And as the first salvo from a Jewish institution in the culture war litigation, the ADL pressed beyond even those asserted limitations, opening up the door to finding religious institutions liable—and even inviting courts to inject themselves into the internal affairs of church-operated schools and minister-like employees.  

Accordingly, briefs in Hosanna-Tabor expanded the dissensus among Jewish institutions in two important ways. First, Jewish institutions were now divided over whether courts could inquire into the religious responsibilities of employees and thereby limit the reach of free exercise protections afforded religious institutions. Second, some Jewish institutional amici moved beyond prior willingness to apply relatively broad protections to minister and minister-like employees when in the service of a religious organization, pursuing religious objectives. In so doing, progressivist Jewish institutions explored alternative ways to limit and interrogate the scope of religious protections afforded religious institutions—alternatives directed no longer at the periphery of religious liberty doctrine, but to its center.


If Hosanna-Tabor demonstrated a willingness among some Jewish institutions to nudge beyond old constitutional limits, the contraception mandate cases—Burwell v. Hobby Lobby and Zubik v. Burwell—would represent an even broader embrace of that trend. Hobby Lobby and Zubik find their origins in the Affordable Care Act’s contraception mandate, which was enacted pursuant to the guidelines promulgated by the Department of Health and Human Services. Those guidelines required

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302 Drawing the appropriate lines to delimit the scope of the ministerial exception is no easy task. For my attempt at doing so, see Michael A. Helfand, Religion’s Footnote Four: Church Autonomy as Arbitration, 97 MINN. L. REV. 1891 (2013).


304 The Affordable Care Act required that covered health insurance plans provide “preventative care” for women in accordance with guidelines promulgated by the Health Resources and Services Administration, which is an agency of the Department of Health and Human Services. 42 U.S.C. § 300gg-13(a) (2016) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in
covered insurance plans to include “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” Final rules issued by the Department of Health and Human Services provided an exemption for “religious employers,” although that exemption did not cover for-profit companies. In response to the guidelines, numerous Christian institutions filed suit, arguing that complying with the contraception mandate would require them to violate their religious consciences. This wave of lawsuits fell into two broad categories.

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

In reaching its holding, the Court addressed two central issues in the case: whether for-profit entities, given their overriding pecuniary motives, could engage in “religious exercise,” and therefore qualify for RFRA’s protection; and whether in objecting to the contraception mandate, comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.”).


307 Id.

308 For updated information on the range of lawsuits filed against the contraception mandate, see *HHS Mandate Information Central,* THE BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last updated Nov. 7, 2018).


310 Id. at 2779, 2782, 2785.

311 Id. at 2782–84.
companies could demonstrate a substantial burden. As both questions were threshold issues, the Court—in holding in favor of Hobby Lobby—answered in the affirmative. Referencing both the Dictionary Act and indications from past precedent, the Court held that for-profit entities qualified as “persons” for the purpose of RFRA, and that, given the costs of non-compliance with the mandate, the plaintiffs had demonstrated the contraception mandate imposed a substantial burden on their religious exercise. The Court did so even as the link between the provision off insurance and the alleged “sinful” conduct—the use of contraception—was somewhat attenuated.

The Orthodox Jewish Institutions, in an amicus brief filed by COLPA on behalf of the OU and RCA, among others, supported the RFRA claimants. And as the target of their brief, they chose the government’s argument that excluded for-profit entities from RFRA’s protections. Specifically, the brief highlighted how neither the corporate form, nor the choice to operate as a for-profit justified restricting an entity’s religious liberty protections under the Court’s precedent. This was of particular importance from the perspective of these organizations given that Jewish law, they argued, imposed religious obligations on entities regardless of their corporate form or profit motive. As a result, to withhold RFRA protections from for-profit companies would leave many Jewish for-profit entities both subject to their own perceived religious obligation—and thereby engaged in religious exercise—but without parallel religious liberty protections.

By contrast, the AJCommittee and the JCPA filed a brief in favor of the contraception mandate which was very much in the mold of briefs from the

312 Id. at 2768–75.
313 Id. at 2775-79.
314 Id. at 2765, 2775–79. With respect to the merits of the doctrine, I have previously expressed my views on how courts ought to assess the substantiality of burdens on religious exercise. Michael A. Helfand, Identifying Substantial Burdens, 2016 U. I.L.L. L. REV. 1771 (2016).
316 Id. at *15–16
1980’s. It expressly avoided the questions of “whether (i) a for-profit corporation has Free Exercise rights under the First Amendment or RFRA, or (ii) the Mandate imposes a substantial burden on religious practices.”

Instead, the brief focused its efforts on the limiting principle of RFRA, evaluating whether the purported substantial burden on religious exercise was the least restrictive means for advancing a compelling government interest. Ultimately, the brief concluded “that the Mandate furthers the government’s compelling interests in promoting women’s equality and public health in the least restrictive means available.”

But a number of Jewish institutions took a very different route when filing briefs in *Hobby Lobby*. In stark contrast to the tactics in the first phase of dissensus, a number of Jewish institutions attacked the very existence of a viable religious liberty claim in the first place. Thus, the *amicus* brief filed by, among others, the ADL, the Women’s Zionist Organization of America, and the National Council of Jewish Women argued that the for-profit corporations’ RFRA claims failed because the government’s regulation did not constitute a substantial burden on two counts:

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

This argument is noteworthy in that it stands somewhat in contrast to the ADL’s argument in *Bob Jones*. As described above, the ADL largely

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319 Id.
avoided addressing the quality or content of the religious liberty claim in *Bob Jones*, instead opting to focus on the compelling nature of the government’s interest.\(^{322}\) In so doing, the ADL—and others—avoided building limitations on religious liberty protections into the core of the substantial burden framework, leveraging instead side constraints on the doctrine that flowed from external considerations like the fundamental importance of the government’s implicated interest.

Other institutions attacked the viability of the religious liberty claim by contesting whether for-profit entities were proper subjects of RFRA’s protections. Thus, the Jewish Social Policy Action Network argued that “[e]xtending the definition of ‘person’ in RFRA to for-profit corporations would upset the delicate balance and lead us down a path where individuals could be deprived of federally protected rights because they did not share the religious views of the company’s owners.”\(^{323}\)

The ADL was not alone in adopting this new approach to identifying limits on religious liberty. A number of other Jewish organizations have made similar arguments about the exclusion of for-profit entities from religious liberty protections in various *amicus* filings before the Court. For example, eleven Jewish institutions, including the AJCommittee, the National Council of Jewish Women, and the CCAR,\(^{324}\) referenced this issue in a joint *amicus* brief filed in *Obergefell v. Hodges*—the case in which the Court upheld a constitutional right to same-sex marriage.\(^{325}\) In so doing, they argued, under the heading “Commercial Businesses Have No Constitutional Right To Discriminate”, that “[a] business that avails itself of the benefits of doing business with the public must be subject to the public’s rules for conducting that business.”\(^{326}\) Considering these principles in the public accommodations context, the brief went on to state “when a business chooses to solicit customers from the general public, it relinquishes

\(^{322}\) See supra notes 170–172 and accompanying text.


\(^{326}\) Brief for Anti-Defamation League, supra note 324, at 29.
autonomy over whom to serve.”

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

The increasing number of Jewish institutions adopting the view that religious liberty claims in general—and RFRA claims in particular—ought not be available to for-profit corporations does represent a shift from the general consensus among Jewish institutions in the 1960’s that for-profit entities ought to be able to assert free exercise rights. As described above, Jewish institutions were unanimous in their support of Orthodox Jewish merchants challenging Sunday Closing laws, in part, because of a uniformly held view that these laws violated the free exercise rights of these for-profit entities. The size and scope of some contemporary for-profit entities certainly dwarfs the scale of the shops owned by mid-20th century Orthodox Jewish merchants, but the shift towards rejecting the religious liberty rights of for-entities represents yet another important way in which Jewish institutional dissensus during the culture wars has grown in fundamentally new ways.

And the growing divide over what claims qualify for religious liberty protections did not stop with *Hobby Lobby*. In the wake of the Court’s decision in *Hobby Lobby*, the government amended its contraception mandate regulations to exempt both nonprofit as well as closely-held, for-profit entities that “hold[] [themselves] out as [] religious

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327 *Id.*


330 *See supra* notes 87–92 and accompanying text.

Initially, these nonprofits and closely-held, for-profit entities, unlike core religious organizations such as churches and their auxiliaries, had to self-certify to qualify for this exemption by filling out Form 700 and sending the form to their respective insurers or third-party administrators. However, many non-profit companies objected to filling out Form 700; they believed that filing the paperwork that confirms they are a religious institution, and thereby secures their religious exemption, will trigger contraceptive insurance coverage for their employees. In turn, triggering such coverage—even if provided by a third party and not paid for by the employers—makes them complicit in conduct they believe to be sinful. Accordingly, they argued that being put to the choice of filling out the form or complying with the mandate still constituted a substantial burden on their religious exercise; it continued to put them to the choice of compliance with the mandate or the payment of hefty financial penalties. Accordingly, they argued the self-certification requirement itself violated the protections afforded by RFRA.

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

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332 45 C.F.R. § 147.131(b) (2016).
334 If the entity was self-insured, it can provide Form 700 to the third-party administrator of its health plan. 45 C.F.R. § 147.131(c)(1)(i).
336 Id. at 237.
337 Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs., 778 F.3d 422, 442 (3d Cir. 2015) (“[C]an the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a ‘substantial’ burden on the appellees’ free exercise of religion? We think not. . . . [W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.”); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 388 (6th Cir. 2014) (“The government’s imposition of an independent obligation on a third party
disagreed, thereby creating a circuit split ripe for the Court to address.

The Court did indeed grant certiorari in Zubik v. Burwell on the substantial burden question, indicating that it would rule on the extent to which complicity claims might qualify for protection under RFRA. However, instead of addressing the substantial burden question, the Court—left with only eight justices at that time because of Justice Scalia’s death in early 2016—chose to vacate the non-profit cases and remand them to the federal courts of appeals. In so doing, the Court took the extraordinary step of indicating a strong desire for the parties to compromise, stating “the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”

Jewish institutions, however, filed amicus briefs in Zubik indicating they were in far less compromising moods. COLPA, once again filing a brief on behalf of Orthodox Jewish organizations, supported the RFRA claimants and focused its argument on the government’s exclusion of “independent institutions or entities which are not themselves houses of worship or their ‘auxiliaries’” from the accommodation provisions of the mandate, thereby requiring such auxiliary institutions to self-certify. This was particularly

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338 See Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Serv., 801 F.3d 927, 936–37 (8th Cir. 2015) (“Here, the substantial burden imposed by the government . . . is the imposition of significant monetary penalties should CNS and HCC adhere to their religious beliefs and refuse to comply with the contraceptive mandate or the accommodation regulations.”).


340 Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (“The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners’ religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.”).

341 Id.


343 Id. at 5.
troubling to COLPA given that under Jewish law, “[a]lthough the Jewish place of worship—a Synagogue—is a very sacred location, its sanctity is exceeded by a location where there is communal Torah study—a Yeshiva.”\textsuperscript{344} Thus, to set a precedent distinguishing between houses of worship and other religious institutions raised, in COLPA’s view, constitutional infirmities that would significantly impact the Jewish community.

A brief filed by “Orthodox Jewish Rabbis” supporting the petitioners attacked the broader argument against applying RFRA,\textsuperscript{345} to deny the existence of a substantial burden would lead courts “courts to weigh theological burdens,” which would entail second-guess[ing] religious adherents’ sincerely held beliefs. Such a reversal would dramatically weaken RFRA’s protection of religious liberty.”\textsuperscript{346}

But numerous Jewish institutions—led by the ADL and including Bend the Arc: A Jewish Partnership for Justice, the Jewish Social Policy Action Network, Keshet, the National Council of Jewish Women, and the Women’s League for Conservative Judaism—extended the arguments they made in \textit{Hobby Lobby}, challenging the RFRA claims asserted by non-profits on the ground that the petitioners had not satisfied the substantial burden requirement.\textsuperscript{347} Accordingly, they argued the following:

\begin{quote}
[T]he objective facts do not support a substantial burden. The Government’s opt-out procedures . . . allow organizations to self-certify that they have religious objections to providing contraceptive insurance coverage. The form requires an organization to write in just four boxes, providing its name, authorized agent’s name, contact information, and signature. The form is itself an accommodation to alleviate religious objections to directly providing contraceptive coverage.\textsuperscript{348}
\end{quote}

In making this argument, the ADL’s brief emphasized that “[t]he determination of whether a burden on religious exercise is substantial

\footnotesize{\textsuperscript{344} Id. at 10.  
\textsuperscript{346} Id. at 3.  
\textsuperscript{348} Id. at 7.}
requires an objective assessment of the actual effect of state action.”

Merely assessing the sincerity of the religious belief in question should not qualify. When reaching this conclusion, the ADL relied on the Court’s precedent in *Lyng v. Northwestern Indian Protective Association* as support because “when faced with a religious challenge to the construction of a Forest Service road through sacred ground, the Court accepted that Indian tribes believed the road posed a ‘grave’ threat to their religious practice, but it declined to measure the burden by comparison to that religious belief.”

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

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

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

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349 *Id.* at 10.
350 *Id.* at 11–15.
351 *Id.* at 10.
352 *Id.* at 21.
356 *Id.* at 5.
Not surprisingly, in making this argument, they also relied heavily on *Lyng v. Northwestern Indian Protective Association* as supporting two propositions. The first was the somewhat standard suggestion that “not all burdens [are] sufficient to warrant an exemption or other accommodation.” But secondly, and maybe more importantly, the brief quoted extensively from *Lyng* as part of its argument why mere complicity claims could not qualify as substantial burdens: “[T]o support the claim that the logical consequence of a finding that others’ compliance with a law can impose a substantial burden on objectors’ religious exercise is that there must be ‘no law at all’ addressing whatever happens to be the contested issue.” This, the brief contended, was an impossibility and fundamentally contravened *Lyng*’s statement that “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.”

The heavy reliance by Jewish institutional *amici* in *Zubik* on both *Estate of Thornton* and *Lyng* is a useful marker for increased dissensus among Jewish institutional *amici* triggered by the cases at the heart of the culture wars. In crafting their objections to the RFRA claim in *Zubik*, both the ADL and AJCommittee’s briefs leveraged holdings from cases they previously had viewed as wrongly decided. This doctrinal migration among some of the progressivist Jewish institutions helps demonstrate the ways in which some institutions expanded the range of views held among the broad class of Jewish *amici*. Thus, the fact that cases like *Estate of Thornton* and *Lyng* became so central to arguments imposing internal limits on the content and quality of RFRA claims highlights the shift from the earlier phases of Jewish institutional dissensus to the dissensus typical of the current culture war phase. In the 1980s, Jewish institutions gently leveraged external constraints, such as disestablishment concerns or the compelling nature of implicated government interests. They almost uniformly lined up with claimants asserting religious liberty claims in cases like *Estate of Thornton* and *Lyng*. However, with the rise of the culture wars, Jewish institutional responses morphed to support new threshold requirements for a *prima facie*
religious liberty claim.


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

Public accommodation cases—that is, cases where businesses, in contravention of state law, discriminated in the provision of their goods and services—wound through various state courts in the better part of the decade preceding *Masterpiece Cakeshop*. Importantly, these cases followed a recurring pattern; the businesses in question had refused to provide their services at same-sex weddings, viewing professional participation in such events through the provision of goods and services as violating their religious commitments. As a result, those cases lurked in the background as *amici* filed briefs in the same-sex marriage case. Repeatedly, in those briefs, parties opined on whether recognizing a constitutional right to same-sex marriage would ultimately undermine religious liberty rights through the application of anti-discrimination laws protecting members of the LGBT community. Similarly, many Jewish institutions had already begun staking out positions on the issue early on, incorporating analysis on the connection between same-sex marriage and anti-discrimination law into briefs filed in the 2013 Supreme Court cases

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361 For other important public accommodations cases, see supra note 260.
362 Id.
363 Id.
implicating the constitutional right to same-sex marriage: *Hollingsworth v. Perry* and *United States v. Windsor.*\(^{364}\) In so doing, a number of Jewish institutions pressed the Court to consider the religious liberty implications of same-sex marriage as part of any decision on the constitutional right to same-sex marriage. In turn, they highlighted concerns that the right to same-sex marriage might lead to legal impingement on the rights of religious institutions and organizations opposed to such marriages.

Perhaps the best example of Jewish institutions addressing this issue in advance of *Masterpiece Cakeshop* is the AJCommittee’s brief in *Hollingsworth v. Perry.* In *Hollingsworth,* the Court reviewed a lower court decision holding that the Equal Protection Clause prohibited California from defining marriage as only between a man and a woman—a decision the Court ultimately vacated on standing grounds.\(^{365}\) Notwithstanding the focus of the case, the AJCommittee filed a brief that began the summary of its argument as follows: “The Court must protect the right of same-sex couples to marry, and it must protect the right of synagogues, churches, and other religious organizations not to recognize those marriages.”\(^{366}\) In so doing, the AJCommittee highlighted various areas in which a decision upholding a constitutional right to same-sex marriage—an outcome the brief unequivocally endorsed\(^{367}\)—would implicate questions of religious liberty, including public accommodation “disputes . . . about individuals who provide creative and personal services that directly assist or facilitate marriages.”\(^{368}\) The AJCommittee expressly took no position on the range of such cases,\(^{369}\) instead choosing to highlight the existence of “doctrinal tools . . . available to protect religious liberty with respect to marriage.”\(^{370}\) And in their estimation, those protections relevant to the marriage context included the free exercise protections afforded to religious organizations to be free from governmental intervention into internal religious decisions;\(^{371}\) free exercise protection from laws that substantially burden religion, but fail the general applicability test by providing various other secular


\(^{367}\) Id. at 7.

\(^{368}\) Id. at 26.

\(^{369}\) Id.

\(^{370}\) Id. at 27.

\(^{371}\) Id. at 27-28.
exceptions; and statutory protections under state and federal RFRA
 Most notably, the brief ended by noting that those tools had limitations, unable to provide, in the AJCommittee’s estimation, sufficient religious liberty protections. As a result, the AJCommittee encouraged the Court to reconsider Smith because its holding allowed courts to adequately address the competing claims in such highly charged cases: “Smith appears to mean that if a rule is generally applicable, government can refuse religious exemptions whether or not it has a plausible reason, or any reason at all. A rule of law that takes account of the weight of the competing constitutional interests would do justice more often than a rule of law that ignores those interests.”

But while the AJCommittee worried about the religious liberty implications of a constitutional right to same-sex marriage—particularly in the public accommodation context—a host of Jewish institutions filed briefs to the contrary in other cases, expressing that these worries were either overblown or unfounded. The ADL and a number of other organizations filed a brief in United States v. Windsor, in which the Court addressed the constitutionality of the Defense of Marriage Act. In the brief, these organizations argued that recognition of same-sex marriage had no implications for public accommodations—as well as other similar—cases. Responding to claims of other amici that striking down DOMA would immediately subject “those who wish to discriminate against gay and lesbian people” to lawsuits pursuant to antidiscrimination laws, the brief argued “[t]his argument is nonsensical. . . . [D]iscrimination against gay and lesbian people is already illegal in many states, and it will continue to be illegal in those states if this Court overturns DOMA.”

And in yet another brief, another group of Jewish institutions—including the Rabbinical Assembly, the United Synagogue of Conservative Judaism, Reconstructionist Rabbinical Association, and the URJ—similarly argued that the constitutional recognition of same sex marriage would not

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372 Id. at 29-31.
373 Id. at 31-32.
374 Id. at 34.
377 Id. at 26.
impact the scope of available religious liberty protections: “Where lawful
civil marriages of same-sex couples are recognized, the First Amendment’s
guarantees continue to protect the decisions of those faiths that choose not
to solemnize such marriages, as well as those that do.”378 Therefore, the
brief continued, striking down DOMA “would not alter the freedom of all
religious communities to decide which religious unions are consistent with
their beliefs. Nor would affirmance burden religious persons and
institutions in the pursuit of their religious activities or the exercise of
conscience.”379 In supporting this claim, the brief first asserted, citing
Hosanna-Tabor v. EEOC, that “existing constitutional principles protect the
autonomy of various religious entities to define religious marriages to
comport with their respective tenets.”380 Beyond those principles, the brief
contended that recognizing a constitutional right to same-sex marriage
would not impact public accommodations cases: “the types of disputes
anticipated . . . have more to do with existing civil rights laws barring
discrimination based on sexual orientation than with any conflicts that are
likely to arise based on marital status . . . .”381 And other briefs made
similar claims.382 All told, these briefs manifested, even if somewhat

378 Brief for Bishops of the Episcopal Church in the State of California, Connecticut,
Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont,
Washington and the District of Columbia et al., as Amici Curiae Supporting Respondent at
28, United States of America v. Windsor, 570 U.S. 744 (No. 12-307), 28 2013 WL 840023
(2013).
379 Id.
380 Id. at 29. It is worth noting that in its brief, the ADL asserted that the protections
for religious organizations come from the freedom of association and did not reference the
religion clauses. See Brief for Anti-Defamation League et al., as Amici Curiae Supporting
Respondent at 27, United States of America v. Windsor, 570 U.S. 744 (No. 12-307), 2013
WL 840022 (2013) (“According to well-established precedent, people of religious
conscience may worship as they please and adopt eligibility criteria for membership in
their private and religious associations.”).
381 Brief for Bishops of the Episcopal Church in the State of California, Connecticut,
Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont,
Washington and the District of Columbia et al., as Amici Curiae Supporting Respondent at
36, United States of America v. Windsor, 570 U.S. 744 (No. 12-307), 28 2013 WL 840023
(2013). Many of these organizations filed a brief with identical language in Hollingsworth
v. Perry as well. See Brief for Bishops of the Episcopal Church in the State of California et
al., as Amici Curiae Supporting Respondent at 36, Hollingsworth, et al. v. Perry, et al., 570
U.S. 693 (No. 12-144) (2013), 2013 WL 12354917 (including among amici the Rabbinical
Assembly, The Reconstructionist Rabbinical Association, Reconstructionist Rabbinical
College; Union for Reform Judaism and the United Synagogue of Conservative Judaism).
382 See Brief for California Council of Churches et al. Supporting Respondents at 30-
12354917 (including the Pacific Association of Reform Rabbis among amici); See Brief for
California Council of Churches et al. Supporting Respondents at 24-32, Hollingsworth, et
implicitly, a broadly held view among progressivist Jewish institutions that if the Court were ever to hear a public accommodations case, religious liberty protections ought to have no purchase in tilting the outcome in favor of religiously motivated businesses.

Similar dissensus among Jewish organizations typified the *amicus* briefing in the next same-sex marriage case, *Obergefell v. Hodges*—only this time, the claims of Jewish institutions became clearer even as the institutional line-up somewhat differed. In *Obergefell*, the Agudath Israel filed a brief arguing that “[t]he recognition of same-sex marriage poses a threat to the liberty of religious organizations and individuals whose faith prevents them from acting in accordance with that recognition.” In identifying the “most obvious” areas of conflict, the brief identified clashes between “religious institutions and the people they service or employ.” Accordingly, the brief highlighted some of the previously litigated public accommodations cases, noting that “[t]he Orthodox Jewish community that we represent is likely to also encounter some of those conflicts.”

Supporting this worry, the brief—without expressing a view on the substantive requirements of Jewish law—noted that “our organization has personal knowledge of such an incident. In a local Jewish community in Maryland, a kosher certification agency was compelled to certify the kosher status of a gay wedding out of fear of a discrimination lawsuit.”

On the other side, the ADL once again filed a brief with a coalition similar to the one it had joined in its *Windsor* brief, although this time it also included the AJCommittee—a somewhat surprising turn given the AJCommittee’s brief in *Windsor* this time around. Picking up on the

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384 Id. at 17.
385 Id. at 19.
386 Id.
388 See supra notes 366-374 and accompanying text.
argument in the Windsor brief, the ADL’s brief in Obergefell argued that recognition of same-sex marriage was unrelated to the public accommodations cases: “Regardless of whether the ceremonies are official, vendors have been—and will continue to be—subject to any applicable anti-discrimination laws just as they would be if they refused to provide service for an interfaith couple or an interracial couple.”389 In turn, “[a]llowing the ceremonies to be official civil marriage ceremonies—though important for the couple—will make no difference whatsoever to any vendor’s pre-existing obligation to comply with anti-discrimination laws.”390 And to the extent it remained unclear, the brief continued in the following subsection, titled “Commercial Businesses Have No Constitutional Right To Discriminate,” asserting that “[a] business that avails itself of the benefits of doing business with the public must be subject to the public’s rules for conducting that business.”391 It then emphasized that “it is a fundamental principle of public accommodations law that when a business chooses to solicit customers from the general public, it relinquishes autonomy over whom to serve.”392

Another brief, joined by numerous Jewish rabbinical organizations and schools, including the Jewish Theological Seminary, the Reconstructionist Rabbinical Association, the Reconstructionist Rabbinical College and Jewish Reconstructionist Communities, the United Synagogue of Conservative Judaism, made parallel arguments. This brief argued that recognizing a constitutional right to same-sex marriage would not “unduly burden religious persons and institutions in the pursuit of their public, community, or commercial activities. Religious actors become subject to public accommodation laws and other neutral government regulation when they engage in the public sphere.”393 Thus, the brief noted that the “tradition of respect for religious autonomy has, indeed, permitted various religions to define religious marriage in ways that would be unenforceable under civil law—declining to sanctify or even recognize, for example, marriages between persons of different faiths and races or successive marriage

389 Id. at 28
390 Id.
391 Id. at 29
392 Id.
393 Brief for President of the House of Deputies of the Episcopal Church and the Episcopal Bishops of Kentucky, Michigan, Ohio, and Tennessee et al. as Amici Curiae Supporting Petitioners at 28, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-562, 14-571, 14-574), 2015 WL 1057623 (including as amici the Jewish Theological Seminary, Reconstructions Rabbinical Association; Reconstructions Rabbinical College and Jewish Reconstructions Communities, Union for Reform Judaism and United Synagogue of Conservative Judaism).
following divorce."\(^{394}\)

However, when it came to public accommodation cases, the brief stated that granting a constitutional right to same-sex marriage has “more to do with existing civil rights laws barring discrimination based on sexual orientation, where such laws exist, than with any conflicts likely to arise based on marital status.”\(^{395}\) In expressing how such public accommodation cases ought to be decided, the brief simply pointed to “existing law.”\(^{396}\) And in describing that existing law, the brief implicitly differentiated between the limited protection afforded commercial institutions and the robust protections afforded religious institutions. To make this point through the existing case law—and thereby express its approval for the distinction between religious institutions and for-profit corporations—it contrasted a 2013 public accommodation case where a photographer was found liable for refusing to provide her service at a same-sex wedding with *Hosanna-Tabor*, which affirmed the ministerial exception so as to “ensure[] that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”\(^{397}\)

Given these indications in the initial *amicus* filings before the Court in the same-sex marriage cases, the dissensus among Jewish institutions—between traditionalists and progressives—in the first public accommodations case before the Court, *Masterpiece Cakeshop*, was wholly predictable. In *Masterpiece Cakeshop*, the Court addressed the religious liberty claim of Colorado baker Jack Phillips, who refused to bake a cake for a same-sex wedding because doing so violated his religious conscience.\(^{398}\) And he did so even as state public accommodations law prohibited businesses from discriminating against customers on the basis of sexual orientation.\(^{399}\) Moreover, because Colorado had not enacted a state RFRA, Phillips’ religious liberty claims were all made pursuant to the Free Exercise Clause.\(^{400}\) Given this background, the case brought to the fore the clash between LGBT and religious rights, an issue that in many ways stood

\(^{394}\) Id. at 29
\(^{395}\) Id. at 33
\(^{396}\) Id.
\(^{397}\) Id. (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* et al., 132 S. Ct. 694, 707, 709 (2012)).
\(^{399}\) Id.
at the very center of the culture wars. And given the stakes, numerous Jewish institutions filed amicus briefs to provide their own views on how the clash should be resolved.

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

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

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

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401 SMITH, *supra* note 4, at 302–03 (“The contemporary fight over religious freedom is one battleground—a central one, as it happens—in the larger and essentially religious struggle to define and constitute America.”); Horwitz, *supra* note 7, at 160 (“Same-sex marriage and its consequences have become a central, foregrounded, socially contested issue. The church-state consensus, drawn into the gravitational pull of this contest, has been put up for grabs as a result.”).

402 See *supra* notes 203–209 and accompanying text.

between “LGBT consumers” and “people of faith.” Accordingly, the brief sought to leverage the identity of the amici as people of faith who see marriage as having spiritual significance, but are still committed to a vision of the case as implicating prohibited discrimination: “[I]t is precisely [the amici’s] understanding of human dignity as both a religious value and a feature of this Court’s equal rights jurisprudence that leads Amici to view this dispute first and foremost as a discrimination case, not a religious liberty case.”

Indeed, the brief highlighted efforts of religious organizations to oppose efforts to “enable religious liberty claims to prevail in a way that would permit discrimination against protected classes and other minorities, including but not limited to the LGBT community,” referencing in a footnote—already mentioned above—the Reform Jewish community’s opposition to claims that for-profit business ought to have religious liberty protections. Accordingly, the brief argued that “contrary to the suggestion of some amici that LGBT equality broadly threatens mainstream religion, an emerging consensus among people of divergent faith beliefs [thinks] that enforcing principles of antidiscrimination in the civic arena is compatible with—or at least does not endanger—their religious sensibilities and practices.”

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

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405 Id. at 3.
406 Id. at 20 (quotation omitted).
407 See supra note 328.
408 Brief for Central Conference of American Rabbis, supra note 404, at 20 n.35.
409 Id. at 19.
410 Id. at 22 (quotation omitted).
411 Id. at 23 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015)).
as limited to the union of one man and one woman and to withhold spiritual blessing from any marriages, or bar those entering into them from being congregants at all.” In supporting this claim, the brief referenced the fact that Colorado’s own anti-discrimination laws excluded houses of worship or any place “principally used for religious purposes” from the definition of public accommodations—although it did not make clear what the contours of the constitutional protection of such houses of worship might be.

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

All told, given that the case was argued under the Free Exercise Clause—as no RFRA applied—briefs arguing against Phillips’ claims did not focus on the content or quality of the religious liberty at stake. Thus, nearly all such briefs—in stark contrast to much of the briefing in *Hobby Lobby* and *Zubik*—avoided questions related to the substantiality or attenuated nature of the burdens on religious exercise.

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412 Id. at 23–24.
413 Id. at 24.
414 Brief for 15 Faith and Civil Rights Organizations as Amici Curiae Supporting Respondents at 8, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1723 (2018) (No. 16-111) (“Public accommodation laws are essential to protecting against religiously motivated discrimination. Any exemption from these laws, especially one as far-reaching as the one requested by petitioners, risks causing serious harm to the religious minorities who rely on these laws to safeguard their right to equal protection under the law.”).
415 Brief for National Women’s Law Center et al. as Amici Curiae Supporting Respondents at 3, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1723 (2018) (No. 16-111) (“Amici focus on women and the importance of enforcing public accommodations laws to ensure the full participation of women in the marketplace. If the Court creates an exemption from the public accommodations law to permit the Company to refuse service to a gay couple on First Amendment grounds, the implications of such a precedent for undermining the protections of these laws for women are far-reaching.”).
416 But see Brief for Central Conference of American Rabbis et al. as Amici Curiae Supporting Respondents at 3, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n,
That being said, briefs from progressive Jewish organizations contested Phillips’ religious liberty claim much in the same way they had in the contraception cases. This was an alignment that had become increasingly familiar in this second phase of religious liberty dissensus among Jewish institutions. In keeping with this alignment, numerous traditionalist Jewish institutions filed amicus briefs supporting Phillips. COLPA filed a brief arguing two points. First, it emphasized the significance of Jewish law’s prohibition against participating in sinful conduct: “Jewish Law reproaches not only one’s own violations but, based on a Biblical passage and extensive rabbinic interpretation over centuries, also deters active participation in another person’s conduct that violates religious prohibitions.” Second, the brief argued that imposing liability on Phillips violated Smith’s more narrow interpretation of the Free Exercise Clause because it constituted a “covert suppression of particular religious beliefs.”

Agudath Israel took a similar approach in its brief, although its rhetoric was far more direct. Beginning with an explanation that Jewish law “prohibits aiding and abetting forbidden practices,” the brief went on to explain that “Jewish law unequivocally prohibits and condemns homosexual practices.” Further, it stated that “Jewish law does not limit itself to religious practices as that term is generally understood, but also governs every aspect of day-to-day life[,] including] tort law, contract law, other aspects of business law, and family law.” Therefore, based on this combination of theological commitments, the brief—in invoking Braunfeld v. Brown—summarized its argument as follows:

138 S. Ct. 1719, 1723 (2018) (No. 16-111) (making oblique reference to the lack of a substantial burden at stake and to the attenuated nature of the burden on the claimant’s religious exercise).


418 Id. at 10 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)).

419 Id. at 9.


421 Id.

422 Id. at 2.
Our argument was summarized by Justice William J. Brennan, Jr., 56 years ago: “[T]he issue in this case . . . is whether a State may put an individual to a choice between his business and his religion. . . . Such a law prohibits the free exercise of religion.” Braunfeld v. Brown, 366 U.S. 599, 611 (1961) (Brennan, J., concurring and dissenting).

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

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

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

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

423 Id. at 4.
424 Id. at 6.
he, like Jack Phillips, would be committing a personal sin by complying.”

Similarly, Agudath Israel stated that “[i]t is . . . quite likely that an Orthodox Jewish baker would refuse to design and bake a cake for an event celebrating a marriage of two men, and it is likely that an Orthodox Jewish caterer would refuse to prepare food for it, and that Orthodox Jewish photographers, printers, florists, etc. would refuse to provide their services.”426 These equivocations—reflecting the multiplicity of legal views under Jewish law—captured the continued approach of such organizations to support religious liberty claims, even where those claims did not implicate the interest of Jews directly.

But in this contemporary alignment—with progressive Jewish institutions continuing to challenge the expansion of religious liberty in culture war cases and traditional Jewish institution continuing to support religious liberty cases that do not directly implicate their interests—one brief stands out as noteworthy. A brief written by law professors Douglas Laycock and Thomas Berg, and signed by numerous religious organizations, including the OU and the RCA,427 emphasized the need to protect both members of the LGBT community and members of religious communities. Indeed, the brief describes the interest of the amici as “religious organizations who accept that same-sex civil marriage is the law of the land”428 and then explains that “[m]ost of these amici are involved in ongoing efforts, mostly unsuccessful so far, to negotiate legislation prohibiting sexual-orientation discrimination while providing religious exemptions.”429

In stark contrast to the culture war language of the Agudath Israel, the brief signed by the OU and RCA framed the issue in Masterpiece Cakeshop as follows: “In its decision protecting the right of same-sex couples to marry, this Court affirmed that ‘[t]he Constitution promises liberty to all within its reach,’ allowing persons, ‘within a lawful realm, to define and express their identity.’ Now this Court must hold that religious dissenters from same-sex marriage have the same liberty to live consistently with their

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426 Brief for Agudath Israel of America, supra note 420, at 3 (emphasis added).
428 Id. at 1.
429 Id.
In turn, the brief focused on the inherent religious nature of participation in a wedding, arguing that the case pit a strong religious liberty interest against the government’s weaker interest in. In a particularly noteworthy section, the brief—foreshadowing the Court’s eventual decision in Masterpiece Cakeshop—focused on how the Colorado Civil Rights Commission had failed to neutrally and uniformly apply the provisions of the state public accommodations law, denying protection to Phillips but granting protection to Colorado bakers in a parallel case when they refused to bake a cake denouncing same-sex relationships.

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

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

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430 Id. at *2 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015)).
431 Id. at *13-18.
432 Id. at *18-21.
434 Id. at 1729.
435 Id. at 1730-31.
adjudicating Phillips’ claims.\textsuperscript{436}

That the Court adopted much of the logic of the amicus brief signed by the OU and RCA is not itself remarkable for our purposes. But the choice of the OU and RCA to forego signing both COLPA and the Agudath Israel’s briefs is noteworthy when compared to the brief all four parties joined together in \textit{Bob Jones University v. United States}.

As noted above, in \textit{Bob Jones}, all four parties filed a brief that highlighted the role of the First Amendment in “protect[ing] minorities from the tyranny of the majority,” emphatically arguing that would undermine the core purposes of the Free Exercise Clause if government could withhold benefits “from the minority . . . merely because the minority, in pursuit of its religious rights, refuses to conform to the social practices of the majority.”\textsuperscript{438}

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

To be sure, the choice of briefs and arguments is, often, a strategic decision, which takes a variety of factors into account, including changes in doctrine as well as likelihood of success. Yet this choice is noteworthy given that both organizations had, in the not so distant past, issued press releases that resolved, in response to debates over same-sex marriage, the necessity “to forcefully resist all attempts . . . to legitimize that which our Torah, our history and our traditions have deemed illegitimate.”\textsuperscript{439} and

\textsuperscript{436} \textit{Id.} at 1729-31.


\textsuperscript{438} \textit{Id.} at *6–7.

\textsuperscript{439} \textit{OU Convention Resolution Text}, ORTHODOX UNION ADVOCACY CENTER (Oct 12, 2010), https://advocacy.ou.org/ou-convention-resolution-text/. The choice of the OU was
“call[ed] upon Jews and citizens everywhere to oppose any effort to bestow the sanctity of marriage upon same sex couples.” But the public accommodations claims in Masterpiece Cakeshop triggered a very different response. Thus, in evaluating the impact of the culture wars on Jewish institutional consensus around religious liberty, the growing split even among traditionalist responses to clashes between LGBT and religious rights stands out. Indeed, on this count, it is not simply that the culture wars have triggered increasing dissensus between traditionalist and progressivist Jewish institutions, but it has also introduced dissensus among the very organizations that had retained consensus even in the face of Bob Jones University v. United States.

V. CONCLUSION

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

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

also somewhat surprising given that it had joined an amicus brief in Hollingsworth v. Perry that articulated the values behind traditional, as opposed to same-sex, marriage. Brief for National Association of Evangelicals et al. as Amici Curiae Supporting Petitioner at 6-11, Hollingsworth, et al. v. Perry, et al., 570 U.S. 693 (No. 12-144) (2013), 2013 WL 390990.  

religious conduct from substantial burdens on religious exercise.

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

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

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