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The fight for religious liberty is never going to end. We'd better get used to it.

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"I feel the country was founded on Christian principles," Sandra Long, an 80-year-old resident of Mahanoy City, Pa., and a lifelong Democrat, told CNN before the election. "And now, if our ministers don't marry a gay couple or refuse to marry a gay couple, they can be arrested and taken to jail."

Long was mistaken. Despite the Supreme Court's legalization of gay marriage two years ago, ministers are not required to perform same-sex wedding ceremonies. But the perception that they might soon be—and that the government is continually encroaching on the ability of houses of worship and even individual Americans to live out their beliefs—seems to be widespread. Moreover, it likely played a role in the decision of many voters, such as Ms. Long, to support now-President Trump last November.

As Megan McArdle, a columnist at Bloomberg View, wrote in December, "When you think that you may shortly see your church's schools and your religious hospitals closed, and your job or business threatened in the private sphere by the economic equivalent of 'convert or die,' you will side with whoever does not seem to set its sights on your conservative beliefs."

The Catholic writer Mary Eberstadt, in her recent book *It's Dangerous to Believe,* called this "the new intolerance" and said that what many believers "feel to the marrow these days is fear."

And just before the election, Archbishop Joseph E. Kurtz, president of the U.S. Conference of Catholic Bishops, encouraged his fellow Catholics "to take a moment to reflect on one of the founding principles of our republic—the freedom of religion." It is up to voters, he implied, to ensure that "the rights of people to live their faith without interference from the state" are respected by those in positions of authority.

Believers appear to be listening. In 2016, according to exit polls, white born-again Christians supported Trump by an even higher margin (65 percentage points) than they did George W. Bush—himself a white born-again Christian—in 2004 (57 percentage points). And the trend is not limited to evangelicals. Catholics, who narrowly favored Al Gore over Mr. Bush in 2000, broke for Mr. Trump by an estimated seven percentage points.

Fears about religious liberty were, to be sure, one among many reasons the vote turned out as it did. Still, there is no doubt the concern is widespread. If the government can force family-run businesses to provide services for gay weddings and Catholic sisters to facilitate access to birth control, people are asking, what might be next? Could laws be on the way that

criminalize traditional beliefs about sex and marriage? Or punish churches for excluding gay men and women from ministerial positions? Or, as Sandra Long assumed was already the case, compel houses of worship to host and solemnize same-sex weddings?

For every American raising the alarm over these questions, there is someone else throwing cold water on them. The political left is quick to assure their brothers and sisters of faith that our rights are safe. After all, they say, the First Amendment protects the freedom to believe whatever you want, and any attempt to constrain that freedom would surely be invalidated by the courts.

Douglas Laycock, a law professor at the University of Virginia, is an expert on issues of religious freedom and not one to downplay the extent of the attacks on this right. Still, he says, some fears go too far: "The ministerial exception decision," a 2011 Supreme Court case that upheld the ability of religious organizations to decide for themselves who to hire for positions that involve passing on the faith, "was unanimous. It's not going anywhere. And nobody on the gay rights side thinks the pastor should have to do [a gay] wedding."

But Professor Laycock acknowledges the line is moving all the time. During arguments in Obergefell v. Hodges, the case that legalized same-sex marriage nationwide, Justice Samuel Alito asked the Obama administration's lawyer whether a college could have its tax-exempt status revoked because it opposes traditional marriage. "It's certainly going to be an issue," the solicitor general replied. "I don't deny that. I don't deny that, Justice Alito. It is going to be an issue."

There have also been attempts to legally define churches as places of "public accommodation," thus opening them up to state and federal regulations that normally do not apply to houses of worship. Last year, the Massachusetts Commission Against Discrimination said that welcoming non-congregants to a spaghetti supper would be enough to subject a church to state rules about transgender bathroom use. (It has since removed that language from its guidelines.) Some people even argue that "if you make your church available for weddings for anyone other than your members, you have to make it available on a nondiscriminatory basis," Professor Laycock notes. And the Notre Dame law professor Richard Garnett says, "I've seen it argued that some church sanctuaries should count as places of public accommodation if they're tourist spots."

Both men think this kind of reasoning would be an overreach by government—but that does not mean it could not happen.

In fact, history suggests that believers' fears may not be so outlandish. The Bill of Rights has failed to protect religious groups from legal assault on a number of occasions since our nation's founding. In some cases, American citizens have been forced to renounce central teachings of their faith or else be stripped of fundamental civil rights. And so long as the moves are supported by a political majority, the courts have often been willing to overlook even glaring constitutional defects.

What Once Was

Ninety years before the U.S. Supreme Court heard arguments in Zubik v. Burwell, the case meant to decide whether the Little Sisters of the Poor and other religious charities could be

forced to facilitate birth control access for their employees (the Supreme Court ended up sending the case back to lower courts last May, another group of Catholic sisters appeared before the highest court in the land.

At issue in Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary was an Oregon law passed by voters two years earlier, at the behest of the anti-Catholic Scottish Rite Masons, to require all children to attend public schools. "The effect of this law will be, if upheld by the courts, to close every private school in the State," The New York Times reported. "That was its purpose, openly avowed in public discussions preceding the election." Not coincidentally, many of the state's private schools were affiliated with the Catholic Church.

The measure had the enthusiastic support not just of the state's majority-Protestant electorate but also of the Klu Klux Klan, newly arrived in the Pacific Northwest. "We are against the Catholic machine which controls our nation," explained "Kleagle Carter," according to a book about the Oregon chapter of the Klan edited by David A. Horowitz.

The story has a happy ending: The Supreme Court justices unanimously struck down the statute. But they did so not on the grounds that a ban on parochial schools violated the First Amendment rights of the church or its students. Rather, they decided the law threatened to destroy the sisters' business without due process. It was a property law decision.

Not every violation of religious liberty has been stopped by the courts. More than 30 states have on their books to this day some form of legal prohibition on public dollars going to religious institutions. Known as Blaine amendments, after the House Speaker James G. Blaine, who tried to get an amendment added to the U.S. Constitution in the 1870s, these "no-aid" provisions purposely put faith-based organizations at a disadvantage. While secular nonprofits are free to apply for government grants, and secular private schools are free to accept government scholarships on behalf of their students, religiously affiliated groups are disqualified solely because of the nature of their beliefs.

As with the Oregon private school ban, all accounts suggest that the Blaine amendments were motivated by deep animus toward Catholics. "They were passed in a series of outbursts of anti-Catholicism, there's no doubt about the history," Professor Laycock says. The federal effort "arose at a time of pervasive hostility to the Catholic Church," Justice Clarence Thomas wrote in Mitchell v. Helms, a 2000 Supreme Court case on school vouchers, "and it was an open secret that 'sectarian' was code for 'Catholic.'" Yet the state-level "baby Blaines," as some now call them, remain in force.

As bad as anti-Catholic sentiment has been at points in America's past, however, it is nothing compared to the vitriol directed at smaller religious groups over the years.

In 1862, fearful of a fringe sect known as the Mormons, Congress passed the Morrill Anti-Bigamy Act, which banned plural marriage in federal territories (including Utah). Over the next three decades, penalties and enforcement were ratcheted up until finally, in 1890, the Church of Jesus Christ of Latter-day Saints abandoned its defense of the practice.

The single-minded efforts to force the Mormons to that point belie modern claims that the courts and the Constitution can always be relied on to protect the free exercise of religion.

Despite rhetoric to the contrary, the government used every means at its disposal, including the denial of basic rights, to coerce the Mormons into changing not just their actions but their teachings as well.

The Edmunds Act, passed in 1882, made polygamy a felony everywhere in the United States and "bigamous cohabitation" a misdemeanor. It also revoked polygamists' right to vote, disqualified them from jury service and prohibited them from holding public office. Myriad reports suggest it was used against anyone who stated a belief in the Mormon doctrine of plural marriage, even without participating in it. Five years later, the Edmunds-Tucker Act went even further, with the federal government threatening to "disincorporate" the L.D.S. Church and seize most of its assets unless its leadership recanted the institutional belief that God wanted Mormon men to take more than one wife.

Test oaths were introduced, requiring individuals to swear not to "directly or indirectly, aid or abet, counsel or advise, any other person to commit" the crime of plural marriage. Thus, even spreading a central tenet of the faith could lead to disenfranchisement. Believing that refusing God's demands would cost them "enjoyment in the eternal worlds," many church leaders took their families into hiding.

Five decades' worth of attempts to achieve statehood for Utah territory were meanwhile denied until the Mormon people agreed, in the 1890s, to write a categorical ban on plural marriage into their founding document. The result is a rather nonsensical provision in the Utah constitution, reading: "No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited." For 19th-century Mormons who believed plural marriage was an important aspect of practicing their faith, the claimed protection must have rung hollow.

The whole thing amounted to "an unfair targeting and persecution of a religious minority," says Patrick Q. Mason, dean of the School of Arts & Humanities at Claremont Graduate University and an expert on Mormon history.

The point is not, of course, that Catholics should celebrate or condone polygamy. The point is that modern-day activists who say America's institutions will necessarily protect believers against violations of their rights are failing to grapple with the uncomfortable reality that what exactly counts as "religious freedom" is often in dispute.

As the historian Kenneth H. Winn wrote in his book *Exiles in a Land of Liberty*, 19th-century Mormons "warned other Americans that it was in their self-interest to put down all encroachments on liberty, as well as to give justice to those whose rights had been injured. 'The fate of our church now,' they cautioned, 'might become the fate of the Methodists next week, the Catholics next month, and the overthrow of all societies next year.'" The country did not listen.

What Is Today

Today efforts continue to push the boundaries of what the government may do at the expense of religion. When it comes to the free exercise of faith, "unless you understand how important and how central this has been to American culture and society and law, it's easy for any kind

of other value to trump that right," says Allen Hertzke, a political scientist at the University of Oklahoma who also sits on the Pontifical Academy of Social Sciences. Indeed, in recent years we have heard that everything from abortion access to chickens' rights are more important than religious freedom.

Since 2006, Catholic Charities agencies in Boston, San Francisco and multiple Illinois dioceses have been forced to shut down their adoption services or comply with dicta from the state or city government that all such agencies must place children with same-sex couples. The branch in Washington, D.C., had its contract terminated by the city on the same grounds.

In an effort to wipe out dissent on the issue of gay marriage, these regulations hurt one of the most vulnerable populations: children in need of homes. People think, "Why shouldn't social-service institutions that accept public money have to serve all clients equally?" Walter Olson, a senior fellow at the Cato Institute, wrote in The Wall Street Journal in an op-ed article in 2011. But "purism on the equality front sometimes comes at the expense of clients in need."

As my colleague Scott Shackford put it in the November 2015 issue of Reason magazine, "Being denied service by one agency does not prevent a gay couple from finding and adopting children. But eliminating Catholic Charities from the pool does reduce the number of people able to help place kids in homes."

Some activists are now invoking a similar rationale to try to force religiously affiliated hospitals to carry out abortions. In 2015, the American Civil Liberties Union sued a Catholic medical system, Trinity Health, on the theory that abortions are sometimes medically required. The lawsuit alleged that these institutions should be legally compelled to do something the church calls intrinsically evil, and that laws protecting the right of hospitals and their staffs not to participate in the taking of an unborn human life are a form of discrimination against women.

A federal court dismissed the challenge last April. But the very fact the challenge was brought should be chilling. "Those who doubt that anyone would ever try to force someone to commit an abortion need only look at this case," says Matt Bowman, a lawyer with the Alliance Defending Freedom, the firm representing Trinity Health. Nor did the ruling stop the A.C.L.U. from bringing another suit last July, this time with the goal of stopping public money from supporting the U.S. Conference of Catholic Bishops in their work caring for underage immigrants along the southern border. The problem, according to the lawsuit: The bishops' care does not include contraception or abortion.

Catholics are not the only ones bearing the brunt of these attacks. Last year in California, an animal-rights group petitioned to stop a Jewish atonement ceremony called *kapparot*, which involves the killing of a chicken on the eve of Yom Kippur. The federal judge agreed to a restraining order that temporarily prohibited the ritual before realizing his error and reversing course. But by the time the ban was lifted, the time period for performing the ritual had passed.

In this way, activists stopped a religious congregation from engaging in an explicitly religious practice. What is more, they did so using a legal sleight of hand of claiming the ritual counted as a "business practice" and was thus subject to an antitrust provision of the state's Business

and Professions Code. As Howard Slugh wrote in National Review, "It is one thing to argue that a religious institution engages in a business practice if it runs a restaurant or a shoe store. It is an entirely different matter to argue as the plaintiffs do here: that core religious functions are business practices…open to government regulation."

This development is troubling in part because of how widespread the view has become that a person forfeits religious freedom rights when engaging in commerce.

In 2007, the Washington State Board of Pharmacy issued a "delivery rule" mandating that all pharmacies—including family-run businesses—carry abortifacient drugs. "Facilitated referral," or the right of a worker with moral or ethical objections to refer customers to another nearby store to fill such prescriptions, was banned. Pharmacies could decline to stock medications for a variety of secular reasons, and often did. Religious reasons were intentionally excluded.

Washington officials had never bothered to enforce requirements that pharmacies stock certain drugs, "except in these emergency contraceptive cases," Professor Laycock points out. "It's absurd, but there it is."

The American Pharmacists Association, in conjunction with more than 30 other state and national pharmacy groups, came out strongly against the regulation. The rule "effectively eliminated pharmacists' right not to participate in actions they conscientiously oppose," they later wrote in an amicus brief to the U.S. Supreme Court, "even though a 'right of conscience' has always been integral to the ethical practice of pharmacy."

More shocking still, the state Board of Pharmacy itself had tried not to issue the rule at first. The body signed off on the regulation only after the state Human Rights Commission sent a letter "threatening Board members with personal liability if they passed a regulation permitting referral," and then-Gov. Christine Gregoire sent another letter that "publicly explained that she could remove the Board members" if she deemed it necessary.

The 9th Circuit Court of Appeals upheld the constitutionality of the "delivery rule" in 2015, finding no right "to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes lead to the taking of human life." Short a member on the bench after Antonin Scalia's death, the Supreme Court opted last summer not to take up the case, and so the circuit court's ruling remained in place.

Any one of the above instances could perhaps be interpreted as the messy but natural give-and-take of democracy in action. Take them together, however, and it becomes harder to escape the conclusion that strong forces hostile to traditional belief are on the march. As Justices Alito, Thomas and John Roberts noted in their dissenting opinion on the pharmacy challenge, "those who value religious freedom have cause for great concern."

What Is Still To Come

If a study of Supreme Court history makes one thing clear, it is that there is no fixed line differentiating the kinds of laws that are acceptable under the First Amendment from the kinds

that go too far. Where lawmakers and the courts come down on contested questions is often influenced by what a majority of Americans seem to favor.

"I think that if a case went to the Supreme Court today and the question was if it's O.K. for the government to pull the tax exemption from the Catholic Church, I predict the Court would say no," says Prof. Garnett of Notre Dame. "And part of the reason would be that the justices would be aware that public opinion is not quite there yet. But these things can build up over time."

None of the experts I talked to thought the Supreme Court literally keeps an eye on poll numbers as it hands down decisions. But they all agreed that as fallible humans, even the most upstanding jurists will be affected by the cultural zeitgeist. "It might not be that it's conscious on the justices' part," Professor Garnett says, "but we're all shaped by the cultural air we breathe, and as the cultural air we breathe changes, we can become conducive to other arguments."

Consider the bans on polygamy from a century ago. At the time, Orson Pratt, a leader of the L.D.S. Church, traveled the East Coast arguing that Congress was "seeking to debar the Mormons from the enjoyment of a religious right." But with The New York Times urging the federal government "to exert its power for the extermination of this great social evil," the legal system almost always sided with the majority of Americans who saw marriage as a union between one man and one woman only.

"The Supreme Court was reflecting popular sentiment," says Brian Cannon, a historian at Brigham Young University. "It wasn't preserving the rights of minorities, which I would like to think is one of its chief responsibilities."

Of course, public opinion can change. Gay marriage is among the most vivid illustrations of that. For decades, public support for legal recognition of same-sex unions was a minority position. Between May 2011 and May 2012, according to Gallup, the numbers flipped. On May 9, 2012, President Obama suddenly announced that his views had "evolved" and he was now in favor of same-sex marriage. Thirteen months later, the Supreme Court ruled the federal Defense of Marriage Act unconstitutional. Two years after that, it struck down all statewide bans on same-sex unions.

Within hours of the Obergefell decision, people began suggesting the precedent should be extended even further. Fredrik DeBoer wrote an article for Politico titled "It's Time to Legalize Polygamy." Similarly, in 2013, Jillian Keenan had argued at Slate that "Legalized polygamy…would actually help protect, empower, and strengthen women, children, and families." If marrying whomever you want is a fundamental right, they wondered, shouldn't the same be true of taking multiple spouses?

In a sense, the idea was already old news. In 2013, responding to a challenge by Kody Brown, a star on the reality television show "Sister Wives," a judge threw out a Utah provision outlawing "bigamous cohabitation." It was part of the same anti-polygamy legislation the courts had repeatedly upheld 100 years before.

If something that was constitutional yesterday can be unconstitutional today, it is impossible to predict what might happen tomorrow. When public opinion changes, it is reasonable to expect that judicial decisions will turn out differently as well.

Sometimes that will be for the best, as when the Supreme Court, in Brown v. Board of Education of Topeka, overturned its own abhorrent precedent and decided the "separate but equal" doctrine to be unconstitutional. On the other hand, if society really is becoming not just more tolerant of new beliefs but less tolerant of old ones, the fear that government is encroaching in on religious freedom starts to look more credible. That makes recent poll numbers—like those from the Pew Research Center, which found 67 percent of Americans, including half of Catholics, saying employers should have to offer contraception coverage regardless of religious objections—all the more discouraging.

As government grows larger and more entwined with our lives, it gains powerful new levers for exercising control over people of faith. Recall that the U.S. Conference of Catholic Bishops came under attack by the A.C.L.U. because it does not provide access to contraceptives or abortion services while accepting federal funds for its work with refugees. As Professor Garnett puts it: "They don't have to ban pastors from reading from the book of Leviticus. There are other ways to impact [a religious institution's] ability to function."

"It's pretty unlikely that the government would ever say, 'No church may adopt as one of its tenets the traditional view of marriage,'" he continues. "But the reality is that the government has a really strong ability, because it controls so many benefits"—from licensing and accreditation to tax exemptions, grant money and student loans—"to attach conditions to those benefits and thereby put a lot of pressure on religious institutions."

So what are we to conclude from all this history?

A better lesson—at once more accurate and more hopeful—is that institutional protections are only as strong as the underlying culture. If people are willing to see a minority group's rights disregarded, neither the courts nor the Constitution is an airtight safeguard against abuse. But if the majority is unwilling to see liberties infringed, those in positions of authority are likely to take notice.

"We've developed sort of an amnesia about the importance of protecting this fundamental freedom," Professor Hertzke observes. "We need to reconnect religious liberty to the grand liberal tradition."

Martin Luther King Jr. famously said that the arc of the moral universe bends toward justice. It might have been truer if he had said it can be bent, assuming enough people are willing to do the hard work of persuasion. In other words, if what counts as "religious freedom" is eternally in dispute, it matters who shows up to the debate.