

**A WORD OF WARNING FROM A WOMAN:
ARBITRARY, CATEGORICAL, AND HIDDEN RELIGIOUS EXEMPTIONS
THREATEN LGBT RIGHTS**

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INTRODUCTION

Religious exemptions have already undermined women’s rights. Now exemptions threaten gays and lesbians. The Constitution protected women’s equality and liberty until religious exemptions eroded them. Now that LGBT individuals have finally attained the goal of marriage equality, religious exemptions threaten to diminish their hard-earned constitutional right. For this reason, it is past time to reject the religious-exemption theory

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of religious liberty, which privileges religion over civil and constitutional rights, in favor of neutral laws that govern all.

Religious exemptions pervade American law in numerous ways that are harmful to civil rights. In this essay, I identify three types of religious exemptions—arbitrary, categorical, and hidden—that first developed to restrict women’s rights and now threaten LGBT equality.

I. DEFINING THE THREE EXEMPTIONS: ARBITRARY, CATEGORICAL, AND HIDDEN

Burwell v. Hobby Lobby and the Religious Freedom Restoration Act (RFRA) embody the “arbitrary exemption” theory of religious freedom, which assumes that individuals are usually entitled to follow their own consciences instead of the law.¹ Whenever an individual (or now a corporation) doesn’t agree with a law, he seeks a personal exemption from the court or legislature, or sometimes the executive. He may receive it, or not; the outcome depends upon the arbitrary choices of judges and politicians who decide which exemptions they prefer. Freeing religious employers from the demands of the Affordable Care Act (ACA) in *Hobby Lobby* was an arbitrary exemption.

The “categorical exemption” theory of religious freedom is best represented by *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. By identifying a ministerial exception to the First Amendment, *Hosanna-Tabor* created a huge religious zone where the employment laws do not apply and individuals lose their constitutional and statutory rights.² Exempting a whole category of American life from the laws that should govern everyone is inconsistent with maintaining equality and liberty for all. This categorical exemption is particularly dangerous to women and LGBT people because the world’s religions have consistently opposed women’s and LGBT rights.

“Hidden exemptions” are hiding in plain sight. The term refers to the religion-based laws that pretend to be neutral but instead impose a majority religion on everyone else. Religion-based laws exempt religious individuals from neutral laws they would otherwise be obligated to follow. When Representative Henry Hyde successfully restricted abortion funding for

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); 42 U.S.C. § 2000bb (2012).

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

poor women because his faith taught him that no woman should ever have an abortion, for example, he exempted himself and his co-religionists from the laws that properly protect women's health.³

Religion-based laws like the Hyde Amendment should be invalidated under the Establishment Clause of the First Amendment. Instead, in *Harris v. McRae*, the Court denied an Establishment Clause-based challenge to the Hyde Amendment.⁴ The Court provided the anti-abortion forces with a hidden exemption when it refused to recognize that religion was the only reason for the amendment's passage. Abortion opponents then became exempt from laws protecting abortion rights.

The same-sex marriage bans were also hidden exemptions; all arguments against marriage equality were religious ones.⁵ The Supreme Court finally rejected the religious rationale for marriage in favor of neutral constitutional principles when it recognized a constitutional right to same-sex marriage in *Obergefell v. Hodges*.⁶ One hidden exemption, which long allowed religions to impose their own beliefs about marriage, has finally disappeared.

Just as they did after women briefly achieved religion-neutral reproductive freedom, however, the arbitrary and categorical exemption proponents have come out with a vengeance to restrict LGBT rights by any means they can. The story of women's rights confirms that arbitrary, categorical, and hidden religious exemptions all serve one purpose: to promote powerful religions at the expense of civil and constitutional rights. LGBT rights can rise only if exemptions fall. *Hobby Lobby* is the most recent example of an arbitrary exception, as I explain in the next section.

II. THE ARBITRARY EXEMPTION THEORY OF RELIGIOUS FREEDOM: RFRA AND *HOBBY LOBBY*

A. Background on the Law of Arbitrary Exemptions

The arbitrary exemption theory of religious freedom rests on the idea that actors are usually entitled to follow their own consciences instead of

3. The details of the Hyde Amendment are available in *McRae v. Califano*, 491 F. Supp. 630, 640-48 (E.D.N.Y. 1980).

4. *Harris v. McRae*, 448 U.S. 297, 319 (1980).

5. See Leslie C. Griffin, *Hobby Lobby: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 677-87 (2015).

6. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

the law. This theory is best exemplified by state and federal RFRA's, which allow individuals, and now corporations, to claim exemption from neutral laws of general applicability.⁷

The Supreme Court powerfully presented the appropriate, non-exemption model of religious liberty in *Employment Division v. Smith*, when it ruled that every citizen must obey neutral laws of general applicability.⁸ To allow every religious citizen an exemption-excuse to disobey the law, the Court ruled, would “permit every citizen to become a law unto himself.”⁹

When every citizen becomes a law unto himself, there is no law left to protect anybody from harm, and law becomes ad hoc. That is the central problem with the arbitrary exemption theory of the First Amendment.

In response to *Smith*, a coalition of religious groups immediately and vigorously protested the idea that they should be subject to neutral laws.¹⁰ In response to the political power religions have, Congress passed RFRA, which allows persons to challenge any laws that they allege substantially burden their religion.¹¹ Once a substantial burden exists, the government must meet the most difficult standard in constitutional law, namely to prove that it used the least restrictive means of fulfilling a compelling government interest.¹² RFRA’s “arbitrary exemption” theory of religious freedom—that religious freedom is best served by entitling persons to claim exemptions—is thus based on the notion that religions do not have to follow neutral laws.

B. How Arbitrary Exemptions Hurt Women’s Rights

Unfortunately, Congress is not the only actor that gives RFRA-like religious exemptions. President Obama similarly succumbed to religion-based political pressure about the contraceptive mandate of the Affordable Care Act (ACA). The ACA originally exempted purely religious employers like houses of worship from its requirements, but otherwise applied the contraceptive regulations to both for-profit and nonprofit religious

7. Details of the state and federal RFRA's are available at Marci A. Hamilton, RELIGIOUS FREEDOM RESTORATION ACT PERILS, <http://rfraperils.com> (last visited Oct. 3, 2015).

8. *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

9. *Id.* at 879.

10. See generally MARCI A. HAMILTON, GOD V. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY (2014).

11. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(2) (2014).

12. 42 U.S.C. § 2000bb-1.

employers.¹³ Then the nation's Catholic bishops and other religious employers like the University of Notre Dame accused the administration of conducting a war on religious freedom (i.e., on their exemption model of religious freedom, which holds that religions are above the law).¹⁴ Obama immediately accommodated them and, in the name of religious freedom, gave the religious nonprofits an exemption from the contraceptive mandate.¹⁵

One exemption always slides down the slippery slope to the next. The for-profits owned by religious individuals then wanted what the nonprofits received from President Obama. They got it by bringing their RFRA case to the Supreme Court. The Court ruled that the corporate owners' religion was substantially burdened by the ACA, assumed a weak governmental interest in women's equality, and found that applying the mandate to for-profits was not the least restrictive means of meeting the government's goal of contraceptive coverage.¹⁶

The government failed the least restrictive means test because the nonprofits' exemption was less restrictive than requiring employers to provide insurance coverage directly to their employees.¹⁷ In other words, one political exemption for Notre Dame led to another RFRA-based exemption for Hobby Lobby. *Hobby Lobby* is an example of an arbitrary-exemption-squared case, which combines the congressional RFRA exemption with the presidential ACA exemption. Because of exemptions, both nonprofit and for-profit religious organizations have become a health law unto themselves in defiance of women's health needs.

One full year after the Court's glib decision in *Hobby Lobby* pretending that women's rights are protected by the arbitrary exemption theory, Hobby Lobby's employees continue to lack access to the contraceptive coverage required by the mandate.¹⁸ Moreover, the *Hobby Lobby* precedent allows 47 other companies to deny contraceptive insurance coverage to their employees.¹⁹

13. 45 C.F.R. § 147.131(a) (2014).

14. See generally, PHYLLIS SCHLAFLY, NO HIGHER POWER: OBAMA'S WAR ON RELIGIOUS FREEDOM (2012).

15. See 45 C.F.R. § 147.131(a).

16. *Hobby Lobby*, 134 S. Ct. at 2759.

17. *Id.* at 2759.

18. See Nelson Tebbe et al., *Hobby Lobby's Bitter Anniversary*, BALKINIZATION (June 30, 2015), <http://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html>.

19. *Id.*

The contraceptive exemptions cost women their constitutional equality and liberty. LGBT rights are next. As illustrated by Congress's RFRA and President Obama's accommodation of the nonprofits, the arbitrary exemption theory of religious freedom can be pursued either by broad RFRA's or by writing religious exemptions into other laws. In all the situations described below, someone is seeking an exemption in order to discriminate against gays and lesbians in general and marriage equality in particular.

C. The Next Threat: LGBT Rights

Over the past twelve years, marriage equality gradually became legal, state-by-state. Across the country, arbitrary exemption advocates repeatedly sought to remove themselves from obligations to obey the neutral laws of marriage. That exemption campaign intensified in the wake of *Obergefell v. Hodges*.²⁰ Three exemptions are particularly pernicious, namely allowing government employees to deny marriage licenses, permitting adoption agencies to place children with heterosexual couples only, and giving commercial businesses the right to refuse LGBT customers. State and federal laws should protect access to justice, the right to marriage, and antidiscrimination norms. Battling over and granting exemptions undermines those core values and defeats the rule of law.

Government Employees.

Some would argue that the most fundamental job of democratic government is to provide citizens with equal and fair access to public resources. In the pro-arbitrary exemption climate, however, state and municipal marriage clerks who religiously oppose same-sex marriage asserted their right to refuse marriage licenses to qualified applicants.²¹ Pre-

20. *Obergefell*, 135 S. Ct. 2584.

21. Associated Press, *Yellowstone County Clerks Object to Issuing Same-Sex Marriage License One Deputy Clerk has Expressed Religious Objections While Three Others have Objected on Moral Grounds*, FLATHEAD BEACON (Nov. 23, 2014), <http://flatheadbeacon.com/2014/11/23/yellowstone-county-clerks-object-issuing-sex-marriage-license/>; Matthew Burns, *Berger Blasts NC Courts Official Over Gay Marriage*, NC CAPITOL (Nov. 10, 2014), <http://www.wral.com/berger-blasts-nc-courts-official-over-gay-marriage/14167619/>; Ashley Cusick, *AZ Clerks Objecting to Gay Marriage Urged by Religious Right Not to Issue Licenses*, PHOENIX NEW TIMES (Oct. 23 2014), <http://blogs.phoenixnewtimes.com/valley>

Obergefell, Louisiana, North Carolina, and Utah exempted government officials from participating in same-sex marriages.²² Three other states introduced legislation permitting state officials to refuse to perform same-sex marriages.²³ Legislators in Missouri, Oklahoma and Texas introduced legislation calling for state officials who perform same-sex marriages to be fired.²⁴ Then, in direct response to *Obergefell*, Texas Attorney General, Ken Paxton, issued an official declaration protesting the Court's decision to "manufacture a right that simply does not exist" as well as recognizing and encouraging the religious freedom of county clerks, justices of the peace and judges to refuse marriage licenses to LGBT Texans.²⁵ Individual clerks in Alabama, Kentucky, Louisiana and Texas either closed their offices or refused LGBT requests for marriage licenses.²⁶

fever/2014/10/clerks_office_licensing_surge.php; Mary Jo Pitzl, *Memo to Clerks: You Can Object to Gay Marriage*, AZ CENTRAL (Oct. 23, 2014), <http://www.azcentral.com/story/news/arizona/politics/2014/10/23/arizona-gay-marriage-conservative-advice-clerks/17761157>.

22. Marci Hamilton, *To Discriminate or Not to Discriminate? That Will Be the Question Following the Supreme Court's Ruling on Same-Sex Marriage in Obergefell v. Hodges*, HAMILTON AND GRIFFIN ON RIGHTS (June 16, 2015), <http://hamilton-griffin.com/to-discriminate-or-not-to-discriminate-that-will-be-the-question-following-the-supreme-courts-ruling-on-same-sex-marriage-in-obergefell-v-hodges/>; see also Marci A. Hamilton, *States that Permit Discrimination Against Same-Sex Marriage Couples*, RELIGIOUS FREEDOM RESTORATION ACT PERILS, <http://rfraperils.com/ssm.pdf> (last visited Oct. 2, 2015).

23. Marci Hamilton, *To Discriminate or Not to Discriminate? That Will Be the Question Following the Supreme Court's Ruling on Same-Sex Marriage in Obergefell v. Hodges*, *supra* note 22; See Marci Hamilton, *States that Permit Discrimination Against Same-Sex Marriage Couples*, *supra* note 22. Details of the state and federal RFRAs are available at Marci A. Hamilton, RELIGIOUS FREEDOM RESTORATION ACT PERILS, <http://rfraperils.com/> (last visited Oct. 2, 2015).

24. Colin Murphy, *Mo. Bill Would Make Issuing Same-Sex Marriage Licenses a Fireable Offense*, LGBTQ NATION (Feb. 28, 2015), <http://www.lgbtqnation.com/2015/02/mo-bill-would-make-issuing-same-sex-marriage-licenses-a-fireable-offense/>.

25. *Attorney General Paxton: Religious Liberties of Texas Public Officials Remain Constitutionally Protected After Obergefell v. Hodges*, THE ATTORNEY GENERAL KEN PAXTON (June 28, 2015), <https://www.texasattorneygeneral.gov/oagnews/release.php?id=5144>.

26. Martin Swant & Claire Golofaro, *Ala. Probate Judges Refuse to Issue Same-Sex Marriage Licenses*, THE CLARION-LEDGER (July 1, 2015), <http://www.clarionledger.com/story/news/2015/07/01/alabama-same-sex-marriage-licenses/29554595/>; Amy Yurkanin, *Two Counties Out of Marriage Business for Good After Supreme*

Like the contraception exemption in *Hobby Lobby*, the marriage exemption (which pretends to protect religious freedom) is selective and arbitrary. It denies a group of citizens their constitutional right to marry and the protection of the neutral laws. Further proof that the exemptions are arbitrary is that the religious freedom of members of the LGBT community is never considered—just as women’s religious freedom was never considered in *Hobby Lobby*.

Adoption

In his two decisions about same-sex marriage, Justice Kennedy eloquently explained the importance of marriage equality to the children of LGBT parents, who are frequently adopted.²⁷ The Defense of Marriage Act, he wrote, “humiliates tens of thousands of children now being raised by same-sex couples,” and brings them financial harm.²⁸ All parties agree, he wrote in *Obergefell*, that “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples . . . This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”²⁹

Nonetheless, Michigan, Rhode Island, and Vermont allow religiously-affiliated adoption agencies to discriminate against same-sex couples,³⁰ while Maryland, Minnesota and Connecticut permit discrimination if the agencies don’t receive government funding.³¹ Early in 2015, the Florida House passed legislation allowing private adoption agencies to refuse child placement to same-sex couples.³² The timing was significant; the state ban

Court Ruling, AL.COM (June 29, 2015), http://www.al.com/news/index.ssf/2015/06/alabama_probate_office_closes.html.

27. *LGBT Adoption Statistics*, LIFELONG ADOPTIONS, <http://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics> (last visited Aug. 23, 2015).

28. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

29. *Obergefell*, 135 S. Ct. 2584.

30. See Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1244 (2014) (listing religious exemptions in states where same-sex marriage was legal pre-*Obergefell*).

31. *Id.* at 1183.

32. Sam Levine, *Florida House Approves Bill to Let Adoption Agencies Refuse Gay Parents*, HUFFINGTON POST (Apr. 9, 2015), http://www.huffingtonpost.com/2015/04/09/florida-gay-adoption-bill_n_7037076.html.

on gay adoption had just been lifted.³³ So it goes. Whenever a hidden exemption disappears (here the religion-based ban on same-sex adoption), arbitrary exemptions pop up to take its place. Although the Florida Senate declined to vote on the bill,³⁴ the adoption battle is far from over. Led by Catholic Charities, religious adoption agencies have long defended their religious right to refuse child placement to same-sex couples.³⁵

They have a friend in the Chief Justice of the United States. Unfortunately John Roberts, himself the father of adopted children, encouraged the arbitrary exemption strategy in dissent in *Obergefell*. Teeing up a prolonged religious exemption strategy for litigants, the Chief Justice wrote:

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or *a religious adoption agency declines to place children with same-sex married couples* . . . There is little doubt that these and similar questions will soon be before this Court.³⁶

Arbitrary exemptions arise from all sources and appear in all sizes and shapes. The Chief Justice’s rhetoric again confirms my point—whenever a religion-based law like marriage inequality disappears, the law’s religious proponents will seek an arbitrary way to redo it. The fact that a chief justice—or a president—backs a religious exemption makes it no less arbitrary.

Like adoption, insurance is a huge battleground for LGBT rights opponents, who argue they should not provide insurance to same-sex

33. H.B. 7013, 2015 Leg. Sess. (Fla. 2015).

34. Staff, *Florida Senate Panel Derails Discriminatory Adoption Bill*, LGBTQ NATION (Apr. 21, 2015), <http://www.lgbtqnation.com/2015/04/florida-senate-panel-derails-discriminatory-adoption-bill/>.

35. Joseph R. LaPlante, *Tough Times for Catholic Adoption Agencies*, OUR SUNDAY VISITOR (May 7, 2014), <https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx>.

36. *Obergefell*, 135 S. Ct. at 2625-26.

spouses, children, or even the individual employee.³⁷ As in adoption services, children are the new frontier. Providing services to children of same-sex couples may contradict the conscience of religious opponents of marriage equality. Recently a lesbian couple in Michigan sought treatment from Dr. Vesna Roi, a pediatrician with nineteen years experience, because they respected her holistic practice. The respect was not mutual. After “much prayer,” Roi decided she wouldn’t treat the child because she disapproved of the mothers’ marriage.³⁸ “You’re discriminating against a baby?” one mother said. “It’s just wrong.”³⁹ Although 22 states have laws prohibiting doctors from discriminating on the basis of sexual orientation, Michigan does not.⁴⁰ Moreover, as noted above, Michigan explicitly allows religious adoption agencies to discriminate against same-sex couples.⁴¹ Why should the state care about pediatricians?

News stories haven’t related any details of Dr. Roi’s religion, only noting that she prayed before she refused service.⁴² Roi later wrote a letter to the couple telling them: “I felt that I would not be able to develop the personal patient doctor relationship that I normally do with my patients.”⁴³ Under the arbitrary exemption theory and RFRA-type statutes, that is all that counts. Children’s needs are trumped by conscience. Similar to Dr. Roi, counseling students have argued a religious right to attempt to convert homosexuals to heterosexuality.⁴⁴ They are part of a growing trend to exempt all businesses from laws protecting customers.

37. See generally, Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1244 (2014).

38. Tresa Baldas, *Pediatrician Won’t Treat Baby with Two Moms*, USA TODAY (Feb. 19, 2015), <http://www.usatoday.com/story/news/nation/2015/02/18/doctor-discrimination-baby/23642091/>.

39. *Id.*

40. *Id.*

41. Kathleen Gray, *Michigan Law Allows Adoption Agencies to Say No to Gays*, USA TODAY (June 11, 2015), <http://www.usatoday.com/story/news/politics/2015/06/11/gay-unmarried-couple-adoption-michigan/71058222/>.

42. Baldas, *supra* note 38.

43. *Id.*; see also Dianne Witkowski, *Creep of the Week: Dr. Vesna Roi*, PRIDESOURCE (Feb. 26, 2015), <http://www.pridesource.com/article.html?article=70379>.

44. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

Commercial Businesses

Religious opponents of same-sex marriage similarly defend their right not to provide commercial services for same-sex weddings. These situations include the refusals of florists to provide flowers;⁴⁵ bakers to bake cakes;⁴⁶ photographers to take pictures;⁴⁷ bed and breakfasts owners, innkeepers, and wedding halls to rent facilities;⁴⁸ and catering companies to provide food.

Confronted with these situations of businesses that choose to discriminate, many states debated using their RFRA's and other statutes to codify the right to discriminate as a matter of religious freedom.⁴⁹ A Louisiana executive order permits businesses to refuse same-sex couples as customers.⁵⁰ An Indiana bill would have allowed small businesses to refuse

45. *Washington v. Arlene's Flowers*, No. 13-2-00871-5, 2015 WL 94248 (Wash. Super. Jan. 7, 2015).

46. In the Matter of Klein, No. 44-14 & 45-14, 2015 WL 4868796 (Or. BOLI July 2, 2015); *Charlie Craig and David Mullins v. Masterpiece Cake Shop*, ACLU (Aug. 13, 2015), <https://www.aclu.org/cases/charlie-craig-and-david-mullins-v-masterpiece-cakeshop>; Bobby Ross, *Religious Freedom vs. Gay Rights: Have Your Cake and Read Both Sides of the Story, Too*, GETRELIGION (Dec. 19, 2014), <http://www.getreligion.org/getreligion/2014/12/19/religious-freedom-vs-gay-rights-have-your-cake-and-read-both-sides-of-the-story-too>; Deborah Munn, *It Was Never About the Cake*, ACLU (Dec. 9, 2013), <https://www.aclu.org/blog/religion-belief-lgbt-rights/it-was-never-about-cake>.

47. *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 U.S. 1787 (2014).

48. *Mattoon Couple Challenge Denial of Services at Two Illinois Bed and Breakfast Facilities*, ACLU OF ILLINOIS (Nov. 2, 2011), <http://www.aclu-il.org/mattoon-couple-challenge-denial-of-services-at-two-illinois-bed-and-breakfast-facilities/>; *Baker and Linsley v. Wildflower Inn*, ACLU (Aug. 23, 2012), <https://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn>; Associated Press, *Iowa Venue Settles Bias Complaint Filed by Gay Couple, Will Discontinue All Weddings*, LGBTQNATION (Jan. 29, 2015), <http://www.lgbtqnation.com/2015/01/iowa-venue-settles-bias-complaint-filed-by-gay-couple-will-discontinue-all-weddings/>.

49. See Jonathan Cohn, *Why Indiana's Religious Freedom Law is Such a Big Deal*, HUFFINGTON POST (Apr. 1, 2015), http://www.huffingtonpost.com/2015/04/01/indiana-religious-freedom_n_6984156.html.

50. See Marci Hamilton, *States that Permit Discrimination Against Same-Sex Marriage Couples*, *supra* note 22.

services to gay and lesbian couples.⁵¹ An Oregon religious freedom group tried to get an initiative on the ballot allowing florists, bakers, and others the right to refuse services for same-sex marriages.⁵² The Kansas House passed legislation allowing religious employers to refuse services *or employment benefits* related to same-sex marriage.⁵³ Arizona Governor, Jan Brewer, vetoed legislation allowing denial of services to gays and lesbians as an exemption to the public accommodations laws.⁵⁴ Tennessee, Idaho, and South Dakota considered similar bills allowing religious businesses to discriminate.⁵⁵ Mississippi had an extended debate whether its state RFRA allows corporations to refuse goods and services whenever they like.⁵⁶ Arkansas considered a “conscience protection” measure as a shield for discrimination against gays and lesbians; similar measures were debated in

51. Tony Cook & Marisa Kwiatkowski, *Religious Freedom Bill Coming to Indiana*, INDYSTAR (Dec. 26, 2014), <http://www.indystar.com/story/news/politics/2014/12/26/religious-freedom-bill-coming-indiana/20911991/>.

52. Edith Honan, *Gay-Marriage Debate Takes New Twist in Oregon: Religious Exemption*, REUTERS (Feb. 2, 2014), <http://www.reuters.com/article/2014/02/02/us-usa-gaymarriage-oregon-idUSBREA1106Z20140202>; *Oregon Considers Religious Exemption for Businesses on Gay Marriage*, NEWSMAX (Feb. 2, 2014), <http://www.newsmax.com/Newsfront/oregon-religious-exemption-gay/2014/02/02/id/550378/>.

53. Adam Serwer, *Religious Freedom Used to Chip Away at LGBT Rights*, MSNBC.COM (Feb. 19, 2014), <http://www.msnbc.com/msnbc/religious-freedom-chip-away-gay-rights>.

54. Jude Joffe-Block, *Arizona ‘Religious Freedom’ Bill Riles Gay Rights Supporters*, HERE & NOW (Feb. 21, 2014) <http://hereandnow.wbur.org/2014/02/21/arizona-businesses-gay>; Ray Sanchez, *Arizona Lawmakers Pass Controversial Anti-Gay Bill*, CNN.COM (Feb. 21, 2014), <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/>; Michael Lipka & David Masci, *Arizona Bill Sparks Debate About Religious Objections to Gay Marriage*, PEW RESEARCH (Feb. 25, 2014), <http://www.pewresearch.org/fact-tank/2014/02/25/arizona-bill-sparks-debate-about-religious-objections-to-gay-marriage/>.

55. Nora Caplan-Bricker, *Do the New “Turn the Gays Away” Bills Stand Up to the Constitution?*, NEW REPUBLIC (Feb. 25, 2014), <http://www.newrepublic.com/article/116756/religious-freedom-anti-gay-bills-dont-pass-constitutional-muster>.

56. See Eric Brown, *Mississippi Gov. Signs ‘Religious Liberty’ Bill that Allows Anti-Gay Discrimination*, INTERNATIONAL BUSINESS TIMES (Apr. 4, 2014), <http://www.ibtimes.com/mississippi-gov-signs-religious-liberty-bill-allows-anti-gay-discrimination-1567540>.

Georgia, Hawaii, Michigan, Utah, West Virginia, and Wyoming.⁵⁷

Oklahoma State Senator Joseph Silk's dismissive comment about gays and lesbians captures the pro-exemption attitude. He stated: "They don't have a right to be served in every store. People need to have the ability to refuse service if it violates their religious convictions."⁵⁸ If that attitude had prevailed during the Civil Rights Movement, we would still have segregation in many parts of the United States.

Even marriage equality-friendly states like New York and Connecticut included religious exemptions in their same-sex marriage laws.⁵⁹ New York law gave religious corporations protection to discriminate in the provision of services and to continue to receive government funding as they did so.⁶⁰ "For example, if the Knights of Columbus owns a banquet hall, it can rent the hall for only those marriage ceremonies that it chooses to allow there."⁶¹ In both Connecticut and New York, such corporations cannot face any penalty for their discrimination; they can receive state funding even while discriminating.⁶²

57. Associated Press, *Arkansas Panel Rejects 'Conscience-Protection' Measure*, N.Y. TIMES (Feb. 25, 2015), <http://www.nytimes.com/aponline/2015/02/25/us/ap-us-xgr-anti-discrimination-laws.html>; Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 5, 2015), <http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html>.

58. Fausset & Blinder, *supra* note 57.

59. See David Masci, *States that Allow Same-Sex Marriage Also Provide Protections for Religious Groups and Clergy Who Oppose it*, PEW RESEARCH (Nov. 20, 2013), <http://www.pewresearch.org/fact-tank/2013/11/20/states-that-allow-same-sex-marriage-also-provide-protections-for-religious-groups-and-clergy-who-oppose-it/>.

60. Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html>; Douglas Laycock, *For Gay Rights, Embrace the Religious Exemption*, N.Y. TIMES (Mar. 3, 2014), <http://www.nytimes.com/roomfordebate/2014/03/24/if-gays-can-marry-and-be-fired-for-doing-so/for-gay-rights-embrace-the-religious-exemption>.

61. *Know Your Rights: Frequently Asked Questions About New York's Equality Act*, NEW YORK CIVIL LIBERTIES UNION (Mar. 2014), <http://www.nyclu.org/marriageFAQ#12>.

62. Connecticut Substitute Senate Bill 899, Pub. Act No. 09-13, available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm> (last visited Oct. 3, 2015).

Everywhere

The exemption trend does not end with government services, adoption, and commercial businesses. Proposed exemptions wreak havoc with the law everywhere. For reasons described in Part III, no federal antidiscrimination statute outlaws discrimination on the basis of sexual orientation. As a start in that direction, in 2014 President Obama signed an executive order prohibiting sexual orientation discrimination in federal contracts.⁶³ The President resisted strong calls for religious exemptions “allowing religiously affiliated federal contractors to fire, refuse to hire, or decline to promote LGBT people because of their sexual orientation or gender identity.”⁶⁴

LGBT rights advocates withdrew support for a proposed federal Employment Non-Discrimination Act (ENDA) that would have banned discrimination based on sexual orientation because it had too many religious exemptions.⁶⁵ The proposed ENDA exemptions were:

- A complete exemption for houses of worship, parochial and similar religious schools, and missions;
- A codification of the so-called “ministerial exemption” recognized by many federal courts, exempting positions at religious organizations that involve the teaching or spreading religion, religious governance, or the supervision of individuals engaged in these activities;
- A provision allowing religious organizations to require employees and applicants for certain classes of jobs to conform to a declared set of significant religious tenets, including ones which would bar LGBT people from holding the position. For example, a religiously-

63. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf>.

64. Sunnivia Brydum, *Faith Leaders Beg Obama for Religious Exemptions in ENDA Exec. Order*, ADVOCATE (June 27, 2014), <http://www.advocate.com/enda/2014/06/27/faith-leaders-beg-obama-religious-exemptions-enda-exec-order>; see also Letter from Inst. Religious Freedom Alliance, to Pres. Barack Obama (June 25, 2014), available at <http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf>.

65. See Ed O’Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, WASH. POST (July 8, 2014), <http://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/>.

affiliated hospital could choose to require all nurses to follow a declared set of significant religious tenets, including avoiding same-sex sexual activity, and be able to terminate a male nurse who they subsequently learn is in a relationship with another man. Similarly, a social services agency run by a religious sect could require its executive director to subscribe to a set of tenets that it declares significant, including one that bars LGBT people from holding the job, but choose not to impose the same requirement on its social workers or other classes of employees.⁶⁶

“This exemption is so broad that it could leave a transgender doctor at a hospital or a gay food-services worker at a university without protection from workplace discrimination.”⁶⁷

Even if federal legislation outlawing sexual orientation discrimination were in place, RFRA and its exemption-friendly interpretation in *Hobby Lobby* would undermine it. *Hobby Lobby* makes it easy for plaintiffs to win RFRA lawsuits against the federal government. Contrary to statutory and constitutional precedent, Justice Alito concluded that the courts should not challenge plaintiffs’ account of a law’s substantial burden on their religion but instead ask only if they asserted an “honest conviction” that it burdens their religion.⁶⁸ With this low threshold to undermine federal laws, it becomes less necessary to write religious exemptions into federal statutes. If plaintiffs sincerely believe they are cooperating with the “evil” of homosexuality or “giving scandal” by associating with gays and lesbians, they easily meet RFRA’s low substantial burden standard.

Federal RFRA offers a religious defense to any federal statute.⁶⁹ There

66. *ENDA Religious Exemption – Fact Sheet*, THE LEADERSHIP CONF. ON CIV. AND HUMAN RIGHTS, <http://www.civilrights.org/lgbt/enda/religious-exemption.html> (last visited Aug. 21, 2015).

67. Ian Thompson, *ENDA’s Religious Exemption is Far Too Broad*, SLATE (Apr. 14, 2014), http://www.slate.com/blogs/outward/2014/04/14/enda_s_religious_exemption_is_too_broad_to_truly_protect_lgbt_workers.html.

68. *Hobby Lobby*, 134 S. Ct. at 2779 (“[I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction,’ . . . and there is no dispute that it does.”).

69. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2014).

is no reason why it can't be proposed as a defense to EMTALA,⁷⁰ ERISA,⁷¹ FMLA⁷² and Title VII⁷³ claims. EMTALA: why should religious hospitals accept emergency cases of gays and lesbians? ERISA: why should employers provide pensions or retirement benefits to gays and lesbians? FMLA: why should an employer allow family leave for an employee who wants to care for a same-sex spouse or child of a same-sex relationship?

Even Title VII is in play. Justice Alito's opinion in *Hobby Lobby* suggested RFRA is not a defense to racial discrimination, but left open religious discrimination on the basis of gender.⁷⁴ *Hobby Lobby* demonstrates that women's equality, which is already protected in Title VII and the Constitution, is quickly dismissed in the name of religious freedom.⁷⁵ Sexual orientation discrimination, which to date has not enjoyed similar statutory and constitutional protection to women's equality, cannot be expected to survive any better.

Exemption advocates argue that religious plaintiffs will not win all these cases because the courts and legislatures will wisely decide which religious commitments are worthy of protection and which government interests should prevail.⁷⁶ That discretion, however, is a major problem with the arbitrary exemptions theory. It favors the mainstream religions preferred by the Justices and state and federal judges, as the majority of the Supreme Court demonstrated when it gave the back of the hand to women's rights in *Hobby Lobby*.⁷⁷

70. Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd (2014).

71. Employment Retirement Income Security Act of 1974, 93 P.L. 406, 88 Stat. 829.

72. Family and Medical Leave Act of 1993, 29 C.F.R. § 825 (2015).

73. Equal Employment Opportunity Act of 1972 (Title VII of the Civil Rights Act), 42 U.S.C. §§ 2000e-1—2000e-17 (2014).

74. *Hobby Lobby*, 134 S. Ct. at 2783.

75. *Id.* at 2795.

76. *Id.*

77. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2591 (2015) (“[r]ecent empirical work suggests that the religion of a claimant seeking accommodation in court correlates with the likelihood of accommodation being granted, with Catholics and Protestants, for instance, having higher success rates than Muslims. See Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 Notre Dame L. Rev. 1371 (2013); Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012).”).

Antidiscrimination norms can't prevail in a world of religious exemptions. If we want a society in which everyone is treated equally, we need to be governed by laws that everyone follows equally. Everyone includes religious employers, as I argue in the next section.

III. THE CATEGORICAL EXEMPTION THEORY OF RELIGIOUS FREEDOM: HOSANNA-TABOR

A. Women Were the First Victims of Categorical Exemptions

Imagine you're a member of a hierarchical church with a clearly defined priesthood limited to men. Your church directs a huge national chain of grade schools, high schools, colleges and universities, hospitals and social services agencies. That large network could not exist if priests were the only available employees. Therefore those organizations hire schoolteachers, professors, nurses, doctors and administrators. Some of those employees are members of the church; others are not. The employees sign employment contracts with their employers, whose policy manuals routinely affirm their adherence to state and federal laws, including antidiscrimination norms.

With so many educational, health, and social service institutions, the church is a big player in American life, and it receives large amounts of government funding.⁷⁸

A typical employee of such an organization may be a female schoolteacher or school principal who does her job effectively for many years. Then, her employer decides she is too old to work effectively or too disabled to do the job. Perhaps she suffered sexual harassment in the workplace, her employer decided she was not worthy of pay equal to her male colleagues or she was fired because she was pregnant or because he simply doesn't like to work with women. Her employer might even deny her family leave to care for her children.

Like any American with an employment contract, such an employee would likely go to court to vindicate her rights as protected by state contract and tort law; equal pay acts; and age, disability, gender, pregnancy and family leave laws.

That employee would be in for a big surprise. After the lawsuit was

78. Martha Minow, Symposium: Public Values in an Era of Privatization, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

filed, the employer would claim the protection of the First Amendment, arguing the employee's lawsuit must be dismissed because she is a minister. This defense is puzzling to her. The employee knows her hierarchical employer does not ordain women. She is a schoolteacher, principal, or nurse, and never a priest. Although her lawyer explains this fact to the court, her lawsuit is nonetheless dismissed. The court explains that whether she is a minister, or not, is a theological question that courts can't resolve.⁷⁹ The employee finds out that she doesn't possess any employment rights because her employer has just ordained her under a theory of religious freedom called either the "ministerial exemption" or the "ecclesiastical abstention" theory of the First Amendment.⁸⁰ Unknown to the employee, her employer enjoys a complete, categorical exemption from the employment laws in the name of religious freedom.

The woman whose church ordains women and preaches their equality with men fares no better. Her lawsuits for equal pay, gender discrimination, and pregnancy discrimination are all similarly dismissed because she is an actual minister or priest.⁸¹ She is at least as puzzled as the non-ordained woman. Why is an employer that believes in women's equality and ordains women allowed to fire or demote her when she is pregnant, or to pay her less than equally qualified males?

The First Amendment case law offers these women no explanation, only a categorical exemption for their employers. The case law of the categorical exemption has disproportionately affected women.⁸²

B. The Case Law of the Ministerial Exemption

Long before the Supreme Court recognized the ministerial exemption defense in 2012 in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the federal and state courts unanimously adopted this categorical exemption theory of the First Amendment. Under this theory one word, "minister," wipes out employees' rights.⁸³ As with *Hobby Lobby* and the arbitrary exemption, women's rights suffered first and most. In 1972, the Fifth Circuit Court of Appeals created the ministerial exception in

79. See, e.g., *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003).

80. *Id.* at 290.

81. *Hosanna-Tabor*, 132 S. Ct. 705.

82. *Hobby Lobby*, 134 S. Ct. at 2788 (Ginsburg J., dissenting).

83. *Hosanna-Tabor*, 132 S. Ct. at 694.

the case of Mrs. Billie McClure, a woman ordained in the Salvation Army.⁸⁴ Mrs. McClure alleged she received “less salary and fewer benefits” than her equivalent fellow male employees and was fired when she complained about it.⁸⁵

McClure’s case was categorically dismissed, as were all subsequent cases involving gender and pregnancy discrimination by women priests and ministers.⁸⁶ Thereafter, in Catholic institutions, in particular, numerous women schoolteachers and principals who knew definitively they were not priests found out they had no rights against their employers.⁸⁷ Even claims of racial discrimination were dismissed under the ministerial exemption.⁸⁸

Thus, it was no surprise that a woman employee, Cheryl Perich, was the plaintiff in the Supreme Court’s only ministerial exemption case.⁸⁹ Perich, a grade school teacher at a Lutheran school, was taken ill during the school year.⁹⁰ After she recovered faster than expected, Perich tried to return to her job at Hosanna-Tabor. Expressing skepticism about her doctor’s report, the school refused Perich reentry, and then fired her after she pursued a disabilities discrimination claim with the Equal Employment Opportunity Commission, which enforces federal antidiscrimination laws.⁹¹

Perich had a classic claim of disabilities discrimination and retaliation, which could have been litigated like any similar case, with testimony about

84. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

85. *Id.* at 555.

86. *See, e.g., Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

87. Cases involving Catholic women deemed ministers for purposes of the ministerial exception include *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1240 (10th Cir. 2010); *Musante v. Notre Dame of Easton Church*, CIV.A. 301CV2352MRK, 2004 WL 721774 (D. Conn. Mar. 30, 2004); *Pardue v. the Ctr. City of Consortium Schs. of Archdiocese of Wash., Inc.*, 875 A.2d 669 (D.C. 2005); *Archdiocese of Miami, Inc. v. Minagorri*, 954 So.2d 640 (Fla. Dist. Ct. App. 2007); *Brazauskas*, 796 N.E.2d 286; *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W. 2d 483 (Mich. Ct. App. 2008); *Sabatino v. St. Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996); *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868 (Wisc. 2009).

88. *See, e.g., Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1308 (N.D. Ga. 2007).

89. *Hosanna-Tabor*, 132 S. Ct. at 700.

90. *Id.*

91. *Id.* at 700-01.

the medical evidence and the school's actions in response to her doctor's orders.⁹² Hosanna-Tabor had no religious belief in discriminating against disabled people and its employee handbook expressed its commitment to all antidiscrimination laws.⁹³

Nonetheless, the Supreme Court ruled that Perich was a minister and allowed her lawsuit to be dismissed under the First Amendment, *even though her lawsuit had nothing to do with religion*.⁹⁴ It was only late in the litigation that Perich's superiors at Hosanna-Tabor pretended they fired her because she was not a good Lutheran.⁹⁵ The most astonishing part of the Court's opinion was its blithe assertion that religious employers win even when there is no religious dispute at stake: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."⁹⁶ Instead of ruling that religious employers are justified in disobeying the law whenever they have a doctrinal reason to do so, the Court opened the possibility that purely secular lawsuits against religious employers will also be dismissed. The exemption appears to be almost absolute.

The Court's fact-specific ruling in *Hosanna-Tabor* left open the question of which future plaintiffs would be dismissed from court because they are "ministers."⁹⁷ It also left the courtroom door open to tort and breach of contract claims by religious employees.⁹⁸ Unfortunately, in the current campaign against LGBT rights, religious employers are working to slam that door closed as fast as they can.

C. The Church's Crusade against LGBT Rights

Post-*Hosanna-Tabor*, Catholic schools are on a rampage to fire and limit the rights of their LGBT employees *and anyone who dares to support them*.⁹⁹ The cases of LGBT-related firing keep accumulating, as described

92. See Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 986-87 (2013).

93. *Id.* at 985.

94. *Hosanna-Tabor*, 123 S. Ct. at 709.

95. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010) rev'd, 132 S. Ct. 694 (2012).

96. *Hosanna-Tabor*, 123 S. Ct. at 709.

97. *Id.* at 707.

98. *Id.* at 710.

99. Sources for the following scenarios are available at Leslie C. Griffin, *San Francisco Catholic Teachers Fight for Their Rights*, HAMILTON AND GRIFFIN ON

below.

Christa Dias, a non-Catholic, lesbian Technology Coordinator at Holy Family School and St. Lawrence School in the Archdiocese of Cincinnati, Ohio, was initially fired for becoming pregnant outside of marriage and then for using artificial insemination to become pregnant; the archdiocese changed its explanation a few times.¹⁰⁰

Shaela Evenson, a non-Catholic middle-school teacher, taught literature and physical education for 9 years at Butte (Montana) Central Catholic Schools until fired for becoming pregnant outside of marriage, and not, school officials insisted, for being a lesbian.¹⁰¹

Barbara Webb, a chemistry teacher and volleyball coach at Marian High School in Bloomfield Hills, Michigan, lives with her lesbian partner. When Webb was 14 weeks pregnant, she tried to arrange the pregnancy leave that other teachers at the school enjoy. Instead, she was fired. The school told her she could keep her health insurance if she remained silent about her firing. She refused.¹⁰²

Mike Moroski, Assistant Principal at Purcell Marian High School in Cincinnati, Ohio for 12 years, was fired after posting on Facebook “I unabashedly believe that gay people SHOULD be allowed to marry” and quoting President Obama’s support for same-sex marriage. Moroski is married to a woman.¹⁰³

Maria Krolkowski, who taught for 32 years at St. Francis Preparatory High School in Queens, New York, was fired for insubordination after she came out as transgender, which a school administrator said was “worse than gay.”

Carla Hale, a gym teacher and coach for 19 years at Bishop Watterson High School in Clintonville, Ohio, was fired for having a “quasi-spousal

RIGHTS (Feb. 22, 2015), <http://hamilton-griffin.com/san-franciscos-catholic-teachers-fight-for-their-rights/>; Leslie C. Griffin, *Tuesday’s Top Ten Teachers Update*, HAMILTON AND GRIFFIN ON RIGHTS (Sept. 8, 2014), <http://hamilton-griffin.com/tuesdays-top-ten-teachers-update/>; Leslie C. Griffin, *Tuesday’s Top Ten Teachers*, HAMILTON AND GRIFFIN ON RIGHTS (June 23, 2014), <http://hamilton-griffin.com/tuesdays-top-ten-teachers/>. New Ways Ministry regularly posts teachers’ firings on its Bondings blog. *Bondings 2.0*, NEW WAYS MINISTRY BLOG, <https://newwaysministryblog.wordpress.com> (last visited Oct. 4, 2015).

100. Griffin, *Tuesday’s Top Ten Teachers*, *supra* note 99.

101. *Id.*

102. Griffin, *Tuesday’s Top Ten Teachers: Update*, *supra* note 99.

103. Griffin, *Tuesday’s Top Ten Teachers*, *supra* note 99.

relationship” with a woman after her lesbian partner’s name appeared in Hale’s mother’s obituary.

Erin Macke, an alumna of Mother McAuley Liberal Arts High School in Chicago who returned to teach at her alma mater, was fired after telling a student she was a lesbian while counseling the LGBT student, who was suicidal.

Mark Zmuda was fired as Vice Principal of Eastside Catholic High School in Seattle, for marrying his partner, Dana Jergens, after same-sex marriage became legal in Washington. School authorities told him he could either divorce or be fired.

Michael Griffin, who taught French and Spanish at Holy Ghost Preparatory School in Bensalem, Pennsylvania, was fired on the day he went to get his New Jersey license to marry Vincent Giannetto.

Ken Bencomo, an English teacher for 17 years at St. Lucy’s Priory High School in Glendora, California, was fired after a Southern California newspaper announced his marriage to Christopher Persky soon after the Supreme Court’s decision in *Hollingsworth v. Perry* restored same-sex marriage to California.

Flint Dollar, Band Director at Mount de Sales Academy in Macon, Georgia, was fired after he announced plans to marry his male partner on Facebook. Dollar asked supporters to donate band uniforms in place of wedding presents.¹⁰⁴

Brian Panetta, after 5 years as Band and Choir Director at Sandusky (Ohio) Central High School, was forced to resign immediately after announcing his engagement to Nathan David, even though Panetta had offered to resign at the end of the school year, before the wedding took place.¹⁰⁵

Tippi McCullough, who taught English at Mount St. Mary Academy in Little Rock, Arkansas, for 15 years, resigned after marrying Pulaski County deputy prosecuting attorney Barbara Mariani in New Mexico. School officials called McCullough in New Mexico just before the wedding to warn her she would be fired if she got married, and called again 45 minutes after the ceremony to tell her she could either resign or be fired.¹⁰⁶

Matthew Barnett received a “dream job” offer to become Food Services Director at Fontbonne Academy in Milton, Massachusetts, but the offer was rescinded after he listed his husband Ed Suplee as an emergency

104. *Id.*

105. *Id.*

106. *Id.*

contact.¹⁰⁷

Al Fischer, a music teacher at St. Ann Catholic School in St. Louis, Missouri, was fired after school officials overheard him telling coworkers about plans to wed partner Charlie Robin in New York.¹⁰⁸

Olivia Reichert and *Christina Gambaro*, a teacher and a coach at Cor Jesu High School in St. Louis, Missouri married in New York. A copy of their mortgage application was sent to their employer. Reichert and Gambaro were fired once the school realized they were married from the mortgage form.¹⁰⁹

Richard Miller, who taught at St. Rita's School for the Deaf, in Cincinnati, Ohio, was fired for having a committed male partner and six children.¹¹⁰

Margie Winters was fired from Waldron Mercy Academy (WMA) in Merion, Pennsylvania in June 2015 for marrying her lesbian spouse in 2007. The school's principal acknowledged that Winters had made "amazing" contributions to the school and "enriched the lives of everyone" at WMA. Moreover, Winters had revealed her marriage to school officials in 2007, and they had urged her to keep it hidden. After two parents complained about the marriage to the Philadelphia Archdiocese, however, Winters was fired.¹¹¹ No school job is safe.

As noted above, *Hosanna-Tabor* left open several loopholes for non-ministerial employees to file for employment discrimination, namely a fact-based definition of minister and the possibility of filing tort or breach of contract lawsuits.¹¹² For example, Christa Dias was able to win a jury verdict because she was non-Catholic.¹¹³ For that reason, numerous Catholic dioceses are using all their power to close the courtroom door

107. *Id.*

108. *Id.*

109. Griffin, *Tuesday's Top Ten Teachers: Update*, *supra* note 99.

110. *Id.*

111. Francis DeBernardo, *Catholic School Fires Lesbian Who Is 'Perfect Example of Living a Religious Life'*, NEW WAYS MINISTRY BLOG (July 9, 2015), <https://newwaysministryblog.wordpress.com/2015/07/09/catholic-school-fires-lesbian-who-is-perfect-example-of-living-a-religious-life/>.

112. *Hosanna-Tabor*, 132 S. Ct. at 710.

113. Lisa Cornwell, *Christina Dias, Ohio Mom, Awarded More Than \$170,000 For Discrimination, Cincinnati Catholic Archdiocese Expected to Appeal*, HUFFINGTON POST (June 4, 2013), http://www.huffingtonpost.com/2013/06/04/christa-dias-mom-awarded-_n_3383022.html.

completely on employees' rights.¹¹⁴ Late in their contract negotiations, the dioceses have required teachers to sign contracts stating they are ministers.¹¹⁵ They have also added new, more detailed morals clauses to employee handbooks.¹¹⁶ San Francisco's archbishop, for example, not only asked all teachers to sign "minister" contracts but also added language to the faculty handbook binding all teachers to the church's teachings on sexual morality. Even non-Catholic teachers are to be treated as ministers and held specifically to the standards to:

Affirm and believe the Church's teaching about the sinfulness of contraception . . . [a]ffirm and believe that the fundamental demands of justice require that the civil law preserve the definition of marriage as the union of one man and one woman . . . [a]ffirm and believe the grave evil of artificial reproductive technology.¹¹⁷

In Cincinnati, first grade teacher Molly Shumate refused to sign such a contract prohibiting employees from publicly supporting the "homosexual

114. S.E. Smith, *If You're a Catholic Church Employee, You Don't Have as Many Rights*, CARE2.COM (Jan. 15, 2013), <http://www.care2.com/causes/if-youre-a-catholic-church-employee-you-dont-have-as-many-rights.html> ("[The Catholic Church is] not afraid to throw its weight around in court to set precedents that will make future suits harder for employees to pursue"). Michael O'Loughlin, *Meeting Aims to Stop Firings of Catholic LGBT Employees*, CRUX.COM (Apr. 27, 2015), <http://www.cruxnow.com/life/2015/04/27/meeting-aims-to-stop-the-firings-of-catholic-lgbt-employees/> (discussing Archbishop Cordileone of San Francisco's efforts to insert stronger morality clauses in church employment contracts). See Bob Shine, *Hawaii Catholic Schools Add Tougher Morality Clauses to Teacher Contracts*, NEW WAYS MINISTRY BLOG (Mar. 29, 2014), <https://newwaysministryblog.wordpress.com/2014/03/29/hawaii-catholic-schools-add-tougher-morality-clause-to-teacher-contracts/>.

115. Bob Shine, *Cincinnati Archdiocese New Morality Clause Sets Troubling Precedents*, NEW WAYS MINISTRY BLOG (Mar. 18, 2014), <https://newwaysministryblog.wordpress.com/2014/03/18/cincinnati-archdioceses-new-morality-clauses-set-troubling-precedents/>.

116. Smith, *supra* note 114; O'Loughlin, *supra* note 114.

117. *Archdiocese Releases Statement on Church Teachings, Practice in High Schools*, CATHOLIC SAN FRANCISCO (Feb. 4, 2015), <http://catholic-sf.org/ns.php?newsid=25&id=63175>.

lifestyle” because she publicly loves and supports her gay son Zachery.¹¹⁸ Thus, the church is targeting not only LGBT reproductive privacy and the right to marry, but also everyone’s core free speech rights about marriage equality. Indeed, the Archdiocese of San Francisco is requiring affirmation of the beliefs of its employees even though their own religious beliefs should be absolutely protected by the First Amendment.¹¹⁹

There is no reason to expect that religious colleges, universities, hospitals and social services organizations will not follow the elementary and high schools’ lead in finding more ways to restrict the rights of their employees.

The timing of *Hosanna-Tabor* and the new teachers’ contracts makes clear that the only purpose of these ministerial contracts is to rob employees of any employment rights. The result is a growing lawless swath of American life that enjoys a categorical exemption from laws, and keeps growing bigger. The categorical exemption pretends to support religious freedom. Tell that to the employees who enjoy no religious freedom because their institutions are categorically exempt from the laws that are supposed to protect individual Americans.

Note one huge anomaly between the arbitrary exemption theory of *Hobby Lobby* and the categorical exemption theory of *Hosanna-Tabor*. *Hobby Lobby* made it exceptionally easy for plaintiffs to win a lawsuit while *Hosanna-Tabor* almost completely kept plaintiffs out of court. Any exemption theory is easily adjusted to meet its ultimate goal: to protect religious freedom selectively in order to keep the powerful and traditional in charge against the upstarts who want their constitutional rights. Hidden exemptions do the same, as I argue in the next section.

IV. THE HIDDEN EXEMPTION THEORY: READING THE ESTABLISHMENT CLAUSE TO ALLOW RELIGION-BASED LAWS

A. The Exemption Hiding Behind Abortion Laws

The first major political and judicial victory of religious doctrine over women’s equality occurred with the passage of the Hyde Amendment in

118. Michael D. Clark, *Catholic Teacher Backs Gay Son, Quits to Protest Contract*, CINCINNATI.COM (May 10, 2014), <http://www.cincinnati.com/story/news/education/2014/05/09/catholic-teacher-backs-gay-son-quitting-protest-controversial-contract/8898181/>.

119. See *Archdiocese Releases*, *supra* note 117.

1976.¹²⁰ Roman Catholic Representative Henry Hyde of Illinois had one legislative goal, namely to ban abortion *completely and absolutely*.¹²¹ After a proposed constitutional amendment banning abortion failed to reach the floor of the House of Representatives, Hyde took another route to restrict it. “I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid [sic] bill,” he announced in Congress.¹²²

Medicaid is the federal health insurance program for the poor, which provides funding for all “medically necessary” services.¹²³ In his quest to ban abortion, Hyde introduced an amendment completely outlawing payment for all abortions.¹²⁴ From the introduction of the amendment to the adoption of a final version in a House-Senate conference, the pro-amendment legislative debate was conducted completely in moral and religious language.¹²⁵ Although Hyde’s proposal was an amendment to an appropriations bill, the comparative expenses of childbirth and abortion were never mentioned.¹²⁶ Although Medicaid protects “medically necessary” procedures, Congress considered no medical or scientific testimony.¹²⁷ Although the Court had recognized that women’s life and health must be protected in any abortion regulation, Hyde, just like the Roman Catholic Church to which he belonged, insisted that the ban on abortion must be absolute, with fetal life always given priority over maternal life.¹²⁸ Thus the Hyde Amendment, which banned funding even for medically necessary abortions where maternal or fetal health was at stake, was almost fully consistent with the moral teachings of Hyde’s church, but inconsistent with women’s physical and emotional health and, consequently, their equality.

Challengers immediately filed suit alleging that the Hyde Amendment unconstitutionally violated the Establishment Clause by making Roman Catholic dogma law.¹²⁹ Although the district court’s 215-page ruling about

120. *See, e.g.*, Pub. L. No. 94-439, 90 Stat. 1418 (1976).

121. *McRae v. Califano*, 491 F. Supp. 630, 773 (E.D.N.Y. 1980).

122. *Id.*

123. *Id.* at 732.

124. *Id.* at 743.

125. *Id.* at 746.

126. *Id.* at 773.

127. *McRae*, 491 F. Supp. 630.

128. *Id.* at 773.

129. *See Harris v. McRae*, 448 U.S. 297 (1980).

the Hyde Amendment chronicled the extensive role that religious opposition to abortion played in the amendment's passage, and the clear translation of that religious perspective into law, neither the district court nor the Supreme Court found any Establishment Clause violation because the Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely "*happens to coincide or harmonize* with the tenets of some or all religions."¹³⁰ Although the Hyde Amendment did not just "happen[]" to coincide with Catholic teaching but was "a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual,"¹³¹ the Court applied the coincidence rule to deny the establishment challenge to the Hyde Amendment in *Harris v. McRae*.¹³²

An alternative establishment argument was already available to invalidate the Hyde Amendment. The secular purpose standard had dominated establishment case law, and the Hyde Amendment lacked any secular purpose.¹³³ Ironically, for years the secular purpose standard was used to deny funding to religion.¹³⁴ In the context of women's rights, however, that argument about denying special benefits to religion was completely ignored. Thus the Hyde Amendment gave rise to case law immunizing legislators from enacting their religious dogmas into law, even if their goal was "to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly."¹³⁵

B. Same-Sex Marriage: The Hidden Exemption Comes Out Into the Open

Marriage equality was similarly long denied to gays and lesbians because of a religion-based norm that marriage must always be heterosexual and procreative. The state and federal legislatures that passed anti-marriage

130. *Id.* at 319 (quoting *McGowan v. Maryland*, 336 U.S. 420 (1961)) (emphasis added).

131. *Id.* at 332 (Brennan, J., dissenting).

132. *Id.* at 319-20.

133. *See, e.g.*, *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 773 (1973) ("to pass muster under the Establishment Clause, the law in question, first, must reflect a clearly secular legislative purpose"); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("[T]he statute must have a secular legislative purpose").

134. *Id.*

135. *McRae*, 448 U.S. at 331 (Brennan, J., dissenting).

equality laws pretended they were defending a neutral ideal of traditional marriage. Instead, their procreative ideal of marriage linked directly to St. Augustine, the prominent Christian Bishop of Hippo who wrote *On the Good of Marriage* around the year 401 C.E. According to the Bishop of Hippo, marriage has three goods: procreation, fidelity, and indissolubility.¹³⁶ States defending their same-sex marriage bans promoted that first theological rationale for heterosexual-only marriage, as did the dissenting Justices in *Obergefell*.¹³⁷

St. Augustine was troubled by the sinfulness of sexual desire, which he viewed “as in itself an evil passion (that is, distorted by original sin).”¹³⁸ Instead of insisting that Christians renounce all sex, however, he identified a moral rationale that justified some sexual activity, namely procreative heterosexual marriage.¹³⁹ His theory of marriage channeled sexual desire into its proper procreative purpose within heterosexual marriage. Such limited sexual activity was moral because it served the goal of procreation, thus avoiding unruly passion and sin.

Incredibly, some modern judges and legislators not only agree with Augustine, but think his ideas should determine the marriage laws of the states. The procreative Augustinian ideal was the last main roadblock to marriage equality. It appeared in numerous dissents to pro-marriage equality decisions and as the main legislative and judicial reason for the marriage ban.¹⁴⁰

Augustine was everywhere. Dissents to Massachusetts, California, Connecticut and federal marriage equality relied on the Augustinian rationale.¹⁴¹ Massachusetts Justice Robert Cordy identified the *procreative*

136. See generally Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 *BYU J. PUB. L.* 449 (2004).

137. *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting); Reid, *supra* note 136 at 470.

138. MARGARET A. FARLEY, *JUST LOVE: A FRAMEWORK FOR CHRISTIAN SEXUAL ETHICS* 40 (2006).

139. *Id.*

140. See, e.g., *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting); See also Reid, *supra* note 136 at 470-71.

141. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting); *Perry v. Brown*, 671 F.3d 1052, 1106 (9th Cir. 2012) (Smith, J., concurring in part and dissenting in part), *vacated sub nom*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 985 (Mass. 2003) (Cordy, J., dissenting);

purpose of marriage as the reason to deny equal marital status to gays and lesbians.¹⁴² Similarly, Ninth Circuit Judge N.R. Smith defended California's two justifications for marriage, namely the "responsible procreation theory" and the "optimal parenting theory."¹⁴³ The first theory argues that heterosexual marriage "'steers procreation into marriage' because opposite-sex couples are the only couples who can procreate children accidentally or irresponsibly."¹⁴⁴ Connecticut Justice Peter Zarella also adopted the "responsible procreation" theory because the actual purpose of marriage is "to privilege and regulate procreative conduct."¹⁴⁵ Justice Samuel Alito's dissent in *United States v. Windsor* asserted that "marriage was created for the purpose of *channeling* heterosexual intercourse into a structure that supports child rearing."¹⁴⁶ Suggesting that even sterile heterosexual marriages are procreative (and therefore permissible while same-sex marriage is banned), Alito wrote that marriage "is intrinsically ordered to producing new life, even if it does not always do so."¹⁴⁷ That outmoded channeling sexuality and sterile marriage theory is purely Augustinian.

Post-*Windsor*, four circuit courts identified a due process and equal protection right to same-sex marriage while one circuit court denied it.¹⁴⁸ The procreative rationale dominated the dissents to marriage equality and the one opinion that upheld same-sex marriage bans.¹⁴⁹ According to the Sixth Circuit in *DeBoer v. Snyder*,

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 516-17 (Conn. 2008) (Zarella, J., dissenting).

142. *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).

143. *Perry*, 671 F.3d at 1106 (Smith, J., concurring in part and dissenting in part).

144. *Id.*

145. *Kerrigan*, 957 A.2d at 516-517 (Zarella, J., dissenting).

146. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (emphasis added).

147. *Id.*

148. *See* *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). *But see* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) *cert. granted* 135 S. Ct. 1040 (2015), *cert. granted sub nom. Obergefell*, 135 S. Ct. 1039 and *cert. granted sub nom. Tanco v. Haslam*, 135 S. Ct. 1040 (2015) and *cert. granted sub nom. Bourke v. Beshear*, 135 S. Ct. 1041 (2015).

149. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting); *DeBoer*, 772 F.3d at 405; *Kerrigan*, 957 A.2d at 516-17 (Zarella, J., dissenting); *Goodridge*, 798 N.E. 2d at 985 (Cordy, J., dissenting).

People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative.¹⁵⁰

St. Augustine couldn't have said it any better.

The validity of the procreative argument is completely undermined by the facts that many heterosexual marriages are not procreative, the state may not legally force any married couple to bear children, technology now allows gays and lesbians to become parents, and children flourish in a wide variety of family environments.

Justice Kennedy drove a stake through the heart of Augustinian marriage in *Obergefell* by rejecting the religious rationale for marriage in favor of neutral constitutional principles.¹⁵¹ One hidden exemption, which long allowed religions to follow their own beliefs about marriage instead of fair and neutral laws, finally disappeared.

Augustine, however, lives on in the hearts of many dissenters, especially Justice Alito, who seems sorrowful that “the tie between marriage and procreation has frayed.”¹⁵² The rhetoric of the four dissenters in *Obergefell* should remind you: when hidden exemptions disappear, arbitrary and categorical exemptions appear to take their place.

C. Warning: Arbitrary and Categorical Exemptions Replace Hidden Exemptions

This is not the time to become complacent about LGBT rights. Recent developments illustrate the linkage of the three exemption theories. The hidden exemption banning same-sex marriage has just disappeared. In response, the arbitrary and categorical exemption forces have come out with a vengeance to restrict LGBT rights by any means they can. The anti-LGBT developments in Parts II and III of this paper are largely a result of the

150. *DeBoer*, 772 F.3d at 405.

151. *See Obergefell*, 135 S. Ct. at 2608.

152. *Id.* at 2642 (Alito, J., dissenting).

disappearance of the hidden exemption surrounding same-sex marriage. Without the hidden exemption to protect them, LGBT opponents seek arbitrary and categorical ways to deny LGBT rights.

Women's history confirms that all three exemptions serve one purpose: to impose powerful religions at the expense of civil and constitutional rights. After all, during the 1960s and 70s, women's reproductive freedom occurred when the Court overturned religion-based laws banning contraception and abortion as a violation of due process.¹⁵³ Our victory was short-lived. The arbitrary exemption process began almost immediately with federal and state so-called conscience clauses, which exempted religious medical personnel from obeying laws that protect women's health and choice.¹⁵⁴ *Hobby Lobby* is only the most recent stage of the long religious battle to exempt away women's freedom. Indeed, women today suffer not only from arbitrary and categorical exemptions; most new abortion laws contain hidden exemptions.

Proponents of marriage equality have reason to celebrate the end of the hidden exemption regime of religion-based marriage laws. The battle is far from over, however, as the arbitrary and categorical religious exemptions people are hard at work. LGBT advocates need to learn a lesson from their predecessor women's equality movement, which is currently losing all three exemptions battles. Religious freedom should not be defined as a right to do whatever you like and to discriminate as you please. Instead, religious freedom is protected by non-religion-based laws that govern everyone equally, without exceptions.

V. CONCLUSION

This symposium focused on *Hobby Lobby*'s implications for LGBT rights. By exempting businesses from the contraceptive mandate of the Affordable Care Act (ACA), *Hobby Lobby* gave opponents of LGBT rights a powerful weapon to restrict LGBT freedom and equality. Because of *Hobby Lobby* and the Religious Freedom Restoration Act (RFRA), business owners now argue that religious freedom entitles them to refuse professional and commercial services and insurance coverage to gays and lesbians and their families.

Hobby Lobby is a threat to religious freedom. But it is only one third of

153. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

154. *See* Nejaime & Siegel, *supra* note 77.

the story. The big picture is that all types of religious exemptions—arbitrary, categorical and hidden—threaten civil and constitutional rights. Religious forces continue to undermine women’s equality and reproductive liberty, rights that were once taken for granted until religious freedom exemptions emerged as civil rights’ most powerful opponent. It would be a tremendous loss if the same thing happened to gays and lesbians.