

# ALABAMA CIVIL RIGHTS & CIVIL LIBERTIES LAW REVIEW

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## MOVING TARGETS: *OBERGEFELL, HOBBY LOBBY, AND THE FUTURE OF LGBT RIGHTS*

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### INTRODUCTION

LGBT equality and religious freedom increasingly appear to be on a collision course. The Supreme Court’s decision in *Obergefell v. Hodges*,<sup>2</sup> in

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1. F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University. I am grateful to Andy Koppelman, Dan Mach, Doug NeJaime, Jim Oleske, Liz Sepper, and Bob Tuttle for comments on an earlier draft of this paper, prepared for a Symposium hosted by the *Alabama Civil Rights and Civil Liberties Law Review* on March 27, 2015, and to Bill Cohen and Harrington Park Press for generous promotional efforts. The errors are mine.

2. 135 S. Ct. 2584 (2015) (invalidating Ohio’s exclusion of same sex couples from marriage). *Obergefell* was consolidated with *Bourke v. Beshear*, 135 S.Ct.

which the Court ruled that states may not exclude same sex couples from marriage, has raised the intensity and political salience of this conflict. *Obergefell* will energize an already growing movement to expand the coverage of laws prohibiting discrimination based on sexual orientation or gender identity, and simultaneously invigorate religious resistance to that movement.

In the battles to come, the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>3</sup> (hereinafter "*Hobby Lobby*") will play a central role. *Hobby Lobby* upheld a claim under the federal Religious Freedom Restoration Act<sup>4</sup> (hereinafter "federal RFRA" or "RFRA") by a business corporation objecting, on religious grounds, to the inclusion of certain contraceptives in the firm's health insurance policy for employees. Inevitably, *Hobby Lobby* and its vision of religious freedom will shape the conversation about the enactment, content, and enforcement of LGBT anti-discrimination laws.

*Hobby Lobby* involved application of federal RFRA, a law that restrains only the federal government,<sup>5</sup> to the Patient Protection and

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1041 (2015) (Kentucky); *Tanco v. Haslam*, 135 S.Ct. 1040 (2015) (Tennessee); and *DeBoer v. Snyder*, 135 S.Ct. 1040 (2015) (Michigan). In *Obergefell*, several Justices made specific references to concerns of religious freedom. *See* 135 S. Ct. at 2607 (Kennedy, J., opinion for the Court); *id.* at 2625-26 (Roberts, C.J., dissenting); *id.* at 2638-39 (Thomas, J., dissenting); *id.* at 2643 (Alito, J., dissenting).

3. 134 S. Ct. 2751 (2014).

4. 42 U.S.C. §§ 2000bb—2000bb-4 (2012). RFRA's command to the federal government is succinctly set forth in *id.* §§ 2000bb-1:

a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

5. The decision in *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997) held RFRA unconstitutional as applied to state and local governments. For an early and important take on how the Court's interpretation of federal RFRA in *Hobby*

Affordable Care Act. The far broader topic of LGBT rights involves the new regime of marriage equality, and the evolving bodies of federal, state, and local law on both religious liberty and anti-discrimination. For all sides in this conflict, the targets are multiplying, moving quickly, and interacting rapidly.<sup>6</sup>

Consider how these questions map onto the venue for this symposium. In mid-July, 2015, Alabama remained in conflict between federal court orders to allow same sex marriage,<sup>7</sup> and a state supreme court order to not allow same sex marriage.<sup>8</sup> Alabama also has a state RFRA enshrined in its

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*Lobby* may influence the development of state law, see Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of Hobby Lobby's Implications for State Law*, 9 HARV. L. & POL'Y REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2498637](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498637).

6. The most intense episodes in the Indiana RFRA controversy, discussed in Part III *infra*, occurred soon after the delivery of an early draft of this paper to an audience at the University of Alabama. The targets keep moving.

7. *Searcy v. Strange*, 81 F.Supp.3d 1285 (S.D. Ala. 2015) (holding unconstitutional Alabama's exclusion of same sex couples from marriage). When the order in *Searcy* became effective, Alabama immediately experienced considerable legal uncertainty about the status of same sex couples seeking to marry. See Sandhya Somashekhar, *Judicial Defiance in Alabama: Same Sex Marriages Begin, but Most Counties Refuse*, WASHINGTON POST (Feb. 9, 2015), [http://www.washingtonpost.com/politics/alabama-judge-stakes-out-defiant-stance-against-same-sex-marriages/2015/02/09/a1be2de4-b06f-11e4-854b-a38d13486ba1\\_story.html](http://www.washingtonpost.com/politics/alabama-judge-stakes-out-defiant-stance-against-same-sex-marriages/2015/02/09/a1be2de4-b06f-11e4-854b-a38d13486ba1_story.html).

8. After the federal court ruling, the Alabama Supreme Court issued orders to the state's probate judges to not issue marriage licenses to same sex couples. *Ex parte State of Alabama ex rel. Alabama Policy Inst.*, No. 1140460, 2015 WL 892752 (Ala. 2015). The federal litigation then turned into a class action against the states' probate judges. *Strawser v. Strange*, 2015 U.S. Dist. LEXIS 8439 (S.D. Ala. 2015). On June 29, the Alabama Supreme Court issued a brief Corrected Order, giving parties until July 6 to file briefs on the question of the relationship between *Obergefell* and the Court's prior orders to probate judges. Corrected Order, *Ex parte State of Ala. ex rel. Ala. Policy Inst.*, No. 1140460 (Ala. 2015), available at <http://i2.cdn.turner.com/cnn/2015/images/06/29/al.pdf>. A number of Alabama counties have stopped issuing marriage licenses to anyone. Ross Hackman, *Meet the Alabama Judges Who Refuse to Issue Marriage Licenses – Gay or Straight*, THE GUARDIAN (July 12, 2015), <http://www.theguardian.com/us-news/2015/jul/12/alabama-judges-gay-marriage-licenses>. For discussion of the current procedural and remedial tangles over marriage equality in Alabama, see Howard M. Wasserman, *Crazy in Alabama: The Judicial Process and the Last*

own constitution,<sup>9</sup> but it has no state statutory law that forbids discrimination, based on sexual orientation or gender identity, in employment or public accommodations.<sup>10</sup> When marriage equality fully arrives in Alabama, how and why will *Hobby Lobby*, a decision applying federal RFRA, have any impact at all in this state, with its separate and independent RFRA and its nearly blank page of relevant civil rights statutes?

In what follows, I will appraise the legal and political salience of *Hobby Lobby*, and religious freedom concerns more generally, with respect to the development of LGBT anti-discrimination law. My overarching thesis is that the political impact of *Hobby Lobby* may be much greater than its legal impact. In the adjudicative process under federal law, I predict that *Hobby Lobby* will prove to be little or no impediment to full recognition of LGBT rights,<sup>11</sup> where they exist. With respect to state law, that prediction is more difficult to make with confidence, but for the reasons offered in Part III.C., I adhere to that forecast.

In contrast, the force of *Hobby Lobby* in politics, especially in the short run, may be dramatic. Many religious conservatives will continue to oppose the expansion of LGBT rights, and will rely on principles enunciated in *Hobby Lobby* to demand broad exemptions from any new obligations of non-discrimination law. The First Amendment Defense Act,<sup>12</sup> recently proposed in Congress, is a prime example. Those who favor LGBT rights will offer their own account of the *Hobby Lobby* principle as a reason to oppose any such exemptions, even very narrow ones. *Hobby Lobby* may

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*Stand Against Marriage Equality in the Land of George Wallace*, NW. U. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2596633](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596633).

9. ALA. CONST. art. 1, §3.01 (amended 1998); See generally Thomas C. Berg, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47 (2000).

10. Alabama has no state wide statutory law that protects anyone from discrimination in employment or public accommodations. The state does have a fair housing law, ALA. CODE § 24-8-4 (1991), but it does not include sexual orientation or gender identity as prohibited grounds of discrimination.

11. For an earlier, briefer iteration of this prediction, see Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 36, 93-100 (2015).

12. H.R. 2802, 114th Congress (2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/2802>. I discuss the Act in Part II, B, *infra* (text at notes 115-123).

thus be an operative political factor in a persistent stalemate with respect to legislative change in the rights of LGBT people to be free of discrimination.

Parts I and II both focus on federal law, where *Hobby Lobby's* impact will be most immediate and direct. Part I first sketches LGBT rights under federal constitutional law, including the case of Rowan County Clerk Kim Davis. Part I then analyzes potential conflicts between RFRA and other parts of federal statutory law and regulation. Part II focuses on the ways in which *Obergefell* and *Hobby Lobby* are likely to color the conversation, legal and political, about expanding federal law protections against discrimination based on sexual orientation or gender identity – for leading example, in the newly proposed Equality Act.<sup>13</sup> Part II introduces a distinction between broad, generic protections of religious freedom, such as RFRA, and explicit, context-specific accommodations, such as the right of religious entities to prefer co-religionists in employment, or wedding vendors to refuse to serve same sex couples. This distinction is crucial to the conversation about religious accommodation in Parts II and III.

Part III is devoted to developments under state law, where the geographical disconnect between religious freedom principles and statutory LGBT rights is significant. Where state-based rights of religious freedom appear to be strong, statutory LGBT rights are frequently weak or non-existent; where statutory LGBT rights are strongest, religious exemption rights do not exist or in any event are highly unlikely to trump anti-discrimination law. Now that marriage equality has become nationwide and constitutionally mandated, these geographical disparities will become increasingly significant.

Part III-A describes current legal circumstances, including the ongoing cases of vendors who refuse to serve same sex weddings, in light of this disconnect. Part III-B analyzes recent and anticipated legislative fights,

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13. On July 23, 2015, U.S. Senators Baldwin, Booker, and Merkley introduced The Equality Act, S. 1858, 114th Cong. *See Historic, Comprehensive LGBT Non-Discrimination Legislation Introduced in Congress*, MERKLEY.SENATE.GOV (July 23, 2015), <http://www.merkley.senate.gov/news/press-releases/historic-comprehensive-lgbt-non-discrimination-legislation-introduced-in-congress>. In the section by section summary, the Act's sponsors describe its purposes as "Ending Discrimination against LGBT Americans in Public Accommodations, Education, Federal Financial Assistance, Employment, Housing, Credit, and Federal Jury Service." SENATOR JEFF MERKLEY ET AL., SECTION BY SECTION SUMMARY OF THE EQUALITY ACT (2015), *available at* [http://www.merkley.senate.gov/imo/media/doc/EqualityAct\\_SectionBySection.pdf](http://www.merkley.senate.gov/imo/media/doc/EqualityAct_SectionBySection.pdf). The full text of the proposed Act is available at <http://www.merkley.senate.gov/imo/media/doc/EqualityAct.pdf>.

including those involving religious charities, and the role that *Hobby Lobby* has played and continues to play in legislative discourse. Part III-C focuses on the adjudicative battles that lie ahead between LGBT rights and religious freedom, and the significance of *Hobby Lobby* for those contests.

### I. LGBT ANTI-DISCRIMINATION RIGHTS IN FEDERAL LAW

The non-discrimination rights in federal law for LGBT people arise from the U.S. Constitution, Acts of Congress, and actions by the Executive Branch. Judicial and administrative interpretations of all those sources play a major role. Let's start at the top.

*The U.S. Constitution.* Thus far, the primary source of LGBT rights in federal law is the U.S. Constitution. As construed and applied in *Romer v. Evans*,<sup>14</sup> *Lawrence v. Texas*,<sup>15</sup> *U.S. v. Windsor*,<sup>16</sup> and *Obergefell v. Hodges*,<sup>17</sup> the 5<sup>th</sup> and 14<sup>th</sup> Amendments have become significant sources of protection for freedom of intimate association and civil equality – most recently, marriage equality – for members of the LGBT community. Indeed, the startlingly rapid movement to marriage equality drives a great deal of the conversation about wider expansion of LGBT rights. The relevant federal constitutional protections are rights only against the government and its agents, and do not apply to private actors, such as for-profit businesses and religious entities. Nevertheless, marriage equality creates an immediate occasion for wider recognition of equality whenever marital status is linked to rights against private parties.

In the context of this Symposium, two additional points are worth highlighting about the protections of the federal constitution. First, although the Supreme Court has never formally elevated the standard of review in Fifth<sup>18</sup> or Fourteenth<sup>19</sup> Amendment cases involving sexual orientation, it is hard to imagine a federal court upholding any state policy that explicitly discriminates based on sexual orientation.<sup>20</sup> I suspect that there are few such

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14. 517 U.S. 620, 635-36 (1996).

15. 539 U.S. 558, 578 (2003).

16. 133 S. Ct. 2675, 2681 (2013).

17. 135 S. Ct. 2584, 2604-05 (2015).

18. See *Windsor*, 133 S. Ct. at 2694.

19. See *Obergefell*, 135 S. Ct. at 2602-04; *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 636.

20. As others have noted, marriage laws discriminated *de jure* based on the sex of a partner, and only *de facto* based on sexual orientation. See WILLIAM N. ESKRIDGE, THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO

laws or explicit policies remaining in any jurisdiction in the U.S.<sup>21</sup> This is not to say that discrimination by state actors on the basis of sexual orientation is a thing of the past. Rather, I am asserting that no court would find any constitutionally legitimate basis for any formal policy of exclusion, based on sexual orientation, from state created opportunities. Whether the policy is based on prejudice, animus,<sup>22</sup> or sincere religious belief, it rests on reasons that the state is forbidden to pursue. Governmental policies driven by prejudice or animosity violate the Equal Protection Clause,<sup>23</sup> and governmental policies that rest exclusively on religious propositions violate the Establishment Clause.<sup>24</sup>

Second, whatever the possible role of religious liberty as a counterforce to LGBT equality in the private sector, to be discussed below, the individual religious liberty of public officials cannot provide a mandatory counterforce

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CIVILIZED COMMITMENT (1996); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). Professor Koppelman was among the first to press this line of argument in gay rights law in his note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

21. State laws on assisted reproductive technology may still be based on an exclusive model of different sex couples, but that model will not survive. *See DMT v. TMH*, 129 So.3d 320 (Fla. 2013) (striking down exclusion of same sex couple from coverage of such a law). Similar problems have arisen under statutory presumptions concerning parenthood, and have been similarly resolved in favor of same sex couples. *See Gartner v. Iowa Dept. of Pub. Health*, 830 N.W. 3d 335 (Iowa 2013) (holding that Iowa statute regarding presumption of parentage for non-birthing parent must be extended to non-birthing lesbian mother). Professor NeJaime has been writing at the cutting edge of these developments. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (forthcoming 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2630748](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630748) (arguing that parental rights should flow from intent and function, rather than from biology); Douglas NeJaime, *Griswold's Progeny, Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. F. 340 (2015), <http://www.yalelawjournal.org/forum/griswolds-progeny>.

22. For an astute account of the role of animus in the enactment of the federal Defense of Marriage Act, see Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2013).

23. *Romer*, 517 U.S. at 631; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *see also Windsor*, 133 S. Ct. at 2693 (involving equal protection component of the Fifth Amendment's Due Process Clause).

24. *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

to their legal duties. The litigation involving Rowan County (KY) Clerk Kim Davis<sup>25</sup> represents the most prominent illustration of this proposition. Soon after the Supreme Court's decision in *Obergefell*, Ms. Davis announced that her office would no longer issue marriage licenses to any couple, same sex or otherwise.<sup>26</sup> In an attempt to justify this policy, Ms. Davis relied on her Apostolic Christian belief that marriage was limited to a union of a man and a woman.<sup>27</sup> Two same-sex and two opposite-sex couples sued Ms. Davis in her individual and official capacity. All members of the four couples were residents of Rowan County, and they asserted that the refusal of Ms. Davis to permit her office to issue marriage licenses violated the plaintiffs' rights under the 14<sup>th</sup> Amendment, as construed in *Obergefell*.<sup>28</sup>

U.S. District Court Judge Bunning agreed entirely with the plaintiffs, and granted them preliminary injunctive relief.<sup>29</sup> His opinion identifies the sources of Clerk Davis' duties to the plaintiffs as the 14<sup>th</sup> Amendment, state law specifications of the duties of the County Clerk with respect to marriage licenses, and Kentucky Governor Steve Beshear's order to County Clerks to comply fully with the result in *Obergefell*. Judge Bunning completely rejected Davis' assertion that the Free Exercise Clause of the First Amendment empowers her to follow her religious beliefs and close her office to couples seeking to marry. As Judge Bunning noted, the Free Exercise Clause does not protect persons, as individuals or as public employees, against generally applicable rules that incidentally burden religious exercise.<sup>30</sup> All of the legal norms to which Ms. Davis is subject – the federal Constitution, relevant state statutes, and the Governor's Order – are generally applicable; they do not target religious objectors in any way.<sup>31</sup>

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25. *Miller v. Davis*, 2015 U.S. Dist. LEXIS 105822 (E.D. KY, Aug. 12, 2015) (granting preliminary injunction, requiring County Clerk's Office to remain open for granting marriage licenses to legally eligible couples).

26. *Id.* at 2.

27. *Id.*

28. *Id.* at 16-17.

29. *Id.* at 42.

30. *Id.* at 24-25 (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)).

31. *Id.* at 27-31. Judge Bunning also rejected Ms. Davis' argument that the plaintiffs' rights were not violated because they could obtain a license to marry in another County. He reasoned that there was no guarantee that all other County Clerks would comply with *Obergefell*, and in any event plaintiffs should not be burdened with the expense and inconvenience of having to travel to obtain something to which county residents have a legal right. *Id.* at 17-18. Judge



Accordingly, the Free Exercise Clause does not entitle her to any accommodation from her legal duties, and certainly does not authorize the closing of her office to marriage license applicants.

When Ms. Davis refused to comply with the injunction, Judge Bunning held her in contempt and ordered her jailed until she agreed to not impede her deputies in the discharge of their duties to couples seeking marriage licenses.<sup>32</sup> Even after Ms. Davis was released from jail, she defaced license forms in order to remove her name and the name of her office from them.<sup>33</sup> Although her office has now resumed the issuance of marriage licenses, legal and cultural controversy continues to swirl around Ms. Davis.<sup>34</sup>

Under some circumstances, state law may permit (or even require) religious accommodation of public employees, so long as the accommodation is fully respectful of the rights and interests of others. Ms.

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Bunning also rejected Davis' other defenses, based on U.S. CONST., Art. VI, cl. 3 (barring "religious Tests" for federal office), *id.* at 36-38, and Kentucky RFRA, *id.* at 38-41. The prohibition on religious tests is inapt to the case of Ms. Davis, because the state and county are not basing qualifications for office on religious beliefs; the government's only concern is that the County Clerk carry out her official duties, or at least not impede others in her office from carrying out those duties. Kentucky RFRA, whatever it may require as an accommodation for Ms. Davis, cannot trump the state's and county's federal constitutional duties. U.S. CONST., art. VI, cl. 2 (making the U.S. Constitution and other federal laws the "supreme Law of the Land.")

32. Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html>.

33. For a careful report of Ms. Davis' attempts to interfere with the marriage licensing function of her Office, see Marty Lederman, *Don't be surprised if Kim Davis is remanded to the custody of the federal marshal – again*, BALKIN.BLOGSPOT.COM (Sept. 19, 2015), <http://balkin.blogspot.com/2015/09/dont-be-surprised-if-kim-davis-is.html>. An additional motion, designed to limit Ms. Davis' ability to deface or alter the licensing forms, is now pending in front of Judge Bunning. The motion is available at *Motion to Enforce September 3 and September 8 Orders*, JUSTSECURITY.ORG, <https://www.justsecurity.org/wp-content/uploads/2015/09/miller.plaintiffs.motion.enforce.orders.pdf> (last visited Oct. 28, 2015).

34. See, e.g., Brandon Ambrosino, *The Shady Group That Played Pope Francis*, THE DAILY BEAST (Oct. 5, 2015), <http://www.thedailybeast.com/articles/2015/10/05/the-shady-group-that-played-pope-francis.html> (analyzing the role of Liberty Counsel in arranging for and publicizing the interaction between Pope Francis and Kim Davis).

Davis, however, was not seeking a narrow accommodation for herself, with full scope for official recognition of same-sex marriage. Rather, she was trying to close her office to such marriages, and she was asserting a religious justification for that complete closure. However attractive Ms. Davis may be as a political martyr to those who continue to oppose same sex marriage on religious grounds, her legal position is entirely indefensible. Government itself may not assert a religious identity,<sup>35</sup> and so is constitutionally barred from relying on religious beliefs in defending any policy of discrimination. Moreover, officers and employees of government are subject to duties to provide equal respect to all citizens, regardless of sexual orientation or gender identity.<sup>36</sup> Ms. Davis acted in defiance of all relevant legal norms.<sup>37</sup>

The extreme and indefensible legal position of Kim Davis should not blind us to the possibility of softer accommodations for religiously objecting employees. In the wake of *Obergefell*, Attorney General Ken Paxton of Texas issued a formal opinion concerning the “[r]ights of government officials involved with issuing same-sex marriage licenses and conducting same-sex wedding ceremonies.”<sup>38</sup> Relying on state and federal

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35. This is a core command of the First Amendment’s Establishment Clause. For full explication of this concept, see IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 26-29, 160-63 (2014).

36. For a full explication of this proposition in light of *Obergefell*, see Memorandum from Public/Rights Private Conscience Project (Columbia University School of Law) to Interested Parties (June 30, 2015), available at [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage\\_exemptions\\_memo\\_june\\_30.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage_exemptions_memo_june_30.pdf). An important post-*Obergefell* application of this principle in the context of judicial ethics appears in Supreme Court of Ohio, *Judicial Performance of Civil Marriages by Same Sex Couples*, EQUALITY CASE FILES (Aug. 7, 2015), <http://files.eqcf.org/cases/ohio-supreme-court-advisory-on-performance-of-civil-marriages/>.

37. Ms. Davis can be defended only by a claim that *Obergefell* is an illegitimate usurpation of judicial power that should be resisted by public officials. See, e.g., *Statement Calling for Constitutional Resistance to Obergefell v. Hodges*, AMERICAN PRINCIPLES PROJECT (Oct. 8, 2015), <https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/>.

38. Memorandum from Attorney General Ken Paxton to Governor Dan Patrick (June 28, 2015), available at <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf> [hereinafter *Paxton Opinion*]. For a briefer opinion to similar effect, see Memorandum from Thomas Enright, Executive Counsel to Office of [Louisiana] Governor Bobby Jindal (June 29, 2015),

law, the Attorney General concluded that “county clerks and their employees retain religious freedoms that may provide for certain accommodations of their religious objections to issuing same-sex marriage licenses--or issuing licenses at all, but the strength of any particular accommodation claim depends upon the facts.”<sup>39</sup>

Insofar as the Attorney General is relying on the federal Free Exercise Clause, federal RFRA, or federal employment law, his conclusion is completely unwarranted. The Free Exercise Clause of the First Amendment confers no rights on state or local officials to resist or be exempt from those generally applicable legal duties.<sup>40</sup> If probate court judges, county clerks, or other state officials object to cooperating in same sex marriages, the federal Constitution cannot help them. Nor can federal RFRA, which does not apply to the duties imposed by state and local government, and which in any event cannot trump federal constitutional norms. Moreover, state law cannot supersede any protection of LGBT equality imposed by federal law, especially federal constitutional law.<sup>41</sup>

Only with respect to the possibility of a discretionary accommodation under Texas RFRA does Attorney General Paxton’s opinion rest on plausible grounds. Texas may choose to accommodate public employees whose religious convictions are in conflict with their official duties. For example, public employees may be given days or hours off from work in order to observe religious holidays. All such accommodations are permissive rather than constitutionally mandatory, however, and are strictly bounded by federal constitutional concerns. Under the Establishment Clause, any such permissive accommodation must not inflict significant harm on third parties,<sup>42</sup> and must in any event fully respect the constitutional right recognized in *Obergefell* – that is the “right under the Fourteenth Amendment for same sex couples to be married on the same

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available at <http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=5012>.

39. Paxton Opinion, *supra* note 38, at 4. The opinion reached a similar conclusion with respect to judges who have authority to conduct marriage ceremonies, but added the important legal proposition that judges (unlike clerks) have no statutory duty to conduct such ceremonies for anyone. *Id.* at 5.

40. *Emp. Div. v. Smith*, 494 U.S. 872, 892 (1990).

41. This is the command of the Supremacy Clause in U.S. CONST. art. VI, cl. 2.

42. *See Estate of Thornton v. Caldor*, 472 U.S. 703, 708-09 (1985); *see generally* Lupu & Tuttle, *supra* note 35, at 216-247.

terms as accorded to couples of the opposite sex.”<sup>43</sup> Accordingly, the constitutional permissibility of any accommodation of objecting employees will turn on whether the accommodation can be executed without material or dignitary harm to same sex couples.<sup>44</sup> Any such accommodation must be designed to avoid insult or discriminatory delay in the processing of licenses. An attempt to accommodate public employees, in Texas or elsewhere, that does not respect this “no harm” principle is constitutionally doomed.

*Federal statutory law.* At present, federal statutory law contains very few explicit prohibitions on discrimination based on sexual orientation or gender identity. Recent federal legislative proposals would, if successful, radically change that state of affairs,<sup>45</sup> but enactment of any of these proposals is unlikely in the current, Republican-dominated Congress. As of this writing, the Violence Against Women Act is the *only* federal statute that explicitly forbids discrimination based on sexual orientation or gender identity.<sup>46</sup>

For now, the relevant conflicts between federal statutory rights<sup>47</sup> and

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43. Paxton Opinion, *supra* note 38, at 2. Similar language appears in *Obergefell*, 135 S.Ct. at 2605 (“[T]he State laws challenged . . . in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage *on the same terms and conditions* as opposite-sex couples.”) (emphasis added).

44. For example, recent Utah legislation (discussed further in Part III *infra*) accommodates the religious freedom of individual public employees while guaranteeing equal access for all to public offices and officials who deal with marriage. S.B. 297, 61st Leg. Gen. Sess. (Utah 2015), *available at* <http://le.utah.gov/~2015/bills/static/SB0297.html>.

45. *See supra* note 13 and accompanying text. As discussed in Part II.B. *infra*, serious consideration of these proposals would invite a variety of counter-proposed religious exemptions.

46. Violence Against Women Act, 42 U.S.C. § 13925 (b)(13)(A) (2012). In addition, the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249, makes it a federal crime to commit an act of physical violence that is motivated by, among other characteristics, the actual or perceived sexual orientation or gender identity of the victim.

47. Other, non-statutory sources of federal law currently include LGBT anti-discrimination provisions. *See infra* notes 121-125 and accompanying text. In addition, federal regulations in specified contexts extend antidiscrimination norms to LGBT persons. *See, e.g.* George Gonzalez, *HUD Issues Guidance on Multifamily Assisted and Insured Housing based on Equal Access to Housing Rule*, HUD.GOV (July 13, 2015), [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2015/HUDNo\\_15-086](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-086).

religious freedom arise from the repeal or disappearance of federal laws that mandated discrimination *against* members of the LGBT community. I refer principally to the repeal of “Don’t Ask, Don’t Tell,”<sup>48</sup> which has ended the exclusion from the Armed Forces of those who are openly gay or lesbian, and the invalidation in *U.S. v. Windsor* of Section 3 of the federal Defense of Marriage Act, which excluded valid same sex marriages from all federal recognition. The elimination of these barriers to federally created opportunities has invited new possibilities for religious freedom objections to obligations under federal law.

1. *Integration of the Armed Forces.* The repeal of “Don’t Ask, Don’t Tell” has led to the open integration of the Armed Forces with respect to sexual orientation. That change has produced conflict with assertions of religious liberty by some chaplains, who have objected to officiating at same sex weddings, counseling same sex spouses or partners within the military, and counseling LGBT servicemen and servicewomen on matters related to their sexual identities.<sup>49</sup> As Professor Tuttle and I have explained

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48. See Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321 (repealing 10 U.S.C. § 654). Discrimination against transgendered persons in the armed forces continued after the repeal. See Juliet Eilperin, *Transgender in the Military: A Pentagon in Transition Weighs its Policy*, WASHINGTON POST (April 9, 2015), [http://www.washingtonpost.com/politics/transgender-in-the-military-a-pentagon-in-transition-weighs-its-policy/2015/04/09/ee0ca39e-cf0d-11e4-8c54-ffb5ba6f2f69\\_story.html?postshare=9481428673479708](http://www.washingtonpost.com/politics/transgender-in-the-military-a-pentagon-in-transition-weighs-its-policy/2015/04/09/ee0ca39e-cf0d-11e4-8c54-ffb5ba6f2f69_story.html?postshare=9481428673479708). The Armed Forces are now changing their policies. See Sandhya Somashekhar and Craig Whitlock, *Military to Allow Transgender Members to Serve Openly*, WASHINGTON POST (July 16, 2015), [http://www.washingtonpost.com/politics/pentagon-to-allow-transgender-members-to-serve-openly/2015/07/13/fe9b054a-298d-11e5-a5ea-cf74396e59ec\\_story.html](http://www.washingtonpost.com/politics/pentagon-to-allow-transgender-members-to-serve-openly/2015/07/13/fe9b054a-298d-11e5-a5ea-cf74396e59ec_story.html).

49. The most prominent controversy in this regard has involved Navy Lt. Cmdr. Wesley Modder, who faces discipline by the U.S. Navy “for allegedly scolding sailors for homosexuality and premarital sex.” See Andrew Tighman, *Chaplain Faces Possible Discharge for Being ‘Intolerant’*, MILITARY TIMES (Mar. 11, 2015), <http://www.militarytimes.com/story/military/2015/03/10/chaplain-fired/24699275>. Some Members of Congress have proposed a Military Religious Freedom Protection Act, designed to protect military chaplains and others against being required to cooperate with or assist LGBT members of the Armed Forces. H.R. 914, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/914>. Congress did not enact the proposal. See Howard Friedman, *President Objects to House Passed LGBT Related Provisions*, RELIGION CLAUSE (May 24, 2012, 7:05 AM), <http://religionclause.blogspot.com/2012/05/president-objects-to-house-passed.html>.

elsewhere, military chaplains have a dual role.<sup>50</sup> They are endorsed by their particular faith community as ordained or approved clergy, and in that capacity they preside over worship services and sacraments within their faith. When acting in that role, chaplains may follow the dictates of their faith when deciding how to worship, and who is entitled to particular sacraments. Accordingly, a chaplain may refuse to perform any marriage ceremony, including one involving a same sex couple, if that ceremony is not consistent with the chaplain's faith.

Military chaplains, however, have a distinct role as officers responsible for the spiritual welfare of all service members in their units.<sup>51</sup> In that role, chaplains are obliged to provide counsel and direction – either themselves or by appropriate referral to others -- to members of every faith. This is an essential part of the chaplain's official mission, necessary to guarantee that all who serve in the Armed Forces have equal and sufficient access to spiritual resources.<sup>52</sup> Accordingly, chaplains are obliged to counsel openly gay and lesbian members of the Armed Forces, even with respect to matters that touch on same-sex intimacy.<sup>53</sup> Allowing exemptions to objecting chaplains from such an obligation would undercut the government's interest in providing equal access to spiritual resources, especially if other chaplains were unavailable.

A chaplain's assertion of rights under federal RFRA should not alter this outcome. First, it may not be a "substantial burden" on a chaplain's religious exercise to compel him to counsel all who seek help. Outside the role of chaplain in a public institution, ordained clergy are of course free to minister or refuse to minister as they choose. Within such institutions, however, the dictates of the role require service to all, and the claim that such service is a religious burden seems quite inconsistent with the chaplain's commission, voluntarily accepted. Even if, *arguendo*, the obligation to counsel all is religiously burdensome, the government's refusal to provide a RFRA exemption to a complaining chaplain should be

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50. LUPU & TUTTLE, *supra* note 35, at 251-262; Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89, 132 (2007).

51. *Id.* at 119.

52. *Id.*

53. If a chaplain offered marital or couples counseling limited to members of her faith community, this would justify exclusion of all couples, same sex or otherwise, from outside that community. But if the couples counseling were not so restricted, exclusion of same sex couples would be discrimination, pure and simple, based on sexual orientation.

upheld under RFRA's terms. The government has a very strong interest in providing equal and adequate resources to all who serve. In some situations, the government may have an alternative chaplain available, but that will not always be the case – a particular ship or base may have very few chaplains for all who serve there. And even if alternatives are available, the refusal by a chaplain to serve a particular member of the Armed Forces may inflict indignities that the government has a strong interest in preventing.

To put the matter differently -- chaplains acting in their role as spiritual advisers to all within their zone of responsibility are officers of the United States. The equal protection component of the Fifth Amendment's Due Process Clause<sup>54</sup> mandates that chaplains treat all Members of the Armed Forces with equal respect, and prohibits invidious discrimination against any of them. That chaplains are also ordained clergy, with a separate and distinct role with respect to those in their own faith community, does not insulate chaplains from the dictates of the Constitution.

2. *Federal recognition of same sex marriages.* Prior to *Windsor*, section 3 of DOMA excluded same sex married couples from federal rights, benefits, and obligations triggered by marital status. *Windsor* invalidated that statutory exclusion.

The erasure of DOMA's effect has catapulted federally mandated rights for same sex married couples into the private sector. For prominent example, the Family and Medical Leave Act (hereafter "FMLA") requires covered private employers to make available a period of unpaid leave for employees whose spouse, child, or parent has a serious medical problem.<sup>55</sup> In February of 2015, in light of *Windsor*, the U.S. Department of Labor announced a rule that amends the definition of spouse so that eligible employees in same-sex marriages are now eligible to take FMLA leave to care for a spouse.<sup>56</sup>

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54. U.S. v. *Windsor*, 133 S. Ct 2679, 2693 (2013) (holding the due process clause of the Fifth Amendment requires invalidation of DOMA, section 3). For an earlier iteration of the concept of an "equal protection component" to the Fifth Amendment, see *Bolling v. Sharpe*, 347 U.S. 497 (1954).

55. FMLA covers private sector employers who employ fifty or more employees for at least 20 workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A)(i) (2012). Another federal statutory context in which similar issues about recognition of same sex marriages may appear is the Employee Retirement Income Security Act, which includes protections for surviving spouses of persons with private pension plans. See 29 U.S.C. § 1055 (a)(2) (2012).

56. *Federal Job-Protected Family and Medical Leave Rights Extended to Eligible Workers in Same-Sex Marriages*, DOL.GOV (Feb. 23, 2015),

Suppose a private employer asserts a RFRA objection to extending such a leave, related to a spousal illness, to an employee in a valid same-sex marriage. The employer does not want to fire this employee because of his or her sexual orientation, but objects to being compelled by federal law to recognize the marriage as valid. At a superficial glance, the structure of this claim seems similar to that advanced in *Hobby Lobby* – a business enterprise would be making a religious objection to being implicated, by granting a leave of absence with a right to return to the position, in recognition of a relationship that the employer views as religiously unacceptable, both in its sexual component and in its claim to full respect as a marriage.<sup>57</sup>

Although the Court's opinion in *Hobby Lobby* appears to have left such questions open, I think it highly unlikely that the employer would prevail. The arguments in such a dispute are worth unpacking in detail, because they will track many of the arguments in any comparable case in which RFRA-based rights (federal or state) are advanced against the protections of employment law. The arguments are likely to fall into the categories of 1) the employer-objector's religious sincerity; 2) whether the FMLA

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<http://www.dol.gov/opa/media/press/whd/WHD20150285.htm>. The Rule itself is 29 C.F.R. § 825.102 (2015).

57. There is nothing far-fetched about this hypothetical. For example, when Illinois legislated the validity of same sex marriage, a number of religious liberty advocates proposed legislative provisions that would permit objecting employers to refuse to recognize same sex marriages as valid for purposes of the employment relationship. See Letter from Thomas C. Berg, *et al.*, to Representative Christopher Donovan (Apr. 20, 2009), available at <http://mirrorofjustice.blogs.com/files/letter-to-rep.-donovan-re-bill-899-04-20-09.pdf> (citing letter to Illinois lawmakers and other, similar letters to lawmakers in other states). For an exposition of the views opposing such provisions in the Illinois legislation, see Dale Carpenter, *et al.*, *Religious Liberty and Marriage for Same-Sex Couples*, CHICAGO TRIBUNE (Oct. 23, 2013), available at <http://blogs.chicagotribune.com/files/five-law-professors-against-changing-sb-10.pdf> (containing letter from legal scholars, myself included, responding to the arguments made by the proponents of these provisions). In its law ending discrimination in marriage against same sex couples, the Illinois legislature did not enact any exemptions for commercial businesses in their employment or customer service obligations. *Id.* In the spring of 2015, the Louisiana legislature considered a Bill that contained such religion-based exemptions. See H.B. 707, 2015 Leg., Reg. Sess. (La. 2015), available at [http://media.nola.com/politics/other/Religious%20Freedom%20bill%20\(1\).pdf](http://media.nola.com/politics/other/Religious%20Freedom%20bill%20(1).pdf) (original version). I discuss the Louisiana proposal, which was not enacted, in Part III.B., *infra*.



obligation imposes a substantial burden on the employer-objector's religious exercise; 3) the weight of the government's interest in denying an exemption to FMLA to the employer-objector; and 4) whether the government has alternative ways to satisfy its interest in the employee obtaining the relevant benefits under FMLA. Let's consider these, one-by-one, in the terms in which they are likely to be contested.

*Religious sincerity.* This is a potential threshold question in every religious exemption case. Like the Free Exercise Clause, RFRA protects only sincere religious beliefs,<sup>58</sup> not other kinds of beliefs, sincere or not, masquerading as religious. In our hypothetical FMLA dispute, the employer will offer whatever evidence may be available to him on this question – for example, membership in a church that teaches the sinfulness of same sex intimacy, and/or consistent and demonstrated adherence by the employer to that principle. The employee may challenge the veracity or credibility of that evidence. The employee may also offer evidence of inconsistent statements or conduct, including perhaps the employer's social acceptance of the employee's spousal relationship (for example, by invitation of the spouse to an office holiday party).

Not so long ago, a claim that opposition to same sex marriage was religiously sincere would have been met with a completely non-skeptical response, by courts or otherwise. At a moment of great social change and cultural agitation on issues of same sex intimacy, including ferment within many religious communities, we may be entering a period of increased skepticism about whether any particular employer – especially a secular, commercial, for-profit employer – is acting out of sincere religious conviction, or reflexive, homophobic bigotry. This will rarely be an easy question, though the evidence may push one way or the other – for example, does the employer treat LGBT employees with personal respect, or is he tolerant of nasty and disrespectful slurs? Tolerance of hateful treatment suggests bigoted animus, not religious disapproval.

Over time, I suspect that employees, administrative agencies, and reviewing courts in this sort of situation may become increasingly disinclined to accept the employer's word on the question of religious

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58. U.S. v. Ballard, 322 U.S. 78, 86-87 (1944) (finding Free Exercise Clause protects only sincere religious belief, and juries may appraise sincerity when relevant). The sincerity requirement applies similarly in generic statutory protections of religious liberty. *Hobby Lobby*, 134 S. Ct. at 2774, n. 28 (stating that RFRA requires sincere religious belief); *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015) (stating that protection under RLUIPA requires sincere religious belief).

sincerity. Needless to say, putting this issue in dispute may be personal and ugly, and yet simultaneously necessary to weed out non-meritorious claims at the threshold. Moreover, this sort of inquiry incentivizes respectful treatment of all employees. An employer who wants respect for his religious convictions about sexual orientation would be wise to police derogatory name-calling and harassment of LGBT employees in the workplace. As religious opposition to same-sex intimacy wanes over time and space, decision-makers might appropriately adopt a rebuttable presumption that anti-gay attitudes are not religiously sincere.<sup>59</sup>

*Substantial burden.* The trigger for federal RFRA (and most or all state RFRA) is a showing that the RFRA claimant's religious exercise has been substantially burdened. What would the asserted burden be in our hypothetical FMLA dispute? I would expect the objecting employer to argue that the obligation to grant a leave, even without pay, to the employee to care for his same sex spouse represents a recognition of the employee's marital status, to which the employer has a religious objection.

Does *Hobby Lobby* foreclose a judicial interrogation of that claim of burden? The employer in *Hobby Lobby* objected to inclusion of certain contraceptives in the employer-provided health insurance plan, on the grounds that the inclusion made the employer complicit in the use of those contraceptives.<sup>60</sup> However attenuated that seems to some,<sup>61</sup> the Court concluded that it could not second-guess the employer's assertion that this kind of complicity violated the employer's religious conscience. That claim of complicity seems similar, though not identical, to the claim of a baker or

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59. A comparable skepticism attached almost immediately to claims that religious principles animated policies of racial exclusion in public accommodation. See generally James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 105-110 (2015). The leading decision, summarily rejecting a claim of religious exemption from public accommodation laws in matters of race, is *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 n.5 (1968).

60. For analysis of the increasingly broad role of complicity claims in the jurisprudence of religious freedom, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2202 (2015).

61. See Abner Greene, *Religious Freedom and (other) Civil Liberties: Is There a Middle Ground*, 9 HARV. L. & POL'Y REV. 161, 185 (2015) (arguing that burden on employer's religious exercise was too attenuated to be substantial within the meaning of RFRA).

photographer to refrain from providing goods or services to a same sex wedding – that is to say, to facilitating a particular practice.

In contrast, a RFRA objection to a leave to care for a spouse is not aimed at a particular practice. Rather, the objection is broader and far more troubling, because its target is a relationship, an ongoing status protected in many ways by law. If the employer, acting on religious grounds, can treat a marriage as invalid, the employer can presumptively exclude the spouse from all benefits that federal law requires private employers to provide to employees' spouses – for example, notifications or pension benefits under a private, ERISA-regulated pension plan.<sup>62</sup>

It is difficult to see how this kind of claim of a religious burden could be limited to same sex marriages. Why would it not also extend to other marriages to which the employer had religious objection (e.g., inter-racial, inter-faith, purely secular), or to parent-child relationships to which the employer had religious objections (e.g., a child born out of wedlock, or through some form of assisted reproduction)? An employer might assert that any of these relationships are unnatural, disordered, contrary to God's plan, or evil.<sup>63</sup> These kinds of objections, to status rather than acts, extend far beyond any singular act of 'sinful' behavior, and are sweepingly hostile to the life plans of those whose family connections are being denied.

Although objections to recognition of status are likely to have greater legal and emotional consequences than objections to facilitation of acts, the wholly individualized and utterly subjective character of religious conscience, as validated in *Hobby Lobby*,<sup>64</sup> makes it logically impossible (at

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62. See *supra* note 55.

63. See Heather Knight, *Archbishop Salvatore Cordileone Spells Out Schools' Sex Doctrine*, SFGATE (Feb. 3, 2015, 10:20 AM), <http://www.sfgate.com/bayarea/article/SF-archbishop-clarifies-sexual-doctrine-for-high-6060293.php>.

64. 134 S. Ct. at 2777-2779 (citing *Thomas v. Review Board of Indiana*, 450 U.S. 707, 715 (1981)) (concluding that in Free Exercise Clause cases, courts may not second-guess the accuracy, consistency, or credibility of the claimants' religious beliefs). Professor Tuttle and I have argued that *Thomas* is correct in concluding that government officials are constitutionally incompetent to appraise the religious significance of a practice. See LUPU & TUTTLE, *supra* note 35, at 226-32. We see this disability, however, as a reason to be deeply skeptical of RFRA as a matter of policy, and to construe it narrowly when (in a case like *Hobby Lobby*) it otherwise will do harm. See *id.* at 237-247. See also Ira C. Lupu & Robert W. Tuttle, *Religious Questions and Saving Constructions*, SCOTUSBLOG (Feb. 18, 2015, 11:12 AM), <http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/>.

the “burden” phase) to distinguish between acts and status.<sup>65</sup> Unfortunately, this means that all religious objections to a legal obligation to act supportively toward same sex marriage will trigger the demanding tests of “compelling governmental interest” and “least restrictive means.”

*Compelling interest in denying the exemption.* Suppose that, for the reasons just advanced, a court finds that compliance with FMLA with respect to a same sex spouse substantially burdens an employer’s religious exercise. That doesn’t end the case, but it does immediately place formidable obstacles in the legal path of opponents of the RFRA claim. What is the quality and weight of the government’s interest in denying a RFRA exemption to the FMLA?

The question is more complex than it first appears. The most straightforward answer averts to the policies that led to enactment of the FMLA – that is, to protect employees from adverse job consequences that arise from their own medical needs, or (as in our hypothetical case) the medical needs of close family members. Some of these needs may be voluntary, such as those arising from a wanted pregnancy, but most are not – they involve some form of illness or injury to a family member, and the corresponding pressure on an employee to take time off from work to care for that family member. The government interests here include work-family balance, economic security, and integrity of families.<sup>66</sup> The government

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65. Although RFRA claimants get to define their own “religious exercise,” courts must decide whether the challenged law pressures or coerces them to alter their religious exercise. For application of this principle in the context of the accommodation of non-profit employers with respect to the contraceptive mandate, see *Little Sisters of the Poor Home for the Aged v. Burwell*, 2015 WL 4232096 (10th Cir. 2015); *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Serv.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015); *East Texas Baptist Univ. v. Burwell*, 2015 U.S. App. LEXIS 10513 (5th Cir. 2015); *Priests for Life v. U.S. Dep’t of Health & Human Services*, 772 F.3d 229 (D.C. Cir. 2014), *reh’g en banc denied*, 2015 U.S. App. LEXIS 8326 (D.C. Cir. 2015). On November 6, 2015, the Supreme Court granted certiorari in these five cases and two others raising the same issues, and consolidated all seven cases under the caption *Zubik v. Burwell* (No. 14-1418), 577 U.S. \_\_\_\_ (2015). For an excellent analysis of the issues raised by these decisions, see Martin Lederman, *Update on the Contraceptive Coverage Regulations and Litigation*, BALKANIZATION (July 20, 2015), <http://balkin.blogspot.com/2015/07/update-on-contraception-coverage.html>.

66. See Family & Medical Leave Act, 29 U.S.C. § 2601 (b)(1) (1993) (stating purposes of Act are “to balance the demands of the workplace with the needs of

interests also include, more subtly, the social and personal value of family care as compared to no care, or care by strangers, for someone who has significant medical needs; gender equality; eradication of sex stereotypes about who does the caring; and peace of mind for an employee, who would otherwise fear losing his or her job because of family needs to stay at home and provide care.

A RFRA exemption from FMLA for employers who object to same sex marriages would deprive the affected employees and their families of the benefit of up to 12 weeks per calendar year of such leave, without pay but with the right to return to the job without loss of status or seniority. It is crucial to note, however, that the exemption is by definition discriminatory; the employer is not religiously objecting to marriage, or even to the employer's responsibility to provide a marriage-supportive benefit. Instead, the employer is providing leaves with respect to marriages that are religiously acceptable to him, and denying it to others.

Moreover, recognition of a RFRA exemption in a case involving a same sex spouse invites the possibility of objection on religious grounds to other marriages, including inter-racial and inter-faith marriages. On the subjective, individualized religion side of the equation, there is no distinction possible among the objections to these various partnerships. To be sure, objections based on a marital partner's race or religion would violate Title VII's prohibition on discrimination based on such characteristics. In such a case, the employer would be demanding a RFRA exemption from Title VII as well as from FMLA. The addition of Title VII concerns to FMLA concerns adds to the weight of the government's interests in denying a RFRA-based exemption.<sup>67</sup>

Because no widely applicable federal statute explicitly prohibits

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families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”)

67. See *id.* at § 2601 (b)(4)-(5) (stating purposes of FMLA include promotion of equal employment opportunity and non-discrimination). The iconic citation for the proposition that anti-discrimination interests trump religious freedom interests is *Bob Jones Univ. v. U.S.*, 461 U.S. 474 (1983) (upholding revocation of non-profit tax status of a university that prohibited inter-racial dating on campus). The Court in *Hobby Lobby* cited *Bob Jones University* with approval. 134 S. Ct. at 2783. The government had not argued, however, as it might have, that an exception to the contraceptive mandate was a sex discriminatory exception, in contravention of Title VII of the 1964 Civil Rights Act.

discrimination in employment based on sexual orientation,<sup>68</sup> employers will assert that the anti-discrimination interest should not count in the equation to the same extent as if the objected-to marriage was inter-racial or inter-faith. That argument, however, presupposes an overly narrow measure of federal interests. Executive Branch action is another important source of expression for such interests. A variety of federal policies, emanating from the Executive Branch, against discrimination based on sexual orientation should contribute to the appraisal of the quality of federal interests.<sup>69</sup> Accordingly, the anti-discrimination norm – in its focus on material harm as well as stigmatic injury – should play an important role in the appraisal of a RFRA objection to extending FMLA leave to an employee with a sick or injured same sex spouse.

I recognize fully the manipulability of RFRA's terms, including "compelling interests."<sup>70</sup> If we are to take this provision seriously, however, the government's arguments that it has compelling interests in denying RFRA exemptions to the FMLA, in the case of objection to same sex marriage, seem very strong.<sup>71</sup>

*Availability of alternative means of satisfying the government's interest.* Even if a court views the government's interest as compelling, the

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68. There is considerable current controversy concerning whether Title VII's prohibition on sex discrimination should be construed to include discrimination based on sexual orientation or gender identity. For a discussion of this issue, see *infra* notes 81-94 and accompanying text.

69. Exec. Order No. 13087, 63 Fed. Reg. 30097 (May 28, 1998) available at <http://www.eeoc.gov/laws/executiveorders/13087.cfm>; Exec Order No. 13672, 63 Fed. Reg. 42971 (July 21, 2015) available at <http://www.gpo.gov/fdsys/pkg/FR-2014-07-23/pdf/2014-17522.pdf> (prohibiting discrimination based on sexual orientation or gender identity in federal employment and employment by federal contractors).

70. A great deal of the argument in *Lupu*, *supra* note 11, is devoted to the proposition that all of RFRA's terms are extremely vague and malleable.

71. Although the FMLA covers only employers with fifty or more employees, this formula reflects competing interests of smaller employers, who will have more difficulty granting leaves with a right to return, than employers with a larger work force. The formula does not reflect any judgment about the strength or weakness of employees' interests in obtaining family or medical leave. *Cf. Hobby Lobby*, 134 S. Ct. at 2780 (refusing to treat coverage formula in ACA dispositive of the "compelling interest" question.) For further discussion of this important point about the relationship between under-inclusion in coverage and the weight of government interests, see *Lupu*, *supra* note 11, at 82-86.

government will not prevail unless it can show that applying the FMLA to the employer in this case is the “least restrictive alternative” to accomplishing the government’s interest. In *Hobby Lobby*, this question proved dispositive against the government, because it already had in place an accommodation for non-profit religious entities. The Court did not rule that the accommodation, which remains under RFRA challenge from religious non-profits,<sup>72</sup> was itself lawful as applied to all religious non-profits. Nevertheless, a five Justice majority concluded that the accommodation revealed the availability of an alternative that would 1) satisfy the government’s interest in providing access to all contraceptives and 2) be less restrictive of religious liberty than the mandate challenged by Hobby Lobby and other for-profit entities.<sup>73</sup>

Moreover, the Supreme Court’s recent decision in *Holt v. Hobbs*<sup>74</sup> reinforces the importance of the “least restrictive alternative” standard in cases brought under general religious liberty statutes. *Holt* involved a Muslim prison inmate’s claim under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) that Arkansas prison officials had forbidden him to grow a beard, in violation of his obligations as a Muslim man. Among other issues, the Court emphasized that the official concern that prisoners might hide contraband could be satisfied by means far less restrictive of religious freedom than forcing the inmate to shave—for example, requiring him to regularly run a comb through his beard at the request of prison guards. RFRA and the RLUIPA provisions concerning institutionalized persons are framed in identical terms of “substantial burden,” “compelling government interest,” and “least restrictive alternative,” and the *Holt* opinion accordingly cited the recent *Hobby Lobby* decision as authority for the proper interpretation of all those terms.<sup>75</sup>

Despite the force of the “least restrictive alternative” standard in *Hobby*

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72. See, e.g., *Univ. of Notre Dame*, 786 F.3d 606, cert. granted sub nom. *Zubik v. Burwell* (No. 14-1418), 577 U.S. \_\_\_\_ (2015); *East Texas Baptist Univ.* 2015 U.S. App. LEXIS 10513, cert. granted sub nom. *Zubik v. Burwell* (No. 14-1418), 577 U.S. \_\_\_\_ (2015); *Priests for Life*, 772 F.3d 229, cert. granted sub nom. *Zubik v. Burwell* (No. 14-1418), 577 U.S. \_\_\_\_ (2015).

73. In July 2015, the Obama Administration promulgated a Rule extending the accommodation to closely held, for profit corporations. See *Coverage of Preventive Services under the Affordable Care Act*, 80 Fed. Reg. 41317 (Aug. 14, 2015). The major substantive question involved in the Rulemaking was the criteria for which companies will be considered “closely held” and therefore eligible for any new accommodation offered to firms organized for profit. *Id.* at 22-35.

74. *Holt*, 135 S.Ct. 853.

75. *Id.* at 859-63.

*Lobby* and *Holt*, this element of RFRA will not save our employer in the hypothetical FMLA case. The government has made no special accommodation for other religious objectors, so the employer cannot point to any such policy and demand its extension. Most significantly, interests that FMLA is designed to serve—familial care for the sick or injured, employee security with respect to keeping a job in time of emergency, and gender equality—cannot be satisfied with any feasible alternative.

Of course, in theory the government could always make itself the employer of last resort for every covered employee whose employer makes a religious objection. If and when the employer denies an otherwise appropriate FMLA leave request, the employee would contact the government, and it would hire him on the spot to work at the same or better wages when the covered FMLA period expires, or when the emergency ends, whichever is sooner. Or the government would pay the dismissed employee his wages plus the value of lost fringe benefits until he can find a job equivalent to the one he lost.

I suspect that the readers of this article can instantly see how ridiculous this argument is. The government stepping in as an employer of last resort is an alternative to imposing any and all labor standards on religiously objecting employers, whether the objection is to family leave, minimum wages, maximum hours, efforts to unionize, non-discrimination on the basis of sex, religion, or other job-irrelevant characteristics, and so on. If a guarantee of government employment for those who are unlawfully fired, discriminated against, or treated in substandard ways counts as a “least restrictive alternative” under RFRA, then there will always be a relevant option “less restrictive” of religious liberty than full imposition of the relevant labor laws.<sup>76</sup>

RFRA cannot plausibly be construed this way. The predecessor free exercise law on which RFRA was based never suggested anything so extreme in application of the “least restrictive means” test. Even if one

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76. The best judicial expositions of this problem of regress in the evaluation of alternatives are those of Judge Pillard in *Priests for Life*, 772 F.3d at 264-67 and Judge Posner in *Notre Dame*, 786 F.3d at 616-19. Long ago, I played out the scenario of *reductio ad absurdum* in the availability of “less restrictive means,” through use of the Biblical story of Abraham and Isaac. *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. On Civil and Constitutional Rights of the H. Comm. On the Judiciary*, 102 Cong. 381-83 (1992) (statement of Ira C. Lupu), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf>.



accepts the radical view that RFRA incorporates only the “high-water mark” of prior free exercise law,<sup>77</sup> as displayed in *Sherbert v. Verner*<sup>78</sup> and *Wisconsin v. Yoder*,<sup>79</sup> no Justice has ever taken the view that the government must exhaust all available options, regardless of feasibility, for avoiding burdens on religious liberty.

*Hobby Lobby* itself, though hinting that the government could itself provide the challenged contraceptives directly to affected women, falls back on the much more modest proposition that the government’s own accommodation of nonprofits reveals the availability of a reasonable less restrictive alternative. In a regulatory context, in which FMLA and most labor laws reside, there are no reasonable and less restrictive alternatives. Direct government provision of the relevant protection for employees will almost always be non-feasible and un-administrable. Put more directly, the government has a compelling interest in denying a RFRA exemption to these sorts of labor regulations, because granting them will generate significant losses to regulatory beneficiaries and government cannot reasonably step in and replace the lost benefits.

This proposition is most obvious with respect to anti-discrimination laws, which protect against dignitary harms as well as material ones. Even if the government offers employment of equivalent value to an employee denied FMLA leave to care for a same-sex spouse, the employer has insulted and demeaned the dignity of that employee’s marriage commitment and family life. No alternative the government might provide can remedy that harm.<sup>80</sup>

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77. For the earliest, strongest, and best-titled presentation of the radical view, see Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 256 (1995); see also Micah J. Schwartzman, *What Did RFRA Restore?*, BERKLEY CENTER (Sept. 11, 2015), <http://berkeleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/what-did-rfra-restore>; Micah Schwartzman, Richard Schragger et al., *The New Law of Religion*, SLATE (July 3, 2015, 11:54 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/after\\_hobby\\_lobby\\_there\\_is\\_only\\_rfra\\_and\\_that\\_s\\_all\\_you\\_need.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html).

78. 374 U.S. 398 (1963).

79. 406 U.S. 205 (1972).

80. Immediately after the *Hobby Lobby* decision, Professor Tuttle and I predicted that courts would not sustain RFRA objections to anti-discrimination law, whether focused on LGBT rights or otherwise. Robert W. Tuttle & Ira Lupu, *Hobby Lobby in the Long Run*, BERKLEY CENTER (July 1, 2014), <http://berkeleycenter.georgetown.edu/responses/hobby-lobby-in-the-long-run>. The

## II. EMERGING PROHIBITIONS AGAINST LGBT DISCRIMINATION IN FEDERAL LAW

As noted above, federal statutory law currently includes very few explicit prohibitions on discrimination based on sexual orientation or gender identity. Such prohibitions might arise in two ways. First, agencies or courts might construe pre-existing statutes, that forbid discrimination based on sex, to cover LGBT discrimination. Second, Congress might enact new laws that explicitly forbid LGBT discrimination in various contexts.

### *A. New Interpretations of Existing Law*

On the interpretive front, the EEOC and some lower federal courts have advanced the theory that discrimination in employment based on LGBT status is a version of unlawful sex discrimination — that is, the discrimination is driven by gender-based stereotypes about how men and women should act, appear, or interact in their intimate relationships.<sup>81</sup> In a very recent case before the Commission, involving a federal employee, the agency reaffirmed the position that discrimination based on sexual orientation is a form of sex discrimination, forbidden by Title VII.<sup>82</sup> In the

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*Hobby Lobby* opinion characterized the elimination of race discrimination in employment as a compelling interest, but conspicuously omitted mention of any other categories of discrimination, including that based on sex or religion, as similarly compelling. *Hobby Lobby*, 134 S. Ct. at 2783. I discuss this in Lupu, *supra* note 11, at 93-100. See also *infra* Part III.C.

81. Several years ago, the EEOC adopted this as an official position. See *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual and Transgender (LGBT) Federal Employees*, EEOC.GOV, [http://www.eeoc.gov/federal/directives/lgbt\\_complaint\\_processing.cfm](http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm) (last visited Sept. 28, 2015). See also *Terveer v. Billington*, 34 F.Supp.3d 100 (D.D.C. 2014). For additional discussion, see Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against their LGBT Employees*, CORNERSTONE BLOG (July 31, 2014), <http://berkleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/why-the-law-does-not-and-should-not-allow-religiously-motivated-contractors-to-discriminate-against-their-lgbt-employees>, archived at <http://perma.cc/5YRW-Z4WY>.

82. *Complainant vs. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. 2015). For immediate commentary on the ruling, see Dale Carpenter, *Anti-gay Discrimination is Sex Discrimination, Says the EEOC*, VOLOKH

courts, cases brought on behalf of transgender people<sup>83</sup> have thus far fared better than those concerning sexual orientation alone,<sup>84</sup> although the recent EEOC decision suggests that these questions are in considerable flux.

The notion that discrimination based on sexual orientation is a form of sex discrimination has been around for over twenty years. In *Baehr v. Lewin*,<sup>85</sup> the Supreme Court of Hawaii relied on the concept in the context of a same sex marriage case brought under the state constitution. Professor Koppelman soon thereafter further developed this concept under the Fourteenth Amendment's Equal Protection Clause,<sup>86</sup> as did Professor Eskridge in his path-breaking book on same sex marriage.<sup>87</sup>

Moving from the equal protection version of this argument to the Title VII extension of it, however, involves a leap. The Equal Protection Clause of the 14<sup>th</sup> Amendment makes no mention of discrimination, based on race, sex, or otherwise. The Supreme Court has construed the Clause to presumptively forbid sex classifications,<sup>88</sup> because they are analogous in important ways to racial classifications.<sup>89</sup> Classifying based on LGBT status is a persuasive extension of that presumptive prohibition. Like traditional classifications distinguishing between males and females, classifications based on sexual orientation or gender identity suffer from similar qualities of prejudice, negative stereotyping, and caste re-affirmation,<sup>90</sup> and bear little

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CONSPIRACY (July 16, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/16/anti-gay-discrimination-is-sex-discrimination-says-the-eecoc/>.

83. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

84. See, e.g., *Gilbert v. Country Music Ass'n*, 432 F. App'x 516, 520 (6th Cir. 2011) (distinguishing between sexual orientation claims and gender non-conforming claims, and suggesting that only the latter are actionable).

85. 852 P. 2d 44 (Haw. 1993).

86. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

87. ESKRIDGE, *supra* note 20.

88. See, e.g., *U.S. v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

89. Justice Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973) is the strongest attempt in a Supreme Court opinion to fully assimilate sex classifications with race classifications as constitutionally suspect.

90. See *Schroer*, 577 F. Supp. 2d 293; see generally William N. Eskridge, *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. (forthcoming 2015), available at [pers.ssrn.com/sol3/papers.cfm?abstract\\_id=2568675](http://pers.ssrn.com/sol3/papers.cfm?abstract_id=2568675); Akhil Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996);

or no relationship to legitimate governmental purposes. Despite these arguments, the Court in *Obergefell* continued its longstanding pattern of not addressing whether classifications based on sexual orientation should be treated as presumptively suspect under the Equal Protection Clause.<sup>91</sup>

Even if the Court had ruled such classifications suspect in *Obergefell*, however, the Title VII question of whether classifications based on sexual orientation are forbidden by the existing prohibition on sex discrimination would have remained open. Title VII does not track an abstract concept of “equal protection.” Rather, it forbids discrimination in employment based on specific, identified characteristics, including sex. If one believes in dynamic statutory interpretation,<sup>92</sup> extending the concept of discrimination based on sex to discrimination based on gender identity and sexual orientation makes perfect sense. All are related to social constructions of sex and gender. All these types of discrimination involve reinforcing narrow and frequently demeaning stereotypes of male and female roles, attempting to impose gender-based identities on those for whom they are unsuitable, and producing irrational limitation of employment opportunities.

If, in contrast, one asks the static interpretive question whether the enacting Congress in 1964 contemplated that its ban on sex discrimination would protect against discrimination based on sexual orientation or gender identity, I suspect the answer might be quite different. Homophobia and animus toward LGBT people were pervasive in the U.S. at the time. Moreover, forbidding what we now view as conventional sex discrimination — employment opportunities determined heavily by whether the applicant is male or female — was quite radical at that time.<sup>93</sup> The idea that the prohibition on sex discrimination implicitly included discrimination based on sexual orientation or gender identity would have deeply surprised the provision’s proponents, and might well have doomed the provision to

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Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

91. The discussion of equal protection in the *Obergefell* opinion is cursory and reveals no effort to link up with the elaborate body of law about suspicious classifications. *Obergefell*, 135 S. Ct. at 2623-26.

92. WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994).

93. It has been suggested that the prohibition on sex discrimination originally appeared in Title VII as a poison pill, designed to attract votes against the Bill. See Cary Franklin, *Inventing the Traditional Concept of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318 n. 36 (2012) (citing prominent sources). Professor Franklin disputes this account. See *id.* at 1317-1329.

defeat.<sup>94</sup>

If the EEOC's current position on LGBT discrimination eventually finds favor in the federal appellate courts, RFRA objections to application of the provision will not be far behind. Companies whose owners object on religious grounds to same sex marriage are certain to argue that their religious exercise is burdened by any statutory requirement that they recognize such a marriage as valid for purposes of employee benefits.

As demonstrated by the discussion in Part I of RFRA objections to FMLA leave to care for same sex spouses, these RFRA objections should not prevail. The government's interests in preventing invidious discrimination in employment based on sexual orientation or gender identity are very strong,<sup>95</sup> and the government has available no alternative less restrictive of religious liberty for protecting these interests. The government's argument is still more powerful if this conflict between RFRA and Title VII arises from an interpretation that a ban on discrimination against those with same sex spouses is included in Title

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94. The leading academic proponents of the Equal Rights Amendment (ERA), which would have amended the Constitution to forbid governmental classifications based on sex, wrote a lengthy and now iconic piece about the scope and meaning of the proposed amendment without ever mentioning discrimination based on sexual orientation. Barbara Brown, et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872 (1971). ERA advocates publicly disclaimed any connection between the proposed amendment and same sex marriage or intimacy. Douglas NeJaime, *Before Marriage: The Unexplained History of Nonmarital Recognition and its Relationship to Marriage*, 102 CAL. L. REV. 87, 98-99 & n. 48-49 (2014).

95. For recent documentation of the current scope of the problem, see Christy Mallory & Brad Sears, *Evidence of Employment Discrimination Based on Sexual Orientation or Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies*, THE WILLIAMS INSTITUTE (Oct. 2015), <http://williamsinstitute.law.ucla.edu/research/workplace/evidence-of-employment-discrimination-based-on-sexual-orientation-and-gender-identity-an-analysis-of-complaints-filed-with-state-enforcement-agencies>. See also Jenny Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 720-42 (2012) (finding that existing legal protections against LGBT discrimination, including state and local antidiscrimination laws, are inadequate and incomplete); William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 76-101 (2001) (responding, based on empirical data, to common objections to ENDA).

VII's prohibition on sex discrimination. In such circumstances, sustaining a RFRA objection would open the doors to successful RFRA objections in cases of more traditional sex discrimination in employment.<sup>96</sup>

Moreover, if courts do interpret Title VII as currently framed to include discrimination based on sexual orientation, the question will remain whether the right of religious organizations to prefer co-religionists in hiring will permit the exclusion of openly gay, lesbian, or bisexual employees, on the grounds that the organization has religious objection to same sex intimacy. The following section of this paper discusses the considerations of law and policy that will eventually come to bear on that question.

### *B. Proposed Federal Legislation*

For a variety of reasons, advocates for LGBT rights are not depending exclusively upon the EEOC and the federal courts to interpret Title VII and other existing anti-discrimination statutes in ways favorable to the LGBT cause. These advocates have their legitimate doubts as to whether such a strategy will ultimately succeed. They know that Acts of Congress explicitly prohibiting discrimination based on sexual orientation and gender identity will make a more enduring and democratically legitimate statement than a friendly administrative or judicial construction of a fifty year-old statute. Moreover, judges will perceive the government interest in preventing such discrimination as stronger – in RFRA terms, compelling – if the enactment is recent, purposeful, well explained, and explicit on what forms of discrimination are forbidden.

Accordingly, advocates of change through new federal legislation are proceeding vigorously. This path has not been very successful for the past decade. Even as rights to same sex marriage have expanded in state legislation as well as the state and federal judiciary, Congress has done little to explicitly forbid LGBT discrimination.<sup>97</sup>

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96. See, e.g., EEOC v. Fremont Christian Schools, 781 F.2d 1362 (9th Cir. 1986) (holding that religious entity commits unlawful sex discrimination when, for religious reasons, it offers health insurance only to “heads of household,” defined as single parents and married males).

97. The Violence Against Women Act, *supra* note 46, is the only federal statute containing such a prohibition. In contrast, as of this writing, 22 states and the District of Columbia have jurisdiction-wide laws prohibiting LGBT discrimination in various fields, including employment and housing. Douglas NeJaime, *Marriage*

*Obergefell* will enrich and complicate that legislative conversation. Marriage equality is likely to be a strong driver of other claims of legal equality,<sup>98</sup> and simultaneously a motivating source of intense opposition to additional anti-discrimination norms among those who have now lost that fight. In other words, such a ruling from the Supreme Court may increase polarization around issues of LGBT rights. Now that marriage equality has prevailed, the victors will try to ride the front-lash produced by the normative power of what will have become actual – how can we as a nation deny rights of equal treatment in housing, credit, employment, and public accommodation to those whose equal citizenship has just been proclaimed in the sacred precincts of marriage?<sup>99</sup> And the vanquished may redouble their efforts to block the perception that inferior treatment based on sexual orientation or gender identity is invidious, akin to discrimination based on race or color.<sup>100</sup> That perception turns what were once widespread social and religious norms into a form of bigotry, to be quickly and vehemently repudiated.

Many opponents of LGBT rights legislation are likely to operate on two fronts, just as they have in their opposition to marriage equality. The

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*Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1190 n.66-67 (2012) (identifying 21 such states). The only state to expand its anti-discrimination laws recently is Utah in March, 2015. The paper discusses the Utah legislation in Part III.C., *infra*.

98. The historical contrast with the evolution of the law of racial discrimination is worth noting. In that context, statutory protections against discrimination in employment, public accommodations, and voting all preceded the recognition in *Loving v. Virginia*, 388 U.S. 1 (1967), of a constitutional right to be free from race-based restrictions on marriage. Thus, resolution of conflict over the most intimate of interpersonal relations occurred relatively late in the struggle for racial equality. Perhaps the logic of LGBT rights, focused as they often are on patterns of intimacy, explains why ending marriage discrimination is a logical or foreseeable precursor to other progress in LGBT rights.

99. See Jonathan Capehart, *Legally Married Today, Legally Fired Tomorrow*, WASHINGTON POST (Feb. 11, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/11/legally-married-today-legally-fired-tomorrow/>.

100. See, e.g., Gerard Bradley, John Finnis, and Daniel Philpott, *The Implications of Extending Marriage Benefits to Same Sex Couples*, THE WITHERSPOON INSTITUTE (Feb. 22, 2015), <http://www.thepublicdiscourse.com/2015/02/14522/> (arguing that the University of Notre Dame's extension of employment benefits to same sex spouses of employees is scandalous, supportive of sexual sin, and morally indefensible).

primary front is straightforward opposition to the change in the legal status quo, coupled with roll-backs where achievable.<sup>101</sup> The back-up strategy, which has been highly visible in the legislative wars over marriage, will be a demand for explicit exemptions from any anti-discrimination legislation that addresses sexual orientation and gender identity.<sup>102</sup>

For the back-up strategy to have any chance of success, its supporters must make the case that religious opposition to LGBT equality deserves social and moral respect. Moreover, in a campaign for exemptions, specific exemptions are far superior to broad-based, generic religious exemptions like RFRA.<sup>103</sup> A RFRA exemption claim is subject to interest-balancing, and RFRA is so vague that controversial interpretations of it do not confer full democratic legitimacy.<sup>104</sup> RFRA is a Rorschach test, on which everyone can project their hopes and fears, and cannot be proven wrong until the courts resolve particular questions. Even when courts do so, the

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101. Rollbacks have occurred at the state level. *Kansas: Governor Rescinds Order Protecting Gay State Workers*, N.Y. TIMES (Feb. 10, 2015), <http://www.nytimes.com/2015/02/11/us/kansas-governor-rescinds-order-protecting-gay-state-workers.html>. Similarly, recent Arkansas legislation preempts local gay rights laws. *Arkansas Bars Expanding Local Protections for Gays, Lesbians*, N.Y. TIMES (Feb. 23, 2015, 7:08 PM), <http://www.nytimes.com/aponline/2015/02/23/us/ap-us-xgr-anti-discrimination-laws.html>.

102. See *infra* notes 110-115 and accompanying text (discussing the newly proposed First Amendment Defense Act, H.R. 2802, 114th Congress (1st Sess. 2015)). See also Thomas Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html> (discussing letters to state legislatures supporting exemptions related to marriage equality). For broader discussion of this two front strategy, see Siegel & NeJaime, *supra* note 60, at 2558-65.

103. For elaboration of this proposition from an ardent defender of such exemptions, see Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703 (2014).

104. Professor Marshall has a different view of the democratic legitimacy point. William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 123-24 (2014) (arguing that *Hobby Lobby* provides political recognition and legitimacy to the firm's religious objections to contraception). Professor Marshall builds on a comparable argument from Professor Fishkin. Joseph Fishkin, *Hobby Lobby and the Politics of Recognition*, BALKANIZATION (June 30, 2014), <http://balkin.blogspot.com/2014/06/hobby-lobby-and-politics-of-recognition.html>.



resolutions are highly fact-specific, so RFRA-based judicial precedents are rarely generalizable.<sup>105</sup>

In contrast, specific exemptions, such as the exemption from Title VII for co-religionist hiring by religious entities,<sup>106</sup> are typically not subject to interest-balancing. More significantly, they clearly identify their beneficiaries and specify the norms against which the exemptions may be invoked. So, for example, if non-profit religious entities were to be fully exempted from a federal law prohibiting LGBT discrimination in employment, the exemption would be clear and absolute.

In yet another way, this distinction between generic and specific exemptions is likely to play a crucial role in the political fights to come. Prior to the decision in *Hobby Lobby*, in the specific and charged context of anti-discrimination law, the co-religionist provision in Title VII represented a legislative baseline about the entitlement to religion-based exemption. That statutory exemption protects only entities with primary religious purposes, and hence presumptively excludes for-profit firms.<sup>107</sup> Moreover, that exemption does not extend to exclusions based on race, sex, national origin, or any forbidden ground of discrimination other than religion.<sup>108</sup>

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105. I advance this thesis in detail in Lupu, *supra* note 11.

106. Civil Rights Act of 1964 § 702, 42 U.S.C § 2000e-1 (2012). The federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”) is a hybrid, because it relies heavily on vague, RFRA-like standards but is limited to the specific contexts of land use and persons coercively confined by the state. By my terminology, RLUIPA is not a “specific exemption” scheme.

107. *See generally* Letter from Reed L. Russell, Legal Counsel at the Equal Employment Opportunity Commission, to Kevin Cummings, Branch Chief of Business and Trade Services, Dep’t of Homeland Sec., on Title VIII Religious Organization Exceptions (Dec. 28, 2007), *available at* [http://www.eeoc.gov/eeoc/foia/letters/2007/religious\\_organization\\_exception\\_dec\\_28\\_2007.html](http://www.eeoc.gov/eeoc/foia/letters/2007/religious_organization_exception_dec_28_2007.html).

108. *See* Memorandum from Randolph D. Moss, U.S. Assistant Attorney General to Randolph D. Moss, Deputy Counsel to the President, at 30–32 (Oct. 12, 2000), *available at* <http://perma.cc/PAL9-3NE4>. For further discussion of the importance of this proposition for the future of employment discrimination law in the context of LGBT rights, *see infra* notes 132-147. The baseline may be different state-to-state. For example, in Utah, religiously affiliated organizations are entirely exempt from the state’s fair employment law with respect to all categories of discrimination. This made it politically easier to exempt these organizations from a new prohibition on LGBT discrimination in employment. *See infra* text at note 216. For commentary on why the Utah model is not the appropriate national model with respect to discrimination based on sexual orientation or gender identity, *see* Nelson Tebbe, Richard Schragger, and Micah Schwartzman, *Utah “Compromise”*

In distinct and opposing ways, *Hobby Lobby* may profoundly influence the political battles over demands for specific exemptions. Those who seek to limit LGBT rights will assert that *Hobby Lobby* has its own normalizing effect – in particular, that it broadly legitimizes the concept of religious privilege. RFRA itself purports to do precisely that, by elevating religious objections to laws over comparable secular objections. The application of RFRA in a commercial setting, where religious privilege had been highly unusual, to say the least, extends the concept to new and unexpected spheres of life.<sup>109</sup> Once that expansion of religious privilege has become enshrined in the law, the case to embody it specifically in particular statutes becomes far less radical. Accordingly, citing this account of *Hobby Lobby*, exemption promoters may seek specific exemptions for all religious objectors – individuals, non-profit organizations, and business firms — to legal norms of LGBT equality. RFRA already secures religious privilege, they will argue, so why not clarify the boundaries of the exemption rather than leave the matter to the uncertainties of litigation?

An early example of the emergence of this strategy can be found in the

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*to Protect LGBT Citizens from Discrimination is No Model for the Nation*, SLATE (Mar. 18 2015), [http://www.slate.com/blogs/outward/2015/03/18/gay\\_rights\\_the\\_utah\\_compromise\\_is\\_no\\_model\\_for\\_the\\_nation.html](http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html).

109. Ira C. Lupu & Robert W. Tuttle, *Anomalous & Unjust: Responding to Indiana RFRA and Beyond*, CORNERSTONE (Apr. 27, 2015), <http://berkleycenter.georgetown.edu/cornerstone/rfra-in-indiana-and-beyond/responses/anomalous-and-unjust>. Two of my fellow Symposium participants have sparred over whether *Hobby Lobby* represents a new front in religious privilege. Professor Horwitz has argued that the public controversy over *Hobby Lobby* represents a breakdown in what had been a consensus about accommodation of religion. Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014). Professor Sepper has replied that the consensus, whatever its contours, never extended to commercial, for-profit actors, especially in contexts where their employees bore the brunt of the accommodation. Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, HARV. L. REV. FORUM (Nov. 10, 2014), <http://harvardlawreview.org/2014/11/reports-of-accommodations-death-have-been-greatly-exaggerated>. See also James M. Oleske, Jr., *The Born-Again Champion of Conscience*, HARV. L. REV. FORUM (Jan. 22, 2015), <http://harvardlawreview.org/2015/01/the-born-again-champion-of-conscience> (book review) (arguing that many liberals and liberal organizations “support religious exemptions for individuals, while opposing the extension of such exemptions to commercial businesses.”).

proposed “First Amendment Defense Act.”<sup>110</sup> The Act is quite specific in what religious convictions it is designed to protect. It would forbid the federal government from taking

any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.<sup>111</sup>

Although the reference to “discriminatory action” is vague, the Act then specifies several examples of such action, including revoking “an exemption from taxation under section 501(a) of the Internal Revenue Code,”<sup>112</sup> and denying “any Federal grant, contract . . . license, certification, accreditation, employment, or other similar position or status from or to such person.”<sup>113</sup> The specificity of what religiously motivated actions are insulated from federal sanction and which punitive measures by government are barred is in quite sharp contrast to the sweeping and vague generalities of a scheme like RFRA or its state counterparts.

Moreover, building explicitly on *Hobby Lobby*, the First Amendment

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110. H.R. 2802, 114th Cong. (2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/2802>. As of this writing, the future of the First Amendment Defense Act was quite uncertain. See Ed Morrissey, *Will the First Amendment Defense Act Fall Victim to Beltway elbow-throwing?*, HOTAIR (July 13, 2015 10:01 AM), <http://hotair.com/archives/2015/07/13/will-the-first-amendment-defense-act-fall-victim-to-beltway-elbow-throwing/>; Colby Itkowitz, *House GOP Moderates Ready Intraparty Battle over Religious Freedom Bill*, WASHINGTON POST (July 17, 2015), <http://www.washingtonpost.com/news/powerpost/wp/2015/07/17/house-gop-moderates-ready-intraparty-battle-over-religious-freedom-bill/>.

111. H.R. 2802, *supra* note 110, at § 3(a).

112. *Id.* at § 3(b)(1).

113. *Id.* at § 3(b)(3). A recent survey has found that the IRS has not revoked the tax exemption of a religious entity on the grounds that its teachings are contrary to public policy since 1978, when racially discriminatory policies of various schools led to the decision in *Bob Jones Univ.*, 461 U.S. 574. See Sam Brunson, *The Church Will Not Lose its Tax Exempt Status*, BY COMMON CONSENT (July 9, 2015), <http://bycommonconsent.com/2015/07/09/the-church-will-not-lose-its-tax-exempt-status/>.

Defense Act defines person by reference to the U.S. Code definition,<sup>114</sup> which includes corporate persons, and the Act specifically includes “any . . . person regardless of religious affiliation or lack thereof, and regardless of for-profit or nonprofit status.”<sup>115</sup> Whether such a proposal, if enacted, would provide a better defense than RFRA for a business that refused to treat a same-sex marriage as valid for purposes of compliance with federal law is somewhat uncertain, because of the undefined quality of the catch-all prohibition on “discriminatory action.” Enforcing general statutes like the Family and Medical Leave Act is hardly “discriminatory.” Nevertheless, the First Amendment Defense Act is a good example of the specific exemption strategy that I expect will take hold at both the federal and state level.

In the context of anti-discrimination law and otherwise, those who seek to expand LGBT rights in federal law are likely to fight fiercely against any such accommodations. They may oppose even the narrowest of exemptions for religious entities, including houses of worship. First, LGBT rights groups will persistently contest the idea that religious opposition to the intimate lives of LGBT people is culturally or morally respectable. Over time, that idea is likely to become marginalized in ways akin to what eventually transpired with respect to public support for slavery or racial segregation.<sup>116</sup>

Second, these groups will object to the notion that *Hobby Lobby* normalized any broad baseline of religious privilege. From their perspective, explicit religious exemptions should not extend to for-profit business firms. Nor should accommodations for non-profit religious entities go any further than the pre-existing co-religionist preference in Title VII, which cannot be implemented in ways that discriminate against protected classes.<sup>117</sup>

Third, and most significantly, LGBT rights groups will insist that *Hobby Lobby* must be read to permit only those exemptions that do not inflict harm on third parties. The decision, as Justice Kennedy’s concurring opinion predicted, has now produced an accommodation designed to ensure that employees of objecting for-profit firms eventually receive the disputed

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114. See *Hobby Lobby*, 134 S.Ct. at 2755. H.R. 2802, *supra* note 110, at § 6.2(c) (referencing “section 1 of title 1, United States Code”).

115. *Id.*

116. For a careful exploration of why religious objections to same sex marriage have been afforded so much more respect than were comparable objections to inter-racial intimacy, see Oleske, Jr., *supra* note 59.

117. See *infra* notes 140-142 and accompanying text.

coverage through a third party.<sup>118</sup> Accordingly, *Hobby Lobby* remains constrained by a concern that third parties suffer no material harm.<sup>119</sup> If it so bounded, exemptions from anti-discrimination laws must be strictly limited. The proposed First Amendment Defense Act would violate that limit if it permits private parties to refuse to recognize the validity of a same-sex marriage, in contexts where that denial would deprive parties to such a marriage of valuable rights or benefits.

Fourth, in light of *Hobby Lobby*, LGBT rights proponents will be rightly concerned that any specific exemption or accommodation for some religious interests will put a significant burden on the government to explain why the accommodation should not be extended to other religious claimants, business firms or others.<sup>120</sup> For supporters of LGBT rights,

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118. 134 S. Ct. at 2786 (Kennedy, J., concurring). The Obama Administration has created such an accommodation, *see* Coverage of Preventive Services under the Affordable Care Act, 80 Fed. Reg. 41318 et seq., (July 14, 2015), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-17076.pdf>. The new policy builds upon the accommodation that has been in place for religious non-profits. The non-profit accommodation remains mired in RFRA-based litigation. *See supra* note 65. The new for-profit accommodation may yet be challenged in court, and in any event will not lead to contraceptive coverage until the beginning of the next insurance plan coverage year. 80 Fed. Reg. at 41322.

119. Loewentheil, *supra* note 5. This proposition of course remains in doubt, and Professor Nelson Tebbe has testified before a House subcommittee that RFRA should be amended to make that limitation explicit. Hearing on Oversight of RFRA and RLUIPA Before the Subcomm. on Constitutional Rights of the H. Comm. of the Judiciary, 114th Cong. 6-7 (2015) (statement of Professor Nelson Tebbe), *available at* [http://judiciary.house.gov/\\_cache/files/497441bc-b2fa-4b10-8ade-91f6603588fe/tebbe-02132015.pdf](http://judiciary.house.gov/_cache/files/497441bc-b2fa-4b10-8ade-91f6603588fe/tebbe-02132015.pdf). A significant part of the intellectual and jurisprudential push for this proposal comes from the argument that the Establishment Clause requires that RFRA be limited in this way. *See Estate of Thornton*, 472 U.S. 703. For the fullest defense of this line of argument in the context of the *Hobby Lobby* litigation, *see* Frederick Gedicks & Rebecca Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

120. Soon after the Supreme Court's *Hobby Lobby* decision, a major part of the LGBT rights coalition withdrew its support for any broad exemption, from the then-proposed Employment Non-Discrimination Act, H.R. 1755, 113th Cong. § 815 (2013), for religious non-profit entities. *See* Chris Geidner, *Three Reasons LGBT Groups are Fighting Over a Bill That Isn't Going to Become Law*, BUZZFEED (July 9, 2014), <http://www.buzzfeed.com/chrisgeidner/three-reasons-lgbt-groups-are-fighting-over-a-bill-that-isnt>. One reason the withdrawing groups

*Hobby Lobby* has made the bargaining chip, represented by specific exemptions, far more dangerous or expensive to play.

The existing federal baseline for exceptional treatment of religious organizations, and the accompanying concern for third party harms, profoundly influenced the debate over President Obama's decision to amend long-standing Executive Order 11246 to include sexual orientation and gender identity as prohibited grounds of discrimination in employment by persons or firms contracting with the federal government.<sup>121</sup> Prior to the issuance of President Obama's Order, opposing interests conducted a fierce public debate on whether it should include a broad and categorical exemption for religious non-profits. A group of faith leaders called on the President to include such an exemption in the Executive Order.<sup>122</sup> Other faith leaders and a group of legal scholars, myself included, urged the President to issue the Order without a categorical exemption for religious entities.<sup>123</sup>

As issued, the Order did not include the requested exemption. Instead, it left intact Section 204 (c) of the Order, which is in perfect alignment with the Title VII co-religionist exemption,<sup>124</sup> that is, the Order preserved the

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cited was the possibility that *Hobby Lobby* would encourage RFRA objections to ENDA by for-profit firms, and that those objections might be strengthened if ENDA exempted religious non-profits. *Id.* The exemption proposed in H.R. 1755 was very broad, effectively removing religious entities entirely from coverage, without regard to whether they had religious objections to same sex intimacy. *See id.*

121. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

122. Michelle Boorstein, *Faith Leaders: Exempt Religious Groups from Order Barring LGBT Bias in Hiring*, THE WASHINGTON POST (July 2, 2014), [http://www.washingtonpost.com/local/faith-leaders-exempt-religious-groups-from-order-barring-lgbt-bias-in-hiring/2014/07/02/d82e68da-01f1-11e4-b8ff-89afd3fad6bd\\_story.html](http://www.washingtonpost.com/local/faith-leaders-exempt-religious-groups-from-order-barring-lgbt-bias-in-hiring/2014/07/02/d82e68da-01f1-11e4-b8ff-89afd3fad6bd_story.html).

123. *See* Letter from Faith Group Leaders to President Barack Obama (July 8, 2014) (urging no exclusion of religious entities from the proposed order), *available at* <https://www.dropbox.com/s/8wzppbviygds1pv/Faith%20Letter%20to%20President%20Defending%20Exec%20Order%202014-07-08%20FINAL.pdf>; Letter from Legal Scholars to President Barack Obama (July 14, 2014) (urging no exclusion of religious entities), *available at* [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive\\_order\\_letter\\_final\\_0.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive_order_letter_final_0.pdf).

124. Section 204(c) provides that the Order "shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation,

pre-existing statutory baseline for exemption from anti-discrimination law.

The analysis in this paper suggests strongly that the President acted prudently in resisting the demands from some faith leaders that non-profit religious entities be broadly excluded from the new provision in the Executive Order. Had President Obama yielded to these entreaties, for-profit firms that wished to rely on RFRA to likewise discriminate would have jumped on any such exclusion. These firms would have argued that the exclusion showed that a) the President had affirmed a new baseline of broad accommodation of religious objection to LGBT rights measures; b) in RFRA terms, the government interest was less than compelling because a broad exemption had left “appreciable damage to that supposedly vital interest un-prohibited;” and c) as in *Hobby Lobby*, the accommodation could readily be extended to for-profit firms with religious objections to compliance with the new Order. That the Order, as issued, retains only the pre-existing right of religious entities to prefer co-religionists—a right that no court has ever extended under Title VII or RFRA to a for-profit business<sup>125</sup>—renders the Order much less vulnerable to a *Hobby Lobby* style attack from a for-profit religious objector.

This episode, which went through its final stages in the immediate aftermath of *Hobby Lobby*, should be instructive for legislative fights going forward. LGBT rights groups have recently advanced a sweeping proposal, under the umbrella title “The Equality Act,” to expand federal anti-discrimination laws to cover sexual orientation and gender identity, in the contexts of (among others) credit, education, employment, housing, and public accommodations.<sup>126</sup> For all the reasons suggested above, this

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association, educational institution, or society of its activities.” Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), *available at* <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

125. *See* EEOC v. Townley Mfg. Co., 859 F.2d 610, 617–19 (9th Cir. 1988) (for-profit corporation cannot qualify for Title VII exemption of religious corporations from the ban on preferring co-religionists). For broader discussion of which employers are covered by the co-religionist exemption, *see* Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Zoe Robinson, Chad Flanders, Micah Schwartzman, eds., forthcoming 2015), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2535991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535991).

126. *See* references to the proposed Equality Act, *supra* note 13. *See generally*, Human Rights Campaign, *Beyond Marriage Equality: A Blueprint for Federal Non-Discrimination Protections*, HUMAN RIGHTS CAMPAIGN <http://hrc-assets.s3->

package includes no categorical exemptions for religious entities. Moreover, the proposal includes a specific exclusion of RFRA claims from all relevant federal antidiscrimination laws.<sup>127</sup>

That proposed exclusion of RFRA claims will raise the stakes considerably in legislative debate over specific exemptions from LGBT anti-discrimination law. If religiously motivated interests do not get specific statutory protection in any new anti-discrimination laws, they will have no escape whatsoever from compliance. They will thus fight the laws intensely, and they will fight just as intensely for exemptions from any laws that might pass. Groups advocating for LGBT rights will fight for the laws and against the exemptions with equal fervor.

In the past, the leading example of this kind of struggle involved the never-enacted federal Employment Non-Discrimination Act (“ENDA”), which would have prohibited employment discrimination based on sexual orientation or gender identity. Over a number of years and Congresses, the leading ENDA proposals included a complete exemption for all employers that qualify for the existing co-religionist exemption.<sup>128</sup> That is, if an employer was free under Title VII to limit hiring to co-religionists,<sup>129</sup> it would not be subject to ENDA, without regard to the employer’s religious precepts on same-sex intimacy. In the summer of 2014, after the Supreme Court announced the *Hobby Lobby* decision, a number of groups supporting ENDA withdrew their support on the ground that the proposed religious

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[website-us-east-1.amazonaws.com//files/documents/HRC-BeyondMarriageEquality-42015.pdf](http://website-us-east-1.amazonaws.com//files/documents/HRC-BeyondMarriageEquality-42015.pdf) (last visited Sept. 27, 2015).

127. See H.R. 1755, 113th Cong. § 1107 (2015) (excluding RFRA claims and defenses under all the titles of federal law covered by the Act). The exclusion would not be limited to sexual orientation and gender identity claims; it would extend to all categories of forbidden discrimination (race, sex, national origin, etc.) under the covered titles of antidiscrimination law. *Id.*

128. See H.R. 1755, 113th Cong. § 6 (2013) (“[T]his Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant ... to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a), 2000e-2(e)(2)).”

129. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (2012). (“This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).



organizational exemption was too broad.<sup>130</sup>

Consider the competing policy positions on the extent to which religious organizations should be exempt from the proposed Equality Act, or any comparable enactment. The most employer-friendly version is a complete exemption. The alternative is the creation of no special exemption from a prohibition on discrimination based on sexual orientation or gender identity; instead, religious organizations would retain their statutory right to prefer co-religionists.<sup>131</sup> The difference between these positions is wide and significant. A complete exemption represents an unprecedented expansion of the baseline of religious privilege; with respect to non-ministerial positions,<sup>132</sup> employers that qualify for the co-religionist exemption have always been subject to all other prohibitions on discrimination, including race, sex, age, disability, and national origin. A complete exemption would thus constitute a significant departure from the existing baseline, represented by the co-religionist exemption, for hiring by religious entities.

Is there any justification for a complete exemption for religious organizations from a prohibition on LGBT discrimination, rather than a continuation of the legal status quo, in which religious organizations retain their co-religionist hiring privilege but nothing more? In an article admirable for its tone and balance,<sup>133</sup> Professor Alan Brownstein has developed arguments that lead him in the direction of the complete exemption. Professor Brownstein asserts that religious identity and sexual orientation are comparable, in many respects, as defining elements of a

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130. See *supra* note 120 and accompanying text.

131. The text of the proposed Equality Act “would continue to allow religious corporations, associations, educational institutions, and societies to hire only individuals of a particular religion to perform work connected with their religious activities.” SENATOR JEFF MERKLEY ET AL., SECTION BY SECTION SUMMARY OF THE EQUALITY ACT 2 (2015), available at [http://www.merkley.senate.gov/imo/media/doc/EqualityAct\\_SectionBySection.pdf](http://www.merkley.senate.gov/imo/media/doc/EqualityAct_SectionBySection.pdf) (summarizing “Section 7. Employment.”)

132. The constitutionally based ministerial exception effectively removes ministerial positions from all anti-discrimination laws. See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012). See also LUPU & TUTTLE, *supra* note 35, at 43-45, 54-61 (explaining and justifying the ministerial exception on Establishment Clause grounds).

133. Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010).

person's life.<sup>134</sup> From this premise, he reasons that the extent of the right to be selective – that is, to discriminate – with respect to religion should frequently line up with the right to be selective with respect to sexual orientation. This leads him to tentatively conclude, in this article and in recent testimony to the U.S. Civil Rights Commission, that “when Title VII is amended to protect members of the LGBT community against employment discrimination, an additional exemption for religious organizations permitting them to discriminate on the basis of sexual orientation or identity, similar in scope to the [702] exemption, may be justified.”<sup>135</sup>

Professor Brownstein's view is premised on a misreading of the relevant law, and would produce poor policy results. The misreading is his assumption that the existing co-religionist exemption extends to exclusion of those whose religious identity is undesirable to the employer. On that view, an employer covered by the exemption could have a policy of hiring anyone except a Jew, or a Mormon, or an atheist. Were that correct, extension of the policy would permit exclusion of LGBT people. But this understanding of the exemption – as a right to exclude the religiously undesirable -- does not comport with the language, purpose, or judicial interpretation of the exemption.

The exemption reads: “This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>136</sup> As judicially explained, the exemption is designed to permit religious entities to carry out their mission by preferring members of their own faith. Concurring in *Amos v. Corporation of Presiding Bishops*,<sup>137</sup> the decision in which the Court upheld the exemption against Establishment Clause attack, Justice Brennan wrote, “We are willing to countenance the imposition of [religious criteria

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134. *Id.* at 400-409.

135. Alan Brownstein, *Examining Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans*, U.S. COMM. ON CIVIL RIGHTS 6 (Mar. 16, 2015) (copy on file with author and with ALA. C.R. & C.L. L. REV). *See also supra* note 133, at 424-25 (explaining that under Brownstein's model, “Title VII's exemption of non-profit religious organizations from the statute's prohibition against religious discrimination in hiring would extend to the hiring of married gays and lesbians.”).

136. The Civil Rights Act of 1964 § 702(a), 42 U.S.C. § 2000e-1 (2012).

137. 483 U.S. 327 (1987).

for employment] because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.”<sup>138</sup>

The co-religionist exemption thus permits religious entities to prefer members of their own religious community for the purposes of carrying out the organization's mission. It does not, however, extend to excluding members of faiths that the employer views as undesirable. Professor Brownstein's suggestion that LGBT antidiscrimination proposals include a complete exemption for religious organizations, on the ground that it maps onto their existing authority to prefer co-religionists, is flawed.

Once the analogy fails, it remains to be determined as a matter of policy whether religious organizations should have a complete exemption from the Equality Act's employment provisions or still be limited to their co-religionist exemption. The complete exemption, for reasons just discussed, is anomalous. It would permit religious organizations to refuse to hire, or to dismiss, a person based on sexual orientation or gender identity, whether or not the person had acted in ways that violated the organization's religious principles. It is thus entirely overbroad in relation to religious need. Moreover, if religious organizations had the benefit of a complete exemption, the result would frequently be an iteration of “Don't Ask, Don't Tell.” An LGBT employee of a religious organization that would fire anyone who openly revealed that status would have to remain closeted. Needless to say, a same sex marriage is a “tell,” so an employee in such a marriage would have to refrain from claiming spousal benefits available to others, or otherwise disclosing the sex of his spouse.

Does the pre-existing co-religionist exemption satisfy the relevant interests? The right to prefer co-religionists is not limited to matters of religious identity or affiliation. By judicial interpretation, it extends to practices forbidden or required by religious faith.<sup>139</sup> An Orthodox Jewish congregation, for example, could fire an Orthodox Jewish employee for

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138. *Id.* at 342-43 (Brennan, J., concurring). *See also* *Boyd v. Harding Academy of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996) (“[Section 702] does not, however, exempt religious educational institutions with respect to all discrimination. It merely indicates that such institutions *may choose to employ members of their own religion* without fear of being charged with religious discrimination.”) (emphasis added).

139. *See, e.g., Little v. Wuerl*, 929 F. 2d 944 (3rd Cir. 1991) (upholding dismissal of Catholic school teacher who entered a marriage not recognized by the Church).

failing to follow Jewish dietary laws, or for disrespecting the Sabbath.

At first glance, the principle that the co-religionist exemption extends to practices in compliance with faith, as well as to identity and affiliation, suggests that the exemption would permit firing of an employee for being sexually active with a person of the same sex, if the religious employer held to principles condemning such practices. As noted above, however, the law constrains the co-religionist exemption with another, equally powerful principle – the relevant religious prohibition may not run afoul of other prohibited categories of discrimination.<sup>140</sup> The Orthodox Jewish congregation referred to above would not be free to fire females who broke the Sabbath, while giving a pass to males who behaved identically.

Similarly, a religious corporation would be free to discriminate against LGBT persons only if it relied on a religious norm that was itself non-discriminatory. As I have explained elsewhere,<sup>141</sup> “such an employer might exclude from employment any person who divorced and remarried, but the employer would have to enforce this norm against all employees, and could not use it as a pretext for discriminating against LGBT employees. More pointedly, any bright-line exclusion of same-sex spouses from family benefits, coupled with a practice of inclusion of all opposite-sex spouses, would be in direct violation” of a prohibition against discrimination based on sexual orientation or gender identity.

Limiting religious entities to the existing baseline, represented by the co-religionist exemption, thus represents a salutary move in the direction of organizational accountability. The limitation would force these employers to justify, as a matter of religious principle, any adverse job action based on sexual orientation or gender identity. Identifying that principle would clarify any potential ground of exclusion, and block the use of inherently discriminatory grounds. If religious organizations must articulate grounds that are neutral with respect to sexual orientation, they can maintain and enforce much of their teaching on sexuality without favoring heterosexuals. For example, they can insist that their employees refrain from sex outside of

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140. See Memorandum from Randolph D. Moss, U.S. Assistant Attorney General to William P. Marshall, Deputy Counsel to the President 30–32 (Oct. 12, 2000), available at <http://perma.cc/PAL9-3NE4>. See also Lederman, *supra* note 81; Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws*, CORNERSTONE BLOG (July 28, 2014), <http://berkeleycenter.georgetown.edu/responses/the-truth-about-religious-employers-and-civil-rights-laws>, archived at <http://perma.cc/9CZD-XJJZ>.

141. Lupu, *supra* note 11, at 96.

marriage, but they would have to respect same sex marriage equally with different sex marriage.

Concerned religious organizations will no doubt assert that limiting them to the co-religionist exemption, constrained in this way, will not permit them to fully realize their religious principles in the workplace. But that is always true of the operation of the exemption. For a leading example, religious communities that believe that women should be subordinate to men cannot manifest these principles in their hiring policies.<sup>142</sup> Nothing in the context of sexual orientation or gender identity justifies a departure from that limitation.

Significantly, religious organizations still retain the ministerial exception,<sup>143</sup> which gives them full authority to restrict in any way hiring for positions as clergy or other positions responsible for teaching the faith. Religious entities also retain complete control over their religious teaching about human sexuality.<sup>144</sup> Moreover, religious organizations may adjust their employee benefit policies to include a wide array of domestic partners,<sup>145</sup> including spouses, or to eliminate family benefits altogether.<sup>146</sup>

As this discussion reveals, compromise over the form of the Equality Act, and any religious exemption it may contain, will be very difficult.

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142. *EEOC v. Fremont Christian Schools*, 781 F. 2d 1362, 1364 (9th Cir. 1986) (finding a violation of Title VII in Christian school's religion-based policy that only single persons and married men can qualify as "head of household" for purposes of employer-provided health insurance).

143. *Hosanna-Tabor*, 132 S. Ct. at 707 .

144. For a comparable analysis in a somewhat different context, see Nan D. Hunter, *Pluralism and its Perils: Navigating the Tension Between Gay Rights and Religious Expression*, 15 *GEO. J. GENDER & L.* 435 (2014).

145. Catholic Charities in Maine and San Francisco, CA have adopted this sort of "plus one" policy, permitting employees to designate any adult to receive employee benefit coverage without regard to whether the designated adult is a spouse or intimate partner. *Maine Charity to Provide Domestic Partner Benefits*, UNMARRIED AMERICA (Nov. 14, 2002), [http://www.unmarriedamerica.org/members/news/2002/November-DP/ME\\_charity\\_to\\_provide\\_dp\\_benefits\\_Nov\\_14\\_2002.html](http://www.unmarriedamerica.org/members/news/2002/November-DP/ME_charity_to_provide_dp_benefits_Nov_14_2002.html).

146. After the District of Columbia enacted a law permitting same-sex marriage, Catholic Charities of DC eliminated spousal benefits for employees in order to avoid coverage of same-sex spouses. See *Archdiocese of Washington Ends Spousal Benefits, Citing Gay Marriage Law*, LGBTQ NATION (Mar. 2, 2010), <http://www.lgbtqnation.com/2010/03/archdiocese-of-washington-ends-spousal-benefits-citing-gay-marriage-law>.

Traditional religious organizations will want a complete exemption; LGBT rights groups will fiercely resist that. Moreover, *Hobby Lobby* may have widened considerably the gap between each side's approach to the issues. *Hobby Lobby's* false promise of a new, generic baseline of religious privilege, expanded to commercial actors acting in discriminatory ways, may reinforce conservative hold outs from any new legislation. And *Hobby Lobby's* threat that specific accommodation of some objectors will produce an invitation to RFRA-based accommodation of all objectors will equally reinforce progressive resistance to even the narrowest religious exemption. Holding the line on the co-religionist exemption, in its present scope, has become by far the most sensible strategy for the LGBT rights campaign.<sup>147</sup> Whether that will be acceptable to religious organizations is an open question.

As advocates of LGBT rights seek new protections in federal law, they will face many obstacles. *Hobby Lobby* is now among those obstacles, because of the legal and political legitimation it appears to provide to claims of religious exemption in a commercial context. Indeed, because the RFRA purports to restore constitutional norms that the Supreme Court had abandoned, *Hobby Lobby* appears to provide constitutional legitimation as

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147. One other context of federal law deserves mention, because its baseline is different, and far less hospitable to claims of religious privilege. In the development of President George W. Bush's Faith Based and Community Initiative, and its inclusion of faith-based organizations as potential federal grantees in the delivery of social services, the Executive Branch firmly and explicitly prohibited any religious discrimination among beneficiaries. Exec. Order No. 13279, 67 C.F.R. 241, § 2(d) (Dec. 16, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31831.pdf>. A faith-based grantee may not exclude or discriminate against any beneficiary based on faith commitments, membership in a religious community, willingness to engage in any form of worship, or any other ground that has its basis in religious norms. *Id.* § 2(f). In this context, therefore, the baseline is one of no religious privilege whatsoever. For an account of current controversies concerning the role of RFRA with respect to religious selectivity by grantees with respect to employees, and to the choice of services available to beneficiaries, see Chris Geidner, *Progressive Groups Ask Obama to End Bush-Era Religious Protection*, BUZZFEED (Aug. 20, 2015), <http://www.buzzfeed.com/chrisgeidner/progressive-groups-ask-obama-to-end-bush-era-religious-prote#.akrNXnME0>; Sarah Posner, *Discrimination on the Taxpayer's Dime? The Fight to Curtail the Overreach of RFRA*, USCANNENBERG: RELIGION DISPATCHES (Apr. 30, 2015), <http://religiondispatches.org/discrimination-on-the-taxpayers-dime-the-fight-to-curtail-the-overreach-of-rfra/>.

well. In an ironic twist, however, *Hobby Lobby* may turn out to be a friend of the LGBT rights movement. The decision provides a principled reason to oppose statutory exceptions to new anti-discrimination laws for any and all religious objectors; if LGBT rights advocates give an inch, they may lose a RFRA-pushed mile. Indeed, *Hobby Lobby* gives LGBT rights advocates strong grounds to assert the necessity of a generic exclusion from antidiscrimination laws of RFRA claims and defenses.<sup>148</sup> Whether that stance wins the day, or precludes all possibility of compromise, remains to be seen.

### III. RELIGIOUS FREEDOM AND LGBT PROTECTIONS IN STATE LAW

Recent events in Arkansas, Georgia, Indiana, Louisiana, and elsewhere have brought to prominence the intense conflict under state and local law between the possibility of LGBT rights and claims of religious freedom. For many reasons, the state law story of the relationship between *Hobby Lobby* and LGBT rights is significantly different from the federal version. The Federal RFRA, and *Hobby Lobby*'s interpretation of it, are applicable only to federal law. Those who complain of burdens on religious freedom from application of state anti-discrimination law must look to state constitutions, state RFRA, or specific state statutory exemptions. Instead of a single, national jurisdiction, the state-centered narrative involves fifty different state jurisdictions, plus potential conflict between relevant state and local law.

The sections that follow subdivide the subject of state law into three parts. Part A appraises the current legal situation, which has two key components. Part A first describes the wide geographical disconnect between religious liberty legislation and statewide LGBT protections in anti-discrimination law, and then addresses the handful of decisions involving vendors who have refused to serve same-sex weddings. Part B focuses on the likelihood of new state legislation and the ways in which *Hobby Lobby* may influence the relevant political discourse. Part C analyzes the possible impact of *Hobby Lobby* on future state court adjudication of the conflicts that these laws may produce.

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148. The proposed Equality Act would do precisely that. *See* text at note 127, *supra*.

*A. Current Circumstances – Legislation and Adjudication.**1. The Legislative Mismatch*

The current distribution of state-wide laws on LGBT rights and religious liberty reveals a stark mismatch. This paper opened with an extreme example—Alabama has a RFRA in its state constitution, but has no statewide laws that forbid discrimination in employment or public accommodations.<sup>149</sup> More typically, many states with strong religious liberty protections do have prohibitions on some forms of employment discrimination, but do not include LGBT discrimination among the prohibited grounds.<sup>150</sup> A number of blue states reveal the opposite pattern—state-wide anti-discrimination laws that include sexual orientation and gender identity, and no RFRA to set against them.<sup>151</sup>

More precisely, the mismatched numbers reveal the following: twenty-two states (and D.C.) have jurisdiction-wide laws that forbid discrimination based on LGBT status in employment, housing, and/or public accommodations.<sup>152</sup> Twenty-one states now have RFRA modeled on the

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149. *See supra* note 10 and accompanying text. Similarly, Mississippi added a RFRA to its laws in 2014. MISS. CODE ANN. § 11-61-1 (2014). Like Alabama, Mississippi has no state wide regime of anti-discrimination laws with respect to employment or public accommodations. *Id.*

150. *See* James Oleske, *State Inaction, Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2589743](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589743). Professor Oleske argues in this piece that states with anti-discrimination laws that do not include sexual orientation as a forbidden classification are acting in violation of the Equal Protection Clause. *Id.* at (SSRN version) 27-42.

151. Lupu, *supra* note 11, at 99 n.312.

152. *Id.* (citing NeJaime, *supra* note 102, at 1190 n.66–67 (asserting that 21 states follow this model)). Of these twenty-one states, only Wisconsin, New York, and New Hampshire omit gender identity as a forbidden ground of discrimination. *See Non-Discrimination Laws: State by State Information—Map*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Sept. 27, 2015). Recent legislation on LGBT rights and religious liberty made Utah the twenty-second state on this list. *See* Brady McCombs & Kelly Catalfamo, *Mormon Church Backs Utah LGBT Anti-Discrimination Bill*, ASSOCIATED PRESS (Mar. 4, 2014), <http://www.chron.com/news/us/article/Mormon-church-backs-Utah-anti-discrimination-bill-6114748.php>.



federal Act.<sup>153</sup> The overlap between these two sets is four—Connecticut, Illinois, New Mexico, and Rhode Island are currently the only states that have RFRAs and state-wide anti-discrimination laws that include LGBT status.<sup>154</sup> In addition, another eight states have the combination of broad anti-discrimination laws and state constitutional provisions that have been construed in ways akin to the pre-*Smith*, pre-RFRA regime of free exercise adjudication.<sup>155</sup> Accordingly, under current law, only twelve states—four with RFRAs plus eight with constitutional norms—present the possibility of strong conflict between state-wide LGBT anti-discrimination laws and statewide religious freedom laws.

Local law offers another dimension to the possible clashes. In a considerable number of states that have RFRAs, are considering RFRAs, or have strong constitutional protections for religious exercise, local jurisdictions have enacted LGBT anti-discrimination laws. These include (among many others) Phoenix, Arizona, where proposed amendments to the state's religious freedom law produced a political uproar,<sup>156</sup> nearly costing the state the 2015 Super Bowl; and Atlanta, Georgia, where a proposed state level RFRA generated considerable controversy, and eventually died as a result of concern that it would promote discrimination against members of same sex couples and others.<sup>157</sup>

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153. See Marci Hamilton, *Here is What is Happening in Your State*, RELIGIOUS FREEDOM RESTORATION ACT PERILS, <http://rfraperils.com/> (last visited Sept. 27, 2015) (confirming 21 states with RFRAs currently). As discussed below, *Hobby Lobby* may manifest persuasive (though not binding) effects on interpretation of similarly worded state RFRAs.

154. Lupu, *supra* note 11, at 99, n.312.

155. These states are Hawaii, Maine, Minnesota, Massachusetts, New York, Vermont, Washington, and Wisconsin. *Id.* (providing NeJaime list of states with LGBT laws); see also Loewentheil, *supra* note 5. These state constitutional patterns, too, may ultimately be influenced, though they are not in any way bound, by *Hobby Lobby's* explication of federal religious freedom principles, both constitutional and statutory.

156. Lupu, *supra* note 11, at 44, n.25.

157. Kathleen Foody, *Georgia Lawmakers Leave without Vote on Religious Freedom Bill*, WASH. TIMES (Apr. 3, 2015), <http://www.ajc.com/ap/ap/georgia/religious-freedom-measure-focus-of-ga-lawmakers-la/nkkq2/>. I was among the signatories of a Letter from Legal Scholars in opposition to the Georgia proposal. Letter from Ira C. Lupu et al., F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University, to Nathan Deal et al., Governor of Georgia (Jan. 21, 2015), available at <http://www.georgiaunites.org/wp->

## 2. Recent and Current Litigation

The mismatch between LGBT rights-oriented states and RFRA states explains in part the relative infrequency of the oft-discussed legal conflicts between wedding vendors who object to same sex marriage, and members of same-sex couples seeking goods and services for wedding celebrations. The frequency of such disputes is not zero, however, and the vendors thus far have *never* successfully defeated discrimination claims against them. *Elane Photography v. Willock*,<sup>158</sup> decided in 2013, is the most well known of these cases. In *Elane Photography*, the New Mexico Supreme Court avoided dealing with the potential conflict between the state's Human Rights Act and its RFRA by ruling that RFRA applied only in government-initiated actions, and not in actions between private parties.<sup>159</sup>

Other cases remain relatively scarce. The Gortz Haus, an Iowa gift shop and bistro, settled a discrimination case based on its refusal to host same sex wedding celebrations.<sup>160</sup> The Liberty Ridge Farm case in New York State is on appeal to state courts from an administrative finding of

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content/uploads/2015/01/Georgia-Religious-Freedom-Letter.pdf. For further detail about local LGBT-protecting laws, see *State Resource Map*, THE WILLIAMS INST., <http://williamsinstitute.law.ucla.edu/#mapwrap> (last visited Sept. 27, 2015).

158. 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd* 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). At the time of suit and decision in *Elane Photography*, New Mexico did not recognize civil marriage between same sex partners. *Id.* The legal status of marriage is irrelevant to these disputes. See Ira C. Lupu & Robert W. Tuttle, *Apocalypse Now?*, CORNERSTONE BLOG (June 29, 2015), <http://berkeleycenter.georgetown.edu/cornerstone/obergefell-v-hodges-the-ruling-and-its-implications-for-religious-freedom/responses/apocalypse-now>.

159. 309 P.3d at 76–78. The *Ocean Grove* case in New Jersey, while not involving a typical vendor, is another prominent example of a dispute between a same sex couple and a provider of space for a wedding celebration. Bernstein v. Ocean Grove Camp Meeting Ass'n, 2012 WL 169302 (N.J. Adm. 2012). Professor Tuttle and I carefully analyze the *Ocean Grove* case in Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 279-282 (2010).

160. Grant Rodgers, *Grimes' Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, DES MOINES REGISTER (Jan. 28, 2015, 6:49 PM), <http://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677/?hootPostID=%5B%22%5B%277f196770f8af716282875c2320afaadc%27%5D%22%5D>. Iowa has neither a RFRA nor a body of state constitutional law especially sensitive to impact of laws on religious exercise.

discrimination, and consequent damage liability, against a family-owned farm that hosted weddings but refused to be available for a same sex wedding.<sup>161</sup> A similar case from Colorado, involving Masterpiece Cakeshop, produced an identical disposition from a state administrative law judge,<sup>162</sup> recently affirmed by an intermediate appellate court.<sup>163</sup> Iowa, New York, and Colorado are among the states that do not have a RFRA.

Two other prominent cases in progress are on the West Coast – the *Klein* case (Sweetcakes by Melissa) in Oregon, involving a bakery that refused to prepare a cake for a same sex wedding reception,<sup>164</sup> and the *Ingersoll* case in Washington State, involving a florist who refused to provide floral arrangements for a same sex wedding.<sup>165</sup> In the Oregon case, an administrative law judge gave summary judgment to the prosecuting agency, and rejected all constitutional defenses, state and federal, offered by the Kleins. Oregon lacks a RFRA, and its state constitutional protection for religion against incidental burdens is weak.<sup>166</sup>

The *Ingersoll* case, in which a Superior Court judge gave summary judgment to Washington State and the complaining same-sex couple, may prove to be the most substantively significant so far. Washington State does not have a RFRA, but its state constitution has been construed in a religion-supportive way,<sup>167</sup> akin to federal Free Exercise Clause precedents prior to the decision in *Employment Division v. Smith*. Nevertheless, in what

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161. See *N.Y. Farm Fined \$13,000 for Refusing to host Lesbian Couple's Wedding*, LGBTQ NATION (Aug. 14, 2014), <http://www.lgbtqnation.com/2014/08/n-y-farm-fined-13000-for-refusing-to-host-lesbian-couples-wedding/>.

162. See Zahira Torres, *Civil Rights Commission Says Lakewood Bakery Discriminated Against Gay Couple*, DENVER POST (May 30, 2014), [http://www.denverpost.com/news/ci\\_25865871/civil-rights-commission-says-lakewood-baker-discriminated-against](http://www.denverpost.com/news/ci_25865871/civil-rights-commission-says-lakewood-baker-discriminated-against).

163. *Craig and Mullins v. Masterpiece Cakeshop*, No. 2015COA115 (Colo. Ct. App. 2015), available at [https://www.courts.state.co.us/Courts/Court\\_of\\_Appeals/Opinion/2015/14CA1351-PD.pdf](https://www.courts.state.co.us/Courts/Court_of_Appeals/Opinion/2015/14CA1351-PD.pdf).

164. In the Matter of Melissa Elaine Klein, dba Sweetcakes by Melissa, 2015 WL 4868796 (OR BOLI 2015).

165. *Washington v. Arlene's Flowers, Inc.*, and *Ingersoll & Freed v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct. 2015) available at <http://www.adfmedia.org/files/ArlenesFlowersSJruling.pdf>.

166. See, e.g., *Meltebeke v. Bureau of Labor and Industries*, 903 P.2d 351 (Or. 1995) (containing the reasoning the administrative law judge relied on in *Klein*).

167. See, e.g., *Woodinville v. Northshore United Church of Christ*, 211 P. 3d 406 (Wash. 2009).

appears to be the first head-on confrontation between an LGBT discrimination claim and rights asserted under a religion-protective state law regime, Superior Court Judge Ekstrom ruled emphatically against the flower shop and its owner. Although Judge Ekstrom was willing to assume that application of anti-discrimination law substantially burdened the florist,<sup>168</sup> he concluded that the state had a compelling interest in combating discrimination based on sexual orientation.<sup>169</sup> He then rejected as legally insufficient the alternative of referral to other, willing florists by the service-refusing florist; that alternative, he reasoned, was effectively a permission slip for discrimination.<sup>170</sup>

The *Ingersoll* case is not over; the case is now on appeal to a higher state court in Washington.<sup>171</sup> Washington does not have a RFRA.

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168. *Ingersoll*, No. 13-2-00871-5, at 47-48.

169. *Id.* at 48-50.

170. *Id.* at 50-51. In her paper for this Symposium, Elizabeth Sepper develops further the arguments against a system of referrals as an adequate alternative for a generally applicable prohibition on discrimination. Elizabeth Sepper, *Gays in the Moral Marketplace*, 7 ALA. C.R. & C.L. L. REV (forthcoming 2016).

171. *See Ingersoll v. Arlene's Flowers, Inc.*, No. 13-2-00953-3 (Wash. Super. Ct. 2015), available at <http://www.adfmedia.org/files/ArlenesFlowersAppealNotice.pdf>. *Ingersoll* also presents an issue that appears in other wedding vendor cases—whether application of anti-discrimination law in the case of services with a creative component violates the First Amendment's prohibition on compelled speech. In *Elane Photography*, the New Mexico Supreme Court rejected the photographer's compelled speech defense. *Elane Photography*, 309 P.3d at 63–76. In *Ingersoll*, Judge Ekstrom rejected the argument. He wrote, “Because anti-discrimination laws by their nature require equal treatment, they cannot be defeated by the claim that equal treatment requires communication or expression with which the speaker disagrees.” *Ingersoll*, No. 13-2-00953-3 at 39. For a smart and broader take on this question, *see* Hunter, *supra* note 144 (arguing that obedience to anti-discrimination law is not inherently expressive).

When a vendor generally refuses to publish messages with which she disagrees, the compelled speech argument may have some force. *See Hands-On Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-04474 (Fayette Cir. Ct. 3d Div. 2015), available at <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf> (compelled speech doctrine protects t-shirt producer, with an announced and adhered-to policy of “refusing any order that [would] endorse positions that would conflict with the [religious] convictions of the ownership,” from an order to produce shirts that say “gay pride.”) In a much briefer part of the opinion, the Kentucky court also ruled that imposing liability on

Accordingly, *Hobby Lobby* will play at most a remote role in the disposition of the religious liberty issues in *Ingersoll*. The case has yet to arise that presents the perfect conflict between strong vendor-supportive norms of religious exemption, and strong consumer-supportive norms of anti-discrimination.

*B. Hobby Lobby in the State Legislative Politics to Come*

As noted above, twenty-two states have anti-discrimination laws that cover LGBT people, twenty-one states have RFRA's, and only four have both.<sup>172</sup> The arithmetic is simple – thirty-nine states have one or the other but not both (22 + 21, minus the overlap of 4). That means eleven states have neither a RFRA nor a state-wide LGBT anti-discrimination law. These include socially conservative strongholds like Georgia, Montana, North Dakota, South Dakota, and Nebraska. As discussed further below, Arkansas and Indiana have recently enacted RFRA's, though Indiana, after tremendous national pressure, carved out anti-discrimination laws from its coverage.<sup>173</sup> In March 2015, in Utah, the prominent and influential Church

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the producer would violate the state's religious freedom statute. For discussion of the many issues that may arise in connection with a compelled speech defense to a discrimination case against a wedding vendor, see Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert. Denial*, 7 ALA. C.R. & C.L. L. REV. (forthcoming 2016); Mark Strasser, *Speech, Association, Conscience, and the First Amendment's Orientation*, 91 DENVER L. REV. 495 (2014); Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Law to the First Amendment Rights of Artistic Businesses*, 77 BROOKLYN L. REV. 1515 (2012); James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961 (2011).

In some professions, considerations of ethics or competence may permit declining certain undertakings, but not declining certain classes of clients. See Lupu & Tuttle, *supra* note 109 (arguing against all religion-based exemptions from anti-discrimination laws in commercial dealings, but suggesting that a marriage counselor or other professional who must create bonds of trust with a client may refer to other providers when the client presents issues to which the professional cannot effectively respond).

172. The District of Columbia also has both, because it is subject to federal RFRA.

173. Tony Cook, Tom LoBianco & Doug Stanglin, *Indiana Governor Signs Amended Religious Freedom Law*, USA TODAY (Apr. 2, 2015, 6:50 PM), <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom>

of Jesus Christ of Latter Day Saints joined with LGBT rights groups to present a compromise package, which soon became law.<sup>174</sup> *Obergefell v. Hodges*, which mandates marriage equality under the 14<sup>th</sup> Amendment, invites the strong possibility of more such negotiations, initiated by both sides.<sup>175</sup>

In appraising the relative bargaining power of the competing factions under current conditions, it is instructive to recall the last major round of legislative fights. They occurred in mostly blue states, and the issues arose in relation to legislative recognition of marriage equality. Between 2009 and 2014, a number of states enacted such legislation,<sup>176</sup> and religious freedom

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-law-deal-gay-discrimination/70819106/. I am a co-signatory to a letter critical of the original Indiana proposals. See Letter from Katherine Franke, Isidor & Seville Sulzbacher Professor of Law, Columbia University et al., to Ed DeLaney, Representative of Indiana (Feb. 27, 2015), available at [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law\\_professors\\_letter\\_on\\_indiana\\_rfra.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf). I was also co-signatory to a similarly critical letter regarding the unsuccessful Georgia proposal. Letter from Ira C. Lupu et al., F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University, to Governor Nathan Deal, et al. (Jan. 21, 2015), available at <http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/georgia-religious-freedom-letter.pdf> (containing critical analysis of original Georgia proposal).

174. See S.B. 296, 2015 Leg., 2015 Gen. Sess. (Utah 2015) (containing Utah's Antidiscrimination and Religious Freedom Amendments, which outlaw discrimination based on sexual orientation and gender identity in employment and housing, but not public accommodations, with exceptions for religious organizations and the Boy Scouts), available at <http://le.utah.gov/~2015/bills/static/SB0296.html>. The Church had previously signaled it was open to such non-discrimination proposals, but only if such laws respected the religious freedom of those who objected to same sex intimacy and marriage. Michelle Boorstein & Abby Ohlheiser, *Mormon Church Announces Support for Legal Protections for Gay People*, WASH. POST (Jan. 27, 2015), <http://www.washingtonpost.com/news/local/wp/2015/01/27/mormon-church-to-announce-support-for-legal-protections-for-gay-people/>.

175. Conversations in Indiana in the fall of 2015 suggest the difficulties of finding common ground. Stephanie Wang, *Can Indiana Compromise on LGBT Rights, Religious Liberty?*, INDY STAR (Oct. 3, 2015), <http://www.indystar.com/story/news/politics/2015/10/03/can-indiana-compromise-lgbt-rights-religious-liberty/73225792/>.

176. Professor Tuttle and I documented and analyzed that last round in detail in Lupu & Tuttle, *supra* note 159 (discussing various provisions of then-new same sex marriage laws in New Hampshire, New York, DC, Vermont, Maine,

concerns rose and fell in what became a predictable course. First and foremost, religious opponents of marriage equality did not show up to bargain; they came to block the new laws. Their basic position was full opposition to marriage equality.<sup>177</sup>

A group of scholars, some of whom supported same-sex marriage, approached the issues differently. This group, frequently led by Professor Douglas Laycock and Professor Robin Wilson, focused on the concern for religious liberty in the context of changes in the law of marriage. They argued consistently that marriage equality laws should include specific provisions exempting: 1) clergy and houses of worship from any obligation to cooperate in same sex weddings; 2) religious non-profits from any obligation to provide family services, such as adoption or marriage counseling, to same sex couples; 3) public employees and officials from any obligation to issue licenses or otherwise cooperate in achieving legal status for same sex marriages; 4) small businesses that sell goods and services from the obligation to supply them to same sex weddings, unless the denial would cause substantial hardship; and 5) employers from any obligation to treat same sex marriages as valid – for example, in the provision of fringe benefits to spouses.<sup>178</sup>

At that time, the legislative resolution of these fall-back demands were quite similar, state to state. As Professor Tuttle and I documented the scene, state legislatures *always* included the exemptions for clergy and houses of worship, who had never been covered in the first place by non-discrimination laws;<sup>179</sup> they *sometimes* included exemptions for religious non-profit organizations from antidiscrimination laws covering the beneficiaries of services, though the exemptions applied only if these

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Connecticut).

177. *See, e.g.*, THE WITHERSPOON INSTITUTE, <http://www.thepublicdiscourse.com/> (last visited Sept. 27, 2015) (containing writings on marriage, both before and after *Obergefell*); NATIONAL ORGANIZATION FOR MARRIAGE, <http://www.nomblog.com/> (last visited Sept. 27, 2015) (same). *See also* Statement Calling for Constitutional Resistance to *Obergefell v. Hodges*, *supra* note 37.

178. For a collection of letters to state legislators making these and similar proposals, *see* Berg, *supra* note 102. For a set of arguments in opposition to such a proposal in the Illinois Legislature, *see* Letter from Professor Dale Carpenter and Other Religious Liberty Scholars Opposing Illinois “Marriage Conscience Protection” Provisions (Oct. 23, 2013), *available at* <http://perma.cc/5PXG-JG69>. I was among the signatories to this letter. *Id.*

179. Lupu & Tuttle, *supra* note 159, at 275.

organizations were funded through exclusively private sources;<sup>180</sup> and they *never* included exemptions for public employees, commercial vendors, or private, secular employers. This pattern reflected the distribution of political power between the camps in the blue states, where support for marriage equality far exceeded support for broad religious exemptions.

The pattern also reflected a sound comprehension of constitutional principles. Clergy and houses of worship are off-limits from state regulation with respect to conferral of blessings and sacraments.<sup>181</sup> Public employees are already regulated by the Constitution.<sup>182</sup> Commercial vendors and private, secular employers are subject to extensive regulation, and present a deeply unsympathetic case on policy grounds for religious exemption.<sup>183</sup> Religious non-profits fall into an intermediate zone of constitutional and policy concern.<sup>184</sup>

That was five years ago, when marriage equality was the focus of the legislation. That focus invited the possibility of bargains over marriage equality and religious liberty. In today's circumstances, marriage equality is no longer the product of legislation; it is the outcome of litigation in the federal courts, and, for the moment, that litigation does not involve any questions whatsoever of religious freedom. For purposes of legislative

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180. Connecticut is the leading example of this. *See id.* at 299.

181. *Id.* at 282-86. Selection of clergy also represents a purely ecclesiastical question, one that the state is not constitutionally competent to answer. *Hosanna-Tabor*, 132 S. Ct. 694.

182. *See* discussion in Part I *supra* text accompanying notes 25-44. For development of this point, *see also* Memorandum from the Public Rights/Private Conscience Project to the Interested Parties of Columbia University Sch. of Law (June 30, 2015), *available at* [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage\\_exemptions\\_memo\\_june\\_30.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage_exemptions_memo_june_30.pdf). The recent Utah legislation is relevant to this discussion. *See* Utah S.B. 297, *supra* note 48, § 7, lines 201-205 (allowing individual employees to opt out of providing marriage services); *id.* § 1, lines 72-78 (ensuring that every county in the state will provide marriage services to all eligible couples). Under both Equal Protection and Establishment Clause principles, any accommodations of public employees with respect to duties toward same sex couples must be designed to do no harm, either by dignitary injury or discriminatory delay.

183. Lupu & Tuttle, *supra* note 159, at 286-295. *See also* Lupu & Tuttle, *supra* note 109.

184. Lupu & Tuttle, *supra* note 159, at 295-305. For a recent analysis of this set of problems, *see* Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).



bargaining about anti-discrimination norms and competing religious freedom concerns, the current context resembles the period between 2003 and 2008, when state courts were doing the work of marriage equality under state constitutions,<sup>185</sup> and religious exemptions were similarly not on the table.

When courts are adjudicating the marriage question, as was the case between 2003 and 2008, and is again today, the bargaining leverage for those seeking religious accommodation is considerably less than in the days when legislatures were the center of policy making on marriage.<sup>186</sup> The marriage equality campaign no longer needs legislatures, in red states or otherwise. In seeking broad anti-discrimination legislation, however, the LGBT rights camp does indeed need legislatures. State legislatures in the most religiously conservative states will be the most difficult in which to make such progress, and the most receptive to religious exemptions if progress were to be made.<sup>187</sup>

If such broad LGBT rights legislation becomes politically plausible in conservative states, now or in the future, those who seek religious exemptions from it will also be seeking legislative cooperation. Explicit exemptions are obviously the strongest defense against any obligations not to discriminate. For example, in Kansas in the spring of 2014, legislators introduced a proposal entitled “AN ACT concerning religious freedoms with respect to marriage.”<sup>188</sup> The proposal would have very specifically precluded the imposition of any legal duty on an “individual or religious entity” to provide any services or goods related to any marriage or to the celebration of any marriage, or any legal duty to “treat any marriage . . . as valid.”<sup>189</sup> The proposed law defined “religious entity” to include privately held, for-profit businesses as well as non-profit entities.<sup>190</sup> Such explicit

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185. We collect the state court decisions, with relevant citations, in Lupu & Tuttle, *supra* note 159, at 274 n.2 (citing decisions from Massachusetts, Iowa, California, Connecticut, and Vermont).

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

187. Compare the new Utah legislation (S.B. 296 and S.B. 297), discussed *supra* note 44. It addresses discrimination in employment and housing, but not in public accommodations, and creates explicit exemptions for religious entities and the Boy Scouts, but not for businesses. *Id.*

188. H.B. 2453, 85th Leg., Reg. Sess. 2014 (Kan. 2014), available at <http://perma.cc/3FJT-DM42>.

189. *Id.* § 1(c).

190. *Id.* § 3(a).

exemptions, however, invite the most virulent political attacks as “licenses to discriminate.” The proposed Kansas law was indeed an effort to preemptively bar the application of yet non-existent anti-discrimination norms to businesses, public employees, and others who objected on religious grounds to same-sex unions. As such, the proposal triggered a firestorm of criticism, and the state senate eventually rejected it.<sup>191</sup>

In the spring of 2015, as the national constitutional mandate of marriage equality loomed ever closer, other states began to consider such explicit exemptions from any legal duties, present or future, to treat all marriages equally.<sup>192</sup> Most prominent among these was Louisiana’s proposed Marriage and Conscience Act,<sup>193</sup> which would have protected all persons (including corporations) from any adverse action by the state in response to an “act[] in accordance with a religious belief or moral conviction about the institution of marriage.”<sup>194</sup> Governor Jindal and some legislators were in support, but many large business interests, LGBT rights

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191. Bryan Lowry, *Kansas Senate Leaders Kill Controversial Religious Freedom Bill*, WICHITA EAGLE (Feb. 18, 2014), <http://perma.cc/5UWU-HHLV>. The Arizona episode followed soon thereafter. Aaron Blake, *Arizona Governor Vetoes Controversial Bill Allowing Denial of Services to Gays*, WASH. POST (Feb. 26, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/26/arizona-governor-vetoes-controversial-bill-allowing-denial-of-service-to-gays/>.

192. The ACLU maintains a data base with a complete list of such recent proposals. *Anti-LGBT Religious Refusals Legislation Across the Country*, ACLU, <https://www.aclu.org/anti-lgbt-religious-refusals-legislation-across-country?redirect=lgbt-rights/anti-lgbt-religious-refusals-legislation-across-country#mare> (last visited Sept. 27, 2015).

193. H.B. 707, 2015 Leg., Reg. Sess. (La. 2015), *available at* <http://www.legis.la.gov/legis/BillInfo.aspx?s=15RS&b=HB707&sbi=y>.

194. *Id.* § 5245 A (“Notwithstanding any other law to the contrary, this state shall not take any adverse action against a person, wholly or partially, on the basis that such person acts in accordance with a religious belief or moral conviction about the institution of marriage.”). A similar, unsuccessful proposal appeared in Texas. *See* H.B. 2553, 84th Leg., Reg. Sess. (Tx. 2015), *available at* <http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=84R&Bill=HB2553> (“Sec. 606.001. RIGHT TO REFUSE TO PROVIDE GOODS OR SERVICES. (a) A private business owner may refuse to provide goods or services to any person based on a sincerely held religious belief or on conscientious grounds.”). The proposed federal “First Amendment Defense Act,” discussed in Part II, *supra*, has analogous content.

groups, and religious leaders were sharply critical, and the proposal died.<sup>195</sup>

Until the spring of 2015, in the many states where explicit exemptions cannot get political approval, a second best solution for exemption supporters had been a generic religious freedom statute like a RFRA. These once had the virtues and vices of vagueness. They do not mention marriage, and it is impossible to predict with certainty whether a RFRA can be successfully invoked as a defense to a private or government-instituted action against a discriminator.<sup>196</sup>

In the spring of 2014, Professor Thomas Berg described the atmosphere for generic religious freedom protections in state law as “toxic,”<sup>197</sup> because of the perceived association between religious freedom and hostility to LGBT rights. If such a perception was at that time held only

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195. See Emily Lane, *Louisiana’s Religious Freedom Bill Effectively Defeated in Committee*, NEW ORLEANS TIMES-PICAYUNE (May 19, 2015), [http://www.nola.com/politics/index.ssf/2015/05/louisianas\\_religious\\_freedom\\_b.html](http://www.nola.com/politics/index.ssf/2015/05/louisianas_religious_freedom_b.html). Governor Jindal described the opponents of the Bill as being under pressure from radical liberals. Bobby Jindal, *I’m Holding Firm Against Gay Marriage*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/23/opinion/bobby-jindal-im-holding-firm-against-gay-marriage.html> the competing forces. Some of Jindal’s critics can hardly be described as radical liberals. See Rabbi Gabriel Greenberg, *A Religious Case Against Louisiana’s Religious Freedom Bill*, NEW ORLEANS TIMES-PICAYUNE (April 24, 2015), [http://www.nola.com/opinions/index.ssf/2015/04/religious\\_freedom\\_louisiana.html](http://www.nola.com/opinions/index.ssf/2015/04/religious_freedom_louisiana.html). Rabbi Greenberg is an Orthodox rabbi in Metairie, La. Same sex couples would not be permitted to marry in his branch of Judaism. *Id.* Governor Jindal eventually issued an Executive Order, “Marriage and Conscience Order,” which urges state agencies to be respectful of religious conscience in cases involving objectors to same sex marriage. Exec. Order BJ 15-8, DOA.LA.GOV, available at <http://www.doa.louisiana.gov/osr/other/bj15-8.htm> (last visited Sept. 27, 2015). The Order appears to add nothing to existing Louisiana law.

196. Among other possibilities, the discriminator may be shown to be lacking a sincere religious belief in the duty to avoid complicity in certain activities; or the state may have a compelling interest in ending the discrimination, even if the prohibition burdens religious exercise. But none of these outcomes can be predicted with certainty, especially in states where RFRAs are new, and have been enacted in the shadow of the expected new regime of marriage equality.

197. Thomas Berg, *The Scholars’ Mississippi Letter: RFRA’s in General Are Now Bad*, MIRROR OF JUSTICE (Mar. 25, 2014), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2014/03/the-scholars-mississippi-letter-rfras-in-general-are-now-bad.html> (“[P]olitically this is an impossibly toxic time to propose a state RFRA.”).

among rights activists and a few scholars, the circumstances have now changed dramatically. In the current political and cultural climate, proposed RFRA's are a whistle that everyone can hear.<sup>198</sup> After Governor Pence of Indiana signed his state's newly enacted RFRA on March 26, 2015,<sup>199</sup> the NCAA, major business corporations including Apple, Inc., and a broad array of political leaders immediately mounted great pressure on Indiana political leaders to clarify that the new law could not be used as a defense to an action under state or local anti-discrimination law.<sup>200</sup> Within days, the Indiana Legislature had revised the law to so clarify, and the Governor had signed the amended version.<sup>201</sup>

How will the *Hobby Lobby* decision affect this political atmosphere?

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198. Erik Eckholm, *Religious Protection Laws, Once Called Shields, Are Now Seen as Cudgels*, N.Y. TIMES (Mar. 30, 2015), <http://www.nytimes.com/2015/03/31/us/politics/religious-protection-laws-once-called-shields-are-now-seen-as-cudgels.html>.

199. *Indiana: Bill Signed Allowing Denial of Service to Gays*, N.Y. TIMES (Mar. 26, 2015), <http://www.nytimes.com/2015/03/27/us/politics/indiana-bill-signed-allowing-denial-of-service-to-gays.html>. See also *Here It Is: The Text of Indiana's 'Religious Freedom' Law*, INDYSTAR (Apr. 2, 2015, 12:24 PM), <http://www.indystar.com/story/news/politics/2015/03/27/text-indianas-religious-freedom-law/70539772/>.

200. The State of Indiana does not have a law that forbids discrimination based on sexual orientation or gender identity, but Indianapolis does, as do other local governments in Indiana. See, e.g., INDIANAPOLIS, IND., CODE § 581-101 (2008). Controversy over these issues continues in Indiana. Stephanie Wang, *supra* note 175.

201. Wesley Lowery, *Gov. Pence Signs Revised Indiana Religious Freedom Bill Into Law*, WASH. POST (Apr. 2, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/04/02/gov-pence-signs-revised-indiana-religious-freedom-bill-into-law/>. See also *Conference Committee Report*, <https://www.documentcloud.org/documents/1699997-read-the-updated-indiana-religious-freedom.html> (last visited Sept. 27, 2015) (containing the clarifying amendment to the Indiana RFRA). An earlier version of the amendment applied only to discrimination based on sexual orientation or gender identity, and only to public accommodations. Tony Cook, Tom LoBianco & Brian Eason, *Gov. Mike Pence Signs RFRA Fix*, INDYSTAR (Apr. 2, 2015, 8:08 PM), <http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920>. The final, enacted version includes all covered categories of forbidden discrimination (race, sex, etc.), and all contexts (including housing, public and private employment, and public accommodations) in which discrimination is forbidden. *Id.*

More importantly, how will *Hobby Lobby* affect interpretations by state courts of their own RFRA, many of which were enacted years before marriage equality seemed imminent anywhere in the United States? In discussions of proposed federal legislation, *Hobby Lobby* operates directly, because federal RFRA modifies all of federal law. In considering the impact of RFRA on rights conferred by new federal law, lawyers can argue about the scope and meaning of *Hobby Lobby*, but not about its applicability. Thus, as discussed in Part II above, lobbyists and federal legislators will negotiate in the shadow of the uncertain legal principles for which *Hobby Lobby* stands.

When state courts interpret their own state's RFRA, however, *Hobby Lobby* operates only at the level of potentially persuasive, rather than binding, authority. If a state has a RFRA, *Hobby Lobby* may influence the state courts' construction of it. The most likely influence would be in the direction of pushing recognition of corporations, or other business entities, as "persons" who can mount RFRA claims.<sup>202</sup> Such a move is not dispositive; it opens the door for certain claims but does not guide the court to their ultimate resolution.<sup>203</sup>

On dispositive questions, however, such as whether a state interest in preventing discrimination will usually or always trump religious exercise, *Hobby Lobby* is a far less reliable predictor of what state courts will do. From the perspective of those who seek the widest possible set of religious exemptions, *Hobby Lobby* might be viewed as significantly increasing the pre-existing likelihood that state courts would apply RFRA in favor of a religiously motivated discriminator.

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202. Lupu, *supra* note 11, at 99. See also Frank S. Ravitch, *Be Careful What You Wish For: Why Hobby Lobby Weakens Religious Freedom*, 2015 B.Y.U. L. REV (forthcoming 2015) at [SSRN version] 37-44, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2587503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587503)). For a recent example of a state court mechanically following *Hobby Lobby* on the question of corporate personhood, see *Hands-On Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-04474, at 14 (Fayette Cir. Ct. 3d Div. 2015), available at <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf>.

203. If I were advising a state legislature on this coverage issue in light of *Hobby Lobby*, I would suggest that courts are highly likely to construe "person" in a RFRA as covering business entities, including corporations, unless the legislation or its history clearly indicate otherwise. The law of many states includes a presumption to this effect. See, e.g., GA. CODE ANN., §1-3-3 (14) (2010). See also *Eckles v. Atlanta Tech. Group, Inc.*, 485 S.E.2d 22 (Ga. 1997) (stating that "[a] corporation is a 'person'" and citing §1-3-3 to support that proposition).

First, *Hobby Lobby* seemed unreceptive to the argument that actual or potential harm to third parties will necessarily be fatal to a successful RFRA claim.<sup>204</sup> If state courts reasoned similarly, they would reject the argument by a victim of discrimination that a decrease in convenience, access to goods, or respect in the marketplace necessarily trumped a RFRA claim to be free to refuse to engage in commerce with certain customers.

Second, in holding that commercial entities can escape regulation as a result of their owners' religious commitments, *Hobby Lobby* disconnected RFRA from the limitations associated with prior free exercise clause principles, particularly those strongly stated in *U.S. v. Lee*.<sup>205</sup> *Lee* had appeared to lay down a hard and fast rule that business entry constituted a form of waiver of religious objection to general business regulation.<sup>206</sup> To the extent state courts had been committed to tracking such principles in their own RFRA interpretations, *Hobby Lobby* might lead state court judges to feel freer to abandon those principles.

Third, in *dicta*, *Hobby Lobby* singled out *only* race discrimination as a concern of civil rights law that religious freedom should not be able to trump.<sup>207</sup> This prominent omission of discrimination based on sex, religion,

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204. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (characterizing the harm as a refusal to extend benefits to third parties). The most strenuous version of this argument appears in Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356–71 (2014). Professor Nelson Tebbe has proposed in testimony to a Congressional Committee that RFRA be amended to clarify that a showing of material harm to third parties would always be fatal to a RFRA claim or defense. *Oversight of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution and Civil Justice*, 114th Cong. (2015), available at [http://judiciary.house.gov/\\_cache/files/497441bc-b2fa-4b10-8ade-91f6603588fe/tebbe-02132015.pdf](http://judiciary.house.gov/_cache/files/497441bc-b2fa-4b10-8ade-91f6603588fe/tebbe-02132015.pdf).

205. *U.S. v. Lee*, 455 U.S. 252, 254 (1982). See *Hobby Lobby*, 134 S. Ct. at 2783–84. For comment on this aspect of *Hobby Lobby*, see William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71 (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2562949](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562949); James M. Oleske, Jr., *The Born Again Champion of Conscience*, 18 HARV. L. REV. FORUM 75, 87–90 (2015) (book review).

206. “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *Lee*, 455 U.S. at 261.

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

national origin, or LGBT status suggests that the government interests in eradicating any of those categories of discrimination might not be compelling, and that religious freedom might therefore prevail over such interests. This omission was of particular and obvious alarm to advocates of equality rights for women as well as members of the LGBT community.

These propositions, if imported into state court interpretations of RFRA, make such laws considerably more potent in their application to discrimination disputes.<sup>208</sup> The awareness of that potential potency, however, contributes substantially to the atmospheric toxicity of RFRA, both in legislative deliberations such as those in Indiana, and in future adjudication. Moreover, when viewed from the perspective of the strongest proponents of LGBT rights, *Hobby Lobby* may be seen as much narrower than the supporters of RFRA might believe. In particular, *Hobby Lobby* was grounded on the potential availability to for-profits of the accommodation that the government had made available to religious non-profits.<sup>209</sup> The ultimate scope of the *Hobby Lobby* principle may depend on the extent to which government can respect religious liberty without undermining the government's programmatic goals.<sup>210</sup>

The aftermath of *Hobby Lobby* for state legislative deliberations has thus become an ironic dance between RFRA proponents and opponents. The RFRA proponents assert the great importance of religious liberty, suggest that state RFRA have been weakly construed, and downplay the force of *Hobby Lobby*, which may have strengthened the hand of federal

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208. State RFRA will also be more potent if the courts construe them to apply to private rights of action. For discussion of the conflict among the Circuits on this question as applied to federal RFRA, see Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Parties*, 99 VA. L. REV. 343 (2013). *Hobby Lobby* did not address this question.

209. *Hobby Lobby*, 134 S. Ct. at 2780-83. See also *id.* at 2785-87 (Kennedy, J., concurring). The Obama Administration has now extended that accommodation to closely held corporations. See Coverage of Preventive Services under the Affordable Care Act, 80 Fed. Reg. 41318 et seq., (July 14, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-07-14/pdf/2015-17076.pdf>.

210. Although the accommodation for religious nonprofits has now been extended to a narrow class of closely held for-profit firms, see *id.* at 41323-41328, female employees, and female dependents of all employees, of the firms that prevailed in the litigation involving for-profit firms have been deprived of the relevant coverage since at least the end of June 2014, and will not receive coverage until the beginning of the next health plan year. *Id.* at 41322.

RFRA claimants.<sup>211</sup> The RFRA opponents can point to and emphasize *Hobby Lobby* as a danger signal of impending illiberal interpretations, while simultaneously suggesting that *Hobby Lobby* is less serious a setback for reproductive rights than might be feared.<sup>212</sup>

In this political climate, it is easy to see the possibility of endless legislative stalemate on LGBT rights and religious freedom. Champions of religious liberty will prefer broad and explicit religious exemptions, not subject to judicial interest-balancing, for commercial vendors and public employees, as well as for clergy and religious institutions. Proponents of LGBT rights will be extremely unwilling to concede these explicit exemptions with respect to commerce and public employees, for fear of gutting the legislation's thrust. With respect to public servants, in particular, LGBT rights proponents will be rightly concerned about undermining the thrust of *Obergefell*. On the practical level, exemptions allow escape from anti-discrimination norms; on the symbolic level, exemptions legitimize anti-LGBT attitudes in the name of faith.

Nor will proposed enactment of RFRA, with their vague terms and interpretive uncertainties, operate to fully diffuse the opposition to LGBT rights legislation. RFRA proponents who are elected officials will be unwilling to identify the extent to which their agenda *is* the creation of a faith-based license to discriminate. In any event, RFRA supporters can have no confidence that courts will construe the statute to facilitate religious objections by vendors to providing goods and services to same-sex couples, or objections by public employees to serving same sex couples.

By the same token of uncertainty, however, LGBT rights supporters will be unwilling to accept RFRA, unless an Indiana-style exclusion of anti-discrimination laws is included. These groups will lack confidence that courts *won't* so construe the statute, especially after LGBT rights groups

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211. *See, e.g.*, Letter from Douglas Laycock et al., Professor of Law, University of Virginia, to Hon. Same Teasley, Georgia House of Representatives (Feb. 19, 2015), *available at* <https://cmgajcpolitics.files.wordpress.com/2015/02/georgia-hb-218.pdf>. *See also* Letter from Douglas Laycock et al., Professor of Law, University of Virginia, to Hon. Brent Steele, Chair of the Indiana Senate Judiciary Committee, at 5, (Feb. 3, 2015), *available at* <http://www.faithlafayette.org/uploads/Church/LetterSupportingReligiousFreedomRestoration.pdf>. (“In narrow circumstances, some claims to exemption from anti-discrimination laws might properly succeed, especially when the anti-discrimination laws reach into religiously sensitive contexts.”)

212. *See, e.g.*, Lupu, et al., Letter to Nathan Deal, Governor of Georgia, *supra* note 173.



have warned of precisely that danger.<sup>213</sup> Moreover, RFRA opponents can also credibly argue that, at the margin, RFRA may embolden potential discriminators<sup>214</sup> and discourage litigation by their victims. At the very least, the presence of a RFRA changes the bargaining power of both sides, pre-litigation as well as in any settlement phase.

Working out a *modus vivendi* between LGBT rights and religious freedom was inevitably going to be very difficult in the short run. *Hobby Lobby* has considerably aggravated this problem,<sup>215</sup> and *Obergefell* will do little or nothing to neutralize the conflict. Time and cultural change, however, are on the side of LGBT rights proponents. I would encourage them to hold out for good deals later, and not make bad ones now.

In an atmosphere so charged, is it possible that strong LGBT rights proposals can advance in conservative states? Utah managed such a feat, but only because of an unusual degree of cooperation and mutual respect between a single, dominant religious actor and LGBT rights groups. And even in Utah, legislation about public accommodations was left off the table, so the wedding vendor question was not resolved. Moreover, the Utah law was enacted against a longstanding background of broad exemptions from anti-discrimination laws for religiously affiliated organizations.<sup>216</sup>

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213. *Id.* at 4-7.

214. See Paxton Opinion, *supra* note 38, at 2-4. Sections 1 and 2 of Governor Jindal's "Marriage and Conscience Order," <http://www.doa.louisiana.gov/osr/other/bj15-8.htm>, explicitly rely on the Louisiana RFRA for authority. Exec. Order BJ 15-8, *supra* note 201, as does the Memorandum from Thomas Enright, Executive Counsel, Office of Governor Bobby Jindal to Interested Parties (June 29, 2015), available at <http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=5012>.

215. See generally Frank S. Ravitch, *Be Careful What You Wish For: Why Hobby Lobby Weakens Religious Freedom*, 2015 B.Y.U. L. REV (forthcoming) at [SSRN version] 37-44, (describing effect of *Hobby Lobby* on political deliberations over a proposed RFRA, which was not enacted, in Michigan as well as deliberations in other states).

216. See Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Utah 'Compromise' to Protect LGBT Citizens from Discrimination is No Model for the Nation*, SLATE (Mar. 18, 2015 3:18 PM), [http://www.slate.com/blogs/outward/2015/03/18/gay\\_rights\\_the\\_utah\\_compromise\\_is\\_no\\_model\\_for\\_the\\_nation.html](http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html) (explaining why Utah's background legal circumstances make the Utah compromise a poor model for other states or the United States). *But see* J. Stuart Adams & Robin Fretwell Wilson, *Protecting Religious Equality Requires Protections for All*, THE CORNERSTONE BLOG (July 31, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/rfra-in-indiana-and-beyond/respo>

Except for this recent example, these qualities of cooperation and mutual respect have been close to invisible in these fights over the past twenty years.<sup>217</sup>

The remaining context for bargaining involves the interests of religiously affiliated social service organizations in being free to use their own parameters for distribution of social and family services.<sup>218</sup> Such services may have the quality of ministries, and our strong constitutional tradition is that privately supported religious ministries set their own criteria for who deserves and gets their help. This is only one short step removed from recognition that religious communities are autonomous in distribution of blessings and sacraments.<sup>219</sup>

Once these entities accept public funds or operate under public licensure, however, this right to exclude beneficiaries based on religious criteria becomes deeply problematic.<sup>220</sup> Although neither receipt of public

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nses/protecting-religious-liberty-requires-protections-for-all (praising the Utah compromise).

217. For an impressive recent call for mutual respect and appropriate forbearance in litigation, see Steve Sanders, *RFRA and Reasonableness*, IND. L.J. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2661587](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661587).

218. Lupu & Tuttle, *supra* note 159, at 296-305. Note that a recent Michigan proposal, which did not succeed, would have permitted publicly funded religious social service agencies to discriminate against same sex couples. See Kathleen Gray, *Religious Liberty Bills Reemerge in State Legislature*, DETROIT FREE PRESS (Feb. 23, 2015, 9:02AM), <http://www.freep.com/story/news/politics/2015/02/22/religious-liberty-bills-resurface-state-legislature/23846599/>.

219. Nor is there any reasonable ground for apprehension that religious entities will lose their tax exempt status under state law because of their teachings on same sex intimacy. Cf. Sam Brunson, *The Church Will Not Lose its Tax Exempt Status*, BY COMMON CONSENT (July 9, 2015), <http://bycommonconsent.com/2015/07/09/the-church-will-not-lose-its-tax-exempt-status/>. I have seen no evidence that states are more aggressive than the federal government on such matters.

220. See Brownstein, *supra* note 133, at 428. Indirect, or voucher-based, funding, does not implicate the government to the same extent in actions by the religious entity that redeems the vouchers, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), so long as the voucher arrangements do not steer beneficiaries into religious experience. Nevertheless, beneficiaries should not, on religious grounds, be made ineligible for voucher-funded programs. For discussion of the various issues raised by indirect funding, see generally Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003); see also Ira C. Lupu & Robert W.

funds nor state licensure makes the recipient a state actor,<sup>221</sup> both involve a version of official imprimatur on the recipient's qualifications and performance of the service. Public funding involves the support of all taxpayers, whether or not they approve of the particular grantee or its policies, as well as discretionary decisions by public officials to allocate the funds to particular grantees. As recognized by the policies of the Faith-Based and Community Initiative under President George W. Bush, beneficiaries should never be turned away on religious grounds from a publicly supported charity.<sup>222</sup>

Licensure alone may present a closer question. Unlike public funding streams, which supplement private generosity, license requirements interfere with private freedoms, albeit in the good name of quality control over the licensed personnel or enterprise. This is a context for compromise and bargaining, where considerations of utility will play a part.<sup>223</sup> If enough services—for example, in matters of foster care, or adoption—are available for all who need them, including those whose sexual orientation and/or gender identity will make them unwelcome in some quarters, perhaps licenses need not come with strong anti-discrimination requirements for religious providers. In the case of a provider that dominates the service market and treats LGBT people in a discriminatory or disrespectful way, however, continued state licensure would be oppressive and unfair.

Whether negotiations over such matters can solve the empirical problem of determining sufficiency of providers, as well as the problem of political symbolism in affirming a “license to discriminate” (even among religiously affiliated non-profits), remains to be seen. To the extent legislation is necessary to guarantee the freedom of religious organizations to exclude beneficiaries based on LGBT status, there is no reason for LGBT rights advocates to concede on this point unless they are getting new and valuable anti-discrimination laws in exchange.

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Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J. L. & POL. 537 (2002).

221. See *Moose Lodge v. Irvis*, 407 U.S. 163, 175 (1972) (receipt of liquor license does not make licensee a state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (receipt of public funds does not transform private actor into state actor); *accord*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

222. Exec. Order No. 13279, 3 CFR § 13279.2(d) (Dec. 12, 2002), available at <http://www.gpo.gov/fdsys/pkg/FR-2002-12-16/pdf/02-31831.pdf>.

223. Lupu & Tuttle, *supra* note 159, at 297-303.

*C. Hobby Lobby and the Future of State Court Adjudication*

As chronicled above, there has yet been no case in which a state RFRA, modeled after federal RFRA, is put into square conflict with an anti-discrimination law.<sup>224</sup> The possible expansion of anti-discrimination laws into states that already have RFRAs increases the probability that such a case will arise. When that happens – for example, with respect to a wedding vendor, or a private employer who refuses on religious grounds to recognize a same sex spouse for purposes of fringe benefits – how should we expect the arguments to unfold? In particular, what role will *Hobby Lobby* play?

Recall the discussion in Part I of this paper of the elements of a federal RFRA claim or defense. A party who relies on RFRA must demonstrate a substantial burden on her sincere religious exercise. If the claimant is unsuccessful on any of those points – sincerity, religiosity, burden, or substantiality – the claim will fail. If the claimant is successful on those points, which are frequently undisputed, the risk of non-persuasion shifts to whoever is opposing the RFRA claim. That party must show that denying the requested exemption is the “least restrictive alternative” to “furthering [a] compelling governmental interest.”

State RFRAs tend to be very similar in their terms, and one would expect state court interpretations to converge around the interpretations of federal RFRA and those of other state RFRAs. In the past, as Professor Christopher Lund has demonstrated,<sup>225</sup> those convergences have been in the direction of weak interpretation. This has enabled the supporters of recently proposed state RFRAs, such as in Indiana, to portray these Bills as representing only marginal changes in the legal status quo.<sup>226</sup> The looming question after *Hobby Lobby* is whether future state interpretations will

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224. *Elane Photography* would have been such a case if the New Mexico Supreme Court had not construed the state’s RFRA to be inapplicable to a private lawsuit.

225. Christopher Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D.L. REV 466, 477 n.67, tbl I (2010). See also Lupu, *supra* note 11 at 69-71 (suggesting not much has changed regarding interpretations of state RFRAs since Professor Lund published his article, save perhaps in Texas). The effects of *Hobby Lobby*, however, have yet to be seen.

226. Letter from Douglas Laycock et al., Professor of Law, University of Virginia, to Hon. Brent Steele, Chair of the Indiana Senate Judiciary Committee, 4-5 (Feb. 3, 2015), available at <http://www.faithlafayette.org/uploads/Church/LetterSupportingReligiousFreedomRestoration.pdf> (asserting that state and federal RFRAs “have been very cautiously enforced.”)

strengthen the hand of religious objectors. In the broader, conceptual terms I suggested in Part I of this article, does *Hobby Lobby* represent a major step toward expanding and normalizing the concept of religious privilege in the law?

In the immediate wake of *Hobby Lobby*, I expressed the view that state courts would continue to weakly construe state RFRA.<sup>227</sup> I confess that in appraising the situation going forward, I am slightly less confident than I once was. The rapid and explosive surge of marriage equality, arriving in conservative states by court order, inevitably will invite some form of political and cultural response. Very little of the response will take the form of public defiance of the sort demonstrated in Alabama by its Chief Judge and its Supreme Court.<sup>228</sup> Continued discrimination against same sex couples, in defiance of a federal court order, will invite injunctions, contempt citations, and significant awards of attorneys fees.<sup>229</sup> Moreover, no state is going to permanently shut down the institution of marriage for different sex couples in order to stop same sex couples from getting its benefits.

Under current conditions, what should we expect from state courts? What difference, if any, will *Hobby Lobby* make as persuasive, but not binding, authority? The most important quality of *Hobby Lobby* to note in this regard is its partial liberation from, and partial adherence to, the Free Exercise Clause precedents that many thought had been restored by federal RFRA. Before *Hobby Lobby*, lawyers had some confidence in the vitality of the Supreme Court's firm statement in *U.S. v. Lee* about those who enter the commercial realm being unable to superimpose their own faith-based limits "on the [regulatory] schemes . . . binding on others in that activity."<sup>230</sup> That confidence has now been washed away. Under federal RFRA, commercial entities, in the corporate form or otherwise, are free to advance religious objections to regulatory schemes. Moreover, the strong commitment in

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227. Lupu, *supra* note 11, at 98-100.

228. See Ex parte State of Ala., *supra* note 8. See also, *Alabama Judge: Feds Should Issue Same Sex Marriage Licenses*, ASSOCIATED PRESS (Oct. 8, 2015), <http://bigstory.ap.org/article/0857f8d3607a4f959196bbc0a93147e3/alabama-judge-feds-should-issue-same-sex-marriage-licenses>.

229. Procedural issues may continue to be important in any continued litigation over marriage equality. For analysis of the role played by these issues on the path to *Obergefell*, see Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 42 HASTINGS CONST. L.Q. (forthcoming), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2641943>.

230. *Lee*, 455 U.S. 252, 261 (1982).

*Hobby Lobby* to the *Thomas* rule,<sup>231</sup> involving self-declaration of the substantiality of the religious cost of complying with the law, precludes judicial second-guessing about the religious weight of the asserted burden on religious practice.

Liberation from *Lee*, coupled with adherence to *Thomas*, represents a sweet package for commercial enterprises making RFRA claims. Although state courts need not follow *Hobby Lobby* in construction of state RFRA, these propositions are likely to find their way into state interpretations, especially in cases where the enactment of a state RFRA has come after *Hobby Lobby*. Operationally, that means that few if any cases will be disposed of by a party not qualifying as a “person” covered by RFRA, or on the question of whether that person’s religious exercise has been substantially burdened by an anti-discrimination law. If state law imposes fines, money damages, or any other legal disability for refusal to serve a same sex wedding, or refusal to recognize a same sex spouse as eligible for employee benefits, state courts are likely to find a substantial burden on an objecting business owner’s religious exercise.<sup>232</sup>

The sincerity question was not litigated in *Hobby Lobby*, and we know nothing more about what may become an evolving judicial approach to that than we did before that decision. I suggested in Part I of this paper that litigants in the future may challenge more frequently the religious sincerity of those who engage in discrimination based on sexual orientation or gender identity. But the lawyers from The Becket Fund and Alliance Defending Freedom, organizations most likely to mount the earliest test cases of the sort under discussion here, are experienced and able. They will screen potential clients, and choose to litigate only on behalf of those who are the most demonstrably sincere. So, in the earliest, precedent-setting cases, I do not expect the action to swirl around the question of sincerity.

If this appraisal is correct, the dispositive questions will be 1) the weight of the government’s interests in denying religious exemptions, and

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231. *Thomas*, 134 S. Ct. at 2777-79.

232. Direct imposition of civil damages, a fine, or imprisonment for following one’s religious beliefs will always qualify as a substantial burden on religious exercise. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In addition, “where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.” *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981).

2) whether the government has alternative ways of satisfying those interests. And on these questions, the impact of *Hobby Lobby* will be either muted, or positively helpful to those who complain of LGBT discrimination.

*Hobby Lobby* assumed, rather than decided, that the government's interest in providing full contraceptive coverage to women was compelling.<sup>233</sup> The need to secure Justice Kennedy's vote, and thereby make a majority, is the most likely explanation for that assumption,<sup>234</sup> but that is irrelevant in the context of state court interpretations of their own RFRA's. The assumption drove the case into the ultimate question of whether the government had ways of satisfying its interests without burdening the religious exercise of *Hobby Lobby* and other, comparable objectors. Because the government had made an accommodation for non-profits, and in any event might independently assume the costs and responsibility of full contraceptive insurance, the government could not justify imposing that responsibility on the religiously objecting firm.<sup>235</sup>

With respect to laws prohibiting discrimination by sellers of goods and services, states are protecting two sets of strong interests – material access to goods and services, and protection against dignitary harm. Proponents of religious exemptions for vendors of wedding services typically focus on the former.<sup>236</sup> Whatever the weight of the state's interest in guaranteeing access to goods and services, exemption proponents argue that most vendors will serve same sex couples, thereby guaranteeing sufficient access to the relevant goods. In states where exemption proponents have recommended explicit exemptions in the commercial sphere, they have included an exception for cases in which “a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship.”<sup>237</sup> Implicit in such a proposal, which no state

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233. *Hobby Lobby*, 134 S. Ct. at 2780.

234. Lupu, *supra* note 11, at 84-85.

235. *Id.* at 86-90. *See Hobby Lobby*, 134 S. Ct. at 2780-82.

236. Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same Sex Marriage from the Health-Care Context*, in SAME SEX MARRIAGE AND RELIGIOUS LIBERTY (Douglas Laycock, et al., eds., 2008); Douglas Laycock, *Afterword*, *id.* at 194-201; *see also* Thomas Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 N.W. J.L. & SOC. POL'Y 206 (2010); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

237. Letter from Professor Robin Fretwell Wilson et al., to Governor Pat Quinn (Illinois) 4 (Sept. 27, 2015), *available at* <http://mirrorofjustice.blogs.com/files/ill-letter-12-2012.pdf>. This proposal is criticized in Letter from Professor Dale

has ever adopted, is that alternative sources of the relevant goods are usually sufficient to satisfy state interests in ensuring adequate market access. Only when members of same sex couples can prove “substantial hardship,” by virtue of inadequate market alternatives, would the exemption not apply.

Analogously, under RFRA or analogous protections in state constitutions, objecting vendors argue that the state has an option less restrictive of religious liberty than full enforcement of anti-discrimination laws. The “least restrictive alternative” that vendors point to in these cases is the availability of equivalent goods and services from other vendors.<sup>238</sup> But satisfaction of the state’s interests in full and equal access to goods and services cannot be made to rise and fall on the fluctuating numbers, frequency, quality, and location of LGBT-friendly vendors.<sup>239</sup> To permit a religious exemption under conditions of empirical uncertainty makes same sex couples subject to the ever-changing vagaries of market conditions, and imposes on courts intractable problems of measuring whether markets for particular goods in specific locations are sufficiently gay-friendly.

Any such regime of exemptions, moreover, invites dignitary injury to those who are turned away, either to their face or by posted signs, by vendors.<sup>240</sup> Once this set of concerns is added to the RFRA equation, vendors should lose, without regard to issues of market access. It is simply impossible for the government, or the private market, to make alternative

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Carpenter and Other Religious Liberty Scholars 9-10 (Oct. 23, 2013), *available at* <http://perma.cc/5PXG-JG69>.

238. *Ingersoll*, No. 13-2-00871-5, at 50 (describing and rejecting florist’s argument that referral to another vendor, willing and able to provide the goods, is sufficient to satisfy the state’s interest in nondiscrimination).

239. In this Symposium, Andrew Koppelman and Elizabeth Sepper disagree about the relevant empirical questions. *Compare* Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert. Denial*, 7 ALA. C.R. & C.L. L. REV (forthcoming 2016) with Elizabeth Sepper, *Gays in the Moral Marketplace*, ALA. C.R. & C.L. L. REV (forthcoming 2016).

240. The Supreme Court has on several occasions emphasized the dignitary injuries caused by discrimination. *See* *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 250 (1964) (race discrimination); *Roberts v. Jaycees*, 468 U.S. 609, 625 (1984) (sex discrimination). Discrimination based on sexual orientation or gender identity works the same kind of dignitary injury. The LGBT rights literature has abundantly documented this claim. *See, e.g.*, Chai Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (Douglas Laycock et al. eds., 2008).



provisions of equal dignity for victims of discrimination on the basis of sexual orientation or gender identity. The government cannot supply their dignitary wellbeing as they, in their roles as citizens, consumers, tenants, and employees, interact with others.<sup>241</sup>

Even in conservative states, these dignitary interests should be the trump card in this game. Moreover, the dignitary interests at stake are unusually strong in cases about the provision of goods and services in connection with the ceremonies or status of marriage. Some of the religious objectors are wont to say that they are more than willing to have LGBT employees and customers;<sup>242</sup> the objectors just draw their religious line at marriage. However authentically this posture captures their religious sentiment, it is spectacularly tone-deaf and insulting. The act of marrying represents a high point in the lives of many couples, particularly those same-sex couples who have lived for many years deprived by law and custom of such opportunities. Their actual and perceived status as being married, with the identical social, moral, and legal force as different sex couples, is of profound significance to their sense of equal citizenship. For a vendor, employer, or public official to discriminate against them with respect to their wedding or marital status is a deep assault on their full and equal place in American society.

The unwilling vendors and other discriminators thus represent something far more disturbing than a narrowed consumer choice of a cake, flowers, or banquet hall. They represent a continuing and profound insult to those whom they refuse to serve. Why they do not have a crisis of conscience about delivering that blow is a puzzle to me. Forcing them to alter their policies, or to leave the relevant market, is the least restrictive means of furthering the compelling governmental interest of equal dignity for LGBT people. If and when cases of this sort arrive in state courts, I hope

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241. Brownstein, *supra* note 133, at 420-421.

242. See, e.g., *State of Washington v Arlene's Flowers, Ingersoll v. Arlene's Flowers: Overview*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/News/PRDetail/8608> (last visited Sept. 30, 2015) ("Barronelle Stutzman, the sole owner of Arlene's Flowers in Richland, Washington, has served and employed people who identify as homosexual for her entire career. Despite this, the American Civil Liberties Union and the Washington Attorney General claim that she is guilty of unlawful discrimination when she acted consistent with her faith and declined to use her creative skills to beautify the same-sex ceremony of a long-time customer, Robert Ingersoll, and another man, Curt Freed.")

and expect they will be decided on precisely these grounds.<sup>243</sup>

#### CONCLUSION

I fully recognize the subversive quality of the argument just advanced. If I am correct, conservative lawmakers are betraying their constituencies if they accept a RFRA-type law in exchange for support of an LGBT anti-discrimination law. Conservative lawmakers can only serve the interests of religious objectors by holding out for explicit exemptions, not subject to interest balancing by the judiciary, for religious objectors. In its own limited terms, this was precisely the sort of deal that triumphed in Utah, where both sides could respectably claim legislative accomplishments.

LGBT rights advocates, under certain political conditions, thus might accept a proposal with some explicit exemptions for religious nonprofits, in exchange for a statewide law prohibiting discrimination based on sexual orientation or gender identity in various contexts. It's not my place to speak for the political interests of such communities, but I would respectfully advise them to walk away from a proposal that extends exemptions to anyone other than religious institutions, funded entirely from private sources. Despite *Obergefell's* nod to the existence of good faith religious opinion against same sex marriage,<sup>244</sup> religious objections to same sex intimacy will ultimately retain no more respect than religious objections to racial integration and inter-racial intimacy.<sup>245</sup> In a nation committed to a

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243. The situation of a state RFRA in conflict with a local anti-discrimination law presents nothing different. A city or county may have compelling interests – economic as well as dignitary – in eradicating a form of discrimination, and nothing in the conventional relationship of state and local government precludes recognition of local interests as sufficiently compelling to trump state-created rights, of religious liberty or otherwise. In a number of states, the movement to outlaw such discrimination in employment, housing, and other spheres of life has been far more successful at the local than at the state level. *See* Williams Institute, *State Resource Map*, *supra* note 157. For example, Arizona has no such state-wide law, but Phoenix forbids local discrimination based on LGBT status. Similar circumstances obtain in Atlanta and other local jurisdictions in Georgia; Austin, Dallas, and San Antonio in Texas; and Indianapolis and Bloomington, in Indiana. *Id.* There are many other such examples.

244. *Obergefell*, 135 S. Ct. at 2607.

245. *See* Oleske, *supra* note 59; William B. Eskridge, Jr., *It's Not Gay Marriage vs. the Church Anymore*, N.Y. TIMES (Apr. 25, 2015) <http://www.nytimes.com/>

more Perfect Union, the arc of the religious universe is long, but it too bends toward justice.<sup>246</sup>

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2015/04/26/opinion/sunday/its-not-gay-marriage-vs-the-church-anymore.html?emc=edit\_th\_20150426&nl=todaysheadlines&nid=61084530&r=0.

246. For information on the source of the analogous observation about the moral universe, frequently attributed to Martin Luther King, Jr., see *The Arc of the Moral Universe is Long But it Bends Toward Justice*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2012/11/15/arc-of-universe/> (last visited Sept. 30, 2015). In his appraisal of the ways in which such a transition among religious conservatives may occur, Professor Laycock is undoubtedly correct that “[i]t makes all the difference in the world how we get there.” Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 419 (2011). Every tactical choice of “how we get there,” however, has a different calculus of costs and benefits for each side.