

The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages

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One of the most active fronts in the debate over same-sex marriage laws concerns proposed religious exemptions that would allow for-profit businesses to discriminate against same-sex couples. These exemptions, which are being championed by a group of prominent constitutional scholars, would provide a shield from state and local antidiscrimination laws for a wide variety of commercial actors. Examples include innkeepers who refuse to host same-sex weddings, bakers who refuse to provide cakes for such weddings, employers who refuse to extend family health benefits to married same-sex couples, and landlords who refuse to rent apartments to such couples.

Today's widespread academic validation of religious objections to same-sex marriage stands in stark contrast to the academy's silence in the 1940s, 1950s, and 1960s on the then-perceived conflict between religious liberty and interracial marriage. Although religious objections to interracial marriage were pervasive at the time — as reflected in the statements of politicians, preachers, and jurists, as well as in public opinion polls — those objections never found a home in the pages of America's academic law journals.

*This Article offers the first comprehensive discussion of why the legal academy has been so solicitous of religious objections to same-sex marriage when it was never receptive to similar objections to interracial marriage. After examining several factors that have contributed to this "marriage dichotomy" in the academy — including the rise of the conservative legal movement, the influence of the Catholic Church, and the unique role of race in American history — the Article explains why the most important factor for purposes of the proposed exemptions is the recent reconceptualization of religious liberty as extending fully to for-profit commercial businesses. That reconceptualization, which the Supreme Court accepted for the first time in *Burwell v. Hobby Lobby Stores, Inc.*, creates a dynamic in which religious liberty will inevitably conflict with the rights of third parties in the marketplace, a dynamic that is vividly illustrated by the prospect of businesses invoking religion to deny service to same-sex couples. This Article concludes that exemptions authorizing such conduct threaten the constitutional right of same-sex couples to equal protection — a right that has received scant attention in the debate until now, but one that can no longer be ignored in *light of United States v. Windsor*.*

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TABLE OF CONTENTS

INTRODUCTION	100
I. THE MARRIAGE DICHOTOMY IN THE ACADEMY AND SOCIETAL BELIEFS ABOUT MARRIAGE	104
II. EXPLANATIONS FOR THE MARRIAGE DICHOTOMY	110
III. A FUNDAMENTAL RECONCEPTUALIZATION OF RELIGIOUS LIBERTY: EXEMPTIONS FOR COMMERCIAL BUSINESSES	125
IV. THE EQUAL PROTECTION IMPLICATIONS OF RELIGIOUS EXEMPTIONS THAT WOULD ALLOW BUSINESSES TO DISCRIMINATE AGAINST SAME-SEX COUPLES	135
A. <i>The Scope of the Proposed Exemptions and a Map of the Overall Landscape</i>	137
B. <i>The Vulnerability of the Proposed Exemptions Under the Equal Protection Clause</i>	142
CONCLUSION	147
APPENDIX A: COMMENTATORS WHO HAVE INVOKED RELIGIOUS OPPOSITION TO SAME-SEX MARRIAGE IN ARGUING AGAINST LEGAL RECOGNITION	149
APPENDIX B: COMMENTATORS WHO HAVE SUPPORTED RELIGIOUS EXEMPTIONS THAT WOULD ALLOW AT LEAST SOME COMMERCIAL BUSINESSES TO REFUSE MARRIAGE-RELATED SERVICES AND BENEFITS TO SAME-SEX COUPLES	149
APPENDIX C: COMMENTATORS WHO HAVE OPPOSED RELIGIOUS EXEMPTIONS THAT WOULD ALLOW COMMERCIAL BUSINESSES TO REFUSE MARRIAGE-RELATED SERVICES AND BENEFITS TO SAME-SEX COUPLES	151

INTRODUCTION

Former President Harry S. Truman said yesterday he did not believe white persons should marry Negroes. He said that racial intermarriage ran counter to teachings of the Bible.

— *New York Times* (1963)¹

Americans who oppose the legalization of same-sex marriage . . . are most likely to explain their position on the basis of religious beliefs and/or interpretation of biblical passages dealing with same-sex relations.

— Gallup (2012)²

¹ *Truman Opposes Biracial Marriage*, N.Y. TIMES, Sept. 12, 1963, at 30.

² Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx>, archived at <http://perma.cc/44Y5-ZB6N>.

In recent years, there has been a great deal of commentary about how to resolve the widely perceived conflict between religious liberty and same-sex marriage.³ Many scholars writing in the field — including several supporters of same-sex marriage — argue that state laws recognizing same-sex marriage should include broad religious exemptions that go far beyond any accommodations that the Constitution may require.⁴ Among other things, these exemptions would allow for-profit businesses to refuse services to same-sex couples, providing a shield from state and local antidiscrimination laws for a wide variety of commercial actors. Examples include innkeepers and restaurant owners who do not want to host same-sex weddings,⁵ bakers and florists who do not want to provide their services for such weddings,⁶ employers who do not want to extend family health benefits to married same-sex couples,⁷ and landlords and hotel owners who do not want to rent

³ See, e.g., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008) [hereinafter EMERGING CONFLICTS]; William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 685–720 (2011); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 110–17 (2013); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274 (2010). See also *infra* Appendices A–C (collecting additional commentary). The topic has also garnered considerable attention in the media. See, e.g., Mollie Ziegler Hemingway, *Gay Marriage Collides with Religious Liberty*, WALL ST. J. (Sept. 19, 2013), <http://www.wsj.com/articles/SB10001424127887324665604579081742146908298>, archived at <http://perma.cc/K4LT-5J22>; Michael Paulson, *Can't Have Your Cake, Gays are Told, and a Rights Battle Rises*, N.Y. TIMES (Dec. 16, 2014), http://www.nytimes.com/2014/12/16/us/cant-have-your-cake-gays-are-told-and-a-rights-battle-rises.html?_r=0, archived at <http://perma.cc/P8AL-PRLJ>; Sandhya Somashekhar, *Some Conservatives Urging Right Not to Serve Gays on Religious Grounds*, WASH. POST (Dec. 17, 2014), http://www.washingtonpost.com/politics/some-conservatives-urging-right-not-to-serve-gays-on-religious-grounds/2014/12/17/e16fae34-84a7-11e4-b9b7-b8632ae73d25_story.html, archived at <http://perma.cc/XV3T-RR5K>; Greg Stohr, *Gay Marriage Stirs Backlash as Businesses Assert Religion*, BLOOMBERG (July 18, 2014), <http://www.bloomberg.com/news/2014-07-18/gay-marriage-stirs-backlash-as-businesses-assert-religion.html>, archived at <http://perma.cc/UH4E-HBD7>.

⁴ See *infra* Appendix B (collecting arguments in support of broad exemptions). See generally Greenawalt, *supra* note 3, at 110 (explaining that, because it would be unconstitutional to require religious bodies and clerics to perform or recognize same-sex marriages, “the genuine issues concern possible broader exemptions”).

⁵ See, e.g., Carol Kuruvilla, *Iowa Wedding Venue's Lawsuit: We Have the Right to Refuse Same-Sex Ceremonies*, N.Y. DAILY NEWS (Oct. 10, 2013), <http://www.nydailynews.com/news/national/iowa-wedding-venue-lawsuit-refuse-same-sex-ceremonies-article-1.1481816>, archived at <http://perma.cc/EL6T-88YE>; Katie Zezima, *Couple Sues a Vermont Inn for Rejecting Gay Wedding*, N.Y. TIMES (July 19, 2011), <http://www.nytimes.com/2011/07/20/us/20vermont.html>, archived at <http://perma.cc/DY2R-9PGY>.

⁶ See, e.g., Kim Murphy, *Washington Sues Florist Who Said No to a Same-Sex Wedding*, L.A. TIMES (Apr. 10, 2013), <http://articles.latimes.com/2013/apr/10/nation/la-na-nn-washing-ton-gay-wedding-florist-arlene-20130410>, archived at <http://perma.cc/SZ4R-VUT2>; Molly Young, *Sweet Cakes by Melissa Violated Same-Sex Couple's Civil Rights When it Refused to Make Wedding Cake*, STATE FINDS, OREGONLIVE (Jan. 17, 2014), http://www.oregonlive.com/business/index.ssf/2014/01/sweet_cakes_by_melissa_investigation_wraps_up_as_state_finds_evidence_that_bakery_violated_civil_rights_for_refusing_to_make_same-sex_wedding_cake.html, archived at <http://perma.cc/42MA-W3E7>.

⁷ See BECKET FUND FOR RELIGIOUS LIBERTY, ISSUES BRIEF: SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2 (2009), available at <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendi>

apartments or rooms to such couples.⁸ In short, the proposed exemptions would not only allow businesses to withhold wedding-day services, but would also “threaten to subject same-sex couples to discrimination in employment, public accommodations, and housing across time and in situations far removed from the marriage celebration.”⁹

Today’s widespread academic validation of religious objections to same-sex marriage stands in stark contrast to the academy’s silence in the 1940s, 1950s, and 1960s on the then-perceived conflict between religious liberty and interracial marriage.¹⁰ Although religious objections to interracial marriage were pervasive at the time — as reflected in the statements of politicians, preachers, and jurists, as well as in public opinion polls¹¹ — those objections never found a home in the pages of America’s academic law journals.

This Article asks why the academy has been so solicitous of religious objections to same-sex marriage when it was never receptive to similar objections to interracial marriage. Part I concludes that the discrepancy cannot be explained by the extent of contemporary cultural opposition to the respective practices. Indeed, if anything, opposition to interracial marriage in the Civil Rights Era was greater than opposition to same-sex marriage is today. Part II then identifies a variety of factors that, when combined, go a long way towards explaining the “marriage dichotomy” in the literature. They include the rise of the conservative legal movement over the past forty years; the role of advocates and scholars affiliated with the Roman Catholic Church, which did not oppose interracial marriage, but strongly opposes same-sex marriage; strategic considerations that have led some liberals to view broad religious exemptions as a possible tradeoff for achieving recog-

ces.pdf, archived at <http://perma.cc/FW6T-E5FC> (“Lawsuits will likely arise when religious people . . . based on their sincerely-held religious beliefs . . . refuse to extend spousal benefits to same-sex spouses.”).

⁸ See Jennifer Sinco Kelleher, *Gay Couple Sue Hawaii B&B, Claim Discrimination*, YAHOO! NEWS (Dec. 20, 2011), <http://news.yahoo.com/gay-couple-sue-hawaii-b-b-claim-discrimination-230124597.html>, archived at <http://perma.cc/VY6P-KSXS>; Dennis Sadowski, *Advance of Same-Sex Marriage Deepens Concern for Religious Liberty*, CATHOLIC NEWS SERVICE (Oct. 13, 2011), <http://www.catholicnews.com/data/stories/cns/1104037.htm>, archived at <http://perma.cc/T3K6-EDS9> (raising the issue of whether a “private individual can deny renting an apartment to a same-sex couple on religious grounds”).

⁹ Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1230 (2012). See *infra* note 189 and accompanying text (quoting the operative language of the academic exemptions proposal).

¹⁰ See Eskridge, *supra* note 3, at 660, 685 (“There is nothing new about civil equality-religious liberty clashes, for they proliferated over the issue of race. . . . After the civil rights movement, many religious Southerners and their institutions continued to oppose miscegenation on religious grounds and insisted that state antidiscrimination measures abridged the *expressive liberties* enjoyed by the faithful.”).

¹¹ See *infra* notes 34–42 and accompanying text. See also FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, & AMERICAN LAW* 180 (2009) (“[J]ust as religious beliefs imbue the arguments of some contemporary opponents of same-sex marriage, they also profoundly influenced historical antagonism to interracial marriage.”).

dition of same-sex marriage in some states; the common perception today that religious objections to same-sex marriage are more biologically grounded than religious objections to interracial marriage; the continuing lack of doctrinal clarity concerning sexual orientation discrimination; and the unique role racial discrimination has played in American history. Yet while each of these factors can help explain why the academy has been more open to religious exemptions in the same-sex-marriage context than it was in the interracial-marriage context, none can excuse the dearth of equal protection analysis in the modern debate over amending state civil rights laws to add selective statutory exemptions that would sanction religiously motivated discrimination against same-sex couples.¹²

Part III focuses on one additional and particularly important explanation for the marriage dichotomy: the considerable investment religious liberty scholars and advocates have made in promoting religious exemptions since the Supreme Court's controversial 1990 decision in *Employment Division v. Smith*.¹³ That investment has led to a fundamental reconceptualization of religious liberty as extending fully into the for-profit commercial realm¹⁴ — a reconceptualization the Supreme Court accepted for the first

¹² This deficiency has not gone unnoticed. See Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 207–08 (reviewing EMERGING CONFLICTS, *supra* note 3) (observing that “[t]he word ‘equality’ does not appear once” in Robin Fretwell Wilson’s essay, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, which provides the principal support for exemptions in EMERGING CONFLICTS); NeJaime, *supra* note 9, at 148 (“Proponents of the proposed religious exemptions rarely connect their appeals to liberty in a meaningful and explicit way to sexual orientation equality.”).

Of the thirty-seven commentators whose positions on commercial exemptions to same-sex marriage laws were reviewed by the Author, see *infra* Appendices B & C, only two have offered more than a passing discussion of equal protection doctrine. See Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FLA. COASTAL L. REV. 135, 151–54 (2010); Helen M. Alvaré, A “Bare . . . Purpose to Harm”? *Marriage and Catholic Conscience Post-Windsor* 11–18 (George Mason Univ. Sch. of Law, Law & Economics Research Paper Series, Paper No. 14–14 (2014)), available at <http://ssrn.com/abstract=2433741>, archived at <http://perma.cc/EM4S-72GK>. Cf. Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 Nw. J. L. & Soc. POL’Y 307, 311 (2010) (recognizing the equality argument against broad exemptions to same-sex marriage laws, but treating it primarily as a “policy argument” rather than a “legal claim”); Laura Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2070–71, 2081–91 (2011) (examining the debate through the lens of “odious discrimination,” but defining that discrimination by reference to decisions of “democratic government” in each separate state rather than by reference to the Equal Protection Clause).

¹³ 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause does not require exemptions from neutral and generally applicable laws that burden religious practices).

¹⁴ *Compare* United States v. Lee, 455 U.S. 252, 261 (1982) (“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.”), and *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting as “patently frivolous” a restaurant owner’s free exercise objection to racial integration), with Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 5–6 (2013) (contending that recognizing free exercise rights for for-profit corporations is “an essential means of effectuating First Amendment values and individual liberty”).

time last year in *Burwell v. Hobby Lobby Stores, Inc.*¹⁵ So extended, religious liberty will inevitably conflict with the rights of third parties in the marketplace, whether competitors, customers, or employees.¹⁶ As discussed in Part IV, this dynamic is vividly illustrated by proposed exemptions for businesses that threaten to deny same-sex couples equal protection under antidiscrimination laws. That is a consequence the academy never countenanced for interracial couples, and a consequence that will prove particularly difficult to defend in light of the Court's 2013 decision in *United States v. Windsor*¹⁷ protecting the "equal dignity of same-sex marriages."¹⁸ The Court in *Windsor* taught that an "unusual deviation from the usual tradition" that "operate[s] to deprive same-sex couples" of customary benefits available to others is "strong evidence of a law having the purpose and effect of disapproval of that class."¹⁹ Carving out exemptions to antidiscrimination laws for business owners who religiously oppose same-sex marriage would represent precisely such an unusual deviation, as similar exemptions were never adopted to accommodate religious objections to interracial marriages, interfaith marriages, or marriages involving divorced individuals. Accordingly, this Article concludes that if a state were to follow the advice of many academic commentators and adopt exemptions designed to allow businesses to refuse services and benefits to same-sex couples, it would run afoul of the Equal Protection Clause.

I. THE MARRIAGE DICHOTOMY IN THE ACADEMY AND SOCIETAL BELIEFS ABOUT MARRIAGE

There will come a time when religious hostility to gays and to same-sex relationships will be as disreputable as religious hostility to blacks and to interracial relationships. . . .

¹⁵ 134 S. Ct. 2751, 2784 & n. 43 (2014) (holding that under the Religious Freedom Restoration Act of 1993 (RFRA), a for-profit corporate retailer was entitled to a "religious accommodation" from federal regulations governing employer-sponsored health plans, and dismissing the seemingly contrary teaching of *Lee*, *supra* note 14, as "squarely inconsistent" with RFRA). *But see id.* at 2795, 2803 (Ginsburg, J., dissenting) (maintaining that RFRA is properly interpreted as restoring the Court's pre-*Smith* free exercise jurisprudence, which included the "pathmarking" decision in *Lee*, and emphasizing that "religious exemptions had never been extended" by the Court in its pre-*Smith* cases "to any entity operating in the commercial, profit-making world" (internal citation and quotation marks omitted)).

¹⁶ *See Lee*, 455 U.S. at 261 (explaining that granting an employer a religious exemption from the Social Security system would "operate[] to impose the employer's religious faith on the employees"); *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (explaining that granting business owners religious exemptions from a Sunday closing law "might well provide these people with an economic advantage over their competitors who must remain closed on that day").

¹⁷ 133 S. Ct. 2675 (2013).

¹⁸ *Id.* at 2693.

¹⁹ *Id.*

But it makes all the difference in the world how we get there. It is one thing if religious believers change their minds about a moral issue, or if those who cannot change their minds eventually die of natural causes and a new generation holds a different view. It is a very different thing if those who cannot change their mind are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse.

— Professor Douglas Laycock²⁰

If one were looking for a statement to capture the prevailing sentiment in the legal academy on the issue of religious resistance to same-sex marriage, it would be hard to do better than Professor Laycock's assessment above.²¹ Full marriage equality for same-sex couples is coming, most commentators agree,²² but the path forward should be traveled cautiously and with considerable regard for religious objections.²³

Largely unacknowledged in the current literature, however, is the fact that when marriage equality for interracial couples confronted the same barrier of religious objections, the academy demonstrated absolutely no solici-

²⁰ Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 418–19 (2011).

²¹ Professor Laycock has been described as the “preeminent lawyer-scholar of religious freedom over the last quarter-century,” Steven D. Smith, *Lawyering Religious Liberty*, 89 TEX. L. REV. 917, 917 (2011) (reviewing Douglas Laycock, *RELIGIOUS LIBERTY, VOLUME ONE: OVERVIEWS & HISTORY* (2010)), and a “towering figure in the law of religious liberty,” Thomas C. Berg, *Laycock's Legacy*, 89 TEX. L. REV. 901, 901 (2011) (review of same).

²² See, e.g., Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 27 (2014) (“[T]he Supreme Court has not recognized a constitutional right to same-sex marriage. . . . But such a ruling seems increasingly inevitable.”); Lupu & Tuttle, *supra* note 3, at 306 (“[T]he demographics associated with the issue suggest that, in the medium to long run, the forces that support same-sex marriage are destined to prevail.”).

In the fall of 2014, the number of states recognizing same-sex marriage rose sharply from nineteen to thirty-five. See Adam Liptak, *In Same-Sex Marriage Calculation, Justices May See Golden Ratio*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/politics/supreme-court-gay-marriage.html>, archived at <http://perma.cc/5AJ7-QNQC>. The increase resulted entirely from court decisions, several of which were the subject of petitions for certiorari that the Supreme Court denied on October 6, 2014. *Id.* One month after the Court declined to take up the issue, the Sixth Circuit became the first federal court of appeals in the post-*Windsor* era to uphold state bans on same-sex marriage, and the Justices were expected to decide whether to review that decision shortly after this Article went to press. See Robert Barnes, *Supreme Court Watchers Wonder If Justices Are Ready to Take a Same-Sex Marriage Case*, WASH. POST (Dec. 14, 2014), http://www.washingtonpost.com/politics/courts_law/supreme-court-watchers-wonder-if-justices-are-ready-to-take-a-same-sex-marriage-case/2014/12/14/37dd933e-839b-11e4-b9b7-b8632ae73d25_story.html, archived at <http://perma.cc/JH97-LL3T> (“[T]he justices could consider the [Sixth Circuit] cases at their private conferences scheduled for Jan. 9 and 16.”).

²³ See, e.g., Eskridge, *supra* note 3, at 714–15 (arguing that “national recognition of gay marriage is premature, because most religions still deeply oppose that innovation,” and endorsing the recommendation that “the gay friendly state go out of its way to accommodate religion”); Greenawalt, *supra* note 3, at 114 (“Whatever one concludes about the basic rationality of a resistance to gay marriage, one must recognize that a substantial part of our population is still opposed to it, and this includes a significant number of religious groups with many adherents.”).

tude toward those objections. In the two decades between 1948 — when the California Supreme Court became the first post-Reconstruction court to hold that interracial couples had a constitutional right to marry²⁴ — and 1967 — when the United States Supreme Court followed suit in *Loving v. Virginia*²⁵ — not a single law review article appears to have been published either opposing legal recognition of interracial marriage on religious grounds or advocating for religious exemptions that would allow businesses to refuse service to interracial couples.²⁶

By contrast, in the two decades between 1993 — when the Hawaii Supreme Court became the first court to indicate that denying marriage to same-sex couples might violate their rights to equal protection²⁷ — and 2013 — when the United States Supreme Court partially vindicated the rights of married same-sex couples in *United States v. Windsor*²⁸ — several articles were published invoking religion to oppose legal recognition of same-sex marriage,²⁹ and numerous scholars expressed support for broad religious exemptions that would allow at least some for-profit commercial businesses to refuse services to same-sex couples.³⁰ Indeed, prior to *Windsor*, the broad-exemptions position appeared to represent the majority view among those who had written on the issue,³¹ including no fewer than eight supporters of

²⁴ See *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948).

²⁵ 388 U.S. 1, 12 (1967).

²⁶ Extensive searches of the Hein Online law journal database for the years 1948–1967 revealed that while a few commentators defended the constitutionality of interracial marriage bans on originalism and federalism grounds, none either validated religious objections to interracial marriage or argued for exemptions to antidiscrimination laws to accommodate those objections. The prevailing sentiment in the literature was condemnation of interracial marriage bans. See, e.g., Lloyd H. Riley, *Miscegenation Statutes—A Re-Evaluation of Their Constitutionality in Light of Changing Social and Political Conditions*, 32 S. CAL. L. REV. 28, 48 (1958); Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 YALE L.J. 472, 479 (1949); Note, *Statutory Ban on Interracial Marriage Invalidated by Fourteenth Amendment*, 1 STAN. L. REV. 289, 297 (1949); see also Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 572 & nn.81–82 (2005) (citing thirteen contemporary law review publications supporting *Perez*).

²⁷ See *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993).

²⁸ 133 S. Ct. 2675 (2013).

²⁹ See, e.g., George W. Dent Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 556–57 (2007) (“Full legal and social equality of homosexuality . . . cannot be squared with respect for the traditional religions that disapprove of homosexuality. . . . [L]egal recognition of same-sex ‘marriages[]’ . . . is anathema to traditional faiths.”); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1379 (2007) (“Marriage is one of the most important concerns of religion. . . . Changing the core definition of marriage in the law will lead to clashes between law and religion.”); see also *infra* Appendix A (collecting additional articles).

³⁰ See *infra* Appendix B (citing twenty-three commentators who have supported exemptions that would extend into the commercial realm, including sixteen who expressed support before *Windsor*).

³¹ Compare *infra* Appendix B (citing sixteen commentators who supported broad religious exemptions before *Windsor*), with *infra* Appendix C (citing ten commentators who opposed broad religious exemptions before *Windsor*).

Following *Windsor*, five prominent scholars authored a letter opposing broad exemptions that would extend into the commercial sphere. See Letter from Dale Carpenter et al. to Illinois State Legislators (Oct. 23, 2013), available at <http://blogs.chicagotribune.com/files/five-law->

same-sex marriage.³² And the scholars supporting broad exemptions did not limit their advocacy to the academic realm. Instead, they launched a multi-year, multistate lobbying campaign urging governors and state legislators to adopt such exemptions.³³

The dramatic difference between the deference shown by modern legal scholars toward religious objections to same-sex marriage and the complete lack of such deference a half century ago toward religious objections to interracial marriage cannot be explained by the extent of contemporary societal support of the respective practices. According to Gallup, public support of interracial marriage in the 1950s and 1960s was considerably *lower* than support for same-sex marriage in the 1990s and 2000s.³⁴ Religious leaders at the time warned of the evils of interracial marriage,³⁵ and religious opposi-

professors-against-changing-sb-10.pdf, archived at <http://perma.cc/44V2-G6JX> (“The proposed religious exemptions are unprecedented in both who and what they cover.”); see also Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 745, 761 (2014) (concluding that proposed “[m]arriage conscience protection radically departs from the limiting principles” that usually apply to protections for conscientious objectors and expressing skepticism about the propriety of broad exemptions “within the antidiscrimination framework”).

³² See Greenawalt, *supra* note 3, at 114 (expressing personal belief that “gay marriages should be authorized”); Letter from Andrew Koppelman, Douglas Laycock, Michael Perry & Marc Stern to Iowa State Legislators (July 15, 2009), in Thomas Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009), <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html> [hereinafter Berg, *Memos/Letters*], archived at <http://perma.cc/7DND-E8T9> (follow “Iowa Letter 1” hyperlink) (“We support same-sex marriage.”); Letter from Thomas C. Berg, Douglas Laycock, Bruce S. Ledewitz, Christopher C. Lund & Michael Perry to Minnesota Democratic State Legislators (May 3, 2013), in Berg, *Memos/Letters* (follow “Minnesota Group 2 Letter to Democrats” hyperlink) [hereinafter Berg/Laycock/Ledewitz/Lund/Perry Letter] (same).

³³ See generally Berg, *Memos/Letters*, *supra* note 32 (collecting letters sent to elected officials in twelve states between 2009 and 2013). As Professor Douglas NeJaime has noted, the exemptions proposal contained in these letters “has largely shaped the academic discourse.” NeJaime, *supra* note 9, at 1188.

³⁴ Compare Jeffrey M. Jones, *Record-High 86% Approve of Black-White Marriages*, GALLUP (Sept. 12, 2011), <http://www.gallup.com/poll/149390/record-high-approve-black-white-marriages.aspx>, archived at <http://perma.cc/HN22-D5J2> (reporting that public approval of interracial marriage was at just 4% in 1958 and 20% in 1968), with Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>, archived at <http://perma.cc/Y533-7CNC> (reporting that support for same-sex marriage was 27% in 1996, 42% in 2004, and 53% in 2011). See also PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 292 (2009) (describing additional polling from the 1960s).

³⁵ See GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 158 (2004) (“[C]onservative white clergy fifty years ago held up interracial marriage as the logical, inevitable, and most horrifying result of any move toward desegregation. In [a] 1958 sermon, Rev. [Jerry] Falwell warned that integration would ultimately ‘destroy our race. If we mix the races in schools, in churches, the ultimate end will be the social mixing which can only lead to marital relationships.’”). See also BOTHAM, *supra* note 11, at 108–11 (collecting statements from religious figures in the 1940s and 50s and concluding that the “theology of separate races . . . established the religious and biblical bases for American views on interracial marriage”).

tion to the practice was invoked by both state and federal judges.³⁶ Most famously, the trial judge in *Loving* wrote:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.³⁷

Other judges wrote more generally about the authority of the state to ban interracial marriage based upon the “laws of God.”³⁸ Meanwhile, litigation over new antidiscrimination laws raised the issue of whether business owners who sincerely believed the separation of the races to be divinely ordained had a religious liberty interest in noncompliance.³⁹

Another striking similarity between the debates over same-sex marriage and interracial marriage is that just as the 2000s saw politicians who otherwise supported gay rights invoke religion to draw the line at same-sex mar-

Institutional religious opposition to interracial marriage was not confined to the South. For example, Herbert W. Armstrong’s Worldwide Church of God (WCG), which was founded in Oregon and later moved its headquarters to California, strongly opposed interracial marriage from the 1950s through the mid-1980s. See HERBERT W. ARMSTRONG, *MYSTERY OF THE AGES* 149 (1985) (“God originally *set the bounds* of national borders, intending nations to be SEPARATED to prevent interracial marriage.”). According to the *New York Times*, the WCG had considerable reach, with its radio program “heard on 360 stations on five continents,” its television program “seen by 20 million people on 165 stations,” and annual receipts by the end of the 1970s that exceeded those of “Billy Graham and Oral Roberts combined.” Douglas Martin, *Garner Ted Armstrong, Evangelist, 73, Dies*, N.Y. TIMES (Sept. 17, 2003), <http://www.nytimes.com/2003/09/17/us/garner-ted-armstrong-evangelist-73-dies.html>, archived at <http://perma.cc/KEH6-6D42>. See also Wallace R. Bennett, Note, *The Negro in Utah*, 3 UTAH L. REV. 340, 347 (1953) (noting the then-position of the Mormon church that the “Negro is black because of a curse on the descendants of Cain” and, thus, interracial marriage between blacks and whites “is to be avoided”).

³⁶ See BOTHAM, *supra* note 11, at 131 (“During the one hundred years following the American Civil War, several influential antimiscegenation cases offered Protestant theologies of marriage and race as legitimate bases for upholding antimiscegenation statutes. From district and state-level courts to the U.S. Supreme Court, attorneys and judges who argued for the validity of antimiscegenation statutes affirmed the sacred status of marriage and the states’ right to regulate marriage.”). See also Strasser, *supra* note 12, at 140 (“[A]nalogous arguments invoking God’s Will have been used [by courts] to justify prohibiting recognition of interracial and same-sex marriages.”).

³⁷ 388 U.S. 1, 3 (1967) (internal quotation marks omitted).

³⁸ *Perez v. Lippold*, 198 P.2d 17, 37 (Cal. 1948) (Shenk, J., dissenting) (internal quotation marks and citation omitted); see also *Naim v. Naim*, 87 S.E.2d 749, 752 (Va. 1955) (upholding Virginia’s ban on interracial marriage and relying in part on the view that the “natural law” forbidding racial intermarriage is “clearly divine”), *overruled by Loving v. Virginia*, 388 U.S. 1 (1967).

³⁹ See *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966) (rejecting a restaurant owner’s argument that the 1964 Civil Rights Act “violate[d] his freedom of religion under the First Amendment ‘since his religious beliefs compel him to oppose any integration of the races whatever.’”), *rev’d in part*, 377 F.2d 433 (4th Cir. 1967), *aff’d in part*, 390 U.S. 400, 402 n.5 (1968) (dismissing the religious liberty claim as “patently frivolous”). Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983) (rejecting a religious liberty argument brought by a private university that sought to retain its tax-exempt status while banning interracial dating and marriage).

riage,⁴⁰ the 1960s saw a similar phenomenon, with no less a champion of integration than former President Harry Truman openly expressing his religious opposition to interracial marriage.⁴¹ In short, just like religious opposition to same-sex marriage in recent years, religious opposition to interracial marriage had a very strong foothold in society prior to *Loving*.⁴²

Moreover, the two periods were characterized by parallel changes in the legal landscape that threatened similar impacts on business owners who religiously opposed interracial and same-sex relationships. In the years leading up to *Loving*, interracial marriage bans were repealed in fourteen states, all of which either had public accommodations laws prohibiting race discrimination or adopted such laws by 1966.⁴³ Similarly, in the years leading up to *Windsor*, marriage recognition was extended to same-sex couples in twelve states, all of which had extended their public accommodations laws to prohibit discrimination on the basis of sexual orientation.⁴⁴ In addition,

⁴⁰ See Kerry Eleveld, *Obama And Religion: Where Will He Stand On Same-Sex Marriage In 2012?*, EQUALITY MATTERS BLOG (Mar. 10, 2011, 3:58 PM), <http://equalitymatters.org/blog/201103100012>, archived at <http://perma.cc/SU88-99JS> (noting that “all three 2008 Democratic front-runners” opposed same-sex marriage “and appealed to religion at various times to explain their stance during the campaign”).

⁴¹ See *Truman Opposes Biracial Marriage*, N.Y. TIMES, Sept. 12, 1963, at 30 (reporting that “Mr. Truman, long an advocate of integration in other respects,” told an interviewer that “he did not believe white persons should marry Negroes” and “that racial intermarriage ran counter to the teachings of the Bible”). For an account of how opposition to interracial marriage influenced John F. Kennedy’s 1960 presidential campaign, see ANTHONY SUMMERS & ROBBYN SWAN, *SINATRA: THE LIFE* 281 (2005) (discussing Joe Kennedy’s request that Sammy Davis Jr., a prominent JFK supporter, postpone his wedding to a white woman until after the election).

⁴² See Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 190 (2012) (“The claim that opposition to homosexuality or gay marriage is religious, while opposition to integration and interracial marriage was not, is mistaken.”).

⁴³ Compare *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (identifying the fourteen repeal states as Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming), with EMERSON ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 2131–32 (1967) (listing thirty-six states that adopted public accommodations laws by 1966, including all fourteen states listed in *Loving*). In addition, ten of the fourteen repeal states had adopted laws prohibiting racial discrimination in private employment by 1966, and four had adopted laws prohibiting racial discrimination in private housing. See DUANE LOCKARD, *TOWARD EQUAL OPPORTUNITY* 21–22 (1968) (table listing states that had adopted such laws by July 1966).

⁴⁴ Compare *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (identifying the twelve recognition states at that time as Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington), with NeJaime, *supra* note 9, at 1190 & n.66 (listing twenty-one states that had extended their public accommodations laws to cover sexual orientation by 2012, including all twelve states listed in *Windsor*). In addition, all of the pre-*Windsor* recognition states had extended their employment and housing discrimination laws to cover sexual orientation by 2012. See *id.*

In the seventeen months following *Windsor*, same-sex marriage gained legal status in twenty-three additional states, including nine states (California, Colorado, Hawaii, Illinois, Nevada, New Jersey, New Mexico, Oregon, and Wisconsin) that had previously extended their antidiscrimination laws to cover sexual orientation. Compare *Same-Sex Marriage State-by-State*, PEW RESEARCH (Nov. 20, 2014), <http://www.pewforum.org/2014/11/20/same-sex-marri>

during both marriage debates, members of the academy were well aware that nationwide marriage recognition and equal treatment in the marketplace might eventually be required by the Supreme Court and Congress.⁴⁵

Given these cultural and legal parallels between the two marriage debates and the similar potential implications for business owners, why has the legal academy's response to religious objections in the commercial realm been so different this time around?

II. EXPLANATIONS FOR THE MARRIAGE DICHOTOMY

The most obvious explanation for the marriage dichotomy would seem to be the well-documented rise of the conservative legal movement over the past four decades.⁴⁶ This development has undoubtedly created more space in the academy for arguments opposing same-sex marriage than ever existed for arguments opposing interracial marriage.⁴⁷ Indeed, a focal point of the conservative legal movement was establishing a vibrant presence in the academy,⁴⁸ and while conservatives are still vastly outnumbered on most law school faculties,⁴⁹ there can be little question that they have succeeded in substantially influencing academic discourse. Whereas “the conservative le-

age-state-by-state, *archived at* <http://perma.cc/STKQ-BVGP> (listing thirty-five recognition states), *with* NeJaime, *supra* note 9, at 1190 & n.66 (listing twenty-one nondiscrimination states).

⁴⁵ See, e.g., William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 372 (2014) (“At some point in the not-too-distant future, Congress will likely . . . ban workplace discrimination . . . on the basis of sexual orientation Although not currently on the legislative agenda, expansion of federal public accommodations laws to include sexual orientation is also a possibility.”); Conkle, *supra* note 22, at 27 (noting that a Supreme Court decision vindicating the right to same-sex marriage “seems increasingly inevitable”); Roger Paul Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME L. REV. 303, 304 (1959) (“Congressional civil rights legislation of some sort is a certainty.”); Riley, *supra* note 26, at 48 (“Anti-miscegenation statutes are in violation of the Fourteenth and Fifth Amendments to the American Constitution and it is submitted that the Supreme Court will so find when called upon to resolve this historical question.”).

⁴⁶ See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); Michael Avery & Danielle McLaughlin, *How Conservatives Captured the Law*, CHRON. HIGHER EDUC. (Apr. 19, 2013), <http://chronicle.com/article/How-Conservatives-Captured-the/138461>, *archived at* <http://perma.cc/B96M-UW9H>.

⁴⁷ For specific examples of this dynamic at work, see *infra* notes 61–64 and accompanying text.

⁴⁸ See SOUTHWORTH, *supra* note 46, at 171; TELES, *supra* note 46, at 89; Ilya Somin, *Lessons from the Rise of Legal Conservatism*, 32 HARV. J.L. & PUB. POL'Y 415, 418 (2009) (book review).

⁴⁹ See John O. McGinnis et. al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170 (2005) (“The contributions of politically active law professors are overwhelmingly Democratic: 81% of law faculty members in the study who make political contributions contribute wholly or predominantly to Democrats, while 15% contribute wholly or predominantly to Republicans.”).

gal elite . . . did not, in any meaningful sense, exist in the early 1970s,”⁵⁰ conservatives have since “recruited a deep bench of highly competent, committed, and credentialed lawyers who hold prominent roles in law firms, advocacy organizations, and law school faculties.”⁵¹ The most important organizing force for the conservative legal movement has been the Federalist Society, which “began in the nation’s law schools,” and “has never lost its focus on legal education.”⁵² Professor Michael Avery notes:

Federalist Society professors on the faculties of law schools, particularly elite law schools, have succeeded in gaining respect for conservative legal views and in training a new generation of conservative lawyers and law professors. The intellectual work that members have done to develop legal theories and arguments to advance conservative positions has fueled significant campaigns to change the law in a wide variety of areas.⁵³

In addition to establishing a presence at long-established law schools, the conservative movement has also amplified its voice in the academy through the creation of new law schools,⁵⁴ new law journals,⁵⁵ and specialized institutes for training law professors and judges.⁵⁶ And though much of the conservative legal movement’s focus in the academy has been on law and

⁵⁰ TELES, *supra* note 46, at 1. *See also id.* at 45 (describing “[t]he “near-absence of conservative voices in law schools” in the 1960s).

⁵¹ SOUTHWORTH, *supra* note 46, at 168. *See also* TELES, *supra* note 46, at 83 (“Assembling a group of prominent conservative legal theorists and lawyers with government experience would have been impossible a decade earlier, but by the mid-1980s the conservative movement had developed a cadre of activists and thinkers whose primary commitment was to a set of ideas . . .”).

⁵² TELES, *supra* note 46, at 173. *See generally* MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013).

⁵³ Michael Avery, *The Rise of the Conservative Legal Movement*, 42 *SUFFOLK U. L. REV.* 89, 96 (2008) (book review). In addition to helping increase the ranks of conservative law professors over time, the Federalist Society has served since its inception as a vehicle for forging consensus among conservatives, thus amplifying their collective voice. *See* TELES, *supra* note 46, at 146 (quoting co-founder Steven Calabresi on the Society’s role in bringing conservative scholars together around “a homogenous, mature set of conclusions on things that people on the right agree on”).

⁵⁴ *See* SOUTHWORTH, *supra* note 46, at 33–34 (describing how “several new schools . . . were created to challenge established, secular norms of legal education,” including Ave Maria Law School, the University of St. Thomas School of Law, and Regent University School of Law”); TELES, *supra* note 46, at 219 (documenting the founding and building of George Mason University School of Law, a school with “a durable libertarian character” that “actively seek[s] to advance the interests of the larger conservative-libertarian movement”).

⁵⁵ *See* Avery & McLaughlin, *supra* note 46 (discussing the *Harvard Journal of Law and Public Policy*); Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 *CHAP. L. REV.* 255, 263 (2013) (discussing the *Cato Supreme Court Review*).

⁵⁶ *See* Somin, *supra* note 48, at 419 (“Libertarian-leaning law and economics scholars established new research centers intended to challenge traditional liberal legal thought with interdisciplinary scholarship.”).

economics⁵⁷ and libertarianism,⁵⁸ both the intent and the effect of the most successful initiatives in those areas has been a broader ascendance of legal conservatism in the academy.⁵⁹

Against this background, it is not at all surprising that the past several decades have seen “a dramatic increase in legal scholarship espousing and developing ideas of the legal right.”⁶⁰ That dramatic increase, in turn, helps explain the wealth of recent literature countenancing religious opposition to same-sex marriage. For example, there has clearly been “a predilection on the part of conservative religious schools to solicit, develop, and publish anti-same-sex marriage scholarship that is based heavily on religious natural law principles.”⁶¹ Scholarship opposing same-sex marriage has also found a home in the pages of the Federalist Society’s flagship journal, the *Harvard Journal of Law & Public Policy*,⁶² and the book most frequently cited in support of broad exemptions to same-sex marriage laws was co-published by the conservative Becket Fund for Religious Liberty.⁶³ In addition, a number of the scholars who have come out in support of broad exemptions laws in

⁵⁷ TELES, *supra* note 46, at 182 (“The law schools of Harvard, Yale, Chicago, and Stanford boast over a dozen law and economics practitioners each In just twenty years, an economics-focused law school with a libertarian spirit at George Mason University went from nothing to the *U.S. News* top 40.”).

⁵⁸ Ilya Somin, *Libertarianism and Judicial Deference*, 16 CHAP. L. REV. 293, 293 (2013) (discussing how “libertarian ideas have had a major influence in . . . the academy”).

⁵⁹ See TELES, *supra* note 46, at 206 (“By supporting law and economics, the [Olin] Foundation hoped to establish a ‘foothold’ in the law schools for conservatives”); *id.* at 221 (noting “the rising number of conservatives in the legal academy” by the 1990s); SOUTHWORTH, *supra* note 46, at 134 (“Although Federalist Society programs may tilt toward libertarians, the organization actively seeks to involve traditionalists as well [I]ts meetings cover topics of interest to religious conservatives.”).

⁶⁰ Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 532 (2011). See also SOUTHWORTH, *supra* note 46, at 135 (noting that the Federalist Society “produces twenty-two publications”).

⁶¹ Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL’Y 561, 600 n.245 (2007).

⁶² See William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL’Y 915 (2009); Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J. L. & PUB. POL’Y 245 (2011); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939 (2007). It is important to note, however, that opposition to same-sex marriage is far from a uniform position within the conservative legal community. For example, Theodore B. Olson, who served in both the Reagan Administration and the George W. Bush Administration, and whose “[a]ssociation with [the] Federalist Society dates back to [its] inaugural meeting,” AVERY & McLAUGHLIN, *supra* note 52, at 220, is one of the lead lawyers championing the constitutional right of same-sex couples to marry. See Jo Becker, *A Conservative’s Road to Same-Sex Marriage Advocacy*, N.Y. TIMES (Aug. 19 2009), <http://www.nytimes.com/2009/08/19/us/19olson.html?pagewanted=all>, archived at <http://perma.cc/WT7R-DMWT>.

⁶³ See EMERGING CONFLICTS, *supra* note 3 (back cover). See generally SOUTHWORTH, *supra* note 46, at 155 (describing the Becket Fund as one of the “conservative and libertarian groups . . . that pursue[s] law reform through strategic litigation”); Charlotte Allen, *Justice For All*, WEEKLY STANDARD, Sept. 29, 2008, at 37, 40 (review of TELES, *supra* note 46) (describing the Becket Fund as “socially conservative”).

the context of same-sex marriage teach at religiously affiliated law schools that have played an increasingly prominent role in Christian legal scholarship during the rise of the conservative legal movement.⁶⁴

Several of these schools are Roman Catholic, a fact that leads to a second possible explanation for the marriage dichotomy in the legal academy: the role of Catholic legal scholars, whose church's theology was supportive of the right to interracial marriage,⁶⁵ but is strongly opposed to same-sex marriage.⁶⁶ Catholicism played a central role in the first successful state court challenge to an interracial marriage ban in the twentieth century, *Perez v. Lippold*,⁶⁷ a case in which the interracial couple's attorney "brought his Catholic convictions to bear" and pressed arguments before the California Supreme Court that were "shaped by the work of . . . Catholic thinkers he particularly admired."⁶⁸ The strategy paid off, as the "deciding vote" in the case came from a justice who accepted the couple's religious liberty argument, "highlighting . . . the centrality of the religious right to marry both as a legal strategy and as a Catholic position."⁶⁹ Two decades later, American Catholic bishops played a leading role in supporting the claims of Richard and Mildred Loving in the U.S. Supreme Court, filing a brief that represented "the *only* response elicited by any religious group in support of the Lovings."⁷⁰ In recent years, by contrast, the United States Conference of Catholic Bishops has been leading the charge against same-sex marriage.⁷¹ Catholic scholar Robert George, who holds the McCormick Chair in Juris-

⁶⁴ See *infra* Appendix B (citing support for broad exemptions from Thomas Berg at the University of St. Thomas, Brett Scharffs at Brigham Young University, and Richard Garnett at the University of Notre Dame).

⁶⁵ See BOTHAM, *supra* note 11, at 112 ("The Catholic theology of race . . . enabled — required, even — American Catholics to hold a radically different perspective from white southern Protestants on the legitimacy of interracial marriage . . . Catholics never condemned marriage across the color line or cited biblical rationales for segregation. Indeed, by 1940 . . . the Roman Church had begun to articulate a theology of race explicitly emphasizing the biblical bases for racial unity, and it had condemned civil prohibitions of interracial marriage.").

⁶⁶ See Eskridge, *supra* note 3, at 707–08 (citing a statement from the Vatican's Congregation for the Doctrine of the Faith "[a]dmonishing Catholics to oppose state recognition of same-sex 'marriages'" and "express[ing] skepticism about other forms of legal recognition").

⁶⁷ 198 P.2d 17 (Cal. 1948).

⁶⁸ PASCOE, *supra* note 34, at 211–12 (discussing the arguments made by Daniel Marshall, counsel for the petitioners in *Perez*); see BOTHAM, *supra* note 11, at 13–34 (chronicling Marshall's work in greater detail and noting that he "inserted Catholic belief directly into his legal arguments").

⁶⁹ BOTHAM, *supra* note 11, at 42, 49.

⁷⁰ PASCOE, *supra* note 34, at 170–74

⁷¹ See Laurie Goodstein, *Bishops Open 'Religious Liberty' Drive*, N.Y. TIMES (Nov. 14, 2011), <http://www.nytimes.com/2011/11/15/us/bishops-renew-fight-on-abortion-and-gay-marriage.html>, archived at <http://perma.cc/EJY5-CYSG> ("The nation's Roman Catholic bishops opened a new front in their fight against abortion and same-sex marriage on Monday . . ."). Until recently, there was every reason to conclude that "[a]lthough Catholic theology proved beneficial for interracial couples in the American past, it promises little hope for today's same-sex couples." BOTHAM, *supra* note 11, at 190. That prognosis may need updating, however, in light of a lengthy interview Pope Francis gave in September 2013. After initially acknowledging that the current "teaching of the church . . . is clear" on same-sex marriage, he went on to say that:

prudence at Princeton University, serves as the Conference's "intellectual point man."⁷² Described as the country's "most influential conservative Christian thinker," George "has parlayed a 13th-century Catholic philosophy into real political influence" on the issue of same-sex marriage.⁷³ Of course, it would be a mistake to assume that all or even most Catholic legal scholars (or non-Catholic legal scholars teaching at Catholic law schools) share George's and the Conference's position on same-sex marriage,⁷⁴ but it is not difficult to imagine many of them being sensitive to the feelings of Catholics who do share that position. A Catholic blog, *Mirror of Justice*, has served as the online home of academic advocacy for broad exemptions from same-sex marriage laws,⁷⁵ and many of the scholars supporting the broad exemptions position are either Catholic or teach at Catholic law schools.⁷⁶

Taken together, the rise of the conservative legal movement and the influence of the Catholic Church⁷⁷ can supply much of the explanation for why the legal academy has treated religious arguments about same-sex mar-

[H]uman self-understanding changes with time and so also human consciousness deepens. Let us think of when slavery was accepted or the death penalty was allowed without any problem. So we grow in the understanding of the truth. . . . Even the other sciences and their development help the church in its growth in understanding. There are ecclesiastical rules and precepts that were once effective, but now they have lost value or meaning. The view of the church's teaching as a monolith to defend without nuance or different understandings is wrong.

Antonio Spadaro, *A Big Heart Open to God*, AMERICA, Sept. 30, 2013, at 15, 36.

⁷² David Kirkpatrick, *The Conservative-Christian Big Thinker*, N.Y. TIMES (Dec. 20, 2009) (Magazine), <http://www.nytimes.com/2009/12/20/magazine/20george-t.html?pagewanted=all>, archived at <http://perma.cc/P4DY-EWZH>.

⁷³ *Id.* ("If there really is a vast right-wing conspiracy," the conservative Catholic journal *Crisis* concluded a few years ago, "its leaders probably meet in George's kitchen." . . . George has assumed his mantle as the reigning brain of the Christian right.").

For examples of other Catholic scholars making arguments opposing same-sex marriage, see *infra* Appendix A (citing articles by Maggie Gallagher, Thomas Paprocki, and Charles Reid). Professor Reid has since changed his position and now supports same-sex marriage. See Charles J. Reid Jr., *Marriage Equality: How I Changed My Mind*, HUFFINGTON POST (May 3, 2013, 2:10 PM), http://www.huffingtonpost.com/charles-j-reid-jr/marriage-equality-how-i-changed-my-mind_b_3204693.html, archived at <http://perma.cc/3SGH-HT7Z>.

⁷⁴ See Berg/Laycock/Ledewitz/Lund/Perry Letter, *supra* note 32, at 4 (statement supporting same-sex marriage signed by Catholic scholar Michael Perry, as well as Thomas Berg and Bruce Ledewitz, non-Catholics who teach at Catholic law schools). Cf. Kirkpatrick, *supra* note 72 ("George's] critics, including many of his fellow Catholic scholars, argue that he is turning the church into a tool of the Republican Party.").

⁷⁵ See Thomas Berg et al., *Response from Scholars Supporting "Marriage Conscience" Religious Liberty Protection*, MIRROR OF JUSTICE (Nov. 7, 2013), <http://mirrorofjustice.blogs.com/mirrorofjustice/2013/11/response-on-same-sex-marriage-and-religious-liberty.html> (last updated Nov. 9, 2013), archived at <http://perma.cc/3U4J-7C2G>; Berg, *Letters/Memos*, *supra* note 32 (repository of pro-exemption letters hosted on MIRROR OF JUSTICE).

⁷⁶ See *infra* Appendix B (citing support for broad exemptions from Catholic scholars Helen Alvaré, William Bassett, Robert Destro, Ed Gaffney, Richard Garnett, Robert George, and Michael Perry, as well as from Thomas Berg and Bruce Ledewitz, non-Catholics who teach at Catholic laws schools).

⁷⁷ As others have noted, conservative Catholics are a key part of the larger coalition of social conservatives that have increasingly sought religious accommodations from secular laws. See Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 564-66 (2004).

riage so differently than it once did religious arguments about interracial marriage. Nonetheless, it is equally clear that those two dynamics do not tell the full story of the marriage dichotomy. For one thing, several scholars supporting broad exemptions are affiliated with neither the conservative legal movement nor Catholic law schools.⁷⁸ And several are self-identified liberals.⁷⁹

Why might socially liberal academics who strongly support same-sex marriage laws also support broad religious exemptions to nondiscrimination regulations? Pragmatic concerns provide one answer. As Professor Andrew Koppelman has explained, the “great attraction of regulation-plus-exemptions is that it lowers the stakes and makes possible a legislative compromise that does not threaten the deepest interests of either side.”⁸⁰ Of course, one could certainly object that compromising away the right to equal treatment under public accommodations laws does indeed threaten a “deep interest” of same-sex couples.⁸¹ But when it was still unclear how long it might take for marriage equality to move from solidly blue states to purple and red states,⁸² such compromises may well have been viewed

⁷⁸ See *infra* Appendix B (citing Alan Brownstein, Kent Greenawalt, Douglas Laycock, and Marc Stern).

⁷⁹ Thomas Berg has described himself as holding “progressive political views,” see Thomas Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 285–86 (2013); Douglas Laycock has described himself as a “moderate-to-liberal Democrat,” see Tony Mauro, *The Measure of McConnell*, LEGAL TIMES, June 6, 2005, at 1, 12 (quoting Laycock); Bruce Ledewitz has termed himself a “liberal,” see Bruce Ledewitz, *Well, Don’t We Liberals Hate the Public God?*, HUFFINGTON POST (June 29, 2011, 5:12 AM), http://www.huffingtonpost.com/bruce-ledewitz/well-dont-we-liberals-hat_b_886759.html, archived at <http://perma.cc/44WT-SMJ7>; and Michael Perry is a contributor to the progressive blog, *Religious Law Left*, see RELIGIOUS LEFT LAW, <http://www.religiousleftlaw.com> (last visited Dec. 17, 2014), archived at <http://perma.cc/A2S4-DFKS> (listing Perry as a contributor).

⁸⁰ Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 135 (2006). See also Berg/Laycock/Ledewitz/Lund/Perry Letter, *supra* note 32, at 3 (arguing that including “generous exemptions” would be “better for same-sex couples” because it “may quell the fears of a few legislators in the middle whose votes may be crucial”).

⁸¹ See Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in EMERGING CONFLICTS, *supra* note 3, at 153 (“If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt.”).

⁸² By June 2014, all fifteen of the states President Obama won by more than 10% in 2012 recognized same-sex marriage, but only four of the eleven states he won by less than 10% did, and none of the states won by Governor Mitt Romney did. Compare David Leip, 2012 Presidential Election Data, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/data.php?year=2012&datatype=national&def=1&f=0&off=0&elect=0> (last visited Aug. 13, 2014), archived at <http://perma.cc/9SE2-FUTX> (containing a table of state results in the 2012 presidential election), with Q&A: *Same-Sex Marriage, Minimum Wage*, TAMPA BAY TIMES (June 12, 2014), <http://www.tampabay.com/news/humaninterest/qa-same-sex-marriage-minimum-wage/2184173>, archived at <http://perma.cc/25KZ-YNWJ> (listing the nineteen states that recognized same-sex marriage as of June 2014). As noted in note 22, *supra*, the landscape changed dramatically in the fall of 2014 as the result of several court orders that raised the number of recognition states from nineteen to thirty-five.

as the political price for achieving legal recognition absent a judicial mandate.⁸³

Yet, while such pragmatic considerations have undoubtedly influenced some modern scholars, similar strategic considerations would have weighed in favor of adopting broad exemptions to civil rights laws in the 1950s and early 1960s, when the fight for interracial marriage equality was taking place in state legislatures.⁸⁴ The bargaining chip of exemptions was familiar to advocates of the time; to help ensure the votes for the public accommodations provision in the Civil Rights Act of 1964, for example, the Act's sponsors included a "Mrs. Murphy" exemption for self-occupied boarding houses containing five or fewer rooms for rent.⁸⁵ But no legal scholar at the time argued that the best way to accelerate the cause of interracial marriage equality was to adopt religious exemptions to civil rights laws that could be invoked by commercial businesses generally.⁸⁶

Another explanation that has been offered for the marriage dichotomy is that public accommodations laws today have a much broader reach, generating conflicts that were not likely to arise in the 1950s and 1960s.⁸⁷ There are, however, at least two problems with this explanation. First, several of the most high-profile conflicts that have arisen in recent years have concerned inns,⁸⁸ which have long been treated as quintessential public accommodations.⁸⁹ Second, it is simply not accurate to claim that broad public

⁸³ See Greenawalt, *supra* note 3, at 111–12 ("One important practical reason why [exemptions] are not a mistake is that in many states, the granting of some exemptions in any near future may well be needed to get enough support for a same-sex marriage bill to pass."); Rachel Zoll, *Next Gay Marriage Fight: Religious Exemptions*, ASSOCIATED PRESS (Oct. 14, 2014), <http://bigstory.ap.org/article/de029a0e8b7145e1bd84e15a9ff91a1c/next-gay-marriage-fight-religious-exemptions>, archived at <http://perma.cc/2S3Q-UFFR> ("Until recently, gay rights groups accepted some exceptions to pick up badly needed votes from conservative lawmakers.").

⁸⁴ See generally BOTHAM, *supra* note 11, at 155 ("During the seventeen years following *Perez* in 1948, Indiana plus every state west of the Mississippi that had had antimiscegenation statutes in place in 1948 either repealed them through the state legislatures or dropped them from the legal books.").

⁸⁵ See James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 607, 608 (1999).

⁸⁶ Cf. Matthew J. Murray, *Gay Equality, Religious Liberty, and the First Amendment*, 1 L.A. PUB. INT. L.J. 124, 196 (2009) ("Granting exemptions to anyone who framed his objection to complying with a civil rights law in religious terms would fatally undermine the effectiveness of such laws. Many, if not most, people who object to such laws do so in religious terms.").

⁸⁷ See, e.g., Douglas Laycock, *Civil Unions and Religious Liberty: A Response to Stone*, U. CHI. L. SCH. FACULTY BLOG (May 6, 2009, 8:49 PM), <http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-and-religious-liberty-a-response-to-stone.html>, archived at <http://perma.cc/VNX5-BJ6T> ("When anti-miscegenation laws were repealed or invalidated in the mid-twentieth century . . . we did not have modern public accommodations laws of the kind now enacted in many states, which cover substantially all goods and services in the economy.").

⁸⁸ See, e.g., Zezima, *supra* note 5; Kelleher, *supra* note 8.

⁸⁹ See *Civil Rights Cases*, 109 U.S. 3, 25 (1883) ("Inkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for

accommodations statutes did not exist when the nation was publicly debating interracial marriage. California, for example, extended its public accommodations law to cover “all business establishments of every kind whatsoever” in 1959.⁹⁰ Thus, the same type of feared conflicts that have animated so much scholarship in recent years⁹¹ could just as easily have been imagined in the nation’s most populous state in the 1960s. And California was not alone. As of 1966, thirty-six states had public accommodations statutes,⁹² many of which broadly covered all or almost all businesses open to the general public.⁹³ Given that only twenty-one states have since extended their public accommodations statutes to cover sexual orientation discrimination,⁹⁴ it is far from clear that such statutes impose greater burdens today on business owners who oppose same-sex marriage than comparable statutes did in the 1960s on business owners who opposed interracial marriage.

What else, then, might explain the academy’s differing approach to these two classes of religious business owners? For one thing, it appears that at least some of the scholarship has been influenced by an intuitive sense that sexual orientation is more biologically relevant to marriage than race, making religious objections to same-sex marriage more understandable than religious objections to interracial marriage. Professor Kent Greenawalt has succinctly articulated this view:

How is a rejection of same-sex marriage different? Historically, virtually all cultures and religions have regarded marriage as be-

them”); Joseph W. Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1311, 1312 (1996) (discussing innkeeper duty).

⁹⁰ CAL. CIV. CODE § 51 (1959).

⁹¹ Under the heading, “The Unavoidable Conflict,” Professor Laycock notes the breadth of commercial activity implicated by weddings and marriages:

Weddings in our culture generally require printers, tailors, dressmakers, photographers, florists, caterers, bridal shops, wedding registries, and other services. Married couples need a house or an apartment, lodging when they travel, mortgages, furniture, groceries, plumbers, and all the other services of a modern economy. They may need other private actors to recognize their marriage for many potential purposes: fringe benefits, insurance, adoption, child care, marriage counseling, medical care, litigation, and probably many less obvious situations.

Douglas Laycock, *Afterword*, in EMERGING CONFLICTS, *supra* note 3, at 194. See also Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in EMERGING CONFLICTS, *supra* note 3, at 100 (discussing similar “second order conflicts”).

⁹² See EMERSON ET AL., *supra* note 43, at 2131–32.

⁹³ See, e.g., *Commissions: Establishment—Arizona*, 10 RACE REL. L. REP. 900, 901–02 (1965–1966) (reproducing Arizona’s 1965 law, which covered “all establishments which cater or offer its services, facilities or goods to or solicits patronage from the members of the general public,” exempting small boarding houses); *Public Accommodations, Governmental Facilities: Anti-Discrimination Statutes—Missouri*, 10 RACE REL. L. REP. 1384, 1385 (1965–1966) (reproducing Missouri’s 1965 law, which covered “all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages and accommodations,” exempting beauty parlors and barber shops); *Public Accommodations: Definition—Oregon*, 6 RACE REL. L. REP. 644, 644 (1961–1962) (reproducing Oregon’s 1961 law, which covered “[a]ny place offering to the public goods or services”).

⁹⁴ See NeJaime, *supra* note 9, at 1190 & n.66 (listing the states).

tween persons of different genders. This is understandable in light of the realities that, without modern technology, it takes a union of a male and female to produce children, and that most people's dominant sexual inclination is toward people of the opposite gender. Neither of those bases is a sound reason not to allow same-sex marriages, but they do provide a setting in which the sense that such unions are "unnatural" or "less natural" is comprehensible.⁹⁵

This appeal to nature in explaining the marriage dichotomy will no doubt ring true for many, but it is important to keep in mind that confident assertions about the "unnatural" practice of race mixing once resonated with many Americans.⁹⁶ And while "[in] little more than a generation, most White Americans somehow managed to forget how fundamental they once believed [interracial marriage] bans to be,"⁹⁷ the fact remains that arguments appealing to natural law were at the core of the case against interracial marriage, just as they have been at the core of the case against same-sex marriage.⁹⁸ As one commentator has noted, "the notion that such relationships are not 'natural,' and thus may be legitimately prohibited," is "perhaps the most striking parallel between the rhetoric of interracial marriage opponents and the rhetoric of opponents of same-sex marriage."⁹⁹ On a related note, just as arguments are made today that "[d]efining marriage as the union of one man and one woman promotes the optimal environment for rearing children,"¹⁰⁰ arguments about the purported "best interests of chil-

⁹⁵ Greenawalt, *supra* note 3, at 113; *see also* Koppelman, *supra* note 80, at 137 ("Some people regard homosexuality as a kind of handicap, morally neutral but unfortunate inasmuch as it makes it impossible to create children through ordinary . . . biological processes.").

⁹⁶ *See* *Perez v. Lippold* 198 P.2d 17, 41 (Cal. 1948) (Shenk, J., dissenting) ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results. . . . [C]onnections and alliances so unnatural should be prohibited by positive law and subject to no evasion." (quoting *Eggers v. Olson*, 231 P. 483, 484 (Okla. 1924)) (internal quotation mark omitted)); *id.* at 44 ("[T]here is authority for the conclusion that the crossing of the primary races leads gradually to retrogression . . ."). *See also* *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (noting that Virginia's Supreme Court of Appeals had relied on its earlier decision in *Naim*, which held that the state's antimiscegenation law served the "legitimate purposes" of preventing "the corruption of blood" and "a mongrel breed of citizens" (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955))).

⁹⁷ *PASCOE*, *supra* note 34, at 291.

⁹⁸ *See* Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in A Civil Union State*, 41 *CONN. L. REV.* 1381, 1392 (2009) (noting that "separating the races was once considered to be a natural part of the social order and was considered an intrinsic part of marriage law as enacting what nature or God dictated").

⁹⁹ Aderson Bellegarde François, *To Go Into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 *J. GENDER RACE & JUST.* 105, 119–20 (2009); *see also* Angela Onwuachi-Willig, *Undercover Other*, 94 *CALIF. L. REV.* 873, 898–99 (2006) ("[C]laims that interracial marriage was unnatural and immoral parallel contemporary claims that gay marriage is bestial and against the word of God.").

¹⁰⁰ *Amicus Brief of Liberty Counsel and the American College of Pediatricians Supporting Appellant* at 19, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Nos. 14–1167(L), 14–1169, 14–1173) [hereinafter *Liberty Counsel Brief*].

dren” were “used to object to interracial marriage.”¹⁰¹ As the NAACP has pointed out:

In defending its anti-miscegenation statute before the Supreme Court in *Loving*, Virginia . . . cited purportedly scientific sources for its contention that prohibitions against marriage for interracial couples were in the interest of children. These arguments took various forms, including . . . cultural arguments that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing¹⁰²

More fundamentally, even assuming that the inability to procreate without modern technology or beliefs about the best interests of children could be sufficient to make religious objections to same-sex marriage more “comprehensible” than religious objections to interracial marriage, it is well settled that the law cannot judge religious beliefs by their comprehensibility.¹⁰³ As Professor Mark Strasser has observed, those arguing that religious opposition to same-sex marriage can be distinguished from religious opposition to interracial marriage as “a matter of right reason” and “moral fact” fail to confront the critical problem that their position “requires the state to leave its perch of neutrality among religions” and engage in “an assessment of which claims of conscience are correct.”¹⁰⁴ The religious liberty scholars advocating for broad exemptions are as familiar as anyone with the constitutional prohibition of such governmental judgments,¹⁰⁵ so something more is needed to explain their disparate treatment of religious objections to same-sex marriage and interracial marriage.

That “something more” might be found in the Supreme Court’s failure to resolve the level of scrutiny that applies to sexual orientation discrimina-

¹⁰¹ Onwuachi-Willig, *supra* note 99, at 899.

¹⁰² Brief of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc. & NAACP in Support of Appellees at 18, *Bostic v. Schaefer*, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Nos. 14–1167(L), 14–1169, 14–1173). Compare Liberty Counsel Brief, *supra* note 100, at 20–24 (“[S]tudies show children raised by their wedded biological parents fare best [S]ame-sex parents cannot provide the optimal environment for rearing children, and treating same-sex unions as marriages ‘would undermined [sic] marital stability in ways that we know do hurt children.’” (quoting SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 61 (2012))).

¹⁰³ See *Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.”).

¹⁰⁴ Strasser, *supra* note 12, at 140–41.

¹⁰⁵ See, e.g., Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531, 543 (1999) (“The Court [has] said that ‘religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . Courts are not arbiters of scriptural interpretation.’” (ellipsis in original) (quoting *Thomas v. Review Bd. of Ind. Emp’t. Sec. Div.*, 450 U.S. 707, 714, 716 (1981))).

tion.¹⁰⁶ By deciding both of its major equal protection cases involving gay rights without invoking formal heightened scrutiny,¹⁰⁷ the Court has held out the possibility that states may have a considerably freer hand to discriminate on the basis of sexual orientation than on the basis of race or sex.¹⁰⁸ Under those circumstances, it is hardly surprising that some commentators might conclude that exemptions in the same-sex marriage context are more doctrinally defensible than exemptions in the interracial marriage context.¹⁰⁹

On a related note, some scholars have distinguished the two contexts by relying upon the unique role of racial discrimination in American history. Professor Laycock, for example, has argued that “however horrific the old-time discrimination against gays and lesbians was, it does not involve 250 years of slavery, a Civil War with 600,000 dead, or three constitutional amendments.”¹¹⁰ To be sure, the singular place of racial discrimination in American history — which also includes the stain of Jim Crow laws and the “separate but equal” doctrine — cannot and should not be denied. But it is

¹⁰⁶ See Araiza, *supra* note 45, at 392–93 (2014) (describing the Court’s decision in *Windsor* as “yet another foregone opportunity for the Court to apply suspect class scrutiny — or even to acknowledge the possibility that sexual orientation might be a suspect class”).

¹⁰⁷ See *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (“The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”); *Romer v. Evans*, 517 U.S. 620, 635 (1996). Cf. *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O’Connor, J., concurring) (arguing that a sodomy ban limited to same-sex conduct could not survive equal protection scrutiny under “any standard of review”).

Although the majority opinion in *Windsor* did not explicitly address the issue of heightened scrutiny, the Ninth Circuit has since read it to require such scrutiny. See generally *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (holding that Nevada’s prohibition of same-sex marriage violated the Equal Protection Clause). Cf. *Baskin v. Bogan*, 766 F.3d 648, 654–56 (7th Cir. 2014) (initially treating sexual-orientation discrimination as “suspect” based on criteria that has traditionally triggered heightened scrutiny, but ultimately concluding that “[t]he discrimination against same-sex couples [in the marriage laws of Indiana and Wisconsin] is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny”), *cert. denied*, 135 S. Ct. 316 (2014).

¹⁰⁸ Discrimination on the basis of race and religion is subject to strict scrutiny and discrimination on the basis of sex is subject to intermediate scrutiny. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) (race); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (sex).

¹⁰⁹ For a further discussion of the scrutiny issue, which concludes that heightened scrutiny should apply to sexual orientation discrimination and that the proposed exemptions cannot survive that scrutiny, see *infra* text accompanying notes 224–226 and 240–242. For an argument that, even in the absence of formally heightened scrutiny, the proposed exemptions violate the Equal Protection Clause under *Windsor*, see *infra* notes 229–239 and accompanying text.

¹¹⁰ Douglas Laycock, *Civil Unions and Religious Liberty: A Response to Stone*, U. CHI. L. SCH. FACULTY BLOG (May 6, 2009, 8:59 PM), <http://uchicago.law.typepad.com/faculty/2009/05/civil-unions-and-religious-liberty-a-response-to-stone.html>, archived at <http://perma.cc/VNX8-HE4D>. See also Thomas Berg, *What Same-Sex-Marriage and Religious Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL’Y 206, 208, 235 (2010). But see Underkuffler, *supra* note 12, at 2087 (“[E]xemption proponents single out sexual orientation as the one trait or status that should be trumped by religious claims. What about sex, religion, or national origin, for instance? None of those were the subject of civil wars. Why is sexual orientation discrimination not akin to these?”).

far from clear that the exceptional nature of the nation's struggle for racial equality should lead courts to treat race as occupying a *sui generis* constitutional category into which entry is barred for all other victims of discrimination. The more fitting approach might well be to honor that original struggle for civil rights by giving full force to its lessons in other relevant areas.¹¹¹ And one benefit of considering that possibility seriously is that it immediately makes apparent how neglected the Equal Protection Clause has been in the debate over religious exemptions to same-sex marriage laws.

One notable exception to that general neglect is Professor Greenawalt's important discussion of another possible explanation for the marriage dichotomy: Objections to interracial marriage were fundamentally different because they were never really about *protecting marriage*, but instead, and as acknowledged by the Court in *Loving v. Virginia*, about *maintaining supremacy* for the white majority.¹¹² This is evidenced by the fact that the typical pre-*Loving* state ban precluded marriages between whites and non-whites, but did not preclude marriage among members of different racial minorities. Such a law, Greenawalt argues

is not a genuine ban on interracial marriage; it is a law designed to protect the purity of a superior race, the white one. It would be extremely hard to imagine any principled defense of such laws that does not rest on the need to protect the purity of the favored race — a defense that would, or should, seem absolutely outrageous to members of a multicultural, multiracial society.¹¹³

By contrast, Greenawalt concludes, today's opposition to same-sex marriage is not so much about preference for heterosexuality and disapproval for homosexuality, but about marriage as an institution:

Some people, who believe that sexual relations between members of the same gender are as acceptable as most other sexual relations and that people should not be treated differently because they engage in such relations, nevertheless conceive marriage as special and think God has ordained that it be between men and women.

¹¹¹ See Linda C. McClain, *Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society*, 32 CARDOZO L. REV. 1959, 2007 (2011) (“[A]nalogies need not be perfect in order to be persuasive, or at least instructive. It is possible to appeal to the dignitary harms of discrimination on the basis of sexual orientation, without denying the unique harms perpetuated by public and private race discrimination. Moreover, important themes from the Court’s equal protection jurisprudence about race and sex, such as the role of stereotypes and prejudice in rationalizing laws and policies that have hindered the full participation of persons in society, have force when applied to discrimination on the basis of sexual orientation.”).

¹¹² 388 U.S. 1, 11 (1967).

¹¹³ Greenawalt, *supra* note 3, at 112–13. See also *Loving*, 388 U.S. at 11 (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).

Such persons can rightly say that their opposition to gay marriage does not represent any negative view about gay people or sexual relations between them.¹¹⁴

This explanation for the “idea that resistance to same-sex marriage is more understandable and defensible than resistance to interracial marriage involving white persons”¹¹⁵ ultimately falls short for two reasons. First, just as there are people today who support antidiscrimination laws protecting gay people but oppose same-sex marriage, there were people in the 1960s who supported integration generally but opposed interracial marriage. Indeed, as noted above, that class of people included former President Harry Truman, hardly a figure identified with the cause of white supremacy.¹¹⁶

Second, although there may be *some* religious people who are fully accepting of same-sex sexual relations but oppose same-sex marriage, the primary religious argument against gay rights in America has been rooted in biblical passages concerning sex, not marriage.¹¹⁷ In light of those passages, “[m]any persons who accept the Bible as a God-inspired text . . . believe that the Bible indicates that homosexual sexual conduct is always contrary to God’s will, that it is always, in that fundamental sense, immoral.”¹¹⁸ And that view is not limited to members of Christian faiths. In explaining its opposition to same-sex marriage, the Orthodox Union has asserted that “the position of traditional Judaism on homosexual behavior is clear and unambiguous, terse and absolute. Homosexual behavior between males or between females is absolutely forbidden by Jewish law”¹¹⁹ Likewise, the

¹¹⁴ Greenawalt, *supra* note 3, at 111.

¹¹⁵ *Id.* at 113–14.

¹¹⁶ See *supra* note 41 and accompanying text. See also Linda C. McClain, Marriage, Conscience, and Bigotry 89 (Aug. 26, 2014) (unpublished manuscript) (on file with author) (discussing a 1956 speech in which a North Carolina minister who supported the Supreme Court’s desegregation decisions “distinguished a commitment to tolerance from the promotion of ‘amalgamation or merger,’” stating that “‘God, I am sure, does not intend for us all to be one race.’” (quoting Dr. J.R. Brokhoff, *A Lesson on Tolerance*, (Mar. 7, 1956), in RHETORIC, RELIGION AND THE CIVIL RIGHTS MOVEMENT, 1954–1965 172, 173 (David W. Houck & David E. Dixon eds., 2006))).

Public opinion polls from the Civil Rights Era confirm that support for civil rights laws was much stronger than acceptance of interracial marriage. Compare Ilya Somin, *Public Opinion, Anti-Discrimination Law, and the Civil Rights Act of 1964*, VOLOKH CONSPIRACY (May 24, 2010, 4:30 PM), <http://www.volokh.com/2010/05/24/public-opinion-anti-discrimination-law-and-the-civil-rights-act-of-1964>, archived at <http://perma.cc/XB7G-PTH5> (“By 1963, . . . 85% of whites polled in a National Opinion Research Center survey endorsed the view that ‘Negroes should have as good a chance to get any kind of job’ Similarly, 73% of whites . . . embraced the view that ‘Negroes should have the right to use the same parks, restaurants, and hotels, as white people.’”), with Jones, *supra* note 34 (reporting that public approval of interracial marriage was at just 20% in 1968).

¹¹⁷ See Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 456 (2001) (listing specific passages).

¹¹⁸ *Id.* at 454. See also *id.* at 469 (“*The Catechism of the Catholic Church* holds that ‘homosexual acts are intrinsically disordered’ and ‘[u]nder no circumstances can they be approved.’” (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2357 (1st ed. 1994))).

¹¹⁹ Rabbi Tzvi Hersh Weinreb, *Orthodox Response to Same-Sex Marriage*, ORTHODOX UNION ADVOCACY CENTER (June 5, 2006), <http://advocacy.ou.org/2006/orthodox-response-to>

Islamic Circle of North America has asserted its belief that “sexual relations can only be between a man and a woman,” and it has warned that “[t]he push to redefine the established institution of marriage *and embrace homosexuality* can only lead to the deterioration of the very structure of our communities and society as a whole.”¹²⁰ Thus, as Professor Greenawalt candidly acknowledges, “for *most* opponents of same-sex marriage, there does exist an aversion to sexual relations between persons of the same gender.”¹²¹

Once the Supreme Court held in *Lawrence v. Texas*¹²² that such an aversion could no longer be enshrined in law,¹²³ many religious conservatives by necessity retreated to the “last stand” issue of marriage. But nobody should be mistaken about the underlying reason for their opposition to same-sex marriage: they “disapprove of homosexuality.”¹²⁴ As Justice Scalia observed in his *Lawrence* dissent, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s moral disapproval of same-sex couples.”¹²⁵

That moral disapproval of homosexuality, like religious disapproval of race mixing, has helped perpetuate societal and legal discrimination against a distinct and disfavored minority,¹²⁶ with marriage representing the most fiercely guarded privilege being withheld. As one commentator has noted:

same-sex-marriage, *archived at* <http://perma.cc/2LG4-NU6Z>. See also *Agudath Israel Statement on Same-Sex Marriage*, CROSS-CURRENTS (May 9, 2012), <http://www.cross-currents.com/archives/2012/05/09/agudath-israel-statement-on-same-sex-marriage>, *archived at* <http://perma.cc/7CQD-J2FX> (“We hereby state, clearly and without qualification, that the Torah forbids homosexual acts, and sanctions only the union of a man and a woman in matrimony.”).

¹²⁰ Press Release, Islamic Circle of North America, ICNA’s Statement on President’s Support for Gay Marriage (May 11, 2012) (emphasis added), *available at* <http://www.icna.org/icnas-stance-on-president-obamas-support-for-same-sex-marriage>, *archived at* <http://perma.cc/Q53P-4KWF>.

¹²¹ Greenawalt, *supra* note 3, at 111 (emphasis added). See *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx#1>, *archived at* <http://perma.cc/3Z49-URDP>, (last visited July 11, 2014) (reporting that, as of May 2014, 42% of the public opposed same-sex marriage and 38% of the public believed “gay or lesbian relations” were “morally wrong”).

¹²² 539 U.S. 558 (2003).

¹²³ See *id.* at 577–78 (concluding that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

¹²⁴ Dent, *supra* note 29, at 556. David Blankenhorn, the founder of the Institute of American Values and formerly one of the nation’s leading intellectual opponents of same-sex marriage, has bluntly acknowledged that “much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus.” David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html>, *archived at* <http://perma.cc/9VH-YY6V>.

¹²⁵ *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (quoting *id.* at 585 (O’Connor, J., concurring in the judgment)).

¹²⁶ See Eskridge, *supra* note 3, at 665, 685 (“For most of American history, the law uncontroversially denied racial minorities equal treatment wherever religious majorities believed as a matter of faith that racial variation from ‘whiteness’ was malignant. . . . Once homosexuality became a coherent category, the law denied equal treatment wherever religious majorities believed as a matter of faith that sexual or gender variation was malignant.”). For a particu-

However much opponents of same-sex marriage may insist “this time it is different,” there remains an appalling familiarity to the refrain that allowing certain people the same human dignity as everyone else will threaten social order, degrade individuals, and harm children. Courts heard the same awful dirge when anti-miscegenationists sought to preserve the ban against interracial marriage as the last shameful vestige of the separate but equal doctrine.¹²⁷

In short, although arguments can be made that religious objections to same-sex marriage are more defensible than religious objections to interracial marriage,¹²⁸ those arguments are not nearly strong enough to explain why the type of broad exemptions from antidiscrimination laws that were never even discussed in the academy for interracial-marriage objectors are now widely championed for same-sex marriage objectors. And those arguments cannot excuse the near complete absence of equal protection analysis in the current discourse,¹²⁹ which has instead primarily framed the debate as one involving competing liberty interests.¹³⁰

larly forceful statement comparing opposition to interracial and same-sex relationships, see Kim Forde-Mazrui, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2201 (2003) (book review) (“Illustrated most infamously by the murder of Matthew Shep[a]rd, condemnation of those who would seek intimacy with people of the same sex has involved a degree of hatred and cruelty expressed through torture, mutilation, and castration, the brutality of which is matched only by the lynching of blacks that produced the ‘strange fruit’ of the South.”).

¹²⁷ François, *supra* note 99, at 135–36. See also James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 108 (1993) (“Arguments against gay marriage . . . rest on the prejudiced assumption that homosexuality is wrong, and that heterosexuality is superior to homosexuality. This bias is similar to the belief that whites are superior to African Americans.”). Cf. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 255–56 (1994) (“As with the miscegenation taboo, the effect that the taboo against homosexuality has in modern American society is, in large part, the maintenance of illegitimate hierarchy . . . Laws that discriminate against gays . . . implicitly stigmatize women, and they reinforce the hierarchy of men over women.”).

¹²⁸ See, e.g., Wilson, *supra* note 91, at 101 (“The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.”). But see Curtis, *supra* note 42, at 187–88 (“An examination of American history shows the proposed distinction is baseless. Slavery, racial discrimination and segregation, and opposition to women’s rights were all supported by strong religious arguments bolstered by citations to the Bible. As scholarly work has shown, these religious views were deeply held by many people.”).

¹²⁹ See *supra* note 12 and accompanying text.

¹³⁰ See, e.g., Gilreath, *supra* note 12, at 215–16 n.55 (critiquing Professor Chai Feldblum, who wrote the only essay arguing against exemptions in EMERGING CONFLICTS, *supra* note 81, for “adopt[ing] the obfuscating rhetoric of her coauthors, writing about ‘identity liberty’ and ‘belief liberty’”); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1432–33 (2012) (“The same fundamental values of personal liberty that support an individual’s right to follow and fulfill his or her essential identity, including sexual identity and same-sex relationships, also support an individual’s right to live according to his or her religious convictions.”); Douglas Laycock et al., *Gay Marriage Bill Should Be Passed After More Religious Liberty Protections Are Included*, HAWAII REPORTER (Oct. 28, 2013), <http://www>

Part IV of this Article aims to fill in some of the missing equal protection analysis. But before turning to that task, Part III considers one final and particularly important explanation for the marriage dichotomy in the religious-exemptions literature.

III. A FUNDAMENTAL RECONCEPTUALIZATION OF RELIGIOUS LIBERTY: EXEMPTIONS FOR COMMERCIAL BUSINESSES

It is difficult to overstate the profound impact on the academy of the Supreme Court's 1990 decision in *Employment Division v. Smith*,¹³¹ which disavowed the notion that the Free Exercise Clause provides a judicially enforceable right to religious exemptions from generally applicable laws.¹³² In the three decades leading up to *Smith*, the Court did recognize such a right, adhering to the view that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."¹³³ In *Smith*, however, the Court inexplicably claimed that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."¹³⁴ *Smith* was viewed as a dramatic attack on religious liberty,¹³⁵ and the response was equally dramatic. As Professor Angela Carmella has written in describing the response to *Smith*:

The decision immediately provoked reaction (almost entirely negative) from the legal academy, and undoubtedly helped to reinvigorate sustained scholarly interest in religious exemptions, both judge-made as well as legislative. For the decades that followed

.hawaiiireporter.com/gay-marriage-bill-should-be-passed-after-more-religious-liberty-protections-are-included/123, archived at <http://perma.cc/GWL7-GXE9> (focusing on the "human liberty" of same-sex couples and the "religious liberty" of objectors").

¹³¹ 494 U.S. 872 (1990).

¹³² *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (internal citation and quotation marks omitted)).

¹³³ *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (requiring a religious exemption from a compulsory school attendance law); see also *Sherbert v. Verner*, 374 U.S. 398, 399–410 (1963) (holding that a state law disqualifying workers from receiving unemployment compensation benefits if they refused to work without "good cause" could not be applied to withhold benefits from a worker who refused to work on her Sabbath).

¹³⁴ *Smith*, 494 U.S. at 878–79. Just one year prior to the *Smith* decision, its author had explicitly described *Yoder* and three other pre-*Smith* decisions as requiring religious exemptions. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) ("In such cases . . . we held that the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.").

¹³⁵ See RONALD B. FLOWERS, MELISSA ROGERS & STEVEN K. GREEN, *RELIGIOUS FREEDOM AND THE SUPREME COURT* 253 (2008) (noting that the decision "triggered negative reactions from a wide range of religious leaders . . . as well as a number of civil rights activists and legal experts across the political spectrum").

Smith, the statutory responses to the decision from Congress and state legislatures have continued to invite scholarly response.¹³⁶

Initially, the reinvigorated scholarship on exemptions was characterized by a frontal attack on the basic underpinnings of *Smith*¹³⁷ and a defense of legislative efforts to overturn the effects of the decision. These efforts first bore fruit with the near-unanimous passage of the Religious Freedom Restoration Act (RFRA) of 1993,¹³⁸ which was designed to overturn the decision in *Smith*.¹³⁹ In 1997, the Supreme Court found that RFRA exceeded Congress's powers under Section Five of the Fourteenth Amendment and invalidated the statute as applied to the states.¹⁴⁰ It remains in effect, however, against the federal government,¹⁴¹ and with considerable academic prodding, nineteen states have enacted their own RFRA's.¹⁴²

¹³⁶ Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731, 1731 (2011); see also Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 12 (1994) (“*Smith* provoked immediate and widespread surprise and anger.”).

¹³⁷ Two prominent scholarly critics of *Smith*, Douglas Laycock and Michael McConnell, “have excoriated *Smith* as inconsistent with the text and original understanding of the Free Exercise Clause, a sharp break with established precedent, and, ultimately, a naked betrayal of basic human rights values.” Ronald J. Krotoszynski Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1191 (2008); see also Berg, *supra* note 136, at 7 (“Strictly applied, the *Smith* rule destroys most constitutional protection of religious practice.”). But see Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248 (1991) (“*Smith* rightly jettisoned the conduct exemption because it is manifestly contrary to the plain meaning of the Free Exercise Clause . . . Critics of *Smith* who are serious about constitutional law, or who are not liberals, and especially critics who are both, should rethink their position.”); Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 32–37 (1998) (describing *Smith* as “impeccably faithful to the original meaning of the ‘Free Exercise Clause’” and expressing “doubts” about the wisdom of replacing *Smith* with an “arrangement in which legislation that adversely affects anyone’s religious belief or practice is scrutinized by the judiciary to ensure that it is, from a public policy viewpoint, absolutely necessary”).

¹³⁸ 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997). See Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 142 (2011) (noting that RFRA “passed the House of Representatives with a unanimous vote, and the Senate with a near unanimous, 97–3 vote”).

¹³⁹ See President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993) (“[T]his act reverses the Supreme Court’s decision *Employment Division against Smith* . . .”).

¹⁴⁰ *Boerne*, 521 U.S. at 536. Efforts to essentially repass the federal RFRA under the spending power and with a new name (the Religious Liberty Protection Act) faltered in 1999, but Congress did eventually enact a narrower exemptions law, the Religious Land Use and Institutionalized Persons Act of 2000. See 42 U.S.C. § 2000cc to 2000cc-5 (2012).

¹⁴¹ See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006).

¹⁴² See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 468 (2010) (“Prominent scholars poured themselves into debates over these state RFRA's . . .”); Eugene Volokh, *JA. What is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013), <http://www.volokh.com/2013/12/02/1a-religious-freedom-restoration-act/>, archived at <http://perma.cc/JD79-B69T> (containing a map showing eigh-

In the course of the sustained effort (twenty-five years and counting) to champion religious exemptions in spite of *Smith*, many scholars have begun to endorse a view of religious liberty that goes well beyond the Court's pre-*Smith* understanding of the Free Exercise Clause.¹⁴³ For example, in 2012, a group of twenty-four constitutional law professors filed an amicus brief in the Ninth Circuit contending that "surpassingly strict scrutiny" should apply to the denial of a religious exemption whenever a law or regulation contains so much as "a single secular exemption" that "undermines the state interest allegedly served by applying the rule to religious conduct."¹⁴⁴ Given that "virtually all laws . . . contain many secular exemptions,"¹⁴⁵ this argument would frequently lead courts to apply more rigorous scrutiny than during the pre-*Smith* regime, when the level of scrutiny applied was often "strict in theory but feeble in fact."¹⁴⁶

The argument that the existence of a single secular exemption to a law requires religious exemptions from that law, while sweeping, does not represent the most fundamental expansion of religious liberty claims proposed in the wake of *Smith*. The more dramatic development, and the one most relevant here, concerns the reconceptualization of religious liberty as extending fully into the for-profit commercial realm — a view that had been rejected prior to *Smith* by even the most ardent scholarly advocates for religious liberty.¹⁴⁷ Fittingly, this transformation is most vividly illustrated by comparing pre-*Smith* scholarship concerning religious objections to interracial marriage with post-*Smith* literature concerning religious objections to same-sex marriage.

teen states that have adopted their own RFRA's). Since Professor Volokh published his map, Mississippi has enacted a RFRA. See MISS. CODE ANN. § 11-61-1 (West 2014).

¹⁴³ As discussed further below, the Supreme Court has followed suit in one respect in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). See *infra* notes 165–179 and accompanying text.

¹⁴⁴ Brief of Constitutional Law Professors as Amici Curiae in Support of Appellees, *Stormans, Inc. v. Selecky*, Nos. 12–35221, 12–35223, 2012 WL 5915342 at *14, *19 (9th Cir. Nov. 20, 2012) (internal citation and quotation marks omitted). For a more detailed evaluation of this argument and its consequences, see James M. Oleske Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295 (2013).

¹⁴⁵ Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999); see also Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000) (observing that "few statutes are genuinely applicable across the board, without exceptions").

¹⁴⁶ Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994); see *Smith*, 494 U.S. at 883 (noting that while the Court had "sometimes purported to apply" the compelling state interest test in pre-*Smith* cases, outside of limited contexts, it "always found the test satisfied").

¹⁴⁷ See *infra* note 148 and accompanying text (quoting Douglas Laycock). As noted above, Professor Laycock is viewed by many as the preeminent religious liberty scholar of our time. See *Smith*, *supra* note 21. He has also demonstrated "tireless zeal" in advocating for religious liberty "as a litigator, lobbyist, and op-ed writer." *Id.* at 922. And he has played a central role in efforts to convince state legislatures to adopt the proposed religious exemptions that are the subject of this article. See *Wilson*, *supra* note 130, at 1429 n.37 (noting Laycock's leadership role among scholars lobbying for the exemptions).

Writing in the former context three decades ago, Professor Laycock offered the following internal/external paradigm for determining when religious exemptions should — and should not — be made from antidiscrimination laws:

[T]he internal affairs of churches are an enclave where the free exercise clause must control; outside such enclaves, the policy against racial discrimination controls. . . .

. . . A religiously motivated citizen who is conscientiously opposed to racial equality encounters legally required nondiscrimination almost everywhere he goes. . . . *If he owns a business, he must hire and serve all races on an equal basis.* If he buys or sells property, he must deal with blacks and whites on equal terms. *His objection to racial equality does not entitle him to be excused from these obligations; when he participates in government or the secular economy, he must obey the secular rules that apply to all.*¹⁴⁸

The pre-*Smith* Supreme Court shared Professor Laycock's view that religious owners of commercial businesses "must obey the secular rules that apply to all," declaring in 1982 that "[w]hen 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."¹⁴⁹

¹⁴⁸ Douglas Laycock, *Tax Exemptions for Racially Discriminatory Schools*, 60 TEX. L. REV. 259, 263 (1982) (emphasis added). Laycock's article addressed litigation revolving around Bob Jones University's policy banning interracial dating and marriage among its students. *Id.* at 260. See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

Professor Laycock was not the only scholar at the time to distinguish between the internal activities of religious organizations and the external activities of religious adherents in the secular world. See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979) (distinguishing activities conducted in the "spiritual epicenter" of a church from those involving "purely secular business activities and relationships," and contending that once "the church acts outside th[e] epicenter and moves closer to the purely secular world, it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships").

¹⁴⁹ *United States v. Lee*, 455 U.S. 252, 261 (1982); see also *Prince v. Massachusetts*, 321 U.S. 158, 177–78 (1944) (Jackson, J., concurring) ("[M]any religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders . . . All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state . . .").

Justice O'Connor famously argued that a similar rationale warrants denying exemptions to commercial entities that challenge application of public accommodations laws on freedom of association grounds. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) ("The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex."). Without explicitly adopting Justice O'Connor's rationale, a majority of the Court has since indicated that the commercial/noncommercial distinction may be determinative in free association cases. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) ("As the

Discussing these same principles in 1998 congressional testimony, Professor Laycock allayed legislators' fears that RFRA-style laws would enable businesses to obtain exemptions from laws prohibiting sexual orientation discrimination in places of public accommodation, explaining that "courts have never disagreed that in the outside world, religiously motivated people have to comply with the civil rights law."¹⁵⁰ Laycock emphasized that, even in cases involving church-run enterprises, "once the courts characterize [an operation] as commercial, the religious liberty claim loses."¹⁵¹

In more recent years, however, Professor Laycock has offered a different view. Writing in the context of religious objections to same-sex marriage, Laycock has adhered to the internal-church-affairs half of his original paradigm favoring religious-liberty interests,¹⁵² but he has stepped back from the external-secular-economy half favoring equal application of antidiscrimination laws:

The scope of any right to refuse service to same-sex couples must depend on comparing the harm to the couple of being refused service and the harm to the merchant or service provider of being coerced to provide service In my view, *the right to one's own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience.*¹⁵³

definition of 'public accommodation' has expanded from *clearly commercial entities*, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." (emphasis added). See also Lupu & Tuttle, *supra* note 3, at 285 (concluding that "[t]he ruling in *Dale* applies only to the expressive activities of non-commercial entities").

¹⁵⁰ *Religious Liberty Protection Act: Hearings on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 238 (June 16 and July 14, 1998) [hereinafter 1998 House Hearing]; see also OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 115 (1986) [hereinafter 1986 DOJ REPORT] ("The cases . . . demonstrate the reluctance of the courts to recognize a religiously-affiliated business as anything other than a business like any other business.").

¹⁵¹ 1998 House Hearing, *supra* note 150, at 237. Professor Laycock did note the possibility that courts might protect "very small-scale operations" like the "Mrs. Murphy landlord" and the "three-man office" doing "pro-bono work for religious organizations" depending on whether they were "more like the church or more like the outside world." *Id.* at 236-38; see also *id.* at 240 (statement of Professor Steven Green) ("Professor Laycock is exactly right. It really depends on how close the activity looks like a church or how close it looks like a run-of-the-mill commercial activity.").

¹⁵² See Laycock, *supra* note 91, at 200 ("[W]ithin the church itself, I think the protection for religious dissenters from same-sex marriage is substantially absolute.").

¹⁵³ *Id.* at 198 (emphasis added). See *id.* at 201 ("[I]n a substantial range of cases . . . the hardship imposed by refusing to exempt conservative religious business people would far outweigh the hardship to same sex couples of allowing exemptions."). In laying out the opposing view, Chai Feldblum offers a very different perspective on the harm that Laycock terms "mere inconvenience":

Whereas once the rule was that for-profit businesses owned by religious adherents “must obey” all secular laws, now the contention is that such businesses should be presumptively exempted from laws violating their beliefs, with “the only serious argument” countenanced against an exemption being “the asserted compelling interest in regulation.”¹⁵⁴

This dramatic post-*Smith* reconceptualization of religious liberty as a right that extends fully to for-profit commercial businesses first garnered national attention in litigation challenging the contraception-coverage requirement for employer health plans adopted pursuant to the Patient Protection and Affordable Care Act (ACA).¹⁵⁵ From 2012 through 2014, more than four dozen commercial businesses brought lawsuits under the federal RFRA seeking exemptions from the requirement,¹⁵⁶ and the lead case — *Burwell v. Hobby Lobby Stores, Inc.*¹⁵⁷ — involved a company with more than 13,000 employees throughout the nation.¹⁵⁸ The General Counsel for the United States Conference of Catholic Bishops, which helped lead the charge against

If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table, or a medical procedure from someone else. . . . The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me the same way

Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect the ability of LGBT people to live in the world.

Feldblum, *supra* note 81, at 153.

¹⁵⁴ Laycock, *supra* note 91, at 201. It bears repeating that Professor Laycock is a supporter of same-sex marriage, see *supra* note 32, and he is not someone who can be accused of changing his views on religious exemptions to match his social or political views. See Oleske, *supra* note 144, at 324 (describing Laycock as a “notable exception” to the trend of ideological polarization over religious exemptions in the context of hot-button social issues). Rather, Laycock’s endorsement of extending religious exemptions into the commercial sphere, like his endorsement of a vigorous selective-exemption rule, is best viewed as part of a larger trend that has seen many religious liberty scholars champion exemptions with increasing intensity in response to the setbacks for exemptions in *Smith*, *Boerne*, and the nonenactment of the 1999 Religious Liberty Protection Act. See *supra* notes 131–140 and accompanying text.

¹⁵⁵ Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 26 and 42 U.S.C. (2012)). The ACA requires employer group health plans to cover women’s “preventive care.” Pub. L. No. 111-148 § 2713(a)(4), 124 Stat. 131 (2010) (codified at 42 U.S.C. § 300gg-13(a)(4) (2012)). As recommended by the Institute of Medicine, the Department of Health and Human Services (HHS) has defined preventive care as including contraception methods approved by the Food and Drug Administration. See Final Rules, Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,875 (July 2, 2013).

¹⁵⁶ See *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited July 11, 2014), archived at <http://perma.cc/ML5V-Z4L9> (listing “49 for-profit lawsuits”). For more background on RFRA, see *supra* notes 138–141 and accompanying text.

¹⁵⁷ 134 S. Ct. 2751 (2014).

¹⁵⁸ *Id.* at 2765.

the contraceptive-coverage requirement,¹⁵⁹ even went so far as to imply that religious exemptions should be extended to “good Catholic business people” who open “Taco Bell” franchises.¹⁶⁰

The notion that fast-food restaurant owners can invoke their personal religious beliefs to deprive employees and customers of statutory rights, whether under federal health care laws or state antidiscrimination laws, would once have seemed absurd.¹⁶¹ But after a quarter century of backlash to *Smith* that has seen the development of ever more aggressive arguments in the name of religious liberty,¹⁶² the presumed right of commercial business owners to obtain religious exemptions from secular laws has become a central tenet of constitutional faith among religious advocacy organizations,¹⁶³ and it has garnered considerable scholarly support.¹⁶⁴ That support helped lay the groundwork for the decision in *Hobby Lobby*, which was the first time the Court ever granted an exemption “to any entity operating in ‘the commercial, profit-making world.’”¹⁶⁵

¹⁵⁹ Laurie Goodstein, *Catholic Bishops Reject New Plan on Contraception*, N.Y. TIMES (Feb. 11, 2012), <http://www.nytimes.com/2013/02/08/health/bishops-reject-white-house-proposal-on-contraceptive-coverage.html>, archived at <http://perma.cc/ATE6-6H6N>.

¹⁶⁰ See Richard Wolf & Cathy Lynn Grossman, *Obama Mandate on Birth Control Coverage Stirs Controversy*, USA TODAY (Feb. 9, 2012), <http://usatoday30.usatoday.com/news/washington/story/2012-02-08/catholics-contraceptive-mandate/53014864/1>, archived at <http://perma.cc/TB27-76DZ> (quoting Anthony Picarello).

¹⁶¹ See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting as “patently frivolous” a restaurant owner’s argument that, by prohibiting racial discrimination, the 1964 Civil Rights Act “constitute[d] an interference with the free exercise of the Defendant’s religion” (internal citation and quotation marks omitted)). The District Court in *Piggie Park* did not question the restaurant owner’s assertion that “his religious beliefs compel[ed] him to oppose any integration of the races whatever.” 256 F. Supp. 941, 944 (D.S.C. 1966). But the District Court “refuse[d] to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.” *Id.* at 945.

¹⁶² See, e.g., Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA’s*, 55 S.D. L. REV. 466, 497 (2010) (“To me, the kitchen-sink approach makes the most sense; advocates for religious freedom should do what they can at every level to restore religious freedom.”).

¹⁶³ See, e.g., Press Release, The Becket Fund for Religious Liberty, Final HHS Rule Fails to Protect Constitutional Rights of Millions of Americans (June 28, 2013), available at <http://www.becketfund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate>, archived at <http://perma.cc/9FPC-8826> (arguing that the Obama Administration should “exempt sincere religious employers completely, as the Constitution requires.”) (emphasis added).

¹⁶⁴ See generally *infra* Appendix B (collecting articles).

¹⁶⁵ 134 S. Ct. at 2795 (Ginsburg, J., dissenting) (quoting *Corp. of Presiding Bishops of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 337 (1987)).

The majority opinion in *Hobby Lobby* speaks explicitly about the “religious liberties of employers,” expresses concern that failing to extend “conscience” exemptions to the owners of closely held for-profit corporations would “effectively exclude these people from full participation in the economic life of the Nation,” and flatly asserts that “RFRA was enacted to prevent such an outcome.” *Id.* at 2783 (majority opinion). Whatever the normative merits of the participation-in-economic-life argument for extending religious exemptions to for-profit corporations, it is difficult to understand how the *Hobby Lobby* majority determined that Congress actually passed RFRA to address that issue. See *id.* at 2796 (Ginsburg, J., dissenting) (noting that “the legislative history [of RFRA] does not so much as mention for-profit corpo-

There was very good reason, however, for the earlier consensus that owners of for-profit businesses must comply with secular laws regardless of their religious beliefs.¹⁶⁶ In the commercial context, religious exemptions will almost always impose burdens on third parties, whether employees, customers, or business competitors.¹⁶⁷ As a result, such exemptions implicate a rule “with a long history in libertarian thought” — that rights are limited by the need for “prevention of tangible harm to specifiable others without their consent.”¹⁶⁸ Even in its pre-*Smith* jurisprudence, which held that exemptions from generally applicable laws were sometimes required,¹⁶⁹ the Supreme Court gave force to this limitation, refusing to exempt an employer from the Social Security system because doing so would “operate[] to impose the employer’s religious faith on the employees.”¹⁷⁰ In so reasoning, the Court was acting in accord with the general principle espoused by Justice Jackson four decades earlier that the “limitations which of necessity bound religious

rations” and that “none of the cases cited in House or Senate Judiciary Committee reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations”) (citations omitted).

¹⁶⁶ See *supra* notes 147–151 and accompanying text.

¹⁶⁷ For a thorough discussion of the negative externalities of religious exemptions in the commercial context, and an argument that these externalities render many such exemptions violative of the Establishment Clause, see generally Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014). See also *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (“Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.”).

¹⁶⁸ Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 282 & n.376 (citing JOHN STUART MILL, *On Liberty*, in ESSENTIAL WORKS OF JOHN STUART MILL 249 (Max Lerner ed., 1965)). See J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 362 (1969) (“[A]ctions which harm nonconsenting persons need not be exempted no matter how necessary the act is deemed by one of the individuals concerned.”); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1464 (1990) (relying on James Madison’s writings for the proposition that “a believer has no license to invade the private rights of others . . . no matter how conscientious the belief or how trivial the private right on the other side”).

The one clearly established exception to the no-harm-to-others limitation on religious exemptions concerns exemptions that are designed to protect the autonomy of religious organizations. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (granting a religious school an exemption from the antiretaliation provision of the Americans with Disabilities Act and explaining that the Constitution “gives special solicitude to the rights of religious organizations”). See also *Amos*, 483 U.S. at 341 (Brennan, J., concurring) (explaining that “religious organizations have an interest in autonomy and ordering their internal affairs, so that they may be free to . . . ‘select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.’” (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981))).

¹⁶⁹ See *supra* note 133.

¹⁷⁰ *United States v. Lee*, 455 U.S. 252, 261 (1982). See also *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 435 (2006) (“In *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion), the Court denied a claimed exception to Sunday closing laws, in part because allowing such exceptions ‘might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day.’”); 1986 DOJ REPORT, *supra* note 150, at 115 (“The decisions of the institutions [seeking exemptions in the commercial realm], even in a cottage industry case such as *Lee*[.] inevitably affect numerous employees and their families.”).

freedom . . . begin to operate whenever activities begin to collide with liberties of others or of the public.”¹⁷¹ Or as Justice Ginsburg has put it more recently, “with respect to free exercise claims no less than free speech claims, ‘your right to swing your arms ends just where the other man’s nose begins.’”¹⁷²

That same principle was originally seen to be embodied in RFRA, which one supporter described in 1994 as resting “on the premise that government should not restrict religious practice . . . *unless the practice in question causes a direct, individualized harm to specifically identifiable, non-consenting third parties.*”¹⁷³ But that once-accepted principle is now being seriously challenged, as was most vividly demonstrated by the Tenth Circuit’s opinion in *Hobby Lobby*, which makes the Supreme Court’s subsequent decision look modest by comparison. Although the Tenth Circuit acknowledged that Hobby Lobby’s employees “would face an economic burden” if the company’s health plan was exempted from the contraceptive-coverage requirement, it dismissed that concern by asserting that “[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party *and placing it elsewhere.*”¹⁷⁴

The Supreme Court’s opinion in *Hobby Lobby* took pains to strike a very different chord than the Tenth Circuit on the issue of third-party burdens. The Court emphasized that, because the government had already developed an accommodation for religious nonprofit organizations that ensured their female employees would receive full contraceptive coverage direct from insurers, the accommodation could be extended to Hobby Lobby with “precisely zero” effect on its female employees.¹⁷⁵ And Justice Kennedy, who provided the fifth vote for the majority opinion, explained in a separate concurrence that religious liberty rights cannot be permitted to

unduly restrict other persons, such as employees, in protecting their own interests, interests the laws deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified,

¹⁷¹ Prince v. Massachusetts, 321 U.S. 158, 177 (Jackson, J., concurring).

¹⁷² Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (quoting Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

¹⁷³ Berg, *supra* note 136, at 5 (emphasis added). See also *Cutter*, 544 U.S. at 720 (“Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”)

¹⁷⁴ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1144–45 (10th Cir. 2013) (emphasis added), *aff’d sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

¹⁷⁵ 134 S. Ct. at 2760. See *id.* (“Our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations . . . have free rein to take steps that impose ‘disadvantages . . . on others’”; *id.* at 2781 n.37 (“[O]ur decision in these cases need not result in any detrimental effect on any third party.”). But see *id.* at 2787 n.1 (Ginsburg, J., dissenting) (“In stark contrast to the Court’s initial emphasis on [extending the non-profit] accommodation [to Hobby Lobby], it ultimately declines to decide whether the highlighted accommodation is even lawful.”).

and used for circumstances closely parallel to those presented here. . . . As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant case from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.¹⁷⁶

Notwithstanding these reassurances that the Court's decision to recognize exemption rights in the for-profit commercial context will not necessarily permit the burdening of third parties, there is other language in the Court's opinion that could easily be interpreted to require third-party-burdening in some cases.¹⁷⁷ And whether or not *Hobby Lobby* is ultimately read as maintaining a harm-to-third-parties limitation on the *general* exemption right granted by the federal RFRA (which does not apply to state laws), its flat rejection of Lee's "commercial activity" rule¹⁷⁸ will no doubt encourage the efforts of advocates to obtain more *specific* state legislative exemptions in the commercial context.¹⁷⁹ As a result, third-party-burdening exemptions

¹⁷⁶ *Id.* at 2787 (Kennedy, J., concurring).

¹⁷⁷ *See id.* at 2780 (majority opinion) ("The least-restrictive-means standard [of RFRA] is exceptionally demanding . . ."). *See generally* Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GEN. (forthcoming 2015) (manuscript at 94), available at <http://ssrn.com/abstract=2466571>, archived at <http://perma.cc/SA7F-L2DC> ("[T]rade offs are always in play when the Court analyzes less drastic alternatives Such alternative policies are always redistributive in foreseeable and unforeseeable ways; they inevitably make one or more parties worse off.").

¹⁷⁸ *Compare* United States v. Lee, 455 U.S. 252, 261 (1982) ("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."), with *Hobby Lobby*, 134 S. Ct. at 2784 n.43 (concluding that Lee's teaching is "squarely inconsistent" with RFRA, which instead stands for the proposition that "when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing [generally applicable] obligations that substantially burden their exercise of religion").

In light of how the Court actually resolved the *Hobby Lobby* case — finding that there was a readily available accommodation that would remove the burden on Hobby Lobby and impose no third-party burdens — it is far from clear that the Court's wholesale repudiation of Lee's "commercial activity" language was necessary. Indeed, *Hobby Lobby* could have been an opportunity to qualify Lee's teaching while largely preserving it. *See* James M. Oleske Jr., *The Public Meaning of RFRA Versus Legislators' Understanding of RLPA: A Response to Professor Laycock*, 67 VAND. L. REV. EN BANC 125, 133–34 (2014) (suggesting Lee be read as imposing a strong presumption against exemptions in the commercial realm that can be overcome in "the very rare case where the basis for the presumption (a third-party harm) does not exist").

¹⁷⁹ *See, e.g.*, David Montgomery, *Hobby Lobby Ruling Could Bolster Anti-Gay Rights Bills*, ARGUS LEADER (S.D.) (July 9, 2014), <http://www.argusleader.com/story/news/2014/07/09/critics-hobby-lobby-ruling-opens-discrimination-door/12394677>, archived at <http://perma.cc/9L5U-FFPZ> ("The Supreme Court's recent 'Hobby Lobby' decision could mean the return in South Dakota of controversial legislation that would let people refuse service to same-sex couples on the basis of religious convictions."); Jeff Mapes, *Will Hobby Lobby Decision Affect Business Owners Who Don't Want to Serve Gay Weddings in Oregon?*, OREGONLIVE (June 30, 2014), http://www.oregonlive.com/mapes/index.ssf/2014/06/will_hobby_lobby_decision_aff.html, archived at <http://perma.cc/7UDD-X96K> ("Christian conservatives who have been

that once would have seemed unthinkable in the academy — such as exemptions allowing commercial businesses to deny service to interracial couples for religious reasons — will likely continue to be pressed in their modern incarnations — such as the proposed exemptions allowing commercial businesses to deny services to same-sex couples.

The potential consequences of granting third-party-burdening exemptions would seem to be particularly acute in the case of carve-outs from antidiscrimination laws, as one of the specific third-party rights threatened by such carve-outs is the constitutional right to receive equal protection under the law. Yet the scholarship to date has largely ignored that right.¹⁸⁰ The various dynamics discussed above — from the rise of the conservative legal movement to the sustained post-*Smith* campaign to champion religious exemptions — help explain why the academy has given religious objections to same-sex marriage laws a more favorable hearing than similar objections to interracial marriage. But those dynamics do not eliminate the need to confront the implications under the Equal Protection Clause of proposed religious exemptions that would sanction discrimination against same-sex couples in public accommodations, housing, and employment. Accordingly, Part IV takes a closer look at the details of those proposed exemptions and explains how they would be very vulnerable to an equal protection challenge.

IV. THE EQUAL PROTECTION IMPLICATIONS OF RELIGIOUS EXEMPTIONS THAT WOULD ALLOW BUSINESSES TO DISCRIMINATE AGAINST SAME-SEX COUPLES

In a series of letters written to elected officials in twelve states over the past six years, a group of prominent scholars has argued that any legal recognition of same-sex marriage should be accompanied by religious exemptions from state and local antidiscrimination laws that would allow at least some commercial businesses to discriminate against same-sex couples.¹⁸¹ No state has yet adopted such exemptions,¹⁸² but amendments to include them garnered significant support when Minnesota and Washington State passed their same-sex marriage laws,¹⁸³ and there was an effort to put the

watching the case said the decision would help in their effort to battle state actions against businesses in Oregon that don't want to serve gay weddings.”)

¹⁸⁰ See *supra* note 12 and accompanying text.

¹⁸¹ See Berg, *Memos/Letters*, *supra* note 32. Fifteen scholars have participated in the effort at one time or another (William Bassett, Thomas Berg, Robert Destro, Carl Esbeck, Marie Failing, Edward Gaffney, Richard Garnett, Andrew Koppelman, Douglas Laycock, Bruce Ledewitz, Christopher Lund, Michael McConnell, Michael Perry, Marc Stern, and Robin Fretwell Wilson), and all but two (Koppelman and Stern) were still participating as of the fall of 2013. Some of the participants have also argued for broad exemptions in scholarly publications, as have other commentators. See *infra* Appendix B.

¹⁸² Lupu & Tuttle, *supra* note 3, at 275.

¹⁸³ See MINN. S. JOURNAL, 88th Leg., Reg. Sess. 3582–83 (May 13, 2013) (26–41 vote on amendment H.F. No. 1054); Video of Washington State Senate Floor Debate, TVW.ORG

exemptions issue on the Oregon ballot in 2014.¹⁸⁴ As the debate increasingly moves from blue states to purple and red states,¹⁸⁵ exemptions that provide protection to business owners who oppose same-sex marriage on religious grounds may well find greater political support. And while such exemptions at first blush might seem irrelevant in states that do not recognize same-sex marriage or have not expanded their statewide civil rights laws to prohibit sexual-orientation discrimination, there are two key dynamics that help explain why the issue is already being actively debated in some of those states. First, there is widespread anticipation that the Supreme Court may eventually require recognition of same-sex marriage in all states.¹⁸⁶ Second, several states that have not expanded their antidiscrimination laws to cover sexual orientation nonetheless include large cities and counties that have done so.¹⁸⁷ Against that background, it is not surprising that legislators in some non-recognition states without statewide LGBT protections have pro-

(Feb. 1, 2012, 6:00 PM), http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012020049, archived at <http://perma.cc/KV7W-95NZ> (video at 27:45) (22–27 vote on Amendment 14 to S.B. 6239).

¹⁸⁴ See Jeff Mapes, *Gay Marriage Combatants Debate Initiative Allowing Businesses To Refuse To Serve Same-Sex Ceremonies*, OREGONLIVE (Feb. 21, 2014, 5:08 PM), http://www.oregonlive.com/mapes/index.ssf/2014/02/gay_marriage_critics_supporter.html, archived at <http://perma.cc/D7YM-UCCV>. Proponents of the Oregon exemptions initiative decided not to go forward after the Oregon Supreme Court certified a ballot title that proponents perceived to be unfavorable. Jeff Mapes, *Gay Marriage: Backers of Exemption to Serving Gay Weddings Drop Their Initiative*, OREGONLIVE (May 9, 2014, 6:25 PM), http://www.oregonlive.com/mapes/index.ssf/2014/05/gay_marriage_backers_of_exempt.html, archived at <http://perma.cc/8P3F-6B4X>.

In addition to prompting exemption proposals at the state level, the academic lobbying effort has spurred a parallel proposal at the federal level, where more than 100 Members of Congress have cosponsored the Marriage Protection and Religious Freedom Act, S. 1808 (H.R. 3133), 113th Cong. (2013). The Act's very first finding is that "[l]eading legal scholars concur that conflicts between same-sex marriage and religious liberty are real and should be legislatively addressed." *Id.* § 2(1). The Act's operative provisions would preclude the federal government from taking any "adverse action against a[ny] person," including any for-profit business, for behaving "in accordance with a religious belief that marriage should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage." *Id.* §§ 3(a), 6(3).

¹⁸⁵ See *supra* note 82 (discussing the shifting landscape).

¹⁸⁶ See, e.g., Matt Canham, *Utah Poll: Most Oppose Gay Marriage, Think Supreme Court Will Legalize It*, SALT LAKE TRIB. (Aug. 19 2014), <http://www.sltrib.com/sltrib/politics/58310176-90/percent-court-marriage-gay.html.csp>, archived at <http://perma.cc/5892-M6JC> (poll taken before Utah started recognizing same-sex marriages showing that 58% of Utahns believed the Supreme Court would agree with lower court decisions holding that the state had to recognize such marriages).

¹⁸⁷ See Natalie DiBlasio, *Cities 'Way Ahead' of States in LGBT Equality*, USA TODAY (Nov. 12, 2014), <http://www.usatoday.com/story/news/nation/2014/11/12/lgbt-city-equality-gay-transgender/18867749>, archived at <http://perma.cc/YQ9N-NJW3> (describing a report that rated the largest municipalities in every state based on their nondiscrimination laws and noting that "[o]f the 38 cities that scored 100 [the highest rating], 15 are in states that don't have non-discrimination laws").

posed legislation that would exempt business owners from any obligations to provide marriage-related services to same-sex couples.¹⁸⁸

Section IV.A addresses some preliminary matters concerning the scope of the proposed exemptions and the overall landscape of potential conflicts between religious liberty and same-sex marriage. Section IV.B offers an analysis of how the proposed exemptions should fare under the Court's post-*Windsor* equal protection doctrine.

A. *The Scope of the Proposed Exemptions and a Map of the Overall Landscape*

The current version of the academic exemptions proposal would allow business owners to refuse to provide “goods or services that assist or promote the solemnization or celebration of any marriage,” “services that directly facilitate the perpetuation of any marriage,” “benefits to any spouse of an employee,” or “housing to any married couple.”¹⁸⁹ As several commentators have noted, this language covers not only “services provided in connection with the act of getting married,” but also “extends to all services

¹⁸⁸ See, e.g., S.B. 67, 2014 Leg., 89th Sess. (S.D. 2014); S.B. 2566, 108th Leg., Gen. Sess. (Tenn. 2014); see also H.B. 2453, 2014 Sess. (Kan. 2014) (proposed before the state began recognizing same-sex marriages pursuant to a court order in November 2014).

Although this Article focuses on exemption proposals that would *specifically* address the provision of marriage-related services or benefits, alternative proposals have been offered in other states in an effort to address the issue through state RFRA that more *generally* permit religious exemption claims against all manner of state laws. See, e.g., Michael Paulson & Fernanda Santos, *Religious Right in Arizona Cheers a Bill Allowing Refusal to Serve Gays*, N.Y. TIMES (Feb. 21, 2014), <http://www.nytimes.com/2014/02/22/us/religious-right-in-arizona-cheers-bill-allowing-businesses-to-refuse-to-serve-gays.html>, archived at <http://perma.cc/KF4B-H7U7> (discussing an Arizona bill that would have amended the state's RFRA to cover commercial businesses); Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html>, archived at <http://perma.cc/4G69-6TWE> (discussing Governor Brewer's veto of the bill under intense national scrutiny); Emily Wagster Pettus, *Miss. Governor Signs Religious Practices Bill*, ASSOCIATED PRESS (Apr. 3, 2014), <http://bigstory.ap.org/article/miss-governor-signs-religious-practices-bill>, archived at <http://perma.cc/9X67-9MSC> (discussing Mississippi RFRA bill that originally included language explicitly covering commercial businesses, but which was amended to remove that language after the Arizona veto, and was enacted without certainty as to its scope). One political challenge to passing or expanding state RFRA instead of enacting marriage-specific exemptions is that RFRA can be portrayed as empowering businesses to refuse to hire LGBT people, serve LGBT people, or rent to LGBT people (or other minorities), even absent any connection to facilitating a marriage. *But see infra* note 219 and accompanying text (noting that a state court would have a strong argument for rejecting such exemptions using the compelling interest defense available under state RFRA). An additional political dynamic that may have fueled opposition to the the Arizona and Mississippi RFRA bills is that they were not proposed as companion measures to either same-sex marriage recognition or expansion of antidiscrimination laws, so they could not be viewed as compromise measures that were a tradeoff for obtaining important protections for the LGBT community.

¹⁸⁹ Wilson, *supra* note 130, at 1512 (reproducing the text of the academic proposal). Business owners are entitled to the exemption so long as “providing such goods, services, benefits, or housing” would cause them “to violate their sincerely held religious beliefs.” *Id.*

sought by same-sex couples during the entire course of a relationship, from food and shelter to healthcare and legal representation.”¹⁹⁰

Since the academic exemptions proposal was first offered in 2009, it has changed in two significant ways. First, although it initially provided business owners with an absolute right to refuse service, it now contains a “hardship” exception that requires service if “a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship.”¹⁹¹ This modification reduces some of the heaviest potential practical costs of the original exemption, but it does not address the “assault to [one’s] dignity” and “deep, intense, and tangible hurt” of being denied service available to all others; a hurt that “is not mitigated by the fact that others might not treat [one] the same way.”¹⁹² To use an example from another context, the hardship Jackie Robinson suffered when on the road with the Dodgers was not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates.¹⁹³ And as the Supreme Court has recognized, the “fundamental object” of prohibiting discrimination by commercial businesses is to address “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”¹⁹⁴

The second change proponents have made to the exemption is limiting it to small businesses rather than all businesses. Specifically, the current academic version of the proposal is limited to businesses with five or fewer employees or landlords who rent five or fewer units of housing.¹⁹⁵ The more limited universe of commercial actors that would be covered by the revised proposal is still quite large: according to the Census Bureau, 3.6 million American businesses had between one and four employees in 2008,¹⁹⁶ and

¹⁹⁰ Lupu & Tuttle, *supra* note 3, at 292. See also NeJaime, *supra* note 9, at 1230.

¹⁹¹ Wilson, *supra* note 130, at 1513.

¹⁹² Feldblum, *supra* note 81, at 153. See also *id.* (arguing that exemptions in the commercial sector “would necessarily come at the cost of gay people’s sense of belonging and safety in society.”); Murray, *supra* note 86, at 197 (“This individual harm does not depend on the number of providers who seek exemptions from nondiscrimination laws. One exemption is enough to inflict the individual degradation and reminder of second-class status that accompanies each individual act of discrimination.”).

¹⁹³ I am indebted to Steve Kanter for this point.

¹⁹⁴ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16 (1964)). See also *id.* at 291 (Goldberg, J., concurring) (“The primary purpose of the Civil Rights Act of 1964, . . . as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (finding that the “stigmatizing injury” of being denied “equal access to public establishments,” and “the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race”).

¹⁹⁵ Wilson, *supra* note 130, at 1513.

¹⁹⁶ See U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE (INCLUDING SMALL BUSINESS) FROM THE U.S. CENSUS BUREAU, <http://www.census.gov/econ/smallbus.html> (last visited Jan. 15, 2014), archived at <http://perma.cc/ADU6-3KP4>. These small businesses represent 13% of all business firms in America and 61% of all business firms with at least one employee.

according to the National Multi Housing Council, nearly 5 million rental apartments in 2001 were in complexes with two to four units.¹⁹⁷

Notably, the academic narrowing of the exemption proposal to small businesses and small landlords was not reflected in the exemptions considered in Minnesota and Washington,¹⁹⁸ even though the scholar letters to legislators in both states included the limit.¹⁹⁹ Nor was the academic narrowing reflected in the recent proposal in Oregon that would have exempted businesses from the obligation to provide equal services to same-sex couples.²⁰⁰ Finally, and perhaps most notably, the small-business limitation was not included in parallel federal legislation that was introduced in 2013 in an effort to preempt the impact of any future federal antidiscrimination laws on religious objectors to same-sex marriage.²⁰¹

The reticence of legislators and citizen petitioners to limit the exemption to small businesses is understandable given that three of the leading academic proponents of the exemption have argued elsewhere that exemptions for small businesses deprive a law of neutrality and general applicability under the Constitution and trigger a presumptive requirement that large businesses receive religious exemptions.²⁰² In a brief filed with the Supreme Court in *Hollingsworth v. Perry*,²⁰³ which involved same-sex marriage in California,²⁰⁴ Professors Thomas Berg, Douglas Laycock, and Marc Stern wrote: “Some anti-discrimination laws are neutral and generally applicable . . . but others are not. *If, for example, an anti-discrimination law exempts very small businesses, then the Constitution prima facie requires exemptions for religious conscience, subject to the compelling interest test.*”²⁰⁵ Consis-

¹⁹⁷ See *Quick Facts: Apartment Stock*, NAT'L MULTI HOUSING COUNCIL, http://www.nmhc.org/Content.aspx?id=4703#By_Size_of_Property (last visited July 11, 2014), *archived at* <http://perma.cc/UV75-V9JY> (listing the number of rental apartments with two to four units as 4,954,299). These small rental complexes contain 23% of the total national apartment stock. *Id.*

¹⁹⁸ See MINN. S. JOURNAL, 88th Legis., Reg. Sess. 3582–83 (May 13, 2013) (amendment H.F. No. 1054); Amend. 14 to S.B. 6239, 62d Legis., 2012 Reg. Sess. (Wash. 2012), *available at* <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Amendments/Senate/6239-S%20AMS%20SWEC%20S4405.1.pdf>, *archived at* <http://perma.cc/3VZ8-F7Q7>.

¹⁹⁹ See Letter from Thomas C. Berg et al. to Minnesota State Legislature (May 2, 2013), in Berg, *Memos/Letters*, *supra* note 32 (follow “Minnesota Group 1 Letter” hyperlink); Letter from Robin Fretwell Wilson et al. to Washington Governor Chris Gregoire (Jan. 29, 2013) in Berg, *Memos/Letters*, *supra* note 32 (follow “Washington [S]tate Letter 1” hyperlink).

²⁰⁰ See Press Release, Oregon Family Council, Protect Religious Freedom Initiative (Nov. 21, 2013), *available at* <http://www.oregonfamilycouncil.org/2013/11/21/protect-religious-freedom-initiative>, *archived at* <http://perma.cc/SSH7-VWM6> (defining “persons” to include all “corporations, associations, firms, partnerships, [and] limited liability companies”).

²⁰¹ See *supra* note 184 (discussing the proposed Marriage Protection and Religious Freedom Act).

²⁰² For a general discussion of this “selective-exemption rule,” see *supra* notes 144–146 and accompanying text.

²⁰³ 133 S. Ct. 2652 (2013).

²⁰⁴ *Id.* at 2659.

²⁰⁵ See Brief for American Jewish Committee as Amicus Curiae Supporting Respondents at 31, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (Nos. 12–144 and 12–307) (emphasis added). *But cf.* *Hosanna–Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct.

tent with this view, religious owners of large businesses that challenged the federal requirement that employer health plans include contraceptive coverage²⁰⁶ contended that the exemption for small businesses in the health care law triggered a requirement that they be exempted as well.²⁰⁷

The argument that religious owners of large businesses are constitutionally entitled to presumptive exemptions from any law containing exemptions for small businesses is not universally accepted in the literature.²⁰⁸ But its embrace by leading proponents of commercial exemptions to state antidiscrimination laws makes it difficult to credit their assertion that they have meaningfully limited their revised proposal by purporting to cover only “very small businesses.”²⁰⁹ This difficulty is further compounded by the fact that Professor Laycock filed an amicus brief in *Hobby Lobby* arguing that large businesses should be entitled to religious exemptions because “[l]imiting the size of business that can be owned by religious minorities is an historic wrong.”²¹⁰ And even more recently, an influential Catholic legal scholar who supports commercial exemptions in the same-sex marriage context has questioned the propriety of “cut[ting] off conscience protection where larger businesses are involved.”²¹¹ Accordingly, the analysis here will proceed on the assumption that any exemption covering for-profit commercial businesses will, like the proposed exemptions at the federal level and in Minnesota, Oregon, and Washington, extend to all businesses whose owners have sincere religious objections to same-sex marriage.²¹²

Before addressing the equal protection implications of such exemptions, there is one final preliminary matter to consider. In jurisdictions that recognize same-sex marriage and do not adopt specific marriage-related exemptions to antidiscrimination laws, businesses may still be able to claim an exemption from the obligation to serve same-sex couples if either (1) their

694, 707 (2012) (describing the Americans with Disabilities Act’s antiretaliation provision, which prohibits employers from retaliating against individuals who assert claims under the Act, as a “valid and neutral law of general applicability”).

²⁰⁶ See *supra* notes 155–165 and accompanying text.

²⁰⁷ See Brief for Petitioners at 43–48, *Conestoga Wood Specialties Corp. v. Sebelius* (U.S. 2014) (No. 13–356); Brief of Appellants at 49–51, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 12–6294).

²⁰⁸ See, e.g., Gedicks & Van Tassel, *supra* note 167, at 345 n.4 (describing the argument as “implausibly expansive”); Oleske, *supra* note 144, at 331 (concluding that “a broad selective-exemption rule that goes beyond situations suggesting discriminatory intent cannot be reconciled with the Supreme Court’s current understanding of the Free Exercise Clause”).

²⁰⁹ Berg/Laycock/Ledewitz/Lund/Perry Letter, *supra* note 32, at 2.

²¹⁰ See Brief of Christian Legal Society et al. as Amici Curiae Supporting Respondents at 42, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13–354 & 13–356).

²¹¹ See Alvaré, *supra* note 12, at 36.

²¹² Were a state to include the small-business limitation, the substance of the equal protection analysis *should* remain the same, but the limitation would have the superficial appeal of looking somewhat similar to the types of small-business exemptions that are customary in employment discrimination statutes. Those across-the-board exemptions, however, represent judgments about the appropriate reach of antidiscrimination norms into the private marketplace *in general*, not judgments about validating *select* moral objections relating to *particular* classes of people covered by the antidiscrimination laws.

state's constitution has been interpreted to presumptively require religious exemptions from generally applicable laws²¹³ or (2) their state has enacted a Religious Freedom Restoration Act (RFRA) presumptively requiring such exemptions.²¹⁴ In such cases, which today could arise in twenty of the thirty-five states recognizing same-sex marriage,²¹⁵ the threshold issue for the state courts would be the same as it was in the federal contraception coverage cases — whether a general right to religious exemptions should be construed as extending to for-profit commercial businesses.²¹⁶

If a state were to interpret either its constitution or its state RFRA as extending exemption rights to for-profit commercial businesses (as seems more likely in light of *Hobby Lobby*), and a business could show that application of an antidiscrimination law substantially burdened its religion (or, more accurately, its owner's religion), the state would then have to demonstrate that it had a compelling interest in requiring businesses to provide equal services to same-sex couples. The most obvious such interest — combatting “invidious discrimination” — would almost certainly exist if sexual orientation was considered a suspect or quasi-suspect classification under the federal Equal Protection Clause.²¹⁷ As noted above, however, the Supreme Court has declined to decide that issue.²¹⁸ Until it does so, the compelling-state-interest issue will largely turn on state court interpretations of state law. But it seems a relatively safe bet that, at least in states where the elected branches have deemed it important enough to extend statewide antidiscrimination laws to protect gay and lesbian people, the courts will likely

²¹³ Eleven states fall into this category, including nine of the states (Alaska, Indiana, Maine, Massachusetts, Minnesota, Montana, North Carolina, Washington, and Wisconsin) that recognized same-sex marriage as of November 2014. *Compare Same-Sex Marriage State-by-State*, *supra* note 44 (listing thirty-five recognition states), *with* Volokh, *supra* note 142 (containing map of religious liberty protections by state).

²¹⁴ Nineteen states fall into this category, including eleven of the states (Arizona, Connecticut, Idaho, Illinois, Kansas, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia) that recognized same-sex marriage as of November 2014. *Compare Same-Sex Marriage State-by-State*, *supra* note 44, *with* Volokh, *supra* note 142. Mississippi passed a RFRA after Professor Volokh published his map. *See* MISS. CODE ANN. § 11-61-1 (West 2014).

²¹⁵ *See supra* notes 213–214 (listing states that both recognize same-sex marriage and presumptively require religious exemptions from generally applicable laws).

²¹⁶ *See supra* notes 155–165 and accompanying text. Another threshold issue that will arise in certain cases is whether RFRA can be invoked as a defense when antidiscrimination laws are being enforced through private party suits rather than through direct government enforcement. *Compare* *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) (concluding that the language of the federal RFRA “easily covers” suits between private parties), *with* *Elane Photography v. Wilcock*, 309 P.3d 53, 76–77 (N.M. 2013) (holding that the New Mexico RFRA, which contains the same operative language as the federal RFRA, is inapplicable in suits between private parties).

²¹⁷ *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (explaining that “acts of invidious [sex] discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (explaining that “the Government has a fundamental, overriding interest in eradicating racial discrimination”).

²¹⁸ *See supra* notes 106–109 and accompanying text.

deem eradicating sexual orientation discrimination in the marketplace to be a compelling state interest.²¹⁹

In sum, there are two principal avenues by which commercial businesses may be able to seek future exemptions from antidiscrimination laws requiring them to provide same-sex couples with equal services: (1) specific exemption provisions written into same-sex-marriage-recognition or antidiscrimination laws and (2) general exemption rights available under state constitutions and state RFRA's. The remainder of this Part focuses on the equal-protection implications of states choosing to adopt the former type of exemptions, but application of the latter would also raise questions under the Equal Protection Clause.²²⁰

B. *The Vulnerability of the Proposed Exemptions Under the Equal Protection Clause*

If a state were to adopt an exemption to its antidiscrimination laws designed to allow commercial actors to discriminate against same-sex couples,²²¹ and if a business owner were to invoke that exemption in defending itself against a discrimination suit brought by a same-sex couple to which it had refused service, the couple might well argue that the exemption violates the Equal Protection Clause.²²² If the court hearing the case were to

²¹⁹ See generally Underkuffler, *supra* note 12, at 2088 (“In those jurisdictions where the unfairness of sexual orientation discrimination has been recognized by law . . . there is no convincing reason for tolerance of religiously motivated discrimination in [the commercial services] context.”).

²²⁰ Cf. *Bob Jones Univ.*, 461 U.S. at 599 n.24 (“Many of the amici curiae . . . argue that denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the Fifth Amendment. In light of our resolution of this litigation, we do not reach that issue.”).

²²¹ Some versions of the exemption have been explicitly targeted at same-sex marriage. See Press Release, Oregon Family Council, *supra* note 200 (exemption limited to refusals to facilitate a “same-sex marriage ceremony or its arrangements”). By contrast, the leading academic version is facially neutral and would ostensibly apply to refusals to facilitate “any marriage.” Wilson, *supra* note 130, at 1512. However, the exclusive context in which the academic proposal has been urged — as an amendment to laws recognizing same-sex marriage — makes clear its targeted purpose. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (“The specific sequence of events leading up the challenged [facially neutral] decision also may shed some light on the decisionmaker’s purposes. For example, if the property involved here always had been zoned [one way] but suddenly was changed . . . when the town learned of . . . plans to erect integrated housing, we would have a far different case.”). Indeed, after concerns were raised that the facial neutrality of the academic proposal would allow commercial merchants to deny marriage-related services to interracial couples, the proponents offered a proviso that would make the exemptions inapplicable in cases of racial discrimination. See Letter from Robin Fretwell Wilson et al. to Illinois Governor Pat Quinn 4 n.8 (Dec. 18, 2012), available at <http://mirrorofjustice.blogspot.com/files/ill-letter-12-2012.pdf>, archived at <http://perma.cc/T5E6-ZKF6>.

²²² The couple might also argue that the exemption violates the Establishment Clause. For a thorough discussion of the Establishment Clause issues raised by exemptions for commercial businesses, see generally Gedicks & Van Tassell, *supra* note 167.

reach the merits of that argument,²²³ it is far from clear what equal protection methodology the court would use to review the exemption. On the one hand, under the traditional “tiers of scrutiny” approach, the court would ask whether sexual orientation is a suspect or quasi-suspect classification subject to strict or intermediate scrutiny.²²⁴ If some level of heightened scrutiny should apply, as seems likely under the established criteria,²²⁵ the state would be able to defend an exemption targeted at same-sex couples only by showing that it at least “serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”²²⁶ On the other hand, courts could choose to apply the methodology of *United States v. Windsor*,²²⁷ which eschewed the tiers-of-scrutiny approach in favor of a direct inquiry into whether the challenged government action was “obnoxious to the constitutional provision.”²²⁸

Regardless of whether courts choose to apply the methodology of *Windsor* or formal heightened scrutiny, exemptions allowing businesses to discriminate against same-sex couples would appear to be quite vulnerable. In *Windsor*, the Court instructed that “discriminations of an unusual character” warrant “careful consideration,” and it found that an “unusual deviation from the usual tradition” that “operate[d] to deprive same-sex couples” of customary benefits available to others was “strong evidence of a law having the purpose and effect of disapproval of that class.”²²⁹ Exempting commer-

²²³ The defending state might also offer a threshold argument that the exemption is shielded from constitutional challenge under the “state inaction” component of the Supreme Court’s “state action” doctrine. See *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53–54 (1999) (“The State’s decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary. . . . Such permission of a private choice cannot support a finding of state action.”). For a detailed discussion of the state inaction issue, see James M. Oleske Jr., “State Inaction,” *Equal Protection, and Religious Resistance to LGBT Rights Laws* (working paper) (on file with author).

²²⁴ See Conkle, *supra* note 22, at 34 (“[T]he Supreme Court has treated racial discrimination as the paradigmatic ‘suspect classification,’ triggering strict judicial scrutiny and probable invalidation, but it has reasoned by analogy in declaring that certain other classifications also are . . . ‘suspect’ or ‘quasi suspect.’”).

²²⁵ *Id.* at 36 (concluding that under the Court’s established criteria, “the argument for extending heightened scrutiny to sexual orientation is straightforward”). For a recent example of a lower federal court working through the Supreme Court’s criteria and determining that sexual orientation discrimination triggers intermediate scrutiny, see *Whitewood v. Wolf*, 992 F. Supp. 2d. 410, 424–30 (M.D. Pa. 2014).

²²⁶ *United States v. Virginia*, 518 U.S. 515, 524 (1996).

²²⁷ 133 S. Ct. 2675 (2013).

²²⁸ *Id.* at 2691 (quoting *Romer v. Evans*, 517 U.S. 620, 623 (1996)). See also Araiza, *supra* note 45, at 393 (describing *Windsor*’s “alternative approach to equal protection, one that abjures reliance on the indirect mediating principles in suspect-class analysis (and even in traditional ‘fit’ analysis) in favor of a more direct examination of a challenged law’s constitutionality”).

²²⁹ *Windsor*, 133 S. Ct. at 2693 (internal citations and quotation marks omitted). See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 252

cial business owners from the obligation to comply with antidiscrimination laws on religious grounds would not only be “unusual,” it would be unique.²³⁰ Although many Americans had religious objections to interracial marriage in the 1960s,²³¹ and although some still do today,²³² federal and state antidiscrimination laws have never included exemptions that would allow business owners to deny services based on those beliefs. Likewise, although the New Testament quotes Jesus explicitly condemning divorce and remarriage as adultery,²³³ and although such remarriages violate the current teachings of the largest Christian denomination in America,²³⁴ state laws prohibiting discrimination based on marital status²³⁵ do not contain exemptions allowing commercial businesses to refuse to facilitate the remarriages of divorced people. Only after same-sex couples were allowed to marry was there an effort to allow business owners to discriminate for religious reasons, and such an “unusual deviation from the usual tradition” would appear to be “strong evidence” under *Windsor* of an unconstitutional intent “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages.”²³⁶

(2013) (“It is now accepted in constitutional law that departures from substantive principles ordinarily guiding decision makers indicate a possible impermissible purpose.”).

²³⁰ See Lupu & Tuttle, *supra* note 3, at 288 (“[T]he proposed exemption invites skepticism and careful scrutiny because it is legally anomalous. In no other respects are individuals and for-profit entities excused, on religious grounds, from compliance with non-discrimination laws.”).

²³¹ See *supra* notes 34–42 and accompanying text.

²³² One of the more notable examples is the Restored Church of God (RCG), which prides itself on faithfully following the teachings of Herbert W. Armstrong, who — as described *supra* note 35 — condemned interracial marriage in his Worldwide Church of God ministry. An RCG book critiquing other “Church of God” splinter groups specifically lists as one of their “false doctrines” the teaching that “[i]nterracial marriage . . . is neither wrong nor sin.” DAVID C. PACK, SURVIVING “PERILOUS TIMES” 11, 19 (2012), available at <http://rcg.org/sep/books.html>, archived at <http://perma.cc/3VCJ-HHEY>. RCG’s opposition to interracial marriage has not prevented it from prospering. In June 2013, Republican Congressman Jim Renacci of Ohio joined Pack for a ribbon-cutting ceremony at RCG’s new 40,000-square-foot facility in Wadsworth, Ohio. See Emily Caning-Dean, *Restored Church of God Opens New Headquarters*, WADSWORTH POST (June 22, 2013), http://www.thepostnewspapers.com/wadsworth/local_news/article_2e9d4718-8b86-5267-8571-d2490ba70129.html, archived at <http://perma.cc/SY6U-9AWC>.

²³³ *Matthew* 19:9 (“I tell you that anyone who divorces his wife, except for sexual immorality, and marries another woman commits adultery.”).

²³⁴ See CATECHISM OF THE CATHOLIC CHURCH ¶ 2384 (2d ed. 2003) (“Divorce is a grave offense against the natural law. . . . Contracting a new union, even if it is recognized by civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery”); *Fast Facts About American Religion*, HARTFORD INSTITUTE FOR RELIGION RESEARCH (last visited Aug. 16, 2014), http://hirr.hartsem.edu/research/fastfacts/fast_facts.html#largest, archived at <http://perma.cc/A3F4-CE6Q> (listing the Catholic Church as the largest denomination in the United States, with 68.2 million members in 2012).

²³⁵ At least twenty-three states ban marital discrimination in housing, at least twenty states ban it in employment, and at least nineteen ban it in places of public accommodation. See Severino, *supra* note 62, at 959 (housing and employment); Singer, *supra* note 89, at 1491–94 (public accommodations).

²³⁶ *Windsor*, 133 S. Ct. at 2693. Cf. *id.* at 2694 (“DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”) (emphasis added); Carpenter, *supra* note 229, at 223 (“It is central to equal protection jurisprudence that the government

One likely objection to this conclusion is that *Windsor* is a case about government acting with an “improper animus or purpose,”²³⁷ and states that voluntarily recognize same-sex marriage cannot be easily viewed as prejudiced against same-sex couples. But the Court has long held that laws have an improper purpose not only when they embody the government’s own prejudice toward a class, but also when they accommodate private prejudice. As the Court explained in a case widely viewed as one of its formative “animus” cases — *City of Cleburne v. Cleburne Living Center*²³⁸ — the government “may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. ‘Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’”²³⁹ Yet that is precisely what the proposed exemptions would do by selectively accommodating commercial discrimination against same-sex couples that was not previously permitted against other disfavored couples.

Were courts to apply traditional heightened scrutiny to exemptions allowing businesses to discriminate against same-sex couples, the result would be much the same.²⁴⁰ The fact that no state has ever exempted commercial

cannot create castes of citizens because creating a second-class status is itself a harm to their dignitary interests.”); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 266–67 (1996) (“If the equal protection clause means anything, it means that the government cannot pass caste legislation: it cannot create or sanction outcast groups.”).

In an amicus brief filed in *Windsor*, the Becket Fund for Religious Liberty had warned that a ruling striking down DOMA would “cast suspicion on religious objectors” to same-sex marriage and cast doubt on the ability of legislatures to accommodate those objectors. See Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Hollingsworth and the Bipartisan Legal Advisory Group at 9–10, 35, *Windsor*, 133 S. Ct. 2675. See also Alvaré, *supra* note 12, at 2 (“*Windsor*’s findings presage serious and substantial difficulties for religious individuals and groups seeking exemptions from duties to cooperate with same-sex marriage.”).

²³⁷ *Windsor*, 133 S. Ct. at 2693.

²³⁸ 473 U.S. 432, 446–47 (1983) (explaining that “some objectives — such as ‘a bare . . . desire to harm a politically unpopular group’ — are not legitimate state interests” (quoting *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (internal citation omitted))). See Carpenter, *supra* note 229, at 209 (“*Cleburne* added to animus doctrine in several respects.”).

²³⁹ *Cleburne*, 473 U.S. at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). See also Carpenter, *supra* note 229, at 241 (“The focus of the animus doctrine is not on the bad nature of the person who supports legislation. The focus is on the inadmissibility of the reasons offered for supporting the legislation in a republic committed to the concept of equal protection for every citizen.”); Susannah W. Pollvogt, *Windsor, Animus, and the Future of Equality*, 113 COLUM. L. REV. SIDEBAR 204, 209 (2013) (“[A] number of cases demonstrate that animus may be related to a variety of mindsets other than hostility or the desire to harm The quality that makes these laws unconstitutional is that they express, create, and enforce distinctions between social groups, tending to create a caste society of the type that is abhorrent to the core values of the Equal Protection Clause.”).

²⁴⁰ One difficult and related question is what happens if the Supreme Court eventually applies formal heightened scrutiny to sexual orientation discrimination, affords full constitutional protection to same-sex couples, and requires all states to recognize their marriages. Presumably, the states that only grudgingly recognize same-sex marriages under such circumstances (like the states that are only grudgingly recognizing same-sex marriage today pursuant to lower court decisions) will refuse to expand their antidiscrimination laws to cover

business owners from the obligation to provide equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals — even though major religious traditions in America have opposed each type of marriage — belies any argument that exempting commercial business owners from antidiscrimination laws for religious reasons serves “important governmental objectives.”²⁴¹ Quite the opposite, the tradition has been to recognize a compelling governmental interest in applying antidiscrimination laws *notwithstanding* strongly held objections to the requirements of those laws.²⁴²

In sum, whether applying *Windsor* or traditional heightened scrutiny, courts should conclude that carving out exemptions from antidiscrimination laws so as to allow commercial business owners to refuse service to same-sex couples unconstitutionally deprives those couples of equal protection of the laws.

One final note should be added in light of the possibility that both (1) the Supreme Court will eventually require national recognition of same-sex marriage; and (2) Congress will eventually pass federal laws prohibiting discrimination on the basis of sexual orientation in employment, housing, and places of public accommodation. If that combination of events were to occur, business owners seeking exemptions that allow them to refuse marriage-related services or benefits to same-sex couples²⁴³ could pursue the same two avenues available in the state context: (1) seeking passage of a specific exemption provision allowing the withholding of such services and benefits for religious reasons,²⁴⁴ and (2) bringing a claim for an exemption under the federal RFRA.

With respect to the first option, a specific marriage-related exemption at the federal level under the posited circumstances would create at least as serious of an equal protection problem as was discussed above with respect

sexual orientation, thus continuing to permit private businesses to discriminate against same-sex couples. The question then presented will be whether members of the disfavored minority in those states nonetheless have a constitutional right to equal protection under their states' antidiscrimination laws — a question that almost ripened in the Court during the Civil Rights Era with respect to racial minorities, but ultimately went unanswered due to the enactment of the 1964 Civil Rights Act. For a further discussion of this issue, see Oleske, *supra* note 223.

²⁴¹ Cf. Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty*, 8 STAN. J. C.R. & C.L. 123, 124 (2012) (“[R]ecognizing marriages of same-sex couples poses no greater danger to the religious liberty of Catholics . . . than does legal recognition accorded to marriages of Americans who have obtained civil divorces and remarried in contravention to Catholic doctrine.”).

²⁴² See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

²⁴³ As a threshold matter, some types of businesses that have been implicated in the debate over exemptions to state public accommodations laws (e.g., bakeries and florists) might not be covered by a federal public accommodations law prohibiting sexual orientation discrimination. This is because Title II of the 1964 Civil Rights Act, the likely model for any such law, only “regulates restaurants, innkeepers, gas stations, and places of entertainment. Retail stores are not covered.” Singer, *supra* note 89, at 1288.

²⁴⁴ See *supra* note 184 (discussing the proposed Marriage Protection and Religious Freedom Act).

to similar state exemption proposals. And if the Supreme Court decision requiring nationwide marriage recognition in this scenario were based on a rationale requiring formal heightened scrutiny (whether a fundamental rights theory or a suspect or quasi-suspect class theory), the equal protection barriers facing a specific marriage-related exemption provision would be even higher than they already are under *Windsor*.²⁴⁵

As for the second option, the prospects of obtaining a RFRA exemption would appear slim. For one thing, the strongest rationale for the Court requiring nationwide recognition of same-sex marriage — that discrimination on the basis of sexual orientation is inherently suspect²⁴⁶ — is also a rationale that would provide the government with a compelling interest in denying RFRA exemptions that would result in discrimination against same-sex couples.²⁴⁷ Moreover, given the Court's repeated emphasis in *Hobby Lobby* on the fact that the accommodation in that case did not impose any third party burdens,²⁴⁸ and given Justice Kennedy's concurring opinion emphasizing that point,²⁴⁹ it seems unlikely that the Court would require an exemption to be granted under RFRA that would force third parties to endure what Congress has determined (in the posited scenario) to be invidious discrimination under federal law.²⁵⁰

CONCLUSION

As legal recognition of same-sex marriage moves from blue states to purple and red states, it is increasingly likely that a state might choose to temper the effect of recognition by carving out unprecedented religious exemptions from state and local antidiscrimination laws — exemptions that would allow commercial businesses to refuse marriage-related services to same-sex couples. Although such broad exemptions were never contemplated in the academic literature when the country engaged in the religiously charged debate over interracial marriage, they have garnered considerable support among scholars during the similarly charged debate over same-sex

²⁴⁵ See generally Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1149–50 (1987) (“[The Court] subjects to strict scrutiny fully ‘suspect’ classifications or classifications that infringe on the exercise of a ‘fundamental right.’ . . . The Court uses intermediate scrutiny to evaluate ‘semisuspect’ or ‘quasi-suspect’ classifications . . .”).

²⁴⁶ See Conkle, *supra* note 22, at 42 (2014) (“By every indication, the strongest, most candid, and most judicious rationale would rest on equal protection, with the Court concluding that classifications based on sexual orientation are quasi-suspect, triggering heightened scrutiny that marriage prohibitions cannot survive.”).

²⁴⁷ See *supra* note 217 and accompanying text.

²⁴⁸ See *supra* note 175 and accompanying text.

²⁴⁹ See *supra* note 176 and accompanying text.

²⁵⁰ Cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (“The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”).

marriage. Several factors can help explain that discrepancy — ranging from the rise of the conservative legal movement to the unique role of race in American history — but the most consequential is the recent reconceptualization of religious liberty as extending fully into the commercial realm.

The once-prevailing view that religious individuals who choose to open a business must comply with the same rules governing other market participants is no longer a given. Instead, one of the most passionate arguments made by religious liberty advocates today is that the religious convictions of business owners should presumptively trump laws governing the secular economy. Conceived of in those terms, religious liberty will inevitably conflict with the rights of third parties in the marketplace, whether competitors, customers, or employees. And the specific third-party right threatened by allowing businesses to refuse marriage-related services and benefits to same-sex couples is the right of those couples to receive equal protection under state antidiscrimination laws.

To date, the equal-protection issue has received scant attention in the debate over religious exemptions that would permit commercial businesses to discriminate against same-sex couples. It is difficult to imagine such an oversight occurring during the Civil Rights Era if similar exemptions had been proposed with respect to interracial couples. This Article has aimed to highlight that anomaly and to begin a conversation about its consequences for the “equal dignity of same-sex marriages.”²⁵¹

²⁵¹ United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

APPENDIX A: COMMENTATORS WHO HAVE INVOKED RELIGIOUS
OPPOSITION TO SAME-SEX MARRIAGE IN ARGUING
AGAINST LEGAL RECOGNITION

George Dent, *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, *supra* note 29, at 556.

William C. Duncan, *Speaking Up for Marriage*, *supra* note 62, at 915, 920–22.

Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As A Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 67 (2004).

Sherif Girgis, Robert P. George, and Ryan T. Anderson, *What Is Marriage?*, *supra* note 62, at 263–65.

Thomas J. Paprocki, *Marriage, Same-Sex Relationships, and the Catholic Church*, 38 LOY. U. CHI. L.J. 247, 250–51 (2007).

Charles J. Reid Jr., *Marriage: Its Relationship to Religion, Law, and the State*, in EMERGING CONFLICTS, *supra* note 3, at 185. [Professor Reid has since changed his position on same-sex marriage. See *supra* note 73.]

Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, *supra* note 62, at 980.

Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, *supra* note 29, at 1378–83.

APPENDIX B: COMMENTATORS WHO HAVE SUPPORTED RELIGIOUS
EXEMPTIONS THAT WOULD ALLOW AT LEAST SOME COMMERCIAL
BUSINESSES TO REFUSE MARRIAGE-RELATED SERVICES AND
BENEFITS TO SAME-SEX COUPLES

Pre-Windsor:

Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, *supra* note 110, at 208, 227–32.

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, 430 (2010).

Kent Greenawalt, *Religious Toleration and Claims of Conscience*, *supra* note 3, at 116–17.

Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, *supra* note 80, at 131–36. [Professor Koppelman has since withdrawn his support for extending exemptions to businesses. *See infra* Appendix C.]

Douglas Laycock, *Afterword to EMERGING CONFLICTS*, *supra* note 3, at 194–201.

Brett G. Scharffs, *Echoes from the Past: What We Can Learn About Unity, Belonging and Respecting Differences from the Flag Salute Cases*, 25 *BYU J. PUB. L.* 361, 400–01 (2011).

Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, *supra* note 12, at 311.

Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, *supra* note 130, at 1512–13 (2012).

Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 *GEO. L.J.* 1783, 1804–1810 (2012).

Erin N. East, Comment, *I Object: The RLUIPA As A Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 *EMORY L.J.* 259, 273–74, 306–309 & n.289 (2009).

Professors Carl Esbeck, Richard Garnett, Bruce Ledewitz, Christopher Lund, Edward Gaffney, and Michael Perry joined pre-*Windsor* letters that urged states considering same-sex marriage to adopt religious exemptions that would extend to commercial businesses. *See* Berg, *Memos/Letters*, *supra* note 32.

Post-*Windsor*:

Helen M. Alvaré, A 'Bare . . . Purpose to Harm'? *Marriage and Catholic Conscience Post-Windsor*, *supra* note 12, at 35–37.

Ryan T. Anderson & Robert P. George, *Freedom to Marry & Dissent, Rightly Understood*, *REAL CLEAR POLICY* (May 5, 2014), <http://www.realclearpolicy.com/articles/2014/05/05/free->

dom_to_marry__dissent_rightly_understood.html, *archived at* <http://perma.cc/K26Q-H3VJ>.

Professors William Bassett, Robert Destro, Marie Failinger, and Michael McConnell joined five of the scholars above in urging Hawaii to adopt religious exemptions that would extend to commercial businesses. *See* Berg, *Memos/Letters*, *supra* note 32 (follow hyperlink to “Hawaii Group 1 legislative testimony (Oct. 28, 2013)”).

APPENDIX C: COMMENTATORS WHO HAVE OPPOSED RELIGIOUS
EXEMPTIONS THAT WOULD ALLOW COMMERCIAL BUSINESSES
TO REFUSE MARRIAGE-RELATED SERVICES AND
BENEFITS TO SAME-SEX COUPLES

Pre-Windsor:

Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012).

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in EMERGING CONFLICTS, *supra* note 3, at 152–54.

Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW J. L. & SOC. POL'Y 236 (2010).

Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, *supra* note 12, at 211–12.

Ira C. Lupu and Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, *supra* note 3, at 286–95.

Laura Underkuffler, *Odious Discrimination and the Religious Exemption Question*, *supra* note 12, at 2082–88.

Mark Strasser, *On Same-Sex Marriage and Matters of Conscience*, 17 WM. & MARY J. WOMEN & L. 1, 31 (2010).

Jana Singer, *Balancing Away Marriage Equality*, SCOTUSBLOG (Aug. 29, 2011), <http://www.scotusblog.com/2011/08/balancing-away-marriage-equality/>, *archived at* <http://perma.cc/6FED-5W2K>.

Geoffrey Stone, *[Civil Unions]: When Reasonable Isn't Reasonable*, UNIV. OF CHI. LAW SCH. FACULTY BLOG (May 8, 2009), <http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-when-reasonable-isnt-reasonable.html>, archived at <http://perma.cc/7AEX-HLCG>.

Post-Windsor:

Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, *supra* note 31, at 743–45, 761.

Professors Dale Carpenter, Andrew Koppelman, William Marshall, and Douglas NeJaime joined Professor Lupu (who is already listed above) on an October 2013 letter urging Illinois not to adopt broad exemptions. *See supra* note 31.