Navigating the Minefield: *Hobby Lobby* and Religious Accommodation in the Age of Civil Rights

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Our twin constitutional commitments to liberty—specifically religious liberty—and to equality may be seen to pose challenging puzzles when the religious demands of some threaten harm to others. The task of managing tensions between such conflicting claims is not new. But in each generation, the puzzles are novel in their particulars and can seem more challenging than the earlier ones because our society continually diversifies.

As a practical matter, however, most of these puzzles are and have been solvable for those participating in the public marketplace through application of past precedent and the Golden Rule. Put another way, to borrow a timely and time-honored reference from Justice Ginsburg, "'[Y]our right to swing your arms ends just where the other man's nose begins.'"[1]

For lesbian, gay, bisexual, and transgender ("LGBT") Americans seeking equality and inclusion in public life, and presenting what some see as a puzzle of competing needs, the maxim sometimes seems to translate to, "Move your nose." And following the Supreme Court's decisions this past term in *Hobby Lobby* and *Conestoga Wood*,[2] which hold that that owners of large, for-profit businesses essentially may, for religious reasons, "line-item veto" contraception coverage out of the insurance coverage the Patient Protection and Affordable Care Act ("ACA") requires them to offer their employees,[3] the message to workers apparently can be, "Keep your sinful nasal spray prescription out of our health plan."

Some may argue that we reduce the number of bloody noses by allowing more religiously segregated spaces and interactions, including in the commercial arena.[4] But, despite the sincerity of those who believe their re-

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[1] 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)).

[2] *Conestoga Wood* was consolidated with *Hobby Lobby* in the Supreme Court. *Hobby Lobby,* 134 S. Ct. at 2751.

[3] 26 U.S.C.A. §§ 4980H(a), 4980H(c)(2), 5000A(f)(2) (2010).

[4] Ryan T. Anderson of the Heritage Foundation exemplifies this view. Concerning the treatment same-sex couples should expect from for-profit businesses, he says:

> No one has the right to have . . . a certain photographer to capture the first kiss, or a baker to bake the wedding cake. . . . Some citizens may conclude that they cannot in good conscience participate in a same-sex ceremony, from priests and pastors to bakers and florists. The government should not force them to choose between their religious beliefs and their livelihood.

Ryan T. Anderson, *Sexual Liberty and Religious Liberty Can Coexist. Here's How*, THE DAILY SIGNAL, (Nov. 9, 2014), http://perma.cc/FL7Y-T8T6. *See also* Robin Fretwell Wilson, *The*

ligious dictates warrant, or even require, separation, our history teaches that segregation—whatever the ostensible motivation—fosters misunderstanding, mistrust, and eventual discord. Unfamiliar differences among us can be uncomfortable, even jarring. But remaining separate makes those differences seem greater. At least for our public marketplace, free interaction and peaceful coexistence must be the expectation. It is the best recipe for social harmony and justice.

This paradigm necessarily rejects the view that doing business respectfully with others, and following neutral rules, is endorsement of those rules and the beliefs and conduct of others—that co-existence and compliance make one complicit.[5] Because a "complicity" framing often requires a believer either to separate or to act in a burdensome way toward others, it is inconsistent with our commitment to equality and profoundly impractical given our religious pluralism. Thus, Justice Ginsburg rebuked her brethren in the *Hobby Lobby* majority for taking the Court, and our country, into a "minefield."[6]

Justice Alito, author of the *Hobby Lobby* majority, assures us that his decision is narrow and does not portend the obvious potential *sequelae*: employer objections to health insurance for vaccinations, blood transfusions, hormone replacement therapy, or medications for pain, depression, or HIV.[7] Justice Kennedy concurs, emphasizing that the majority is not enabling discrimination or imposition of other undue burdens by those with religious motivations.[8] Time soon will tell. Following on the heels of *Hobby Lobby*, nonprofit religious organizations have brought an orchestrated campaign of further challenges to the ACA's requirement of contraception coverage for women workers.[9] They assail the religious accommodation the Department of Health and Human Services ("HHS") has provided them.[10] While *Hobby Lobby's* seeming endorsement of that accommodation may have seemed discouraging to those litigants, the Court's *per curiam* interim stay order a couple of days later, which allowed Wheaton College, a religious school, to

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Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, And Other Clashes Between Religion and the State, 53 B.C. L. Rev 1417, 1507–08 (2012); *Religious Liberty Rights of Conscience,* Center for Arizona Policy, http://perma.cc/WQ7M-MXPD (last visited Nov. 25, 2014).

[5] *See Hobby Lobby*, 134 S. Ct. at 2775–78, 2778 n.34 (describing the religious belief that employers are complicit in any decisions of their employees to access care through the plan that the employers consider sinful).

[6] *Id.* at 2805 (Ginsburg, J., dissenting) ("The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA" (citation omitted)).

[7] *Id.* at 2783 (majority opinion).

[8] *Id.* at 2786–87 (Kennedy, J., concurring).

[9] *Challenges to the Federal Contraceptive Coverage Rule*, Am. Civil Liberties Union (Nov. 12, 2014), http://perma.cc/LB5V-SJES.

[10] *See, e.g.,* Michigan Catholic Conf. v. Burwell, 755 F.3d 372 (6th Cir.) (affirming district court order denying plaintiff preliminary injunction against requirement that religious organizations use HHS-provided form to submit religious objection to inclusion of contraception in employee health plan), *reh'g en banc denied*, 755 F.3d 372 (6th Cir. 2014); Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir.), *reh'g en banc denied,* 743 F.3d 547 (7th Cir. 2014), *petition for cert. filed* (Oct. 3, 2014).

disregard the accommodation procedure—issued even before the ink dried on *Hobby Lobby*—raised eyebrows, more questions, and the ire of the Court's female justices.[11]

So how much has *Hobby Lobby* changed our analysis of religious liberty claims, at least claims based on federal statutes where the Religious Freedom Restoration Act ("RFRA")[12] plays a role? Before agreeing to decide the merits of any of the religious nonprofits' challenges to the ACA, the Court already has taken two cases presenting religious liberty claims that may shed some light.[13] And further testing may come soon, as the legal landscape in this area has undergone a tectonic shift since *Hobby Lobby* was decided. As this volume goes to press, our country is absorbing a transformation on the question of whether same-sex couples may marry. After

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[11] *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2808 (2014). In a strongly worded, if not outraged, dissent, Justice Sotomayor wrote for herself and Justices Ginsburg and Kagan:

> [J]ust earlier this week in *Burwell v. Hobby Lobby Stores, Inc.*, the Court described the accommodation as "a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all [Food and Drug Administration (FDA)]-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." And the Court concluded that the accommodation "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." Those who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, retreats from that position. That action evinces disregard for even the newest of this Court's precedents and undermines confidence in this institution.

Id. (citations omitted).

[12] 42 U.S.C. § 2000bb–4 (2006).

[13] The Court heard arguments on October 7, 2014 in *Holt v. Hobbs*, 135 S. Ct. 33 (2014), No. 13-6827 (argued Oct. 7 2014), a Muslim inmate's challenge to an Arkansas prison rule that prohibits him from growing the beard he believes his religion requires. In its unanimous decision that the half-inch beard must be permitted, the Court's application of RFRA's later-born sibling, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, did not reveal much about whether *Hobby Lobby*'s particulars are now structural elements of the doctrine in this area. Holt v. Hobbs, 135 S. Ct. 853 (2015). But Justice Ginsburg, in a concurrence joined by Justice Sotomayor, captured the essence of the ideological dispute in one succinct phrase: "Unlike the exemption this Court approved in *Burwell* v. *Hobby Lobby Stores, Inc.*, accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief." *Id.* at 867 (Ginsburg, J., concurring) (citations omitted).

Also, the Court just granted certiorari in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 44 (2014), (cert. granted Oct. 2, 2014) (No. 14-86), which asks whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire or for firing a person based on the person's "religious observance and practice" only if the employer actually knew from a direct, specific communication by the person that she or he needed a religious accommodation. *Abercrombie* is not a RFRA case but may disclose more about the extent to which this Court majority has shifted solicitudes concerning religious issues; in other words, is *Hobby Lobby* more an abortion case, a duty-to-accommodate-religion case, or an anti-business-regulation case? These questions percolate in part because, as Justice Ginsburg has pointed out, the *Hobby Lobby* majority offers "[n]ot much help . . . for the lower courts bound by [the] decision." *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

roughly three decades of foreshadowing and debate, the shift occurred in a week that opened with perhaps the most unexpected series of noes ever issued by the Supreme Court.[14] Each succeeding day saw at least one headline-making court order.[15] Rarely have so few administratively uttered words loosed so much change to flow so quickly.

On Sunday, October 5, 2014, nineteen states and the District of Columbia permitted same-sex couples to marry.[16] The following Sunday, the path to the altar was brightly lit, if not yet fully cleared, for same-sex couples in thirty-five states. That one week's events meant that, once legal processes were completed across the Fourth, Seventh, and Ninth Circuits, nearly seven in ten (68%) same-sex couples in the country, and nearly two-thirds of Americans, would be living in states with marriage equality.[17]

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[14] Order list, 574 U.S. (2014) (denying certiorari in: Herbert v. Kitchen, 755 F.3d 1193 (10th Cir. 2014); Smith v. Bishop, 760 F.3d 1070 (10th Cir. 2014); Rainey v. Bostic, 970 F. Supp. 2d 456 (E.D. Va. 2014); Schaefer v. Bostic, 760 F.3d 352 (4th Cir. 2014); Bogan v. Baskin, 766 F.3d 648 (7th Cir. 2014); Walker v. Wolf, 986 F. Supp. 2d 982 (W.D. Wis. 2014)).

[15] These certiorari denials meant the marriage decisions of the Fourth, Seventh, and Tenth Circuits took effect, allowing couples to marry in Indiana, Oklahoma, Utah, Virginia, and Wisconsin. *See* Bogan v. Baskin, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

On Tuesday, October 7th, the Ninth Circuit decided the cases from Idaho and Nevada and issued its mandate, effective immediately, permitting marriage licenses to issue to same-sex couples. Latta v. Otter, 2014 U.S. App. LEXIS 19620 (9th Cir. Oct. 7, 2014). On Wednesday, Justice Kennedy granted Idaho's motion for an emergency stay of the mandate; he directed that responses be filed for consideration by the full Court by close of business Thursday. Otter v. Latta, 2014 U.S. LEXIS 6731 (Oct. 8, 2014). After clarification from the Supreme Court, the Ninth Circuit mandate was permitted to issue in *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), and the first marriages of same-sex couples took place in Nevada. That same day, the district court for the Southern District of West Virginia lifted its stay in *McGee v. Cole*, F. Supp. 2d 639 (S.D. W. Va. 2014), and the following day, West Virginia Governor Patrick Morrissey conceded that the state would no longer defend its marriage ban. On Friday, the Supreme Court denied a stay in *Otter*, 135 S. Ct. 345 (2014). Then on Sunday, October 12, the federal district court in Alaska struck down that state's ban in light of *Latta*. Hamby v. Parnell, 2014 U.S. Dist. LEXIS 145876 (D. Alaska Oct. 12, 2014).

The court orders kept coming the following week. On Tuesday, the district court in North Carolina held that state's marriage ban invalid in light of *Bostic*. Fisher-Borne v. Smith, 2014 U.S. Dist. LEXIS 147430 (M.D.N.C. Oct. 14, 2014). On Friday, the district court in Arizona struck that state's ban. Majors v. Horne, 2014 U.S. Dist. LEXIS 147960 (D. Ariz. Oct. 17, 2014). That same day, the district court in Colorado confirmed the agreement of the parties that Colorado's ban should be permanently enjoined. Burns v. Hickenlooper, 2014 U.S. Dist. LEXIS 148123 (D. Colo. Oct. 17, 2014).

The following week saw headlines about officials resisting in Kansas and South Carolina, and in Montana, the *Rolando v. Fox* litigation, Case No. CV-14-40-GF-BMM (D. Mont., filed May 21, 2014), had yet to result in a dispositive order. But the implementation of the circuit rulings was nearly complete.

[16] These were: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *See Marriage & Relationship Recognition Laws*, Movement Advancement Project, http://perma.cc/XC9M-CGDB (last updated Nov. 13, 2014).

[17] *Ninth Circuit Court of Appeals Decision Opens Marriage To Nearly 7 in 10 Same-Sex Couples in the U.S.*, Williams Inst. (Oct. 7, 2014), http://perma.cc/WLC8-TXKK.

Thousands of long-patient same-sex couples, including some of my clients, were jubilant.[18] Much of the country seemed at least mildly entertained and favorable, if not actively supportive. But, true to form, there were some who did not toast the newlyweds, and the swift series of court orders put a brighter spotlight on their objections. The Witherspoon Institute's Ryan Anderson, for example, put out a call for stronger federal and state legislation to allow business owners with religious objections to same-sex relationships greater freedom to turn away lesbian and gay couples: "Some will conclude that they cannot in good conscience participate in same-sex ceremonies, from priests and pastors to bakers and florists. They should not be forced to choose between strongly held religious beliefs and their livelihood."[19]

The Alliance Defending Freedom ("ADF"), my opposing counsel in Arizona, issued a memorandum encouraging clerks of the Arizona superior courts who issue marriage license but have religious objections to performing this function for same-sex couples, to contact ADF for legal assistance.[20] And Cathi Herrod, president of the politically influential Center for Arizona Policy, said, "I am heartbroken for a country and a state that has had the redefinition of marriage forced upon them by an out of control federal judiciary."[21] Her organization and other religious conservatives have vowed to continue their fight to expand religious refusal rights, such as with further legislation like Arizona's infamous S.B. 1062, vetoed in early 2014.[22] Mean-

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[18] The Sixth Circuit added to this drama by departing sharply from the circuit consensus and reversing district court judgments in favor of the lesbian and gay plaintiffs in five cases representing each of the four states in the Circuit. Deboer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'g* Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); Deboer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014); Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014); Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013). Many Supreme Court watchers saw that circuit-split-creating decision as making Supreme Court review "almost certain." *See, e.g.*, Lyle Denniston, *Sixth Circuit: Now, a split on same-sex marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), http://perma.cc/6AGN-NZWW. Petitions for certiorari came quickly. *See, e.g.*, Joint Petition For A Writ Of Certiorari, Henry v. Hodges, 14 F. Supp. 3d 1036 (S.D. Ohio 2014) (No. 14-556). They were right. The Supreme Court set the stage for a potential freedom to marry movement denouement by granting the petitions for certiorari in all of these cases on January 16, 2015. Obergefell v. Hodges, No. 14-556, 2015 WL 213646 (Jan. 16, 2015); Tanco v. Haslam, No. 14-562, 2015 WL 213648 (Jan. 16, 2015); DeBoer v. Snyder, No. 14-571, 2015 WL 213650 (Jan. 16, 2015); Bourke v. Beshear, No. 14-574, 2015 WL 213651 (Jan. 16, 2015).

[19] Ryan T. Anderson, *The Defense of Marriage Isn't Over*, The Witherspoon Inst. (Oct. 8, 2014), http://perma.cc/J4KQ-JM5Q.

[20] Memorandum from Alliance Defending Freedom on Rights of Conscience Pertaining to the Issuance of Marriage Licenses to Arizona Clerks Responsible for Issuing Marriage Licenses (Oct. 31, 2014), http://perma.cc/5E53-AGAE.

[21] Cathi Herrod, *For Marriage Supporters: Grief, Yes, Despair No*, Center for Arizona Policy (Oct. 17, 2014), http://perma.cc/U3KT-XMVG.

[22] *See* S.B. 1062, 2014 Leg., 2nd Sess. (Ar. 2014), http://perma.cc/TLU8-FR56. *See also* Center for Arizona Policy, *supra* note 4. Other state leaders have said it would be unwise to renew the contentiousness of the prior legislative session, especially given S.B. 1062's effect on the state's reputation as unfriendly. *See* Hank Stephenson, *The return of SB1062? Gay marriage ruling likely to renew push for 'religious liberty' protections*, Arizona Capitol Times (Oct. 24, 2014), http://perma.cc/YDU4-PDU6. *See also* Jennifer C. Pizer, *ArizoNO: Saying NO to Misuse of Religion to Discriminate,* Lambda Legal (Feb. 26, 2014), http://perma.cc/2NDE-7NJS.

while, in Coeur d'Alene, Idaho, owners of the Hitching Post Wedding Chapel, who had enthusiastically offered their services to all comers for decades, prepared to test the local nondiscrimination ordinance by reincorporating earlier this fall to add religious themes and purposes to their business charter. They sued the city preemptively once the federal courts had confirmed that Idaho's ban on marriage for same-sex couples was unconstitutional.[23]

Many on all sides of the marriage equality issue have anticipated this moment of shift, a return to the Supreme Court, and intensified opposition. In April of 2014, scholars and advocates gathered at Harvard Law School to consider the relationships among pressing civil rights needs and duties to accommodate sometimes conflicting religious claims. The "Religious Accommodation in the Age of Civil Rights" conference was co-sponsored by Harvard Law School, the Williams Institute at UCLA School of Law, the American Civil Liberties Union, and USC's Center for Law, History and Culture. It set out to address current controversies, including those over marriage equality, antidiscrimination laws, and the ACA's contraception coverage rule, all of which have given rise to conflicts between religious claims, on one hand, and equality claims of women and LGBT people, on the other. The conference sought to deepen understanding of the competing claims through discussion among those working in the fields of sexuality, gender, and law and religion.

The participants gathered in a moment of excited equipoise. The Supreme Court had just heard oral arguments in *Hobby Lobby*[24] and *Conestoga Wood*, two of the dozens of cases brought by owners of for-profit businesses who objected to the inclusion of birth control coverage in the basic health insurance the ACA requires large employers to provide for employees. The briefing and decisions in these cases at each level had presented divergent readings of RFRA.[25] They and the dozens of similar cases had riveted those active on both sides of the reproductive health and religious objection "wars."

But these ACA challenges—with their aggressive readings of RFRA—have had obvious implications for LGBT people, too.[26] My colleagues and I

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[23] *See* Complaint, Knapp v. City of Coeur d'Alene, No. 2:14-cv-00441-REB (Oct. 17, 2014); Harrison Berry, *Coeur d'Alene Responds to Chapel Lawsuit Over Nondiscrimination Ordinance*, Boise Weekly (Oct. 21, 2014), http://perma.cc/Y69C-MVJY. *See also* Zack Ford, *For-Profit Wedding Chapel Sues After Idaho Legalizes Same-Sex Marriage*, ThinkProgress (Oct. 20, 2014), http://perma.cc/LMY7-S5PY; Marci Auld Glass, *Donald and Lynn Knapp, The 'Hitching Post' and the Sanctity of the Wedding Mill*, Huffington Post (Oct. 22, 2014), http://perma.cc/TH47-89C2.

[24] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[25] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3rd Cir. 2013).

[26] *See* Jennifer C. Pizer, *Of Counsel: The Freedom to Worship Is Not the Freedom to Shun*, Lambda Legal (Mar. 21, 2013), http://perma.cc/3GU7-B2UN; Jennifer C. Pizer, *Why Religious Exemptions to the Affordable Care Act Are an LGBT Issue*, Lambda Legal (Jan. 30, 2014), http://perma.cc/CU5N-WFHW.

accordingly filed a series of amicus briefs in these and lower court cases explaining that it would work a radical and, in our view, unfair shifting of burdens onto employees if secular, commercial enterprises are allowed to exclude particular medical care from the health plans provided to their employees based on the business owners' religious tenets.[27] We stressed that religiously motivated anti-LGBT discrimination is a widespread problem, as confirmed by social science research and illustrated in part by challenges to laws and policies that protect LGBT persons and those living with HIV from discrimination in commercial contexts, including health care services.[28] We showed and explained why claims for accommodation of secular employers' personal religious beliefs at the expense of their workers have serious adverse consequences for LGBT people and have been rejected consistently.[29] We also warned that granting Hobby Lobby and Conestoga Wood the exemptions they sought would invite re-litigation of these questions and open the door to increased use of religion to deny LGBT persons, those living with HIV, and other vulnerable minorities equal compensation, health care access, and other equitable treatment in commercial interactions. We thus added voices from the LGBT community to the many amici supporting the government in urging the Court not to depart from settled law.

Then, on March 25, 2014, I joined the line outside the Supreme Court to attend the oral arguments. It was a biting cold morning but the crowd was feisty, with the familiar competing demonstrations between pro-choice champions (with pink Planned Parenthood hats and signs), and those opposed (waving Bible verses and full-color fetus portraits). I was struck by the boisterous presence of men in Planned Parenthood pink, and the equally numerous women among the ACA's challengers. Just ahead of me in line was a co-gender group of young Becket Fund attorneys, members of Hobby Lobby's legal team. But inside the Court, once the arguments began, a stark gender divide emerged.

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[27] Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., et al. in Support of the Government, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354, 130356).

[28] *Id.* at 31–33. *See also, e.g.*, Bodett v. Coxcom, Inc., 366 F.3d 736 (9th Cir. 2004) (supervisor religiously harassing lesbian subordinate); Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to provoke coworkers); Knight v. Conn. Dep't. of Pub. Health, 275 F.3d 156 (2d Cir. 2001) (visiting nurse proselytizing to home-bound AIDS patient); Erdmann v. Tranquility, Inc., 155 F. Supp. 2d 1152 (N.D. Cal. 2001) (supervisor harassment of gay subordinate with warnings he would "go to hell" and pressure to join workplace prayer services); Hyman v. City of Louisville, 132 F. Supp. 2d 528, 539–40 (W.D. Ky. 2001) (physician refusal to employ gay people), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002); North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (*Benitez*), 189 P.3d 959, 967 (Cal. 2008) (applying strict scrutiny and rejecting physicians' religious objections to treating lesbian patients).

[29] Brief of Amici Curiae, *supra* 27, at 30–35, http://perma.cc/9WXJ-8J5D. *See generally* Jennifer C. Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012).

The hearing transcript reflects how the intense questioning of counsel quickly revealed deep, unmistakably charged divisions among the justices.[30] They probed the implications of the ACA's requirements and options, as well as the reasons why business owners might insist on litigating against the birth control rule rather than simply ending their employees' coverage, paying the resulting tax, and having their employees purchase insurance themselves through the new insurance exchanges. The Court asked the companies' counsel, Paul Clement, two questions that stood out as potentially telling: How could the owners' exercise of religion be substantially burdened when they have the choice between (a) providing a federally compliant health plan with some coverage to which they object and (b) providing employees additional salary with which they can make their own insurance choices? And, would his clients' religious needs be met if they could use the "opt out" system HHS had developed to accommodate religious organizations with similar objections? (As to the first question, he said they feel it is religiously important to provide the actual insurance with only religiously acceptable coverage. As to the second, he said he did not know.)[31]

But perhaps the most dramatic moment came toward the end of Solicitor General Don Verrilli's time at the podium. Justice Kennedy, who had appeared concerned about working women's access to basic health care, seemed suddenly struck by a potential further extension of the ACA requirement. He asked the Solicitor General, "Under your view, a profit corporation could be forced—in principle, there are some statutes on the books now which would prevent it, but—could be forced in principle to pay for abortions. . . . Your reasoning would permit that."[32] Solicitor General Verrilli gamely attempted to explain that Congress had provided exactly the opposite in the ACA. But Justice Kennedy pressed Verrilli on whether RFRA would provide an exemption *if* such a law were to be enacted. To Chief Justice Roberts, that case was already presented. He asked, "Isn't that what we are talking about in terms of their religious beliefs? . . . I thought that's what we had before us."[33] Some of the women's health advocates sitting near me visibly deflated as Justice Kennedy's tone and body language shifted and his frown deepened.

I left the courtroom sharing their sense of impending doom. Although the briefs presented multiple questions and novel arguments, the hearing had not suggested there would be many surprises in how individual justices ap-

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[30] Transcript of Oral Arguments, Sebelius v. Hobby Lobby Stores, 134 S.Ct. 678 (2013) (No. 13-354).

[31] *Id.* at 27–29, 86–87. There also was an interesting moment when Justice Sotomayor pointed out that one of Mr. Clement's clients actually had been providing the very contraception coverage to which it now objects. One certainly could wonder how the ACA requirement to continue doing so could be an objectionable burden. *See id.* at 31–32 ("Your own client changed its policy, and that's why it's not grandfathered. And he changed it to drop contraceptives it was covering.").

[32] *Id.* at 75.

[33] *Id.* at 76.

proached them. As has been common, Justice Kennedy again seemed likely to be the key vote. His unhappy demeanor at the end was discouraging.

But, while prospects on the reproductive health front looked potentially alarming, multiplying federal court successes were fueling optimism for the freedom to marry. The district court in Utah had opened a new chapter for that movement during the 2013 winter holidays, requiring marriage for same-sex couples in the shadow of the Mormon Tabernacle.[34] That firmly worded decision inspired the filing of additional marriage cases by same-sex couples who saw no reason to continue waiting.[35] It seemingly also inspired some judges to decide pending cases, to the delight of same-sex couples in, for example, Kentucky, Virginia, Texas, and Michigan.[36] Meanwhile, religious refusal problems have continued to plague same-sex couples both where they can marry[37] and where they cannot.[38]

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[34] *See* Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013).

[35] *See, e.g.*, Connolly v. Brewer, No. 2:14-cv-00024-JWS, 2014 WL 5320642 2014 (D. Ariz. Jan. 6, 2014); Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis. 2014); Brenner v. Scott, 298 F.R.D. 689 (N.D. Fla. 2014).

[36] *See, e.g.*, DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (decided on Mar. 21, 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (decided on Feb. 26, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (decided on Feb. 14, 2014); Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (decided Feb. 12, 2014).

[37] For example, a Washington florist refused to sell flowers for a gay couple's wedding. *See Ingersoll v Arlene's Flowers*, Am. Civil Liberties Union (Oct. 11, 2013), http://perma.cc/KZ4Y-RRTB; Geoff Folsom, *Arlene's Flowers case still stalled*, Tri-City Herald (July 10, 2014), http://perma.cc/4S6S-8ELZ. An Oregon baker objected on religious grounds to selling a cake to a lesbian couple. Everton Bailey, Jr., *Same-sex couple files complaint against Gresham bakery that refused to make wedding cake,* The Oregonian (Feb. 1, 2013), http://perma.cc/MJ5W-VJ5L; Molly Young, *Sweet Cakes by Melissa violated same-sex couple's civil rights when it refused to make wedding cake, state finds*, The Oregonian (Jan. 17, 2014), http://perma.cc/66XH-5EYQ. And in Iowa, a couple who operates an event facility, bistro, and art gallery in a former church refused on religious grounds to rent the venue to a gay male couple for a reception after their wedding. Sharyn Jackson, *Gortz Haus owners file suit against Iowa Civil Rights Commission,* Des Moines Register (Oct. 8, 2013), http://perma.cc/B9MB-NRN2. *See also* Verified Petition, Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Polk Cty., Iowa, Dist. Ct. Oct. 7, 2013); Ruling on Defendants' Motion to Dismiss, Odgaard v. Iowa Civil Rights Comm'n, No. CVCV046451 (Apr. 3, 2014) (granting motion and dismissing petition).

[38] Even before marriage was opened to same-sex couples in Hawaii and Illinois by statute, and in Colorado by litigation, lesbian and gay couples encountered a range of refusals of services based on proprietors' religious objections. Diane Cervelli and Taeko Bufford were refused vacation lodging at the Aloha Bed & Breakfast, despite Hawaii's nondiscrimination law, due to the owner's religious objection to hosting lesbians. *See Cervelli v. Aloha Bed & Breakfast*, Lambda Legal, http://perma.cc/NBR4-QU6U (last visited Nov. 25, 2014). In Illinois, a gay couple planning their civil union reception was turned down by two establishments that routinely host weddings; one not only refused the couple but berated them with religiously condemning emails. *See Mattoon couple challenge denial of services at two Illinois Bed and Breakfast Facilities*, ACLU-Illinois (Nov. 2, 2011), http://perma.cc/A82L-SQV6. In Colorado, David Mullins and Charlie Craig were refused a wedding cake by Jack Phillips of Masterpiece Cakeshop, who said it was the policy of his business to refuse to sell wedding cakes for same-sex couples' celebrations due to his religious beliefs. *See Charlie Craig and David Mullins v. Masterpiece Cakeshop*, Am. Civil Liberties Union, http://perma.cc/QE4Y-HBNP (last visited Nov. 25, 2014). The Colorado Human Rights Commission affirmed that the refusal of service was contrary to Colorado's nondiscrimination law notwithstanding Mr. Phillips's religious motive. Craig v. Masterpiece Cakeshop, Inc., Case No. CR 2013-0008 (Co.

Opponents of marriage equality were also responding by asking state legislatures or voters to authorize the refusal to treat same-sex married couples like other married couples in diverse contexts, including in public accommodations, housing, and employment. The 2014 legislative session saw such bills in Kansas and South Dakota, for example, and a proposed state constitutional amendment in Oregon along the same lines.[39] These all were designed not only to permit refusals of services related to same-sex couples' weddings but also to permit disregard of their marriages thereafter. Other state bills, like Arizona's S.B. 1062, aimed in a broad manner to allow greatly increased religious exemptions from generally applicable laws, but their proponents argued for them with reference to same-sex couples.[40] The role of law professors as legislative advocates became more visible during the urgent efforts to persuade Governor Brewer to sign S.B. 1062 despite national outcry. And where Professor Douglas Laycock led a professors' letter to Governor Brewer in Arizona,[41] Professor Ira ("Chip") Lupu led a group with opposing views recommending against a similar bill in Mississippi.[42]

These efforts resembled submissions to legislative leadership in Illinois the year before during the final wrangling over religious exemptions for that state's marriage bill.[43] To the chagrin of some religious conservatives, com-

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Civil Rights Comm'n May 30, 2014). *See generally* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1189–92 (2012).

[39] H.B. 2453, 2014 Leg., S. Reg. Sess. (Kan. 2014); S.B. 128, 89th Leg. Assemb., S. Reg. Sess. (S.D. 2014); Letter from Kate Brown, Oregon Sec'y of State, to All Interested Parties (Jan. 28, 2014), http://perma.cc/CP28-625A.

[40] S.B. 1062, 51st Leg., 2nd Reg. Sess. (Ark. 2014); Howard Fischer, *SB 1062 Author Makes a Final Appeal to the Governor for Bill Passage*, KNAU ARIZONA PUBLIC RADIO (Feb. 26, 2014) (reporting efforts of bill sponsor Sen. Steve Yarbrough to persuade Gov. Brewer that religious people who own businesses need protection, that he disagrees with civil rights protections for gay people, and his view that gay people exaggerate the discrimination they experience), http://perma.cc/2V9F-HF8C; Howard Fischer, *State Senate Votes to Allow Businesses Right to Refuse Services to Gays*, KNAU ARIZONA PUBLIC RADIO (Feb. 19, 2014), http://perma.cc/K44U-FWDT.

[41] Letter from Douglas Laycock, Professor of Law, Univ. of Virginia, et al., to Janice K. Brewer, Governor of Arizona (Feb. 25, 2014) (recommending that she approve S.B 1062), http://perma.cc/WE62-XSEB.

[42] Letter from Ira C. Lupu, Professor of Law, George Washington Univ., et al., to Philip Gunn, Speaker of Mississippi House of Representatives (Mar. 10, 2014) (explaining opposition to Senate Bill 2681), http://perma.cc/W2K6-95TX. Nelson Tebbe examines this development in his article, *Religion and Marriage Equality Statutes*. *See* discussion *infra* pp. 18–21.

[43] *Compare* Letter from Robin Fretwell Wilson, et al., to The Honorable Daniel J. Burke, Chair, Illinois House Exec. Comm. (Feb. 25, 2013) (proposing exemptions described as "a balanced 'middle way'" to avoid "divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty") (on file with author) *with* Letter from Dale Carpenter, et al., to Hon. Michael Madigan (Oct. 15, 2013) (explaining to Speaker of Illinois House of Representatives that exemptions proposed in the Wilson letter would be "unprecedented in both who and what they cover" and would "erode core protections from invidious discrimination," and that "Illinois law already contains numerous exemptions for religious objectors") (on file with author).

These letters played a role complementary to the letters submitted by LGBT community legal advocates opposing broader religious exemptions in the Illinois marriage bill and opposing expansive RFRAs in, for example, Kentucky and Nevada. *See, e.g.*, Letter from Lambda

munity advocates succeeded in resisting most demands for broader exemptions. The result was a more precisely defined exemption to the state's public accommodations law permitting religious organizations to refuse rental of religious facilities for solemnization or celebration of a marriage inconsistent with its religious tenets, and defining "religious facilities" to exclude businesses, health care facilities, educational facilities, and social service agencies.[44]

Similar conversations and negotiations have taken place in other states, especially moderate conservative ones, where business leaders have wanted to advance nondiscrimination protections to improve their states' images, but social conservatives have pressed for broader religious exemptions. Sometimes the two efforts have been joined explicitly, though with limited success.[45] The veto of S.B. 1062 in Arizona marked a dramatic contest in that state between business leaders attempting to improve the state's reputation in order to attract business talent and economic development, and social conservatives unaccustomed to political resistance.

Because these legislative battles captured national press attention through the spring, the *Hobby Lobby* Supreme Court arguments took place in an already charged atmosphere. And after those arguments, the air was further charged with the potential for substantial change. The Harvard conference was well-timed to be a forum for testing predictions about how the justices might address their obvious disagreements in the ACA cases, and what implications the decisions might have for issues arising under other federal laws and in the states.

The conference agenda encouraged systematic examination of the central theme of equality claims in tension with religious calls not to condone conduct seen as sinful. Current disputes playing out in litigation and media provided new material for the familiar questions about what religious accommodations are reasonable and manageable in commercial contexts, and what the impacts may be for those excluded or refused. The Williams Institute's Dr. Ilan Meyer, a rare social scientist among the almost exclusively legal presenters, added complexity to some of the familiar questions with new research findings about the health effects of anti-LGBT social stigma,

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Legal and ACLU to Illinois Representatives Harris, et al. (Dec. 3, 2012), http://perma.cc/2AD9-6ZQV; Letter from Lambda Legal to Kentucky Governor Steve Beshear (Mar. 18, 2013), http://perma.cc/JA7B-FZDR; Letter from Lambda Legal, et al., to Nevada Assembly Speaker Marilyn K. Kirkpatrick, et al. (May 16, 2013), http://perma.cc/VM6M-TJZA.

[44] Illinois Marriage and Dissolution of Marriage Act § 209, 750 ILCS 5/209. *See also Legal Experts Conclude Illinois Same-Sex Marriage Bill Worst In U.S. In Protecting Religious Liberty*, ILL. REV. (May 29, 2013), http://perma.cc/8X82-7Y97.

[45] For example, in early 2014, Missouri Senator Wayne Wallingford, the principal Republican co-sponsor of S.B. 96, that state's sexual orientation and gender identity nondiscrimination bill, decided that the measure should be paired with a bill to broaden religious refusal rights and so introduced S.B. 916. Jason Hancock, *Missouri Republican Senator Introduces Bill Allowing the Refusal of Service for Religious Reasons*, THE KANSAS CITY STAR, (Feb. 25, 2014), http://perma.cc/T556-LUMV. In the end, neither bill moved.

the ameliorative role of an affirming religious affiliation, and the contrary effects of exposure to anti-LGBT religious doctrine.[46]

I. The *Hobby Lobby* Decision

As expected, the Supreme Court released its decision in *Hobby Lobby* at the very close of its term. Although oral arguments had foreshadowed defeat for the contraception coverage rule, it was still a shock.[47]

With Justice Alito's pronouncement that there is "precisely zero" impact on working women when their employers stigmatize their reproductive health decisions by condemning and deleting insurance coverage for disfavored options,[48] and his failure even to mention that the government had asserted a compelling state interest in gender equality among its reasons for requiring no-additional-fee coverage for birth control, it seemed that the Court majority was deliberately deaf to the concerns of women. The implications for reproductive rights and sex discrimination doctrine were not good. But, for LGBT people, people living with HIV, and others concerned about religiously motivated discrimination, the implications were much less clear.[49]

The decision *could* mean that religious interests are to be accommodated only when there is "zero" adverse impact on others, which would be largely consistent with what was the closest prior precedent.[50] Justice Alito's majority opinion signaled in that direction when it said that its analysis was limited to the ACA's unique contraception coverage rules.[51] Justice Kennedy echoed this point in his concurrence.[52] In fact, Justice Alito insisted that his

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[46] *See* Ilan H. Meyer, Merilee Teylan & Sharon Schwartz, *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, Williams Inst. (2014) (research shows anti-gay messages from religious leaders and organizations increases severe mental health reactions), http://perma.cc/QVY6-WPUR; Edward J. Alessi, James I. Martin, Akua Gyamerah & Ilan H. Meyer, *Prejudice Events and Traumatic Stress Among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, Williams Inst. (2013), http://perma.cc/W247-S9Z3. *See also* Maurice N. Gattis, Michael R. Woodford & Yoonsun Han, *Discrimination and Depressive Symptoms Among Sexual Minority Youth: Is Gay-Affirming Religious Affiliation a Protective Factor?*, Arch. Sex. Behav. 1589 (2014) (finding that harmful effects of discrimination among sexual minority youth affiliated with religious denominations that endorsed marriage equality were significantly less than those among peers affiliated with denominations opposing marriage equality).

[47] Tom W. Ude, Jr., *The Hobby Lobby Ruling: What the Court Said*, Lambda Legal (June 30, 2013), http://perma.cc/K673-55YA.

[48] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

[49] *See* Jennifer C. Pizer, *What the Supreme Court's Hobby Lobby Decision Means for LGBT People*, Lambda Legal (July 8, 2014), http://perma.cc/SQ6C-VFJM.

[50] *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982) (holding that an employer with a religious objection to paying into the Social Security system could refuse payments on his own behalf but could not impose his beliefs on his employees and deny them the benefits of that program by refusing payments on their behalf).

[51] *See Hobby Lobby*, 134 S. Ct. at 2783.

[52] *Id.* at 2785 (Kennedy, J., concurring).

approach did not permit discrimination.[53] Justice Ginsburg's dissent, he said, "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."[54] He then offered that there is "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."[55]

Although Justice Alito repeatedly qualified his nondiscrimination assurances with references to race, there is solid support for the proposition that all invidious discrimination—including discrimination based on sexual orientation or gender identity—should receive the same analysis.[56] That could—and *should*—mean that the Court majority has not licensed religiously based discrimination against LGBT people. Indeed, Justice Kennedy may have written his separate concurrence to reinforce this point, which would be consistent with the concern for the dignity and equality of LGBT people that he has expressed in past cases.[57] He emphasized that persons engaged in religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[58]

Justice Kennedy also noted that challenges to the ACA's contraception mandate may be distinguishable from other religious-objection cases because HHS already voluntarily decided to accommodate religious nonprofits by turning to an alternate payment source for birth control—the insurers. Requiring insurers to absorb the costs was feasible in response to these employer objections, at least in part, because contraception is less expensive than costs for prenatal care and childbirth. Insurers would not have this financial incentive with respect to most medical services, however; usually, a requirement to pay for additional medical care simply means additional costs. Thus, if *Hobby Lobby* inspires more employer religious objections to ACA requirements or other federally mandated employee benefits, accommodations that shift costs to willing third parties may be much less likely.

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[53] *Id.* at 2784 (majority opinion).

[54] *Id.* at 2783.

[55] *Id.*

[56] *See, e.g.,* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) ("public accommodations laws plainly serv[e] compelling state interests of the highest order") (alteration in original) (citation omitted); Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (public accommodations laws "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'") (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964)); North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (*Benitez*), 189 P.3d 959, 967 (Cal. 2008) (state had compelling interest in ending sexual orientation discrimination in health care setting); Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 32 (D.C. App. 1987).

[57] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

[58] *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

To focus on *Hobby Lobby*'s potential implications for LGBT people and other minority groups, we might note that these contraception coverage cases are challenges to particular medical *treatments*, without regard to *who* wishes to access those treatments. This distinction may be relevant for future cases. Justice Kennedy's reference to the "compelling" interests of others in the workplace, together with his decisions vindicating the rights of gay people,[59] may indicate that his essential fifth vote would go against discriminatory attempts to deny LGBT workers coverage others receive.

Thus, we might anticipate that he would reject selective denials of coverage when a specified procedure or treatment is covered for some plan participants but withheld from others based on the individual's sexual orientation or gender identity. For example, if donor insemination or in vitro fertilization is covered for heterosexual couples, it similarly should be covered for lesbian and gay couples. And if hormone replacement therapy is covered for menopausal women and for men after testicular cancer surgery, it should likewise be covered for transgender people. Similarly, prescription drug coverage to manage or prevent a persistent viral infection or to boost the immune system should not be vulnerable to employers' religious judgments about how a person may have contracted or may be at risk for HIV.[60]

Notwithstanding these reasons to read *Hobby Lobby* as context-specific and limited in its likely impact, the decision also *could* mean that religious interests now will trump other interests in ways systematically rejected in the past. Justice Ginsburg called out this possibility in her clarion dissent, emphasizing that the majority has invited case-by-case testing of religious objections to all manner of federal laws and policies with little guidance for the lower courts.[61] This new approach may give unprecedented approval to religious refusals based on the drafting or implementation of those laws and policies, following *Hobby Lobby*'s lead.[62]

Those sharing Justice Ginsburg's concerns had reason to be alarmed days later when the Court issued a per curiam order granting Wheaton College's request for an emergency injunction to allow it to ignore HHS's process for ensuring that its insurer provides contraception coverage to its employees.[63] As noted at the beginning of this foreword, the tone of Justice Sotomayor's dissent made clear the depth of her dismay and, perhaps, sense

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[59] *See, e.g.*, *Windsor*, 133 S. Ct. at 2675; *Lawrence*, 539 U.S. at 558; *Romer*, 517 U.S. at 620.

[60] *See* Matt Baume, *Does Hobby Lobby Have to Pay for My PrEP?*, ADVOCATE.COM (Oct. 27, 2014), http://perma.cc/HTS7-2HWK.

[61] *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

[62] The Supreme Court's jurisprudence in this area may evolve, with or without consistent principles, over a course of years. But lower courts already are beginning to apply *Hobby Lobby* in situations going beyond the contraception context. *See, e.g.*, Perez v. Paragon Contractors, Corp., 2014 U.S. Dist. LEXIS 128339 (Utah Sept. 11, 2014) (upholding RFRA-based refusal by member of Fundamentalist Church of Jesus Christ of Latter Day Saints to answer U.S. Dept. of Labor questions about church's potentially unlawful use of child labor).

[63] Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014).

of betrayal. With Justices Ginsburg and Kagan having joined this dissent, the gender divide could hardly be starker.

II. *Hobby Lobby's* Immediate Effects

The *Hobby Lobby* decision unleashed a series of events affecting LGBT rights advocacy. Within days, the national LGBT legal groups withdrew support from the Employment Non-Discrimination Act ("ENDA")[64] and called on President Obama to issue his long-promised executive order governing federal contractors with no new religious exemption.[65] Conservative religious figures had voiced opposition to ENDA and called on President Obama to grant exemptions for those who oppose the executive order on religious grounds.[66] A different group of faith leaders took the contrary position in a letter shortly thereafter,[67] as did a group of law professors.[68]

When the executive order came two weeks later, it did not have a new exemption.[69] But it also kept the flawed framework put in place by the George W. Bush administration that, by executive order, permits religious-organization contractors to favor persons of the organization's faith[70] and similarly permits federal grantees to favor co-religionists based on a 2007 Office of Legal Counsel interpretation of RFRA.[71]

Meanwhile, also at the federal level, opponents of marriage equality were touting the Marriage and Religious Freedom Act—sponsored by Rep. Raul Labrador, R-Idaho, in the House (H.R. 3133) with more than 100 co-sponsors of both parties, and sponsored by Sen. Mike Lee, R-Utah, in the Senate (S. 1808) with 17 co-sponsors. Its supporters contend it is needed to prevent discrimination against individuals and groups—both nonprofit and

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[64] Am. Civil Liberties Union, et al., *Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People*, Lambda Legal (July 8, 2014), http://perma.cc/ XVT7-A7DK.

[65] *See* Letter from national LGBT legal groups to President Barack Obama (letter on file with author).

[66] *See* Letter from Dr. Joel C. Hunter, Senior Pastor, Northland, et al., to President Barack Obama (July 1, 2014), http://perma.cc/7N55-PY43; *see also* Michelle Boorstein, *Faith leaders: Exempt religious groups from order barring LGBT bias in hiring*, Wash. Post (July 2, 2014), http://perma.cc/6HKK-7EVT.

[67] *See* Antonia Blumberg, *Faith Leaders Sign Letter Opposing Religious Exemption For LGBT Hiring Non-Discrimination*, Huffington Post (July 8, 2014), http://perma.cc/Y2XS-EWNU.

[68] *See* Letter from Katherine Franke, Law Professor, Columbia Law School, et al., to President Barack Obama (July 14, 2014), http://perma.cc/62SP-CJP7.

[69] Exec. Order Further Amending Exec. Orders Nos. 11246 and 11478, 79 Fed. Reg. 42971 (2014), http://perma.cc/JD4Y-QDG2.

[70] President Bush's Executive Order No. 13279 permits religiously affiliated organizations that receive government contracts to discriminate in hiring based on religion. Exec. Order No. 13279, 67 Fed. Reg. 77141 (2002).

[71] Office of Justice Programs, U.S. Dep't of Justice, Effect of the Religious Freedom Restoration Act on Faith-Based Applicants for Grants (Oct. 2007), http://perma.cc/8KFV-E3R8 (allowing federal grant recipients discretion to hire "individuals of a particular religious belief").

for-profit—that oppose same-sex relationships. They claim that any adverse tax policy or rules governing employment, licensing, accreditation, or contracting that impose a penalty or loss of a government benefit for exclusion or other discrimination against LGBT people is unfair discrimination against them.[72]

III. This Issue's Contributions

The articles in this issue of the *Harvard Law & Policy Review* explore doctrinal and practical implications of where we are in this period before the next big Supreme Court rulings and the next legislative sessions. The articles show the fruits of a period spent digesting *Hobby Lobby*, drawing from the context explored during the Harvard conference and considering related issues, such as state laws requiring equal insurance coverage for contraception or excluding same-sex couples from marriage, and options for amending RFRA in Congress.

In *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?,* Abner Greene prepares us to address the central questions by exploring whether, in our religiously and culturally pluralistic society, it is philosophically sound to require religious accommodation.[73] He considers the approaches of a series of modern thinkers to questions of whether there is an ascertainable set of truths that should guide human society and our individual lives, and how those truths or values might be determined. He concludes that our constitutional system requires agnosticism about moral truths, which leads him to support accommodations for both religious and other sincere moral belief systems. RFRA, he determines, can be a sensible accommodation system if managed sensibly. He then shows that, even if businesses are seen as having religious rights, the relationship between religious accommodation claims of some and equality claims of others still requires consideration of competing, fact-specific claims of harm, and that other areas of First Amendment law can guide the courts that, in the end, must resolve those competitions.

Greene reaches that conclusion by first unpacking the errors in Justice Alito's explanation for why requiring contraception coverage within a large-company health plan can be considered a "substantial" burden on the company's owners' exercise of religion. He points out that deference to the business owners' assertion that they are burdened, without an independent assessment by the Court, "turn[s] resolution of litigation over to one side of the dispute." Instead, RFRA requires courts to assess whether alleged burdens are "substantial." Green considers three potential measures of burden offered by Justice Ginsburg and agrees with her that the contraception cover-

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[72] *See* Anderson, *supra* note 19.

[73] Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 Harv. L. & Pol'y Rev. 161 (2015).

age mandate should be deemed insubstantial as a matter of law. He then expands on her analysis with lessons he draws from three areas of First Amendment law, giving greater context to the questions of attenuation and indirectness that should be at the center of this inquiry. Those lessons reinforce his conclusion that Justice Ginsburg's analysis is sensible and the majority's approach is simply wrong.

Greene concludes by considering recent claims that state RFRA analogs should provide exemptions for business owners who say it imposes a substantial burden on their religious exercise to be required to treat same-sex couples equally, including with respect to wedding-related services and goods. Assuming arguendo that such burdens sometimes may be substantial, he suggests there is guidance for proper application of the rest of the RFRA test in intimate association doctrine. That body of law considers the nature of relationships in terms of numerosity, quality of personal sharing, and depth of attachments, among other things. Thus he concludes that, although the *Hobby Lobby* majority has held that for-profit businesses can have religious-exercise rights, the distinction between intimate social relationships and commercial interactions remains meaningful. Having taken the *Hobby Lobby* decision as a lens through which to examine the interface between claims of religious believers for leeway from state-imposed norms, and civil liberties claims of others, he concludes that specific cases must come down to assessment of relative harms, which often "inescapably" must fall to courts.

Alex Luchenitser carries this analysis of *Hobby Lobby* further in *A New Era of Inequality?*[74] Ultimately, he makes the case that civil rights laws should be deemed enforceable, *Hobby Lobby* and RFRA notwithstanding, because such laws serve compelling interests and only forbid harmful conduct. But he reaches that conclusion after identifying three ways the "sweeping" *Hobby Lobby* decision expanded RFRA's reach and explaining the unsound aspects of each one. These expansions, in his view, create a significant threat that this law intended to protect religious freedom instead will do the opposite by allowing some religious believers to impose their faiths on others in discriminatory ways.

To assess the seriousness of this threat, Luchenitser considers multiple reasons why *Hobby Lobby* may not open the floodgates of discrimination. To start, RFRA does not apply to states and also generally is understood not to apply in disputes between private parties. On the other hand, state courts may take guidance from *Hobby Lobby* when interpreting their state RFRA analogs and state constitutional provisions that use similar terms. Luchenitser also examines how *Hobby Lobby* may lead to claims for religious exemptions from federal nondiscrimination statutes broader than the exemptions already in those statutes. He examines, too, how the decision may impact LGBT rights claims. On the latter point, he notes that ENDA,

[74] Alex J. Luchenitser, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015).

the federal bill to add explicit employment nondiscrimination protections for LGBT people, is still pending and that, were it to pass, RFRA likely would be raised as a defense by some not otherwise exempted unless the legislation provides expressly that RFRA is inapplicable.

Luchenitser then sketches out questions likely to arise given President Obama's new executive order forbidding sexual orientation and gender identity discrimination by federal contractors. Because federal provisions already allow religiously affiliated employers, federal contractors, and federal grantees to prefer co-religionists when hiring, some may see tension between those religious accommodations and nondiscrimination mandates that protect LGBT people. In his view, we should expect religiously-affiliated employers to invoke *Hobby Lobby* and RFRA, among other things, in pursuit of exemptions to these and any future prohibitions against anti-LGBT discrimination.

But even assuming employers do make such exemption claims, Luchenitser concludes that civil rights laws should remain enforceable because they serve compelling interests and are not overbroad. And yet, he concludes, the various ways the *Hobby Lobby* majority gave inappropriate primacy to business owners' religion claims over their employees' equality needs creates doubt and concern about potential future decisions of this Supreme Court that would subordinate nondiscrimination goals to a "crippling" degree. In light of the many ways *Hobby Lobby* may permit imposition of religion contrary to Congress's intent, Luchenitser determines that RFRA should be amended to reinstate standards consistent with its authors' understandings and goals—to protect freedom of conscience and prohibit religious dominance and other harms to third parties. He offers a series of suggestions for "repairing RFRA," explaining benefits and drawbacks of each. In the end, the best approach in his view is an amendment precluding exemptions or accommodations that impose "nontrivial burdens on third parties." Religious freedom suffers, he says, when people can use law to impose their religious beliefs on others. This principle has even greater salience in the commercial arena, where the "modern social norm of equality for all" must prevail. Because *Hobby Lobby* moves us closer to becoming a society "atomized and divided by corporate theocracy," Luchenitser calls on Congress instead to affirm equality by repairing RFRA.

In *Religion and Marriage Equality Statutes*, Nelson Tebbe picks up Alex Luchenitser's discussion of the still-unmet needs of LGBT people.[75] Where Luchenitser shows that religious exemption questions are front-and-center at the federal level even without passage of ENDA, Tebbe considers how similar questions are percolating in the states. Specifically, Tebbe assesses the efforts of those who oppose marriage for lesbian and gay couples to secure ever-broader religious exemptions in marriage laws and other state

[75] Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).

laws. In doing so, he notes the advent of letters by groups of law professors to state legislators in which competing sides try to occupy the role of teacher. These letters aim both to help explain the legal doctrine and also to support or oppose particular bill language. Tebbe's spotlight on this development is timely and illuminates the gravitas these missives add to the often less visible work of advocates and legislative counsel.[76]

Considering the approaches sketched by the academics to date, and the marriage equality laws enacted, Tebbe admonishes that, moving forward, broad exemptions should be avoided. Instead, he encourages re-assessment of the exemptions approved in earlier bills, when opening marriage to same-sex couples was still a novel proposition. As courts continue to strike down state marriage bans, we can expect state legislatures to take up proposals to codify that change, assuming new religious exemptions are appropriate. To counter such assumptions on the merits, he recommends a "coherentism approach," which urges comparisons between proposed new religious exemptions concerning same-sex couples and the same exemptions if applied in contexts of race, sex, or religious discrimination.[77] It also may be relevant and helpful, he points out, to compare proposed exemptions against "conscience clauses."[78]

For this exercise, Tebbe sets out principles that explain why clergy and religious congregations are understood to be protected against demands to solemnize marriages inconsistent with their tenets, and why those protections fade when a religious organization operates a public accommodation. Likewise, if a religious organization engages with the public to perform a public function, then it should have limited grounds for protest when held to generally applicable standards that protect the public.

Tebbe presents two examples, drawn from actual cases, which illustrate how issues may arise in public accommodations and government licensing contexts and how needlessly broad religious exemptions can permit unsound results. The first example involves rental of a beachfront pavilion. The pavil-

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[76] In numerous states, advocates had prepared the ground for the law professors with submissions to the state legislators explaining the doctrine in this area and why expanded religious exemptions were unwarranted and would be harmful. *See, e.g.*, Letter from Lambda Legal and ACLU to Illinois Representative Harris et al., *supra* note 43, at 13; Am. Civil Liberties Union & Lambda Legal, *Marriage Legislation, Assessing Potential Religious Exemptions* (Feb. 2013) (legal briefing for Minnesota legislators considering then-pending marriage bill) (on file with author).

[77] *See* Tebbe, *supra* note 75. This technique often is effective in litigation as well. Representing a lesbian patient against physicians who selectively refused her a common infertility treatment because of their religious objections to her sexual orientation, we urged the California courts to recognize that such objections would be rejected promptly if made because a patient intended to raise the hoped-for child with a partner of a different race or faith, rather than with a partner of the same sex. *See, e.g.*, Reply Brief on the Merits of Plaintiff and Real Party Guadalupe T. Benitez at 5–6, 19, North Coast Women's Medical Group v. Superior Court (*Benitez*), 189 P.3d 959 (No. S142892); Answer Brief of Plaintiff and Real Party Guadalupe T. Benitez to Amicus Curiae Briefs at 5, 8, 13, 27 n.19, North Coast Women's Medical Group v. Superior Court (*Benitez*), 189 P.3d 959 (Cal. 2008) (No. S142892).

[78] Tebbe, *supra* note 75.

ion was privately owned by a religiously affiliated nonprofit organization that would not have been subject to nondiscrimination rules under usual circumstances. But the organization sought and received preferential local tax treatment of its revenue from rental of the pavilion premised on its agreement not to discriminate in renting the facility. The organization abided by that agreement until a lesbian couple asked to rent it. When the organization refused on religious grounds, the conditional tax break was withdrawn, prompting an indignant response from the organization.

The second example considers a religiously affiliated nonprofit organization that provides foster/adoption child placement services. For this work, the organization seeks and receives substantial public funding that comes with nondiscrimination requirements. When state law requires nondiscriminatory treatment of same-sex couples, the organization balks on religious grounds but claims a right to continued public funding.

Tebbe approaches these examples by first considering religiously based discrimination on grounds other than sexual orientation and concluding that religious exemptions would be unjustified. He then considers, and rejects, an analogy between "conscience clause" objections to particular medical care and religious refusals of same-sex couples. These comparisons lead him to conclude that both the pavilion-rental case and the child-placement case correctly rejected the claimed religious exemption.

He next catalogues the exemptions in many of the marriage equality laws enacted to date, highlighting largely underappreciated potential harms, and pointing out the potential Establishment Clause problems. This analysis prepares the stage for marriage-related legislation to come, including in states where same-sex couples have gained or soon will gain the freedom to marry through litigation and yet have uncertain or limited support in the state legislature.

Recent history shows Tebbe's insights are on point. Public support for the freedom to marry continues to grow, as do opportunities for the public to see the harms of discrimination when religious exemptions allow married same-sex couples to be treated differently from other married people. The rapid spread of marriage equality and ongoing national conversation about it may well persuade legislators against new religious exemptions, along the lines Tebbe recommends.[79] In addition, as Tebbe lays out in his conclusion,

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[79] This has been an important goal for many LGBT legal advocates, too. While serving as director of Lambda Legal's Marriage Project from 2008 to 2011, after having drafted multiple bills to broaden protections for registered domestic partners, this author spent substantial time addressing the framing of marriage bills and other legislation to secure family rights for same-sex couples. Seeing opportunities opening in more states and the sometimes limited legal advocacy resources available in some of them prompted me to collaborate with an expert lawmaker on a "Model Marriage Code" for this purpose. It provided bill text and policy analysis for the successful enactment efforts in Delaware, Hawaii, Illinois, and Minnesota, and for Colorado's civil union law, and material for various marriage cases. Jennifer C. Pizer & Sheila James Kuehl, *Same-Sex Couples and Marriage: Model Legislation for Allowing Same-Sex Couples to Marry or All Couples to Form a Civil Union,* Williams Inst. 42–45 (Aug.

these insights also are relevant to efforts to secure nondiscrimination protections through state legislation and in Congress.

Like Nelson Tebbe, Kara Loewentheil also devotes much of her article to likely developments in state law. She focuses on the potential implications of *Hobby Lobby* and the reasons that decision may be more cabined than many realize, at least with respect to women's access to health insurance coverage for birth control.[80] In *The Satanic Temple, Scott Walker, and Contraception*, she explains that *Hobby Lobby*'s impact will be somewhat muted because some states have contraception equity laws unrelated to the ACA. These state laws are not directly affected by RFRA, which only applies against the federal government.[81] She explains the errors of Scott Walker's claim that *Hobby Lobby* preempts laws like Wisconsin's. But, as Loewentheil's analysis indicates, Walker's claims are driven more by politics than legal analysis. For that reason, he and others may persist.[82]

Loewentheil also considers attempts by self-described Satanists to turn this mistaken elevation of religion around with parody and competing claims.[83] For example, they have created an online form with which a patient can assert a religious objection to state "informed consent" laws that require doctors to provide information and sometimes to perform medically unwarranted ultrasound tests, all designed to deter the patient from ending her pregnancy. Because this online-form approach is not, in fact, intended to be a vehicle for vindicating sincere religious beliefs, a more promising approach might be for women patients, workers and others to present genuine religion claims that push back against those who now appear to have expanded abilities to impose their beliefs on others. Certainly there may be women who believe they have a sacred duty to bring children into the world only when they have the ability to raise them. Similarly, there likely are many health professionals who believe they have a religious obligation to provide kind, respectful medical care to pregnant patients, and not to attempt to coerce or override their patients' personal moral decisionmaking. Along

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2012), http://perma.cc/G38W-S2NY. The model bill text and annotations for accommodating religion reportedly have been particularly useful. *See id.*

[80] Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of* Hobby Lobby*'s Implications for State Law*, 9 HARV. L. & POL'Y REV. 89 (2015).

[81] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[82] Indeed, at Lambda Legal, we already have seen this tried. We represent a lesbian couple, Diane Cervelli and Taeko Bufford, who were refused lodging by a Hawaii bed and breakfast. The couple intended to visit a friend who had just had a baby and were making their plans long-distance. The proprietor rebuffed them, claiming a religious exemption from Hawaii's public accommodations nondiscrimination law. The case is on appeal, following the trial court's rejection of the proprietor's religion argument; within weeks of the Supreme Court deciding *Hobby Lobby*, defense counsel cited that decision as supplemental authority. Letter of Plaintiffs-Appellees and Plaintiff-Intervenor-Appellee to the Clerk of the Court, Intermediate Court of Appeals, State of Hawaii in Response to Defendant's Supplemental Authority Letter, Cervelli v. Aloha Bed & Breakfast, No. 11-1-3103-12 ECN (Haw. Ct. App. Aug. 4, 2014), http://perma.cc/6EZ2-WANG. Additional case documents are available here: http://perma.cc/9WNG-Z6JA.

[83] *See* Loewentheil, *supra* note 80.

these lines, Loewentheil reminds us that the Sanctuary movement and other important campaigns for justice have been galvanizing and effective at least in part due to religious inspiration and resulting moral authority.

But this idea brings to mind Alex Luchenitser's observation that vesting business owners with additional rights puts religious rights of others at risk. True, it may be strategic in some circumstances to counter one assertion of religious rights with another. Yet, consider how readily this approach may get out of hand, leaving important religious interests to suffer because more powerful individuals or entities become still more empowered when their claimed religious needs and goals are given enhanced deference.

Marci Hamilton's *Case for Evidence-based Free Exercise Accommodation* is a vigorous tribute to this caution.[84] Her article gives an authoritative review of RFRA's enactment history with abundant granularity that drives home her conclusion that the Act is simply misguided public policy. She shows in detail how RFRA's proponents were misleading in their initial case for the bill and the ways it imposes heavier burdens on government than did the prior Supreme Court doctrine. She also is direct in pointing out the challenges of lawmaking in this area because most legislators have limited understanding of the doctrine, undue solicitude for religion claims, and susceptibility to religious-conservative political pressure and messaging. From her years of scholarship, litigation, and policy work in this area, Hamilton knows too well the outsized social and political influence of some large, conservative religious institutions. She has called out the skewing of policy, diverting of public resources, and other unwarranted harms that tend to result from a legal framework that grants special rights based on religious motivation and not for personal moral or other secular reasons. Harm to others unavoidably results. Like Luchenitser, she concludes the sensible route forward requires a substantial reframing of RFRA.

The articles in this issue reflect the benefit of some months post-*Hobby Lobby* for considering potential implications of and responses to the majority's reshaping of religious free exercise doctrine. These authors will stimulate your thinking and give you larger context for assessing their intriguing proposals. Among the points clear at least to this author is that basic health care needs of half the adult population should not be deemed exceptional, subjected to separate rules, and made uncertain. Everyone, including women, should have access to the range of professionally appropriate wellness services without interference by their employers or other third parties who wish to constrain others' life-shaping decisions per their own religious views.

It is somewhat reassuring that all nine justices appear aware of *Hobby Lobby*'s potential to unleash discrimination, and all expressly have dis-

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[84] Marci Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129 (2015).

claimed that result. And given the references to the compelling public interests nondiscrimination laws serve, the work to enact explicit, effective protections for LGBT people is as important as ever. So too is a responsibility we all should share to amplify Justice Kennedy's *Hobby Lobby* bottom line: "[N]o person may . . . in exercising his or her religion . . . unduly restrict other persons."[85]

To honor and enforce that principle, both Congress and our courts should listen more attentively and act accordingly because, in fact, religiously motivated conduct presently causes "undue" restrictions of many kinds for many people. Desire for a society that does not see freedom of conscience as license to burden others—and that respects freedom for everyone by protecting everyone's proverbial nose—has created common cause among the LGBT movement, the women's reproductive justice movement, and numerous other movements in which faith traditions provide inspiration, shared goals, and nourishing social bonds. Our Constitution and laws should be in harmony with our efforts to build that society. We have much more work to do.

[85] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring).