

# Religion and Marriage Equality Statutes

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*To date, every state statute that has extended marriage equality to gay and lesbian couples has included accommodations for actors who oppose such marriages on religious grounds. Debate over those accommodations has occurred mostly between, on the one hand, people who urge broader religion protections and, on the other hand, those who support the types of accommodations that typically have appeared in existing statutes. This article argues that the debate should be widened to include arguments that the existing accommodations are normatively and constitutionally problematic. Even states that presumptively are most friendly to LGBT citizens, as measured by their demonstrated willingness to enact marriage equality laws, have included provisions that may well retrench on civil rights principles in ways that are significant but underappreciated. Especially at a moment when marriage equality is moving into jurisdictions that are even more concerned with preserving religious freedom, arguments against existing accommodations should be made available.*

## INTRODUCTION

Many Americans appreciate that today new tensions are affecting the relationship between religious freedom and equality principles. Of course, people understand the conflict between religion and equality in different ways and on different levels of generality. Some think of it abstractly, as a matter of law and moral conscience, while others imagine a more specific contest between free exercise rights and antidiscrimination law. Some are focused on reproductive freedom for women, while others think first of LGBT interests. Whatever their specific conceptions, however, people understand generally that the tension between religion and equality has recently intensified, or at least morphed.

This article will focus on one subtopic, namely the religion exemptions that appear in state statutes extending marriage equality to gay and lesbian couples.<sup>1</sup> To date, every statute that guarantees marriage equality has included protections for those with religious objections.<sup>2</sup>

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<sup>1</sup> This article will use the terms religion accommodation and religion exemption interchangeably.

<sup>2</sup> These statutes vary, but they include the following sorts of provisions. They clarify that clergy are not required to solemnize marriages to which they are religiously opposed (solemnization provisions). They exempt religious organizations from providing goods, services, accommodations, or privileges for a wedding ceremony or reception (accommodations provisions). They clarify that certain religiously-affiliated organizations need not involve themselves in the "promotion of marriages" to which they have theological objections (promotion of marriage provisions). They lift any requirement that fraternal benefit organizations

Consider a simple but important example. Almost without exception, marriage equality laws contain a provision that allows religious actors to refuse to open their facilities for the solemnization or celebration of a marriage to which the actors are opposed theologically.<sup>3</sup> What many observers have not noticed is that these exemptions apply not only to sanctuaries or houses of worship themselves, which can and should be protected as private facilities, but also to public accommodations. Even buildings that are routinely rented to a wide range of consumers can be selectively closed to gay men and lesbians wishing to hold a wedding reception. Affected facilities include a range of event spaces that are open to the public but owned by religious groups and affiliated nonprofits, including schools and universities. Moreover, many of the exemptions are phrased broadly, so that they protect religious organizations that wish to discriminate on any ground—not only sexual orientation or marital status, but also race, ethnicity, and even religion itself.<sup>4</sup> Especially in states and localities that protect gay men and lesbians from discrimination in places of public accommodation, this is a setback.<sup>5</sup>

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provide insurance coverage or other benefits in violation of their religious teachings (fraternal benefit provisions). And they sometimes specify that adoption agencies and other child placement organizations need not place children in ways that contravene their faith (adoption provisions). See CONN. GEN. STAT. § 38a-624a (2009) (fraternal benefit), § 46b-35a (2009) (accommodations), § 46b-35b (2009) (adoption); DEL. CODE ANN. tit. 13, § 106(e) (2013) (solemnization); D.C. CODE § 46-406(e) (2001) (accommodations, promotion of marriage); HAW. REV. STAT. § 572-12.1 (2013) (solemnization), § 572-12.2(a) (2013) (accommodations); 750 ILL. COMP. STAT. 5/209 (2014) (solemnization, accommodations); ME. REV. STAT. tit. 19-A, § 655(3) (2012) (solemnization); 2012 Md. Laws ch. 2 (accommodations, promotion of marriage); MINN. STAT. § 363A.26 (2013) (accommodations), § 517.09 (2013) (solemnization); N.H. REV. STAT. ANN. § 457:37 (2010) (solemnization, accommodations); N.Y. DOM. REL. LAW § 10-b (McKinney 2011) (accommodations), § 11(1-a) (McKinney 2011) (solemnization); N.Y. EXEC. LAW § 296 (McKinney 2010) (religious organizations and housing, admission); R.I. GEN. LAWS § 15-3-6.1 (1956) (accommodations, fraternal benefit); VT. STAT. ANN. tit. 9, § 4502(1) (2014) (accommodations), tit. 18, § 5144(a) (solemnization); WASH. REV. CODE § 26.04.010(5) (2012) (solemnization, accommodations), § 26.04.020(6) (2012) (accommodations).

<sup>3</sup> These accommodations provisions vary somewhat from state to state, but they appear in almost all such laws. For example, Hawaii's recent law provides that "a religious organization or nonprofit organization operated, supervised, or controlled by a religious organization shall not be required to provide goods, services, or its facilities or grounds for the solemnization or celebration of a marriage that is in violation of its religious beliefs or faith." Haw. Rev. Stat. § 572-12.2 (2013). For other examples and citations see *infra* Part II.A. An exception is Delaware's marriage equality law, which contains no such exemption. H.R. 75, 147th Gen. Assemb., 1st Reg. Sess. (Del. 2013).

<sup>4</sup> Some (failed) proposals have targeted same-sex weddings. See, e.g., S. 2566, 107th Gen. Assemb., 2nd Reg. Sess. (Tenn. 2012) (providing broad protections to actors who object on religious grounds to "any civil union, domestic partnership, or marriage not recognized by this state"); H.R. 2453, 84th Leg., 2012 Reg. Sess. (Kan. 2012) (providing broad protections for actions that are related to marriage or civil unions and are "contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender"); *Protect Religious Freedom Initiative*, OREGON FAMILY COUNCIL (Nov. 21, 2013), <http://perma.cc/WWG4-HK47> ("[A] person acting in a nongovernmental capacity may not be . . . [p]enalized by the state or a political subdivision of this state for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements . . .").

<sup>5</sup> See *infra* note 138 and accompanying text (noting that some twenty-one states prohibit discrimination on the basis of sexual orientation and/or gender identity in public accommodations, among other areas of economic life). Even within states that do not protect against

Yet this is only one example. Other provisions protect religious actors who wish to exclude same-sex married couples from a potentially wide range of goods and services, as this article will explain. Examination of those protections below will also serve as a point of departure for consideration of some of the larger questions raised by conflicts between religious freedom and equality rights.

What have commentators made of this situation? So far, debate over state marriage equality and religion has been dominated by two principal positions. On the one hand, some academics have been co-authoring letters to state legislatures, urging them to include broad protections for religious individuals and entities as part of marriage equality legislation.<sup>6</sup> For example, they have advocated for allowing certain commercial actors to claim religion exemptions in the marriage setting.<sup>7</sup> They have also urged accommodations for government officials who object to administering weddings to which they are opposed on religious grounds.<sup>8</sup> These scholars have influenced the debate, even if they have seen only limited success in actual state enactments. On the other side, scholars concerned about broad religion accommodations have only recently started to write opposing letters to state legislatures.<sup>9</sup> And in those letters, they have stopped short of criticizing the sorts of exemptions for religion that have typically appeared in state laws establishing marriage equality.<sup>10</sup> Similarly, the wider public debate has been dominated by these two positions, even if other perspectives have been offered.<sup>11</sup>

This article argues that the conversation should be expanded to include the possibility that even existing protections for religious freedom in marriage equality statutes go too far in important respects. Arguments against existing religion exemptions have not become salient, so far. There are sev-

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discrimination on the basis of sexual orientation and gender identity, some localities do so by municipal ordinance. Some of these state and local anti-discrimination laws contain religion accommodations themselves, or exclude religious organizations from the definition of public accommodations, but they do not do so in a way that greatly affects this article's analysis. For a more detailed explanation, see *infra* note 101.

<sup>6</sup> For the most recent principal letters, see Letter from Edward McGlynn Gaffney, Jr., Valparaiso Univ. Sch. of Law et. al, to Sen. Rosalyn H. Baker, Haw. Leg. (Oct. 17, 2013) [hereinafter Gaffney Hawaii Letter], available at <http://perma.cc/MN53-UN4G>; Letter from Robin Fretwell Wilson, Wash. and Lee Univ. Sch. of Law et al. to Minn. Leg. (May, 2, 2013) [hereinafter Wilson Minnesota Letter], available at <http://perma.cc/AL3K-NF9B>.

<sup>7</sup> See Gaffney Hawaii Letter, *supra* note 6, at 4–5 (proposing to exempt individuals, sole proprietors, and small businesses from providing, over a religious objection, (1) goods and services for the celebration or solemnization of a wedding, (2) employment benefits to spouses, or (3) housing, but providing an exception where alternative goods and services are not available without “substantial hardship”).

<sup>8</sup> Some government officials would enjoy an exemption only if another official were available to administer the union, but judges would have an absolute right to refuse. See *id.*

<sup>9</sup> See Letter from Dale Carpenter, Univ. of Minn. Law Sch. et al., to Ill. Leg. (Oct. 23, 2013), available at <http://perma.cc/GY4V-UG48>.

<sup>10</sup> See *id.* (noting the “careful balance” struck by the bill and remarking on its accommodation for use of the property of religious organizations).

<sup>11</sup> See, e.g., Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1191–92 (2012) (critiquing several existing statutory exemptions).

eral possible reasons why. First, during the years when the earliest marriage equality statutes were being drafted, the political need for religion accommodations was obvious to many.<sup>12</sup> And today, although the political terrain surrounding civil marriage for same-sex couples is quite different, the existing exemptions carry the weight of precedent. Another reason may be that the states that have already passed marriage equality are precisely the ones most protective of LGBT equality. Many observers seem to have simply assumed that the religion provisions included by friendly states must have been appropriate.

Whatever the reason that existing religion exemptions have gone largely unquestioned, they should be carefully examined today, before additional laws are enacted. As marriage equality extends beyond the states that are most sensitive to equality concerns, exemptions for religious actors may become stronger, not weaker. For example, legislators in North Carolina reacted to judicial imposition of marriage equality by proposing to exempt public officials with religious objections from processing certain marriages—a proposal that goes farther than existing exemptions.<sup>13</sup> Moreover, as social norms and political dynamics continue to shift in favor of marriage equality, it may be possible to revisit and even repeal some of the existing state exemptions before they become practically entrenched. Now is the time to carefully examine the attractiveness and constitutionality of existing approaches.

No scholar of religious freedom has critically questioned the prevailing exemption regime. In the literature on religious freedom, as in the public debate generally, the options are framed by wide exemptions, on one side, and existing state approaches, on the other. Positions outside these two poles have largely been occluded. Leading scholars of LGBT rights have launched powerful arguments against some of the existing exemptions in their academic writings,<sup>14</sup> but those arguments have not yet been incorporated into advocacy work in state legislatures.<sup>15</sup> For instance, no scholar critiqued the religion exemptions in Illinois's marriage equality law during the run-up to its enactment, to my knowledge. This article offers those underrepresented arguments.

Nonprofit actors will provide the focus here. Although much scholarly attention has been devoted to for-profit businesses and their claims for relig-

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<sup>12</sup> For more detail on this political calculus, see *infra* note 144 and accompanying text.

<sup>13</sup> See *Berger Calls on Courts To Correct Erroneous Memo Threatening First Amendment Rights, Jobs of N.C. Magistrates*, NCPoliticalNews.com (Oct. 26, 2014) [hereinafter *Berger Calls on Courts*], <http://perma.cc/J7EB-HT84>. Compare with Delaware's current provision that allows "any person" to refuse to solemnize a marriage but limits the refusal ability of "clerk[s] of the peace," who must perform the ceremony if requested by the couple. DEL. CODE ANN. tit. 13, § 106 (2013).

<sup>14</sup> See, e.g., NeJaime, *supra* note 11, at 1191–92, 1236 & n.289 (suggesting disapproval of religion exemptions from antidiscrimination laws in public accommodations).

<sup>15</sup> One new letter opposes the North Carolina proposal, see *Berger Calls on Courts*, *supra* note 13. See Memorandum from Public Rights/Private Conscience Project on Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages to Interested Parties (Nov. 5, 2014), available at <http://perma.cc/U7EL-SJRH>.

ion exemptions, no state has yet accommodated them in its marriage equality law. Religious nonprofits, by contrast, have received widespread protection but little examination.

Methodologically, this article uses a method of reflective equilibrium or coherentism.<sup>16</sup> Simply put, that approach compares new situations to familiar scenarios about which there is a high degree of confidence, and to principles that abstract from those familiar cases. Solutions to new problems qualify as warranted if they cohere with existing convictions in a mutually reinforcing way.<sup>17</sup> Comparisons to existing paradigms can generate particularly powerful guidance when confronting new questions of law and morality.

Here, two sorts of comparisons are helpful. First, it can be enlightening to ask whether similar religion exemptions would be provided in the domain of antidiscrimination law generally, particularly law that protects against targeting on other grounds, such as race, gender, or religion itself. A match between religion exemptions in marriage equality laws and those in other antidiscrimination laws could be mutually reinforcing. A second—often countervailing—comparison is to “conscience clauses” or “refusal clauses” that protect opponents of abortion from direct involvement in terminating a pregnancy.<sup>18</sup> In that area, laws typically extend significant protection, and they do so for objections based on conscience generally, not just religion. This article will contend that marriage equality exemptions ought to be viewed as more analogous to religion exemptions in other antidiscrimination laws than to refusal clauses in the area of reproductive freedom. Therefore, religion exemptions in marriage equality laws receive justificatory support when they cohere with religion accommodations in antidiscrimination laws, but they need not match conscience clauses in order to be justified.

Below, Part I provides an overview of the various types of conflicts that can arise between religious freedom and marriage equality. It then gives two concrete examples of disputes involving same-sex couples and it argues that both situations were rightly handled by the governments. In Ocean Grove, New Jersey, state officials ruled against a religious organization that refused to allow a lesbian couple access to a boardwalk pavilion that was regularly rented to the public. And in Boston, state authorities declined to exempt Catholic Charities from a rule that prohibited adoption agencies from excluding gay and lesbian couples. These two disputes occurred in different states and involved different actors—religious associations operating public accommodations and religiously-affiliated adoption placement agencies, re-

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<sup>16</sup> The method of reflective equilibrium or coherentism was introduced by John Rawls. See JOHN RAWLS, A THEORY OF JUSTICE 19, 44 (1972). It closely approximates how moral actors actually solve problems of political morality, and it provides an attractive way of determining when their claims are warranted or justified. Of course, defending those claims is beyond the scope of this article. For a fuller explanation, see Nelson Tebbe, Religion and Social Coherentism (2014) (unpublished manuscript) (on file with author).

<sup>17</sup> Each element is revisable in light of the others, so that the entire system is dynamic rather than static. See Tebbe, *supra* note 16, at 4.

<sup>18</sup> See *infra* Part I.C.4 (citing examples).

spectively. But officials rightly resolved both of them by enforcing antidiscrimination laws even in the face of reasonable claims for special accommodations by religious actors. Although neither case involved civil marriage as such, they help illustrate why broad religion exemptions are problematic in the marriage context as well. Part I ends by showing how those problems follow from democratic commitments to full and equal citizenship, and it explains how the governments' resolutions of these two cases cohere with precedents concerning antidiscrimination law and conscience clauses.

Part II then argues that both decisions would likely be reversed by existing marriage equality laws. As noted above, religion exemptions in nearly every state would unwind public accommodations protections in these settings. Although exemptions for social service providers like child placement agencies are neither uniform nor unambiguous, they nevertheless exist in several states. And in those jurisdictions, they could well be interpreted to license discrimination by a range of religiously-affiliated social service organizations. Part II then contends that the potential applications are widespread. This will surprise people who assume that the existing exemptions are unproblematic, perhaps because they are focused instead on proposed provisions affecting for-profit corporations. Part II also raises constitutional problems with the exemptions—particularly Establishment Clause difficulties that arise when religion accommodations shift costs from religious actors onto third parties, namely same-sex couples.

The Conclusion considers the politics surrounding these debates, and it speculates about how those dynamics are likely to evolve in the future. The answers will determine whether the article's arguments are likely to remain highly relevant. In particular, the Conclusion asks how the debate might be influenced by judicial decisions establishing marriage equality as a constitutional right in localities that are likely to be politically sympathetic to religious objections to same-sex marriage. If marriage equality continues to spread rapidly as a result of judicial decisions, as many believe that it will, what will the effect be on state legislation? The possibility of increased lawmaking heightens the stakes of this article. If arguments against existing exemptions are being neglected currently, that problem is likely to grow more consequential as marriage equality moves into political terrain that is less sympathetic to LGBT concerns and more inclined toward religious claims for relief in the context of LGBT rights.

## I. THE NORMATIVE CASE

To demonstrate that the existing exemptions overreach, it helps to first establish how conflicts at the intersection of marriage equality and religious freedom should be resolved. This Part introduces the range of laws and actors that are implicated by religion provisions in marriage equality statutes. It then focuses in on two of those areas—namely, public accommodations and government licensing. Despite their importance, these two areas have

been sidelined, at least insofar as they affect religious nonprofits. This Part gives detailed examples of actual disputes in each area. Throughout, it looks not only to courts, but to conflicts outside them as well. Finally, it argues, using the coherentism approach, that both controversies were properly resolved against the religious actors. That sets up an argument in Part II that existing religion exemptions would improperly overturn both resolutions.

### A. *Proposed and Actual Exemptions*

A range of complex laws are affected by proposed and actual exemptions for religion in marriage equality statutes. To appreciate that complexity, consider first the areas of law that are affected and then the actors that might claim exemptions in each of them.

Areas of law implicated by the exemptions are many.<sup>19</sup> Public accommodations law is one potentially significant legal domain, as noted above. Government licensing is another. Individuals and organizations of various types must obtain licenses in order to offer their services to the public: doctors, lawyers, therapists, bankers, child placement agencies, hospitals, etc. States sometimes require various forms of nondiscrimination as a condition of licensing, including equal treatment on the basis of sexual orientation and marital status. Religious actors may seek special relief from those requirements when it comes to same-sex marriage. Could a social service agency be allowed to refuse service to members of a couple not merely because they identified as gay, but more specifically because they were married to someone of the same sex? Of late, religious actors often claim to object not to LGBT people, or even to same-sex couples who merely cohabit or even raise families, but to the misuse of marriage, which they consider to be a religious sacrament.<sup>20</sup>

Think too of employment. Religious employers might wish to refuse to hire someone married to a person of the same sex under civil law, if not gay and lesbian people generally.<sup>21</sup> Probably more realistically, a religious employer might seek relief from laws that require evenhanded provision of health insurance and other benefits to all spouses of employees, regardless of sexual orientation.<sup>22</sup> Many states do require equal provision of such employ-

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<sup>19</sup> Alternatively, these could be conceptualized as subsets within anti-discrimination law.

<sup>20</sup> Opposition to same-sex relationships other than marriage could have a religious grounding as well, but for the sake of simplicity this discussion focuses on marriage.

<sup>21</sup> See, e.g., Michelle Boorstein, *Same-Sex Marriage Is New Test for Catholic Institutions Used to 'Don't Ask, Don't Tell'*, WASH. POST (Apr. 7, 2014), <http://perma.cc/787T-GCRU> (“[M]ore and more Catholic institutions [are] firing gay and lesbian staff members not because they are gay but because they marry.”).

<sup>22</sup> See, e.g., Lornet Turnbull, *Benefits for Same-Sex Spouses an Open Question Legally*, SEATTLE TIMES (Mar. 24, 2014), <http://perma.cc/Q92Q-7ETX> (“Can companies that fund their own health-insurance plans refuse to extend benefits to their employees’ same-sex spouses? . . . The question already has come up in Washington state, where O’Reilly Auto Parts last week reached an agreement with the state attorney general to extend such benefits to same-sex spouses after initially declining to do so.”).

ment benefits to domestic partners. Should exemptions be granted when those employees are legally married?

Other implicated areas include fair housing laws, many of which likewise prohibit discrimination on the basis of sexual orientation and marital status. A landlord might refuse to rent to a married couple not simply because they are lesbian or gay, but specifically because they are married to someone of the same sex.

Government funding and taxation is a final area.<sup>23</sup> A religious actor might seek equal access to government subsidies or tax exemptions despite discrimination against same-sex couples who are legally married. Several statutes explicitly protect religious actors not only against, say, public accommodations laws that might otherwise require them to open their facilities to the celebration of gay or lesbian weddings, but also against defunding because of that exclusion.<sup>24</sup>

In addition to implicating various areas of law, religion exemptions in marriage equality laws can involve a wide variety of actors. These include not just houses of worship and clergy members—probably the paradigmatic examples in the minds of most lawmakers—but also religiously-affiliated nonprofits like hospitals, social service organizations, and universities; fraternal organizations with religious ties; individual government officials such as justices of the peace and marriage license clerks; private individuals running businesses; and, of course, for-profit corporations. All of these actors could invoke religious convictions and seek relief from laws that would otherwise require them to serve all married couples regardless of LGBT status.

Imagining a large matrix, with areas of law arrayed along one axis and types of actors along the other, can convey some sense of the complexity of the debate over these statutory accommodations. Although some cells in the matrix are empty—government officials do not seek licenses, for example—many of them do present difficult questions.

Again, this article will focus on just two areas of law, namely public accommodations and government licensing. These two are centrally implicated by existing statutes, as shown below in Part II.<sup>25</sup> Regarding actors, the

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<sup>23</sup> Surely there are still other areas of law affected by claims for religion accommodations, but they will be bracketed here. Consider for instance a law requiring judicial officers to apply the law in a uniform way, despite any religious scruples to the contrary. See Memorandum from Public Rights/Private Conscience Project, *supra* note 15. See also Letter from John W. Smith, Dir., N.C. Admin. Office of the Courts, to Magistrates and Chief Dist. Court Judges and Elected Clerks (Oct. 13, 2014), available at <http://perma.cc/YUT6-GB88>.

<sup>24</sup> See, e.g., 2012 Md. Laws 2 (providing that a decision by a religious organization to close its facilities to a wedding for theological reasons “may not . . . result in any State action to penalize, withhold benefits from, or discriminate against the entity or individual”); MINN. STAT. § 517.201 (2013) (same); N.H. REV. STAT. ANN § 457:37 (2010) (same); N.Y. DOM. REL. LAW § 10-b (McKinney 2011) (same).

<sup>25</sup> Some statutes contain other troubling accommodations, though far less uniformly. For example, the Delaware statute exempts certain public officials from administering weddings to which they are opposed for any reason. See DEL. CODE ANN. tit. 13, § 106 (2013) (“[N]othing in this section shall be construed to require any person (including any clergy person or minister of any religion) authorized to solemnize a marriage to solemnize any marriage, and no such authorized person who fails or refuses for any reason to solemnize a marriage shall be subject



article will focus on houses of worship and religiously-affiliated nonprofits, though fraternal organizations are also relevant in some states.

Not only are these particular subjects the ones most centrally in play under existing laws, but they have also been somewhat deemphasized by the literature on religion exemptions and same-sex marriage. Most of the conversation so far has focused on for-profit companies, such as the wedding photographer with Christian objections to working for same-sex couples.<sup>26</sup> Yet exclusions by nonprofits will likely also have a significant impact. Relative inattention to these important areas is a consequence of the debate's skew toward even stronger religion protections. To get a sense of claims by nonprofits for accommodations from public accommodations and government licensing laws, it is helpful to consider examples.

### B. Two Examples

Two illustrations not only present the issues implicated by existing statutes, but they have also served as reference points in the national debate. They therefore have importance both because of their substance and because of their impact on the thinking of lawmakers and legal experts. The first takes place in New Jersey and concerns public accommodations law, while the second is from Massachusetts and involves government licensing regulations.

Ocean Grove is a beachfront community located on the New Jersey shoreline.<sup>27</sup> Founded by Methodists, it was originally intended to allow church members to spend their summer vacations in a Christian setting. Its governing association owns not just a large meeting house in the middle of the town, but also a stretch of boardwalk that includes a pavilion capacious enough to accommodate groups. For years, the town's boardwalk pavilion was held open to members of the public, who used it for a wide variety of religious and secular events. Local authorities granted the association favorable tax treatment for the pavilion, partly because it was open to the public.

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to any fine or other penalty for such failure or refusal.”). On its face, this provision would even protect officials who object to interracial marriages, and even if their objection is not stated in religious terms. Unfortunately, refusals like that still occur, if rarely. *See, e.g.*, Shawn Nottingham, *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN (Nov. 3, 2009), <http://perma.cc/WX9H-N53Y>. Even though accommodations for objecting government officials have been urged by scholars, *see* Gaffney Hawaii Letter, *supra* note 6, at 4–5, they nevertheless rarely appear in actual statutes. Therefore, they will not provide a focus of this article.

<sup>26</sup> *See, e.g.*, Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, S. CAL. L. REV. (forthcoming 2014) (manuscript at 1) (on file with author) (leading with the wedding photographer case); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 N.W. J. L. & SOCIAL POL'Y 274, 275 (2010) (also discussing the wedding photographer case).

<sup>27</sup> *See* *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't of Law and Pub. Safety Dec. 29, 2008), available at <http://perma.cc/CS2W-Y2VV>; NeJaime, *supra* note 11, at 1202 (“[S]cholars and advocates consistently point to this case in calling for religious accommodations in marriage equality legislation.”).

In 2007, however, the association excluded from the pavilion a lesbian couple who wished to use the space to celebrate their civil union. After the couple brought a complaint, a state agency found that the town had violated New Jersey's civil rights law, which prohibited discrimination in public accommodations on the basis of sexual orientation and marital status.<sup>28</sup> Subsequently, the state also withdrew tax benefits for the pavilion.<sup>29</sup> In response to those decisions, Ocean Grove closed the pavilion to the public.<sup>30</sup>

The second example also involves a religiously-affiliated nonprofit organization that serves the public. Catholic Charities is a nationwide network of social service organizations affiliated with the Roman Catholic Church. A local affiliate, Catholic Charities of Boston, was one such organization helping children to find foster care homes and adoptive parents. Before 2006, the organization had routinely been placing children with same-sex couples, apparently simply to help address unmet need.<sup>31</sup> Although it had been doing so for years, using substantial government support, the affiliate was forced to stop the practice after church authorities became aware of it.<sup>32</sup> Massachusetts authorities determined that Catholic Charities' exclusion violated the state's licensing requirements, which prohibited discrimination on the basis of sexual orientation and marital status in foster care and adoption placement.<sup>33</sup> After state officials refused to grant an exemption, Catholic Charities surrendered its license and shut down *all* its placement services for children in Massachusetts.<sup>34</sup> Something similar happened afterward in San Francisco

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<sup>28</sup> *Ocean Grove*, No. PN34XB-03008.

<sup>29</sup> Jill P. Capuzzo, *Group Loses Tax Break over Gay Union Issue*, N.Y. TIMES (Sept. 18, 2007), <http://perma.cc/6K2K-QMNP>.

<sup>30</sup> See *Ocean Grove*, No. PN34XB-03008 at 5–6.

<sup>31</sup> See generally Lupu & Tuttle, *supra* note 26, at 296; Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILD. LEGAL RTS. J. 1, 3 (2007); Father Robert J. Carr, *Boston's Catholic Charities to Stop Adoption Service Over Same-Sex Law*, CATH. ONLINE (Mar. 10, 2006), <http://perma.cc/QT4J-P4JA>.

<sup>32</sup> Reportedly, church officials became aware of the practice by Catholic Charities after The Boston Globe published a story about it. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1.

<sup>33</sup> See 110 MASS. CODE REGS. 1.09(3) (2014) (general nondiscrimination policy); 102 MASS. CODE REGS. 1.03(2) (2014) (license requirement), 1.03(1) (nondiscrimination requirement); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 965 n.30 (Mass. 2003) (noting Massachusetts's laws against discrimination on the basis of sexual orientation in adoption). Some have argued that the Massachusetts nondiscrimination policy was a funding condition only. See Laura Kritsky, *Reality Check: The Big Lie About Catholic Charities, Adoption and Marriage Equality*, GLAD (Mar. 10, 2011), <http://perma.cc/NSG8-9ZG7>. In light of the regulations above, however, that perception appears to be erroneous. Massachusetts requires all adoption agencies to be licensed and imposes nondiscrimination on the basis of sexual orientation of all licenses. See 102 MASS. CODE REGS. 1.03(2) (2014). See also Avila, *supra* note 31, at 9, 12 (describing the nondiscrimination requirement as a condition for an adoption license).

<sup>34</sup> See Lupu & Tuttle, *supra* note 26, at 302; see also Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 831–43 (2007).

and the District of Columbia, and also in Illinois (although there the question was state funding rather than licensing).<sup>35</sup>

Not all religious social service agencies have shut down operations in the face of antidiscrimination regulations, however. Some have decided to comply with equality laws despite their theological objections.<sup>36</sup> Reportedly, a few Catholic Charities branches have even disaffiliated with the church in order to continue serving needy children.<sup>37</sup> And observers report that the need for foster care and adoption placement services in Boston itself has been met by other agencies.<sup>38</sup>

These two examples both involve nonprofit organizations that are affiliated with churches. Although the examples intersect with two distinct areas of law—public accommodations law and government licensing (with government funding affecting both)—comparable questions of law and policy are involved.<sup>39</sup>

### C. *Evaluating the Claims*

This Part starts by recalling and applying some familiar principles of law and political morality, and it then proceeds to compare these conflicts with other claims for religion accommodations from civil rights laws about which there is a high degree of confidence. It asks which solution coheres best with basic principles and paradigmatic cases, keeping in mind that any element might have to be revised in light of future lessons. It concludes that the governments correctly handled the religious objections of Ocean Grove and Catholic Charities of Boston.

#### 1. *Principles of Citizenship*

A first principle is *full citizenship*—the idea that every member of the political community should be able to exercise basic liberties consistent with the freedom and equality of others. As Justice Jackson articulated it, “My own view may be shortly put: I think the limits [on religious freedom] begin

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<sup>35</sup> See Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES (Dec. 29, 2011), <http://perma.cc/ZT4H-QGLS>; Cheryl Corley, *Illinois, Catholic Charities At Odds Over Gay Adoptions*, NPR (July 5, 2011), <http://perma.cc/88Q8-899F>.

<sup>36</sup> See Goodstein, *supra* note 35 (noting that Lutheran Child and Family Services, which is affiliated with the Lutheran Church Missouri Synod in Ill., decided to comply with the antidiscrimination provision and continue serving children despite theological opposition).

<sup>37</sup> See *id.* (“The Dioceses of Peoria and Belleville are spinning off their state-financed social services . . . . The work will be carried on, but the Catholic Church’s seminal, historic connection with it has been severed . . . .”).

<sup>38</sup> See *Gingrich Denies Facts About Same-Sex Adoption in Massachusetts, D.C.*, EQUALITYMATTERS (Jan. 10, 2012), <http://perma.cc/NTD8-WR8C>.

<sup>39</sup> It is quite possible that a child placement agency that is open to the public could be treated as a public accommodation in some jurisdictions. Therefore, both government licensing and public accommodations law could be involved in Catholic Charities cases. These areas of law are thus interrelated—again, they could both be understood as species of anti-discrimination law—and they may overlap in these examples.

to operate whenever activities begin to affect or collide with liberties of others or of the public.”<sup>40</sup> Madison said that religious freedom should be immune “from civil jurisdiction, in every case where it does not trespass on private rights or the public peace.”<sup>41</sup> And Jefferson famously championed religious freedom that “does me no injury” for it “neither picks my pocket nor breaks my leg.”<sup>42</sup> Full exercise of citizenship, in other words, should be enjoyed by every member of the political community, consistent with the exercise of basic freedoms by others.<sup>43</sup>

Today, religious freedom is generally conceptualized by federal constitutional law as freedom *under* law, or freedom from discrimination.<sup>44</sup> Even where it means freedom *from* general laws—as in the Religious Freedom Restoration Act (RFRA), certain state laws, and federal constitutional law as it is sometimes applied<sup>45</sup>—the government’s interest in protecting the liberty and equality of other protected classes can override religious interests.<sup>46</sup>

On the other side, the fundamental liberty rights of LGBT people, although increasingly protected as a matter of constitutional doctrine, are virtually universally understood to be freedom *under* law rather than freedom *from* general regulations. The underlying principle seems to be full citizenship for all.

A second principle is *equal citizenship*. Under this commitment, all members of the political community enjoy equal standing before the government. This principle is independent of the first. Even a person able to exercise all the basic freedoms that belong to citizens is also protected from being constituted as an essentially different sort of American. To take a religion example, the government could not declare, “America is a Christian Nation,” regardless of whether it otherwise impeded the exercise of basic

<sup>40</sup> Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring). Jackson continues, “Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.” *Id.* But nonreligious activities, such as when religious organizations engage in secular businesses to raise money from nonbelievers, are “Caesar’s affairs, and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.” *Id.*

<sup>41</sup> JAMES MADISON, WRITINGS 787–88 (1999).

<sup>42</sup> THOMAS JEFFERSON, WRITINGS 285 (1984). Jefferson was arguing against coercion of belief in this passage, but it has been taken to also refer to the limits of religious freedom. See Thomas C. Berg, *Religious Accommodation and the Welfare State*, HARV. J.L. & GENDER (forthcoming 2015) (manuscript at 32), available at <http://perma.cc/EB29-RDG4>.

<sup>43</sup> Antidiscrimination laws can be justified as liberty-based protections where markets cannot give full effect to economic liberty because of pervasive bias. See Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religion Exemptions*, 72 BROOK. L. REV. 125, 133 (2006).

<sup>44</sup> See generally *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

<sup>45</sup> See generally Nelson Tebbe, *Smith in Theory and Practice*, 32 CARDOZO L. REV. 2055 (2011).

<sup>46</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the IRS may deny tax exempt status, under a general policy opposing discrimination on the basis of race, to a university that prohibited interracial dating, even if the university was acting for religious reasons, and even though free exercise law at the time did nominally allow for exemptions from general laws).

freedoms. Justice Kagan recently explained that the Constitution guarantees that however people worship, they “count as full and equal American citizens . . . . [They] stand[ ] in the same relationship with [their] country . . . . [W]hen each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.”<sup>47</sup>

## 2. *Applying the Principles*

How do religion accommodations in marriage equality laws fare under these principles? And how do they cohere with paradigm cases in antidiscrimination and conscience law? Begin with a simple, paradigmatic situation: private individuals may decide whether to solemnize a particular marriage on theological grounds, even if that decision involves discrimination on a prohibited basis in violation of public accommodations law.<sup>48</sup> That is true even though clergy are empowered to preside over weddings that result in civil marriages as well as religious marriages.

So statutory accommodations of these decisions are defensible. They are also unnecessary, because they duplicate basic constitutional law under free exercise and the freedom of expressive association.<sup>49</sup> Clergy and congregations have a constitutional right to shape private marriage according to their beliefs. For example, they may refuse to perform interfaith weddings. And they have been able to perform same-sex weddings even in states that excluded same-sex couples from civil marriage and therefore refused to give such unions legal effect.<sup>50</sup> Conversely, no state could constitutionally require

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<sup>47</sup> *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting). Justice O’Connor articulated a similar principle in the endorsement test, which prohibited government actions that render people “outsiders, not full members of the political community,” on account of their religious identity or beliefs. *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring). *But see* Koppelman, *supra* note 43, at 145 (questioning the equal citizenship rationale with respect to gay men and lesbians).

<sup>48</sup> For a full discussion of this principle, see Lupu & Tuttle, *supra* note 26, at 284 (setting out the rule that “neither clergy nor faith communities can be directly coerced into celebrating weddings for anyone, same-sex couples included” and citing cases). More than likely, officiating at weddings would not be held to be a public accommodation in the first place, of course.

<sup>49</sup> *See id.*; Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. (forthcoming 2014) (manuscript at 6 n.24), <http://perma.cc/MWL7-8QBH> (“No serious [scholar] argues that the government should force religions to perform gay weddings (or ordinations or baptisms or other religious functions) against their will.”); Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Douglas Laycock et al. eds., 2008) (same).

<sup>50</sup> A North Carolina statute seemed to prohibit even private solemnization of a marriage without a license. N.C. GEN. STAT. § 51-7 (2001). Where a license was not available, because for instance same-sex marriages were prohibited in the state, the law appeared to bar even private ceremonies, though the statute was not entirely clear. It was challenged by the United Church of Christ on constitutional grounds. *See* Pl.’s Mem. of Law in Supp. of Their Mot. for Prelim. Inj., *General Synod of the United Church of Christ v. Cooper*, 2014 WL 2451299 (W.D.N.C. 2014). Before the court could rule, the Fourth Circuit mooted the issue by invalidating the exclusion of same-sex couples from civil marriage. *General Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014) (citing *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)).

religious groups to perform such weddings once they became eligible for civil recognition in a state with marriage equality. Similar reasoning allows those congregations to decide who may use their sanctuaries for weddings, so long as the buildings are not held open to the public.

While it is possible to imagine a law that deputizes clergy to perform civil weddings only on the condition that they not discriminate on protected grounds,<sup>51</sup> the practice of allowing clergy to perform civil marriages is so widespread and longstanding in the United States that conditioning it on nondiscrimination would be an affront to religious freedom under understandings that are virtually universal today.<sup>52</sup>

Beyond those constitutional basics, religion accommodations quickly become contested. Take first the exemption that allows religiously-affiliated nonprofit organizations to close their facilities to any and all weddings and receptions that offend their religious beliefs, even if those facilities are public accommodations under general anti-discrimination law. Applying the principle of full citizenship highlights an immediate problem, which is that the accommodation appears to impinge on the liberties of others—namely the ability of LGBT people to access facilities for the celebration of their union in a particular community. The couple that lived in Ocean Grove, for instance, was burdened to some degree by the religious organization's decision to close the boardwalk pavilion to them. Systematic exclusion of that sort could significantly impact the basic economic wherewithal of same-sex couples.

Even if the exclusion is not widespread and alternative facilities exist, however, the principle of equal citizenship weighs against allowing public accommodations to exclude people on the basis of sexual orientation or marital status. One of the basic purposes of antidiscrimination law, after all, is to preserve the equal standing of members of minority groups in the economy and in society, as in politics.<sup>53</sup> A person's relationship with the community can be altered with respect to equal citizenship even if adequate alternative venues exist. Again, the two women who lived in Ocean Grove and were excluded from its primary wedding venue subsequently had an altered relationship with the community run by the Camp Meeting Association: they stood now not simply as residents of the town, but as committed-lesbian

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<sup>51</sup> Lupu & Tuttle, *supra* note 26, at 282.

<sup>52</sup> *Id.* at 284–85. Whether government funds could be withheld from religious entities that refuse to perform same-sex marriages is a more complicated question. See generally Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

<sup>53</sup> *Roberts v. Jaycees*, 468 U.S. 609, 625 (1984) (“[I]n upholding Title II of the Civil Rights Act of 1964, which forbids race discrimination in public accommodations, we emphasized that its fundamental object was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. That stigmatizing injury, 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.”) (citations omitted) (internal quotation marks omitted); Koppelman, *supra* note 26, at 7–8 (“Antidiscrimination law has multiple purposes. Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.”).

residents of the town. Importantly, nothing about that altered relationship depended on their subjective feelings of insult or isolation—it was a consequence of exclusion (or it would have been, had that exclusion been legally sanctioned).<sup>54</sup> A fundamental insight of antidiscrimination law is that equal citizenship in a community can be infringed not just by government discrimination, but also by exclusion from nongovernmental public accommodations that is tolerated by a legal regime.<sup>55</sup>

A similar argument runs against the second exemption claim, concerning the state's licensing provision that required child placement services like Catholic Charities to refrain from refusing to serve same-sex couples. Not only does exclusion restrict the access of gay and lesbian couples to foster care and adoption placement services, but it also affects their citizenship standing when state law explicitly protects such exclusion. According to Massachusetts law, child placement is a public function that cannot be limited on the basis of sexual orientation but must be held open to all families capable of protecting the best interests of the child.<sup>56</sup>

Some might argue against this application of principles of full and equal citizenship by distinguishing between status and conduct. Discrimination against LGBT *people* as such is morally reprehensible and legally punishable, the argument might run, but objection to the *act* of marriage is understandable and should be accommodated.<sup>57</sup> Yet this distinction does not perfectly track social meanings or practices. Marriage, like intimate sexual conduct, may well be too closely associated with LGBT identity to be separately proscribed without damaging citizenship interests. Justice O'Connor rejected the act/identity distinction in the context of intimate sexual relations,<sup>58</sup> and more recently the New Mexico Supreme Court rejected it in the

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<sup>54</sup> Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1524 (2000) (arguing official expression can work constitutional harm not because of its effect on subjective feelings but because it alters the legal relationship with government).

<sup>55</sup> *Jaycees*, 468 U.S. at 625–26 (noting that the state's public accommodation law applied to a range of nongovernmental actors engaged in "various forms of public, quasi-commercial conduct" and noting that this broad definition of public accommodations "reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups").

<sup>56</sup> See sources cited *supra* note 33.

<sup>57</sup> See, e.g., David Bernstein, *Guest Post from Prof. Doug Laycock: What Arizona SB1062 Actually Said, Volokh Conspiracy*, WASH. POST (Feb. 27, 2014), <http://perma.cc/GR5W-ZYAX> ("I know of no American religious group that teaches discrimination against gays as such . . . . The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling."); Gaffney Hawaii Letter, *supra* note 6, at 17–18 ("Some assume that any religious objection to same-sex marriage must be an objection to providing goods or services to gays as such: in other words, that a refusal represents animus towards gay couples. Yet many people of good will view marriage as a religious institution and the wedding ceremony as a religious sacrament.").

<sup>58</sup> *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("[T]he conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

context of unions between people of the same sex.<sup>59</sup> Scholars have questioned the distinction for similar reasons.<sup>60</sup> Citizenship concerns are difficult to avoid in the context of marriage, once they are recognized as relating to sexual orientation itself.

### 3. *Comparison to Other Antidiscrimination Protections*

A method of reflective equilibrium tests these applications of familiar principles by comparing the outcomes they suggest—the denial of religion exemptions from prohibitions on discrimination in public accommodations—with the outcomes in familiar cases. Race discrimination is the paradigmatic civil rights violation in America, of course, and religious objections have arisen to marriage between people of different races as they have to marriage between people of the same sex or gender.<sup>61</sup> Would a religious organization receive an exemption from public accommodations laws so it could exclude access to a couple because of its sincere theological opposition to interracial marriage? Almost certainly not.<sup>62</sup> Neither would it win an exemption from a licensing regime like the one in Massachusetts.<sup>63</sup> Although a few commentators have argued for a change,<sup>64</sup> civil rights laws in the

<sup>59</sup> *Elane Photography v. Willock*, 309 P.3d 53, 61 (N.M. 2013). (“To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of [New Mexico’s antidiscrimination law].”).

<sup>60</sup> See NeJaime, *supra* note 11, at 1169 (“Marriage is merely one form of sexual orientation identity enactment, and religious objections to same-sex marriage are merely a subset of objections to sexual orientation equality.”); Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 714 (2014) (“Despite attempts to resurrect a distinction between sexual conduct and sexual orientation status, religious resistance to same-sex marriage threatens the same antidiscrimination norms that religious objections to . . . sexual orientation discrimination laws did.”); cf. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1311–14 (2011) (exploring whether discrimination against same-sex conduct, such as sexual activity and relationships, is tantamount to discrimination on the basis of status as a matter of social meaning).

<sup>61</sup> See Sepper, *supra* note 60, at 714 (“Historically, as now, religious opposition emerged in response to race, religion, or gender nondiscrimination requirements. In particular, outcry around interracial marriage followed a pattern much like that of objections to same-sex marriage.”); James Oleske, *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriage*, 50 HARV. C.R.-C.L. L. REV. (forthcoming 2015) (manuscript at 3–4), <http://perma.cc/B7EV-BABK> (noting that “religious objections to interracial marriage were pervasive” from the 1940s through the 1960s and drawing a parallel to current religious objections to same-sex marriage).

<sup>62</sup> See, e.g., *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (calling “patently frivolous” the claim by a restaurant owner that an anti-discrimination law “was invalid because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of the [owner’s] religion’”); cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying a free exercise exemption from denial of tax exempt status to a school that prohibited interracial dating among students on religious grounds).

<sup>63</sup> *But cf. Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (turning away a Title VII race discrimination claim under the ministerial exception).

<sup>64</sup> See, e.g., Richard A. Epstein, *Forgotten No More*, 13 ENGAGE 138, 140 (2012) (reviewing JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012)) (arguing that all groups, including commercial actors, ought to enjoy constitutional protection when they make associational decisions, including on grounds of race).



United States virtually never permit that sort of exemption.<sup>65</sup> That is true even though religious objections to interracial marriage have long been heard.

Is religious objection to interracial marriage different from religious objection to same-sex marriage, so that the two cannot meaningfully be compared? Kent Greenawalt has offered the most thoughtful defense of that distinction, based on two arguments. First, he maintains that the practice of limiting civil marriage to one man and one woman has been virtually universal among cultures and religions, historically.<sup>66</sup> Second, he observes that “without modern technology, it takes a union of a male and a female to produce children.”<sup>67</sup> Greenawalt concludes that while neither of these points is sufficient to defend exclusions from civil marriage, they do make “comprehensible” a sense that “such unions are ‘unnatural’ or ‘less natural.’”<sup>68</sup>

Whether prohibitions on interracial and same-sex marriage have been comparably widespread over time is a matter for professional historians. It seems at least debatable. Certainly, interracial marriages have also been considered unnatural—that was noted in the *Loving* opinions, among other places.<sup>69</sup> And, the prohibition had been longstanding. Greenawalt might well answer that the opposition to interracial marriage is not comprehensible, despite its avowed grounding in history and biology, and therefore that it is less worthy of accommodation, even though that opposition has been rooted in religion. Yet if that is so, then some reason other than history and biology must be found for saying that opposition to racial intermarriage is incomprehensible but opposition to LGBT marriage is not. Perhaps a reason can be found, although it does not leap to mind. Reasonable people surely do today disagree on whether the race analogy works.<sup>70</sup>

Even if it does not, however, other analogies are readily available. Laws in both New Jersey and Massachusetts also prohibit discrimination on the bases of religion and marital status.<sup>71</sup> Ocean Grove could no less exclude a Muslim wedding or a wedding for a divorcee, even if it had religious

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<sup>65</sup> See, e.g., *Piggie Park Enters., Inc.*, 390 U.S. at 402 n.5 (denying a claim for a free exercise exemption from an antidiscrimination law for public accommodations).

<sup>66</sup> Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 113 (2013).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (noting Virginia’s rationales for prohibiting interracial marriage, including to prevent “corruption of blood” and creation of a “mongrel breed of citizens”); see also *id.* at 3 (quoting the trial court as saying “Almighty God created the races white, black, yellow, malay and red . . . . The fact that he separated the races shows that he did not intend for the races to mix.”). For a treatment of the comprehensibility of such attitudes, see Oleske, *supra* note 61, at 22–24.

<sup>70</sup> As an aside, recall that nothing about the exemptions being written into most marriage equality laws are specific to sexual orientation—they would excuse religious objections to marriages or relationships on any grounds, including race. For proposed laws that apply more narrowly to same-sex unions and marriages, see Carpenter et al., *supra* note 9.

<sup>71</sup> New Jersey Law Against Discrimination, N.J.S.A. 10:5-4 (2007); 110 MASS. CODE REGS. 1.09(3) (2014); 102 MASS. CODE REGS. 1.03(1) (2014).

reasons for doing so.<sup>72</sup> Nor could Catholic Charities have refused to place children with couples who were remarried. State laws would not have accommodated such objections.

So even if the race analogy is complicated, comparison to prohibitions on differentiation based on marital status and religion itself point to the same result. My provisional conclusion is that a prohibition on religion exemptions in public accommodations and government licensing in marriage equality laws does seem to cohere with scenarios in antidiscrimination law about which there is a high degree of confidence. Comparing the scenarios, in other words, supports the earlier application of principles of full and equal citizenship, namely that we should hesitate to allow a religion exemption that generates exclusion of same-sex couples from public accommodations.

#### 4. *Comparison to Refusal Laws or Conscience Clauses*

But what if the correct comparison is not to antidiscrimination law, but instead to protections for medical providers with moral objections to certain reproductive choices? That might suggest a more permissive approach to cases like *Ocean Grove* or situations like the one involving Catholic Charities of Boston.<sup>73</sup>

Multiple laws on the federal and state level extend significant solicitude to medical providers who otherwise would have a duty of care with respect to certain reproductive choices. These provisions, commonly known as refusal laws or conscience clauses, exempt doctors and certain other medical providers who would otherwise be asked to perform or assist in reproductive activities, most commonly sterilization, abortion, and contraception. A seminal provision was the 1973 Church Amendment, which prohibited federal programs from conditioning funding on any requirement that an individual “perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.”<sup>74</sup> More recently, the 2005 Hyde-Weldon Amendment extended the degree of involvement to cover “facilitat[ing] in any way” the performance of an abortion.<sup>75</sup> It also expanded the definition of covered persons to include

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<sup>72</sup> Assume here that divorce and remarriage are anathema under the relevant religious teachings.

<sup>73</sup> See Wen, *supra* note 32, at 3 (quoting the leader of a Catholic organization arguing that Catholic Charities ought to have the benefit of a “conscience clause” that would exempt it from the state’s nondiscrimination requirement).

<sup>74</sup> 42 U.S.C. § 300a-7 (2006). For an expert treatment of the background and typical content of refusal clauses, see Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. (forthcoming 2015) (manuscript at 11–17).

<sup>75</sup> Consolidated Appropriations Act of 2005 (Hyde-Weldon Amendment), Pub. L. No. 108-447, § 103, 118 Stat. 2809, 2867 (2004) (“None of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of, any abortion.”).

some health insurers as well as individual providers,<sup>76</sup> and it provided accommodation not only for an objectionable procedure, but also for “counseling or referral.”<sup>77</sup>

State laws have continued and expanded some of these exemptions, though there is considerable variation in the provisions. Mississippi, for example, accommodates not only physicians but “any individual who may be asked to participate in any way in a health-care service;”<sup>78</sup> it relieves obligations not just for direct participation but for “any phase of patient medical care, treatment or procedure,” including referral and counseling;<sup>79</sup> and it covers objections not just to abortion, sterilization, and contraception, but to “any other care or treatment rendered by health care providers or health care institutions.”<sup>80</sup> Moreover, the Mississippi law accommodates health care institutions<sup>81</sup> and health care “payers,”<sup>82</sup> in addition to individual providers.<sup>83</sup> Not every state law goes this far, to be sure, but the Mississippi law can provide a sense of the range of possibilities.

A few characteristics of this regime distinguish it from antidiscrimination law in its treatment of conscientious opposition. First and most powerfully, conscience clauses usually apply regardless of whether accommodating objectors imposes serious burdens on patients seeking a medical good or service. Although the clauses sometimes deny accommodation in emergency situations,<sup>84</sup> they do not typically contain limitations for situations in which lifting the requirement on the medical provider would impose a substantial or significant burden on patients.<sup>85</sup>

<sup>76</sup> 42 U.S.C. § 1395w-22(j)(3)(B) (2006).

<sup>77</sup> *Id.*

<sup>78</sup> *See, e.g.*, MISS. CODE ANN. § 41-107-3(b) (2004) (defining “health-care provider” broadly); *id.* § 41-107-5(1) (2004) (“A health-care provider has the right not to participate, and no health-care provider shall be required to participate in a health-care service that violates his or her conscience.”). For a detailed description of the Mississippi law, see NeJaime & Siegel, *supra* note 74, at 14–15.

<sup>79</sup> *Id.* § 41-107-3(a) (2004) (“‘Health-care service’ means any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health-care providers or health-care institutions.”).

<sup>80</sup> *Id.* *But see* ADAM SONFIELD, RIGHTS VS. RESPONSIBILITIES: PROFESSIONAL STANDARDS AND PROVIDER REFUSALS, GUTTMACHER REPORT ON PUBLIC POLICY 8, (2005), <http://perma.cc/QE2Y-NL5L>.

<sup>81</sup> MISS. CODE ANN. § 41-107-7 (2013).

<sup>82</sup> *Id.* § 41-107-9.

<sup>83</sup> *Id.* § 41-107-5.

<sup>84</sup> *See, e.g.*, 745 ILL. COMP. STAT. 70/6 (1998) (“Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.”).

<sup>85</sup> *See* Consolidated Appropriations Act of 2005 (Hyde-Weldon Amendment), Pub. L. No. 108-447, 118 Stat. 2809 (2004) (protecting objectors without regard to consequences, even of an emergency nature); 42 U.S.C. § 300a-7 (2000) (same); N.J. STAT. ANN. § 2A:65A-1 (West 2014) (providing, without an emergency exception, that “No person shall be required to perform or assist in the performance of an abortion or sterilization.”); SONFIELD, *supra* note 80, at 8 (“Only a handful of [state refusal] laws specifically provide an exception to refusal rights in emergency circumstances . . .”).

Second, conscience clauses generally extend protection not only to religious people, but to everyone who has a moral or conscience-based objection to involvement in a medical practice.<sup>86</sup> This broad scope avoids Establishment Clause problems that might follow provisions that relieved only religious people but then shifted the cost of that relief onto women who did not share those religious beliefs.<sup>87</sup> Yet it also increases the impact on affected third parties.

Conscience clauses claim to reflect widespread sympathy with profound opposition to some forms of reproductive freedom and other medical choices. They allow private beliefs to prevail over general duties. Therefore, drawing a comparison between refusal laws and marriage equality statutes appears to push toward broad protection for religion from public accommodations and government licensing law. Much as religious actors are widely thought to deserve broad protections from having to assist with medical decisions to which they are opposed as a matter of conscience, so too should religious actors be afforded protection from involvement with civil marriages to which they are opposed as a matter of theology, it might be thought.<sup>88</sup>

Even if protection afforded by conscience clauses or refusal provisions is supportable as a matter of law and morality—and this article takes no position on that question—several distinctions make this particular comparison inapposite.<sup>89</sup> First, the directness of involvement often differs. Whereas the majority of conscience clauses protect against personal facilitation of medical choices, religion exemptions in marriage equality laws protect against attenuated assistance as well: renting out public buildings or providing child placement services to couples who marry against theological rules, for instance. In other words, religion accommodations in the marriage setting protect against some attenuated involvement with the marriage itself.<sup>90</sup> That marks an important distinction from conscience clauses, which gener-

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<sup>86</sup> See, e.g., 745 ILL. COMP. STAT. ANN. 70/4 (West 1998) (protecting refusals based on “conscience”); N.J. STAT. ANN. § 2A:65A-1 (West 2014) (protecting refusals made on any ground); FLA. STAT. § 381.0051(5) (2012) (protecting decisions made on “medical or religious” grounds); ME. REV. STAT. tit. 22, § 1903 (2014) (protecting “religious or conscientious objection[s]”).

<sup>87</sup> U.S. CONST. amend. I. For further discussion of this constitutional rule, see *infra* Part II.C.

<sup>88</sup> See Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 80–81 (Douglas Laycock et al. eds., 2008) (arguing that conscience clauses in the reproductive health care context can provide useful models for religion exemptions in the context of civil marriage between people of the same sex or gender).

<sup>89</sup> Here I agree with Sepper, *supra* note 60, at 745 (“The analogy to conscientious objection in the medical model is inapt . . .”).

<sup>90</sup> See generally *id.* at 743 (contrasting religion exemptions in the context of same-sex marriage from conscience clauses in the medical context, most centrally because “virtually all objections to marriage founder on the requirements of causal and proximate responsibility for the act of marriage”).

ally shield only direct involvement with the controversial act (though a few do go farther and protect institutions and insurers).<sup>91</sup>

Second and related, refusal or conscience clauses apply at a discrete moment in time—they pertain to provision of a medical service, but they do not license different treatment of people who seek those services outside that moment. Some claims for religion accommodation with regard to same-sex marriage are similarly momentary. For example, the association in *Ocean Grove* only asked for permission to treat the lesbian residents differently during the celebration of their civil union. Yet other claims reach much further in time.<sup>92</sup> Catholic Charities, for instance, wanted to be able to refuse services to same-sex couples for as long as their relationships or marriages lasted—potentially years after any wedding. Its claim therefore persisted longer than the typical conscience clause, making it incomparable in this respect. And some state statutes provide for accommodations that may endure for long periods. For instance, as explained below, the D.C. law exempts religiously affiliated organizations from “promot[ing]” a marriage by providing certain services in violation of their beliefs.<sup>93</sup> Provisions like that last throughout the marriage—they could be invoked years after the wedding itself.

Third, Elizabeth Sepper has argued powerfully that conscience clauses concerning termination of pregnancy implicate life and death issues that intersect directly with the ethics of the medical profession, to which they are generally directed.<sup>94</sup> They compare more readily to the core religion exemption that protects the ability of clergy to celebrate only the weddings that conform with their theological beliefs than they do to requirements that a religious organization not deny publicly-available facilities or social services to LGBT people. Sepper concludes that the closer comparison for marriage equality laws is to antidiscrimination provisions.<sup>95</sup>

In sum, while viewing these cases through an antidiscrimination lens is straightforward—in fact, they actually *are* antidiscrimination provisions, pertaining to public accommodations and government licensing—analogizing them to conscience clauses in the abortion context seems strained, partly because religious actors are involved more indirectly and partly because exemptions that pertain to a marriage, as opposed to a wedding, can endure far longer than exemptions for performing abortions or for dispensing contraception.

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<sup>91</sup> Clergy officiating at a wedding provide a more direct parallel to conscience clauses or refusal provisions in the reproductive context, and that parallel supports constitutional protection for them.

<sup>92</sup> NeJaime, *supra* note 11, at 1229 (“[T]he analogy to conscience clauses reflects a lack of appreciation for the temporal difference between an abortion, which occurs at a specific moment in time, and a marriage, which endures over a significant period of time.”).

<sup>93</sup> D.C. CODE § 46-406(e)(1) (2013).

<sup>94</sup> Sepper, *supra* note 60, at 708. The life and death nature of the act also distinguishes accommodation in the marriage equality context from conscientious objection in the areas of compulsory military service and capital punishment.

<sup>95</sup> *Id.* at 761.

The conclusion of this Part, after a search for coherence with basic principles and paradigm cases, is that both *Ocean Grove* and the situation concerning Catholic Charities of Boston were appropriately handled by the states. That conclusion, if correct, raises serious concerns about some existing exemptions.

## II. EXISTING EXEMPTIONS

Shifting focus to the pattern of statutory accommodations that have been passed so far demonstrates that they would in fact upend attractive outcomes in the two areas of public accommodations and government licensing.

### A. *Public Accommodations*

A common provision allows religious groups and religiously-affiliated organizations to refuse to provide goods, services, facilities, and public accommodations for the celebration and solemnization of any wedding to which the organization is theologically opposed. Almost every marriage equality statute contains some such provision.<sup>96</sup> Religious organizations are defined variously but broadly to include houses of worship and religiously-affiliated groups.<sup>97</sup> Such organizations are then not required to provide “services, accommodations, advantages, facilities, goods or privileges” that are related to the solemnization or celebration of a wedding to which the organi-

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<sup>96</sup> See *supra* note 2.

<sup>97</sup> See, e.g., CONN. GEN. STAT. ANN. § 46b-35a (West 2009) (applying the provision to “a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society”); HAW. REV. STAT. § 572-12.2(a) (West 2014) (“a religious organization or nonprofit organization operated, supervised, or controlled by a religious organization”); 2012 Md. Laws ch. 2 (“a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by a religious organization, association, or society”); N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2011) (“a religious entity as defined under the education law or section two of the religious corporations law, or a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation as described in this subdivision”); R.I. GEN. LAWS ANN. § 15-3-6.1(c) (West 2014) (“a religious organization, association, or society, and any nonprofit institution or organization operated, supervised or controlled by a religious organization, association or society, or a fraternal benefit or service organization that has among its stated purposes the promotion and support or protection of a religious organization, association, or society and that restricts membership to practicing members of that religious organization, association or society”); VT. STAT. ANN. tit. 9, § 4502 (2014) (“a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society”); WASH. REV. CODE ANN. § 26.04.010(5) (West 2012) (“religious organization”).

zation is opposed on religious grounds.<sup>98</sup> Hawaii lists only “goods, services, [and] facilities,” but otherwise is substantially similar.<sup>99</sup> Washington State goes somewhat further and specifies that, in addition to the standard activities listed in other statutes, the accommodation includes “use of any campus chapel or church” for the celebration of a wedding.<sup>100</sup>

Any of these provisions would allow a religious organization, broadly defined, to refuse to allow same-sex couples to use its facilities for the celebration of their weddings—thereby overturning the result in the *Ocean Grove* case—because all of them apply even to buildings and event spaces that operate as public accommodations.<sup>101</sup> Of course, the provisions do not

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<sup>98</sup> See CONN. GEN. STAT. ANN. § 46b-35a (West 2009); see also, e.g., 2012 Md. Laws ch. 2; N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2011); R.I. GEN. LAWS ANN. § 15-3-6.1(c) (West 2014); VT. STAT. ANN. tit. 9, § 4502 (2014); WASH. REV. CODE ANN. § 26.04.010(5) (West 2012). Illinois’ law is somewhat different. See 750 ILL. COMP. STAT. ANN. 5 / 209 (West 2014) (“No [house of worship,] mission organization, or other organization whose principal purpose is the study, practice, or advancement of religion is required to provide religious facilities for the solemnization ceremony or celebration associated with the solemnization ceremony of a marriage if the solemnization ceremony or celebration associated with the solemnization ceremony is in violation of its religious beliefs.”). Unlike other states, Illinois limits this provision by excluding “businesses, health care facilities, educational facilities, [and] social service agencies,” *id.*, but it exempts all other religious organizations.

<sup>99</sup> HAW. REV. STAT. § 572-12.2(a) (West 2014).

<sup>100</sup> WASH. REV. CODE ANN. § 26.04.020(6) (West 2012).

<sup>101</sup> It is true that some states exempt religious organizations from statutes preventing discrimination in public accommodations. New York’s Human Rights Law, for instance, states that “a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private” and therefore not a public accommodation. N.Y. EXEC. LAW § 292(9) (McKinney 2014). If such exemptions were widespread, then the impact on public accommodations law of religion exemptions in marriage equality laws might be quite limited.

However, state laws vary widely in the breadth of religion exemptions in public accommodation statutes, and many of those exemptions would not change the outcome in a case like *Ocean Grove*—the religious organization would still be subject to public accommodations law. Even in New York, the exemption just cited applies only to the state’s Human Rights Law, but not to its Civil Rights Law, which contains no such exemption. See N.Y. CIV. RIGHTS LAW § 40 (McKinney 2010). Moreover, the New York exemption only applies by its terms to religious corporations themselves, and not to religiously-affiliated nonprofits like the *Ocean Grove* Camp Meeting Association. Finally, courts have construed the religious corporation exemption narrowly. See *Logan v. Salvation Army*, 809 N.Y.S.2d 846, 848–49 (N.Y. Sup. Ct. 2005). For an argument that *Ocean Grove* would have come out the same way in New York, before the religion exemption in the state’s marriage equality law, see David Wexelblat, Note, *Trojan Horse or Much Ado About Nothing? Analyzing The Religious Exemptions in New York’s Marriage Equality Act*, 20 AM. U. J. GENDER SOC. POL’Y & L. 961, 973–78 (2012). This suggests that the exemption included in New York’s marriage equality law made a real difference in the law of public accommodations.

Other states that protect gay men and lesbians in their public accommodations laws have religion exemptions that vary widely—only a few of them might protect religious organizations and religiously-affiliated organizations absent accommodations in marriage equality statutes. Many states do not exempt religious organizations from public accommodations law at all. See, e.g., CAL. CIV. CODE § 51 (West 2012) (Unruh Civil Rights Act); DEL. CODE ANN. tit. 6, § 4502 (West 2013), § 4504; HAW. REV. STAT. §§ 489-2 to 489-3 (West 2014); 775 ILL. COMP. STAT. ANN. 5 / 5-102.1 (West 2010) (stating only that the statute does not override constitutional protections for religion); VT. STAT. ANN. tit. 9, § 4502 (West 2014) (providing no accommodation other than the one added as part of the marriage equality act). Others exempt religious organizations, but not in their commercial activities. See, e.g., MINN. STAT.

mention facilities open to the public, but only because they apply by their terms to all facilities, whether private or public.<sup>102</sup> That matters because all of the relevant states prohibit discrimination on the basis of sexual orientation in their public accommodations statutes.<sup>103</sup> If this exemption of religious actors from public accommodations laws is a matter of regret, as Part I argued it is, then there is cause for concern that so many states include such protections as part of their marriage equality statutes.<sup>104</sup> They are dealing a significant setback to antidiscrimination law, not only for LGBT people, but potentially for others who wish to enter into unorthodox marriages.<sup>105</sup>

A few states have drawn their exemptions for religious services and facilities in marriage equality laws somewhat more narrowly, perhaps narrowly enough to preserve the outcome in *Ocean Grove*. For example, Illinois allows religious organizations to refuse to open “religious facilities” for wedding celebrations that are theologically objectionable, but does not extend this accommodation to goods, services, privileges, and the like.<sup>106</sup> And it then defines “religious facilities” so that the term does “*not* include facilities such as businesses, health care facilities, educational facilities, or social service agencies.”<sup>107</sup> If the pavilion at Ocean Grove counts as a “business,” then it would not be covered by the exemption, but of course that is not certain.

Similarly, Minnesota has an accommodation for religious organizations with theological objections to providing “goods and services” for solemnization or celebration of a wedding, but it excludes from this accommodation “secular business activities . . . the conduct of which is unrelated to the religious and educational purposes for which [the religious association] is

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ANN. § 363A.26 (West 2013); R.I. GEN. LAWS ANN. § 34-37-4.2 (West 2014). One state exempts all “religious organization[s],” but only from the prohibition on discrimination on the basis of sexual orientation. N.H. REV. STAT. ANN. § 354-A:2 (2007). Overall, then, few state statutes exempt religious organizations from public accommodations laws in such a way that the exemptions included in marriage equality statutes would be redundant.

<sup>102</sup> In fact, the exemptions *must* be read to apply to public accommodations, because otherwise they have no meaning—after all, private entities are under no obligation to treat gay and lesbian couples evenhandedly in the first place.

<sup>103</sup> See *infra* note 138 and accompanying text. A possible consequence is that without a religion exemption for same-sex weddings, religious groups may feel a need to close their buildings to other groups in order to avoid being deemed a public accommodation that must open their doors to theologically unorthodox weddings. See Troy Washington, *Church boots AA group over gay weddings*, KLSA.COM (Oct. 9, 2014), <http://perma.cc/UTZ8-CKJF> (reporting that a Louisiana church discontinued allowing an Alcoholics Anonymous group to meet in its buildings for fear that otherwise it would be subject to public accommodations laws that would require it to allow same-sex weddings, citing the *Ocean Grove* case). As an advocate quoted in the article pointed out, the church was mistaken—it had nothing to fear because Louisiana law does not prohibit discrimination on the basis of sexual orientation, among other factors that distinguish the *Ocean Grove* situation. See *id.*

<sup>104</sup> See *supra* note 2.

<sup>105</sup> Again, weddings of people of other faiths provide one potential example, and remarriages provide another.

<sup>106</sup> 750 ILL. COMP. STAT. ANN. 5 / 209 (a-10) (West 2014).

<sup>107</sup> *Id.* (emphasis added).



organized . . . .”<sup>108</sup> If providing a public accommodation is considered a “secular business activity” of the Ocean Grove Camp Meeting Association, then this provision would not reverse the result in that case.

New Jersey itself considered a bill that would codify the decision by the state courts to extend civil marriage to gay and lesbian couples.<sup>109</sup> At least some versions of that bill excluded public accommodations from the commonplace exemption for assistance by religious organizations with weddings and celebrations.<sup>110</sup> Even with that limitation, however, the bill died in the state legislature, reportedly because civil rights organizations were unwilling to compromise on religion accommodations in the wake of a favorable judicial decision.<sup>111</sup>

Every other marriage equality law, however, retrenches on civil rights laws in this important respect. The result is that a potentially wide range of public goods, services, and facilities are exempt from antidiscrimination provisions, including university chapels and event spaces in some states.<sup>112</sup>

### B. Adoption and Other Social Services

As the previous Part showed, the existing exemptions will lead to serious problems for public accommodations law. Whether adoption agencies and other social service providers may refuse to serve same-sex couples, married or unmarried, is a somewhat more complicated question under existing state statutes guaranteeing marriage equality. This Part will describe three sorts of statutory religion exemptions that arguably allow social service agencies to refuse service to gay and lesbian couples. But whatever the precise scope of those provisions, it doubtless is the case that at least *some* adoption agencies and other social service providers will be able to refuse service because of religious opposition to same-sex unions. Areas of law implicated by these provisions include the public accommodations law ad-

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<sup>108</sup> More fully, the exemption reads “Except for secular business activities engaged in by a religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized, no religious association, religious corporation, or religious society shall be required to provide goods or services at the solemnization or celebration of any civil marriage . . . .” MINN. STAT. ANN. § 517.09(3) (West 2013).

<sup>109</sup> See *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013). The State dropped its appeal of the decision. See Wilson, *supra* note 49, at 14 n.60.

<sup>110</sup> N.J. S.B. 3109, 215th Leg. (introduced Dec. 12, 2013) (“No religious society, institution or organization in this State shall, *other than when providing a place of public accommodation . . .* be compelled to provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.”) (emphasis added).

<sup>111</sup> See Ken Klukowski, *NJ Stalls Same-Sex Marriage Bill To Kill Religious Protections*, BRIETBART.COM (Dec. 18, 2013), <http://perma.cc/F2BL-HWD8> (explaining that Democratic Senators pulled the bill after gay rights organizations such as Lambda Legal opposed “any kind of religious exemption”); Wilson, *supra* note 49, at 14 n.60.

<sup>112</sup> See, e.g., Benjamin Woodard, *Loyola University Limits Campus Weddings in Wake of Same-Sex Marriage Law*, DNAINFO CHICAGO (Feb. 26, 2014), <http://perma.cc/3QKB-QDGD>.

dressed in the last Part, because some adoption agencies have been considered public accommodations subject to state prohibitions on discrimination on the basis of sexual orientation and marital status.<sup>113</sup> They also include government licensing law, because some jurisdictions prohibit discrimination by government licensees in child placement services. Massachusetts is one such jurisdiction, and that is why Catholic Charities of Boston could not refuse to place children with same-sex couples.<sup>114</sup> Even aside from civil rights statutes, common law rules in some jurisdictions prohibit all entities that hold themselves open to the public from excluding anyone irrationally.<sup>115</sup> All of these laws set up potential conflicts with social service agencies, including child placement organizations, that refuse to serve same-sex couples on religious grounds.

Marriage equality statutes contain at least three types of accommodations that could affect social service providers. A first type of exemption explicitly shields religious organizations engaging in adoption and other social services. For example, Connecticut's law exempts religious organizations engaged in adoption and other "social services," but only if they do not receive government funding.<sup>116</sup> Minnesota has a similar provision.<sup>117</sup> Although those provisions appear on their face to do nothing, since they simply clarify that the state's marriage equality law will not affect the specified activities, their presumptive purpose and effect is to insulate organizations like Catholic Charities from repercussions from refusing to serve same-sex couples.

Second, the broadest provisions exempt religious organizations from "promoting" same-sex marriage through social services or other programs. Although these provisions do not mention adoption or any other service specifically, they arguably leave room open for protection of organizations like Catholic Charities. Specifically, it could be argued that placing children with same-sex couples "promotes" their marriages by helping to build families

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<sup>113</sup> See, e.g., *Butler v. Adoption Media LLC*, 486 F. Supp. 2d 1022, 1056–57 (N.D. Cal. 2007) (holding that same-sex couple stated a claim under California public accommodations law for discrimination on the basis of sexual orientation against a private adoption agency that refused to serve unmarried couples, at a time when California law excluded same-sex couples from civil marriage). Nonprofit organizations, including religious organizations, can count as "business establishments" subject to California's public accommodations law if they offer their services to the public. See *Stevens v. Optimum Health Inst.*, 810 F. Supp. 2d 1074, 1089 (S.D. Cal. 2011).

<sup>114</sup> See *supra* note 33. In many other states, however, licensing law is simply silent on whether gay and lesbian couples may adopt. See *Butler*, 486 F. Supp. 2d at 1046 (finding that neither Arizona nor California law explicitly prohibited adoption by gay men or lesbian women, regardless of whether they were single or in relationships).

<sup>115</sup> See, e.g., *Uston v. Resorts Intern. Hotel, Inc.*, 89 N.J. 163, 173 (1982).

<sup>116</sup> CONN. GEN. STAT. ANN. § 46b-35b (West 2009) ("Nothing in public act 09-13 shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.").

<sup>117</sup> MINN. STAT. ANN. § 517.201(b) (West 2013) ("This chapter must not be construed to affect the manner in which a [religious organization, as defined] provides adoption, foster care, or social services, if that association, corporation, society, or educational institution does not receive public funds for that specific program or purpose.").

that violate religious tenets.<sup>118</sup> Rhode Island's law is one of the broadest. It provides that religious organizations, including religiously-affiliated non-profits, need not provide "services, accommodations, advantages, facilities, goods, or privileges" if those services, etc., are related to the "promotion of marriage through any social or religious programs or services, which violates . . . religious doctrine or teachings."<sup>119</sup> Note that the Rhode Island provision protects religious social service organizations *even if they receive government funding*.<sup>120</sup> Maryland has an accommodation that is otherwise almost identical, and thus also arguably protects adoption agencies along with other social service organizations, but it only exempts organizations that do not receive public funds.<sup>121</sup>

Third, and least likely to exempt adoption agencies, are provisions that specifically protect religious organizations from "promoting" unorthodox marriages by extending services that are related to marriage, typically including religious programs, counseling, courses, and retreats.<sup>122</sup> A few of these laws specify married housing as something that need not be provided to couples whose unions contravene the group's theology.<sup>123</sup> Generally, these

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<sup>118</sup> Cf. Avila, *supra* note 31, at 13 ("John Garvey, the dean of Boston College's Law School, took the state to task for effectively forcing Catholic Charities of Boston out of the adoption field 'because it won't promote an agenda that it views as morally wrong.'") (emphasis added).

<sup>119</sup> The full provision reads:

c) Notwithstanding any other provision of law, a religions [sic] organization, association, or society, and any nonprofit institution or organization operated, supervised or controlled by a religious organization, association or society, or a fraternal benefit or service organization that has among its stated purposes the promotion and support or protection of a religious organization, association or society and that restricts membership to practicing members of that religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to: . . .

(2) The promotion of marriage through any social or religious programs or services, which violates the religious doctrine or teachings of religious organization [sic], association or society. . . .

R.I. GEN. LAWS ANN. § 15-3-6.1(c)(2) (West 2014).

<sup>120</sup> *Id.*

<sup>121</sup> 2012 Md. Laws ch. 2.

<sup>122</sup> D.C. CODE § 46-406(e) (2013) ("Notwithstanding any other provision of law, a [religious organization, as defined] shall not be required to provide [sic] . . . the promotion of marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs."); WASH. REV. CODE ANN. § 26.04.010(7)(a)(ii) (West 2012) (exempting religious organizations, as defined, from providing "religion-based services" that are "designed for married couples or couples engaged to marry and are directly related to solemnizing, celebrating, strengthening, or promoting a marriage, such as religious counseling programs, courses, retreats, and workshops").

<sup>123</sup> N.H. REV. STAT. ANN § 457:37(3) (2010) ("Notwithstanding any other provision of law, a [religious organization, as defined] shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if such request for such services, [etc.] is related to . . . the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals."); N.Y. DOM. REL. LAW § 10-b(2) (McKinney 2011) ("[N]othing in this article shall limit or diminish the right . . . of any [religious organization, as defined] to limit employment or sales or rental of

provisions are more narrowly drawn, targeting only social services that are distinctly religious in nature and/or relate directly to marriage itself. If the exempted “programs” are limited to marriage counseling and couples’ retreats, for example, they would seem not to extend to adoption agencies. Only under aggressive readings would they exempt general social services, like child placement.

Nevertheless, the first two types of exemptions would likely reverse the proper result in cases concerning discrimination against same-sex couples by adoption agencies that constitute public accommodations. Moreover, it is important to appreciate the breadth of these provisions. Some of them, especially the second type, may sweep in a variety of other religiously-affiliated educational and social service organizations, and they may protect them not only when they exclude gay men and lesbians, but also when they discriminate on other grounds out of religious conviction.

Just as important, as noted above, the provisions concerning adoption placement and other social services discussed in this Part are not limited to a discrete moment in time—the solemnization and celebration of a wedding—but instead extend throughout the life of a marriage, potentially for decades.<sup>124</sup> In other words, they operate to allow religious organizations to refuse to “promote” (in specified ways) not just same-sex weddings, but the entirety of same-sex marriages. This temporal reach helps to make them powerful exceptions from civil rights laws.

### C. *Constitutional Principles and Baseline Questions*

So far, this Part has raised normative difficulties with existing statutory exemptions concerning facilities that function as public accommodations, on the one hand, and adoption and other social services, on the other. These difficulties have been overlooked or discounted in the religious freedom literature, and they are worth highlighting. But there is another type of problem for existing exemptions, not mentioned above, namely constitutional concerns under the Establishment Clause. These raise a distinctive set of normative considerations as well as particular legal concerns.

A basic principle holds that governments may voluntarily lift regulatory burdens from religious actors, but not if accommodating them shifts burdens onto third parties. Driving that rule is the normative principle that shifting burdens in this way would improperly impose the faith of one private party on another, in violation of the government’s obligation of evenhandedness in the face of religious differences among citizens. It is possible to understand

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housing accommodations or admission to or give preference to persons of the same religion or denomination.”). Cf. MINN. STAT. ANN. § 363A.26 (West 2013) (“Nothing in this chapter prohibits any [religious organization, as defined] from: . . . (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the [religious organization], the conduct of which is unrelated to the religious and educational purposes for which it is organized.”).

<sup>124</sup> See *supra* notes 92–93 and accompanying text.

this commitment as connected to both full and equal citizenship—full citizenship because here protecting the religious liberty rights of one party against the government would in fact impose on the liberty of others in violation of Justice Jackson’s maxim,<sup>125</sup> and equal citizenship because voluntary accommodations that work by imposing the religious beliefs of one party on another impermissibly align the government with the religious convictions of some citizens over others. When it comes to an identity characteristic as socially salient as religion, government favoritism of that sort works constitutional harm.<sup>126</sup>

Court precedent gives the principle against burden shifting the force of law. In *Estate of Thornton v. Caldor, Inc.*, for instance, the Court reasoned that “[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”<sup>127</sup> It therefore held that a state could not require employers to accommodate every employee’s Sabbath observance, no matter what the impact on the business or on other employees. And in *Cutter v. Wilkinson*, the Court returned to that principle, holding that in applying voluntary accommodations, “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . .”<sup>128</sup> Ignoring that principle risks the religious freedom rights of third parties. The Court’s recent decision in *Burwell v. Hobby Lobby Stores, Inc.* must not be read to abrogate this longstanding rule.<sup>129</sup>

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<sup>125</sup> See *supra* note 40.

<sup>126</sup> See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126 (2007); cf. Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 680–81 (2013) (arguing that government endorsement concerning other socially salient characteristics, including sexual orientation, can also work constitutional harm).

<sup>127</sup> 472 U.S. 703, 710 (1985) (internal citations omitted). Similarly, in *United States v. Lee*, a free exercise case, the Court wrote: “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.” 455 U.S. 252, 261 (1982).

<sup>128</sup> 544 U.S. 709, 720 (2005). The leading article on the Establishment Clause burden-shifting argument is 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 Micah Schwartzman et al., *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <http://perma.cc/A4ZT-EW6S>.

<sup>129</sup> 134 S. Ct. 2751 (2014). A footnote in *Hobby Lobby* appears to cast doubt on the third party harm doctrine, partly on concerns about baselines. *Id.* at 2781 n.37. But it does so without acknowledging the constitutional magnitude of the third party harm doctrine, grounded as it is in the Establishment Clause, and it does so in a context where the Court assumed that no harm to third parties would in fact result from its ruling. Moreover, Justice Kennedy, whose vote was necessary to assemble the majority, was clearer that the absence of a harm to third parties was a necessary predicate of the ruling in *Hobby Lobby*. *Id.* at 2786–87 (Kennedy, J., concurring) (“[In America,] no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means.”).

Not all religion exemptions shift burdens to third parties in the relevant way. Take, for example, the case of *Holt v. Hobbs*, recently decided by the Supreme Court.<sup>130</sup> It involves a Muslim inmate who wishes to grow a beard despite prison regulations which require inmates to be clean-shaven. Granting an exemption under RLUIPA would not impose a burden on anyone else, aside from the government or the public generally.<sup>131</sup> Similarly, the free exercise exemption that the Court granted in *Sherbert v. Verner* did not burden any identifiable person or group—allowing a Saturday Sabbatarian to receive unemployment insurance despite refusing a job that would require her to work on Saturday simply made the unemployment compensation system somewhat more expensive to administer.<sup>132</sup> Again, that kind of undifferentiated cost is not enough to trigger Establishment Clause concerns. But substantial costs imposed on identifiable third parties because of religion accommodations do raise those concerns, as the Court has repeatedly noted.

Here, statutory exemptions for religious actors in marriage equality laws run up against this basic rule of constitutional law and the principle of political morality that it embodies. To see how, return to the two examples this article has been tracking. Both a provision that allows religious organizations to close their facilities to same-sex couples and a provision that protects religious social service agencies threaten to impose costs on third parties—namely the members of same-sex couples who seek to use those facilities and services. That is true regardless of whether alternative facilities or services are available to those couples. After all, the disadvantaged employees in *Caldor* could have sought other employment, and the employers could have sought alternative employees in order to accommodate Sabbatharians, but those search costs counted as the type of substantial burden that

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Some may argue that there are other precedents contradicting the principle as well. See, e.g., Michael McConnell, *Prof. Michael McConnell (Stanford) on the Hobby Lobby arguments, Volokh Conspiracy*, WASH. POST (Mar. 27, 2014), <http://perma.cc/8M8Y-CUVA>. But all of those precedents are distinguishable. In *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), for example, the Court upheld the Title VII accommodation that allows religious employers to favor co-religionists. Although that accommodation may shift burdens to third party employees, it is best understood as limited to churches, with their doctrinally distinctive associational interests. See Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), <http://perma.cc/STX7-UC24>. Nor do any of the Court's other precedents pose insurmountable obstacles to the burden-shifting argument. See Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Reply to McConnell on Hobby Lobby and the Establishment Clause*, BALKINIZATION (Mar. 30, 2014), <http://perma.cc/Q7A4-RAPK>.

<sup>130</sup> 2015 WL 232143, \_ U.S. \_ (2015).

<sup>131</sup> *Id.* at \*12 (Ginsburg J., concurring) (“Unlike the exemption this Court approved in [*Hobby Lobby*], accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief. On that understanding, I join the Court’s opinion.”). See also Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation*, BALKINIZATION (Oct. 16, 2014), <http://perma.cc/3CAR-VQZ9> (arguing that granting an accommodation in *Holt v. Hobbs* would not shift a burden to third parties); but see Marc O. DeGirolami, *More Questions on the Significant Harm to Third-Parties Establishment Clause Theory*, CLR FORUM (Oct. 16, 2014), <http://perma.cc/2C97-5LVT>.

<sup>132</sup> See 374 U.S. 398, 409 (1963).

could not be imposed without offending the Constitution. In sum, many of the accommodations this article has been discussing will shift burdens to gay and lesbian couples in straightforward ways.

One strategy for avoiding that conclusion would be to argue that because the relevant rights are statutory, they can be removed by marriage equality statutes without imposing a “burden” on gay and lesbian couples. Because LGBT people had no right to nondiscrimination by private parties in the first place, the argument goes, returning them to that situation by statute cannot be considered a burden. Rights to equal treatment by private parties in public accommodations and government licensing—to continue with this article’s two examples—are given by statute or local ordinance, and therefore they can be removed by state statute without imposing a harm.

This is a classic baseline argument: it questions the basis for making a judgment that a party has been burdened. Consider two possible baselines for measuring a burden. Under the *libertarian baseline*, organizations that provide goods and services to the public have a right to refuse service to anyone for any reason, however irrational, unless civil rights laws provide protection. Civil rights laws, in other words, mark a departure from the natural state of affairs. And even then, antidiscrimination protection is discretionary and can be removed at any time without cost—that would simply return the parties to the status quo ante. Under the *equal access baseline*, by contrast, actors that provide goods and services to the public must serve everyone, absent some business-related reason. Downward departures from that baseline count as a burden. Selection of a baseline reflects substantive concerns.

Here, objectors may argue that the libertarian baseline is the appropriate one, so that religion accommodations in marriage equality statutes impose no harm for purposes of burden-shifting arguments. This is similar to the baseline argument that some have made in the context of the *Hobby Lobby* litigation.<sup>133</sup> There, the argument is stronger because the religion accommodation, the Religious Freedom Restoration Act, predated the right enjoyed by third parties. Even aside from that point, Justice Alito seems to support the libertarian baseline in a footnote, where he characterizes contraception coverage as a “benefit,” the implication being that it can be removed as part of a religion accommodation without triggering the *Cutter* rule.<sup>134</sup>

Regardless, the argument is questionable in both contexts. Statutory schemes can set baseline guarantees, even as to other statutes or ordinances, and they can work to impose deprivations on third parties that should be regarded as burdens for the purpose of this particular constitutional principle. As Justice Scalia put it in another context,

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<sup>133</sup> See McConnell, *supra* note 129 (running the baseline argument in the context of *Hobby Lobby*); Kevin C. Walsh, *A baseline problem for the “burden on employees” argument against RFRA-based exemptions from the contraceptive mandate*, MIRROR OF JUSTICE (Jan. 17, 2014), <http://perma.cc/KJ99-9CSZ>.

<sup>134</sup> See *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.<sup>135</sup>

That reasoning should apply to the Establishment Clause principle against shifting harm to third parties, partly in order to make sense of precedent and the constitutional convictions it implements. Otherwise, for example, the Amish employer in *United States v. Lee* could have argued that employees did not have a right to social security benefits, which could then be denied without imposing a burden (consequent on accommodating his religious objection to paying the relevant taxes).<sup>136</sup> Baseline expectations can be set by statutory schemes that otherwise apply broadly to the benefit of the relevant third parties, but for a voluntary religion accommodation.<sup>137</sup> And at present, roughly 21 states plus the District of Columbia ban discrimination on the basis of sexual orientation (with 17 of those also protecting gender identity/expression) in areas including employment, housing, or public accommodations.<sup>138</sup> Should LGBT antidiscrimination laws spread to other jurisdictions, they will raise the legitimate expectation of equal protection among additional citizens.

This Part's argument that the burden suffered by third parties excluded from antidiscrimination protections should indeed count as a burden draws support from considering the role of the common law in this area. An assumption of those promoting a libertarian baseline seems to be that background or natural entitlements allow entities that offer goods and services to the public to exclude people for any reason (absent antidiscrimination law). But that common law rule turns out to be constructed and contingent. First of

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<sup>135</sup> *Locke v. Davey*, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting).

<sup>136</sup> See 455 U.S. 252, 261 (1982). For a similar argument against the libertarian baseline based on *Lee*, see Tebbe et al., *supra* note 129. Tellingly, when Congress created a statutory exemption in response to *Lee*, it did so only insofar as employees share the employer's opposition to social security benefits and therefore would not be harmed. 26 U.S.C.A. § 3127 (2014).

<sup>137</sup> See Nelson Tebbe et al., *Hobby Lobby and the Establishment Clause, Part II: What Counts As A Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), <http://perma.cc/QVZ2-L89T>; Gedicks & Van Tassel, *supra* note 128, at 44–45 (arguing against the baseline objection in the context of *Hobby Lobby*). See also Elizabeth Sepper, *Free Exercise Lochnerism* 3 (June 3, 2014) (unpublished manuscript), available at <http://perma.cc/X8RZ-K7GD> (arguing that current arguments for religion exemptions share with the *Lochner* Court an assumption of a natural, laissez-faire baseline).

<sup>138</sup> HUMAN RIGHTS CAMPAIGN, *Equality From State to State 2013* at 12, <http://perma.cc/LS3T-ME4D>. The states that protect against discrimination on the basis of LGBT status in employment, public accommodations, or housing (typically all three) are: Minnesota (1993), Rhode Island (1995, 2001), New Mexico (2003), California (1992, 2003), District of Columbia (1977, 2005), Illinois (2005), Maine (2005), Hawaii (1991, 2005, 2006, 2011), New Jersey (1992, 2006), Washington (2006), Iowa (2007), Oregon (2007), Vermont (1992, 2007), Colorado (2007), Connecticut (1991, 2011), Nevada (1999, 2011), Massachusetts (1989, 2011), and Delaware (2009, 2013). The states that only ban discrimination based on sexual orientation are: Wisconsin (1982), New Hampshire (1997), Maryland (2001), and New York (2002).



all, the libertarian baseline does not exist in every common law jurisdiction—states have a choice. Several states have adhered to an equal access rule instead.<sup>139</sup> Second, historically, the equal access baseline was more widespread during the nineteenth century, at least as to certain economic actors and perhaps generally.<sup>140</sup> Many states abandoned it by statute only after Reconstruction, when it became clear that it could be used by African-Americans to gain access to public accommodations<sup>141</sup>—in those jurisdictions, the libertarian baseline may have been imposed under odious circumstances.<sup>142</sup>

To appreciate this history is not to suggest simply that the common law provides an equal access baseline in many jurisdictions, against which religion accommodations can be said to impose a burden on same-sex couples. It

<sup>139</sup> See, e.g., *Uston v. Resorts Intern. Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982) (“[W]hen property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers . . . but to all property owners who open their premises to the public.”); *Leach v. Drummond Med. Grp., Inc.*, 144 Cal. App. 3d 362, 372 (Cal. Ct. App. 1983) (recognizing a common law duty on all enterprises that hold themselves out as providing goods or services to the public “to serve all members of the public on reasonable terms without discrimination” and recognizing codification of that rule in California’s Unruh Civil Rights Act); *Harder v. Auberge Des Fougères, Inc.*, 338 N.Y.S.2d 356, 358 (N.Y. App. Div. 1972) (rejecting the distinction between inns and “other places of public accommodation” under the common law and concluding that “[i]n our view, a restaurant proprietor should be under the same duty as an innkeeper to receive all patrons who present themselves ‘in a fit condition’, unless reasonable cause exists for a refusal to do so”); *Beech Grove Inv. Co. v. Civil Rights Comm’n*, 157 N.W.2d 213, 226–27 (Mich. 1968) (discussing the common law right against “unjust discrimination”). See also Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1996 (1989) (“In many jurisdictions, the duty to serve doctrine has lain dormant for the last twenty years . . . . The absence of recent cases largely results from the existence of regulatory statutes that responded to specific types of refusals to serve.”).

<sup>140</sup> See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND IN FOUR VOLUMES (1765–69) (“[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.”); see also *Romer v. Evans*, 517 U.S. 620, 627 (1996) (“‘At common law, innkeepers, smiths, and others who ‘made profession of a public employment,’ were prohibited from refusing, without good reason, to serve a customer.’ The duty was a general one and did not specify protection for particular groups.”) (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 571 (1995) (explaining the common law of Massachusetts)); *Bell v. Maryland*, 378 U.S. 226, 296 (1964) (Goldberg, J., concurring) (“Underlying the congressional discussions, and at the heart of the Fourteenth Amendment’s guarantee of equal protection, was the assumption that the State by statute or by ‘the good old common law’ was obligated to guarantee all citizens access to places of public accommodation.”).

<sup>141</sup> See, e.g., *Donnell v. State*, 48 Miss. 661, 681–82 (1873) (holding that the state’s common law includes a right of reasonable access to all public places).

<sup>142</sup> *Uston*, 445 A.2d. at 374 n.4 (“The denial of freedom of reasonable access in some States following passage of the Fourteenth Amendment, and the creation of a common law freedom to arbitrarily exclude following invalidation of segregation statutes, suggest that the current majority rule may have had less than dignified origins.”). See generally Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283 (1996) (examining this history in detail).

likely does not. Instead, the point is that the common law baseline cannot be taken to be natural or neutral, but instead must be understood as contingent and normatively contestable. Cass Sunstein made a similar point in his classic critique of *Lochner*.<sup>143</sup> When we think about whether members of same-sex couples have been burdened as a consequence of religion accommodations extended to entities that are public accommodations or otherwise subject to antidiscrimination provisions that protect LGBT people, in other words, we ought to consider the objection that these third parties have not been burdened as a *normative* question implicating constitutional principles and commitments of political morality. Chiefly, commitments to full and equal citizenship should be in play in the evaluation of claims that religion accommodations shift burdens in violation of the Establishment Clause or other constitutional provisions.

### CONCLUSION

Much of the impetus behind these religion accommodations in marriage equality statutes was political—they were included, in part, to address concerns of potential opponents and thereby to ensure that the laws were passed.<sup>144</sup> To many, the choice was not between marriage equality with religion accommodations and without, but between marriage equality with religion accommodations and continued exclusion of same-sex couples from civil marriage. The gain in equality was thought to outweigh the cost to public accommodations laws and other antidiscrimination provisions of exempting certain religious actors.

How will this political calculus look in the future? The ongoing political dynamics will affect the stakes of the questions raised by this article. We can assess those dynamics and their consequences by considering three possible scenarios.

One possibility is that demographic changes will continue to push toward statutory marriage equality, even in politically conservative states, and that will generate additional marriage equality statutes. Andrew Koppelman points out that 44 states will see majority support for same-sex marriage by 2020, according to the respected statistician Nate Silver.<sup>145</sup> If that is correct, then equal access to same-sex marriage is all but inevitable in most states. Seeing that trend, Robin Wilson has urged advocates of religious freedom to compromise now, while the political conditions still give supporters of marriage equality some reason to negotiate.<sup>146</sup> Under this scenario, legislation

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<sup>143</sup> Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987); see also Soper, *supra* note 137 (applying a similar critique to the baseline arguments in *Hobby Lobby*).

<sup>144</sup> See Wilson, *supra* note 49, at 5–7 (arguing that religion accommodations had an important causal role in passage of marriage equality laws, highlighting states where bills without religion exemptions had failed previously but then passed with the accommodations).

<sup>145</sup> See Koppelman, *supra* note 26, at 5 n.15 (citing *How Opinion on Same-Sex Marriage Is Changing, and What It Means, FiveThirtyEight*, N.Y. TIMES (Mar. 26, 2013), <http://perma.cc/C9MU-NMJL>).

<sup>146</sup> Wilson, *supra* note 49, at 11–12.

will continue to be passed. And because it is being enacted in states that are more politically conservative, it is likely to include increasingly robust protections for religious freedom, at least in the near to middle term.<sup>147</sup>

A second scenario is that the window of opportunity for enacting marriage equality statutes on the state level has closed, and that statutory action accommodation of religion will also cease, at least with respect to marriage specifically. A rough proxy for whether a state has the political climate to pass marriage equality legislation might be whether it has previously passed LGBT antidiscrimination measures in employment, public accommodations, and housing. By that measure, the politically friendly states have been exhausted. Nevada and Colorado were perhaps the last states to protect against discrimination on the basis of sexual orientation and gender identity without providing for marriage equality, and those states have now been required to extend civil marriage to same-sex couples by judicial decisions.<sup>148</sup> Under this second scenario, a lack of state statutory action on marriage equality will also mean a lack of statutory movement on religion exemptions. New Jersey, for instance, declined to enact legislation implementing a court decision extending marriage equality in the state. Legislative leaders considered enacting such a law, but they pulled the bill after civil rights organizations expressed opposition to religion accommodations.<sup>149</sup> This scenario imagines that the political conditions do not favor religion exemptions after judicial decisions in favor of marriage equality.

A third and final scenario sees a continued spread of judicial protection combined with successful mobilizations to protect religious freedom around marriage through state legislation. Courts certainly have been active on the issue recently—and now the Supreme Court has agreed to hear challenges to state bans on marriage equality.<sup>150</sup> Under this scenario, judicial decisions shift marriage equality into states with strong political support for religion exemptions, which are then enacted by statute after a judicial decision. Something similar happened in Connecticut, where legislation codifying a decision by the high court included significant carve outs, including protection for religious adoption agencies that are privately funded.<sup>151</sup> States to the political right of Connecticut might be inclined to pass even stronger mea-

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<sup>147</sup> *Id.* at 11 (“Going forward, one would reasonably expect more robust religious liberty protections to play a central part in any legislative compromises over same-sex marriage, at least for the near term.”).

<sup>148</sup> *Herbert v. Kitchen*, 135 S. Ct. 265 (Oct. 6, 2014) (denying cert.); *Order, Kitchen v. Herbert*, 2014 WL 4960471 (10th Cir. Oct. 6, 2014) (lifting stay after the Supreme Court denied cert.); *Latta v. Otter*, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Otter v. Latta*, 135 S. Ct. 345 (Oct. 10, 2014) (denying stay). Robin Wilson has concluded based on a similar analysis that the opportunity for marriage equality statutes may be evaporating. Wilson, *supra* note 49, at 9 (“Marriage equality advocates have exhausted those jurisdictions in which a ‘perfect storm’ of popular support, political characteristics, and background legal protections coalesced to yield marriage equality.”); *id.* at 10 (arguing that the “advantageous political terrain [for marriage equality] is now nearly exhausted”).

<sup>149</sup> See *supra* text accompanying note 111.

<sup>150</sup> *DeBoer v. Snyder*, 2015 WL 213650, \_\_ S. Ct. \_\_ (2015) (granting cert.).

<sup>151</sup> See CONN. GEN. STAT. ANN. § 46b-35a (West 2009).

sure guaranteeing autonomy to religious actors in the wake of judicial decisions.<sup>152</sup> Recently, for example, state legislators in North Carolina reacted to judicial imposition of marriage equality by proposing to exempt marriage officials, including judicial officers, from administering weddings to which they were religiously opposed.<sup>153</sup> If courts continue to require marriage equality in politically conservative states, we could see a spate of local legislative efforts to extend the various types of religion exemptions that this article has discussed, although not the ones that relieve religious actors from LGBT antidiscrimination provisions, which would not exist in such states.

Another way that legislative enactment of religion accommodations could occur is if political conservatives won them in exchange for passing

<sup>152</sup> An obstacle to state legislation after judicial invalidation of marriage exclusion could be the notion that it is unnecessary. Most states that now exclude same-sex couples from civil marriage also lack antidiscrimination protection for people in such marriages or for LGBT citizens generally. *See supra* note 138 (identifying states that currently protect against private discrimination on the basis of sexual orientation). Therefore, it might be thought that provisions allowing, say, religious organizations to exclude same-sex couples from their facilities are unnecessary because no law prevents them from doing that. However, several considerations make legislation possible despite this argument.

First, local ordinances often prohibit discrimination on the basis of sexual orientation and/or gender identity, even if statewide law does not.

Second, some states may interpret a court decision to require government officials to administer weddings irrespective of sexual orientation, even in the absence of antidiscrimination provisions. *Cf. Wilson, supra* note 49, at 20–21 & n.81 (citing *Statement of Iowa Attorney General Tom Miller County Recordors must Comply with Supreme Court’s Varnum Decision* (Apr. 21, 2009), <http://perma.cc/B4NY-Y6JD> (“Recordors do not have discretion or power to ignore the Iowa Supreme Court’s ruling.”); Kilian Melloy, *Iowa Magistrate to Stop Performing Marriages*, *EDGE BOSTON*, Apr. 23, 2009, <http://perma.cc/N8DC-F96F> (quoting the Iowa Attorney General’s Office explaining that while justices of the peace may opt out of performing all weddings, those who decide to officiate must “do so without bias or prejudice, as per the Code of Judicial Conduct,” but that other officials such as county recordors may not opt out of the duty to issue marriage licenses)). So there may be a perceived need to give specific permission to religious actors who would otherwise be obligated to administer or promote civil marriage for same-sex couples under general laws.

Third, religious liberty accommodations often appear in state statutes even though they duplicate other protections, as we have seen. For example, every marriage equality bill passed so far has specifically allowed clergy to refuse to perform weddings to which they are theologically opposed. A similar dynamic could generate legislation that protects religious actors even in states without civil rights laws that protect against discrimination on the basis of sexual orientation or gender identity.

Another obstacle to state legislation in the wake of a judicial decision could be the threat of lawsuits charging that any religion accommodations that are enacted amount to government licensing of unconstitutional discrimination against LGBT citizens, perhaps in violation of the equality holding of that decision itself. But that theory faces state action hurdles. *See Oleske, supra* note 61, at 44 n.219. And in any event, the possibility of litigation likely would not prevent them from being enacted in the first place.

<sup>153</sup> *Berger Calls On Courts To Correct Erroneous Memo Threatening First Amendment Rights, Jobs Of N.C. Magistrates*, *NCPOLITICALNEWS.COM* (Oct. 26, 2014), <http://perma.cc/ENZ7-66H6>. The legislators were reacting to a letter from the Administrative Office of Courts advising officials that they were under a duty to serve all couples equally. Letter from John W. Smith, *supra* note 23. One provision of scholars’ proposed legislation on religion exemptions in same-sex marriage laws exempts individual government employees from having to perform or administer weddings to which they are religiously opposed. It contains an exception for situations where no substitute employee is available, but it provides that the exemption for judicial officers is absolute. *See Gaffney et al., supra* note 6, at 5.

antidiscrimination protection for LGBT people in employment, public accommodations, and housing. New Jersey already provided that protection at the time its bill died, but again the debate over marriage equality is now moving into states without antidiscrimination measures, where they could be traded for religion accommodations.<sup>154</sup>

Under either scenario one, where marriage equality statutes continue to spread to states without judicial decisions, or scenario three, where judicial invalidations lead to statutory enactment of religion accommodations, we could continue to see legislation on the state level that exempts religious actors in the marriage context. And under either scenario there could be pressure for even broader religion accommodations in a variety of areas, including government licensing, employment benefits, and even conscience clauses for government employees including judicial officers. If that is correct, the stakes could continue to be high, and the arguments presented in this article would have ongoing relevance, even if they could only affect outcomes on the margins and under specific political and legal conditions.

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<sup>154</sup> See Wilson, *supra* note 49, at 12 n.55 (discussing the possibility of that kind of exchange).

