

GAYS IN THE MORALIZED MARKETPLACE

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INTRODUCTION

In the late 1960s, Maurice Bissinger, the owner of Piggie Park BBQ, claimed a right to refuse service to blacks based on his religious beliefs.¹ His religion, he said, did not allow the mixing of the races.² Thus, he sought to keep black people from eating in his restaurant, but was willing to take their money if they ordered their food to go.³ He combined this claim with libertarian demands to be free of all federal government regulation.⁴

The district court dismissed his claims.⁵ In 1968, the Supreme Court

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1. *Newman v. Piggie Park Enter., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966).

2. *Id.*

3. *Id.* at 947.

4. *Id.* at 944.

5. *Id.* at 945 (“This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.”).

called his claim of business religious exercise “patently frivolous” and rejected his other constitutional arguments.⁶ No religious exemption would be granted to the public accommodations provisions of the Civil Rights Act. The U.S. Constitution did not require a moralized marketplace. Nor did Congress act in response to the case to carve out an exemption from civil rights laws for religious objectors.

Although Bissinger lost his case, he went on to have an extremely successful business.⁷ Even as they flew the Confederate flag, his restaurants sold BBQ sauce at stores around the country.⁸ Only in the 1990s after pressure from the NAACP did national chains stop stocking his sauce.⁹ Bissinger remained an outspoken opponent of racial integration until his death in 2014. He continued to insist, “[y]ou can’t be a racist and a Christian, and I am a Christian.”¹⁰

In 2014, in *Burwell v. Hobby Lobby*, the Supreme Court endorsed the concept of the moralized marketplace that in the 1960s, Bissinger once advanced and the Court repudiated.¹¹ In litigation against the Affordable Care Act’s contraceptive mandate, the Court for the first time exempted for-profit corporations from commercial regulations on religious grounds. For-profit businesses—long the subject of extensive regulation as part of public commercial life—became endowed with moral lives and entitled to freedom from government intervention under the federal Religious Freedom Restoration Act. The Court joined market freedom with religious liberty. Religious freedom claims like Bissinger’s became possible.

This article argues that the doctrine of the moralized marketplace developed in the contraceptive mandate litigation risks a retrenchment of equal rights for gays and lesbians. While a legally recognized moralized marketplace has repercussions for gay equality in the workplace, housing markets, and beyond, this article focuses on religious exemptions for public accommodations, which have been at the heart of recent debates. Wedding vendors, professional corporations, and healthcare institutions have objected to

6. *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

7. John Monk, *Barbecue Eatery Owner, Segregationist Maurice Bessinger Dies at 83*, THE STATE (Feb. 24, 2014), <http://www.thestate.com/news/business/article13839323.html>.

8. *Id.*

9. *Id.*

10. *BBQ and the Confederate Flag: Maurice Bessinger Dies at 83*, TIMES & DEMOCRAT (S.C.), Feb. 24, 2014, http://thetandd.com/business/bbq-and-the-confederate-flag-maurice-bessinger-dies-at/article_a0568dc4-9dc0-11e3-b649-0019bb2963f4.html.

11. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

serving same-sex couples. These businesses seek, they say, to preserve their Christian identity. Religious liberty protections require, they argue, this space for moral judgments in the market.

Part I argues that the contraceptive mandate litigation marked the acceptance of a moralized marketplace in religious liberty doctrine. First, commercial for-profit enterprises became infused with religion that the courts treated as entitled to recognition and protection from government regulation. Despite the already wide berth that law and policy grant to religion in commerce, the businesses required exemption from regulation for their religion to flourish. The corporation became moralized. Second, as I argue at greater length elsewhere,¹² the contraceptive litigation manifested a commitment to the ideal of private ordering through the market. As courts joined market freedom with religious liberty, the market became the baseline against which to measure the benefits and burdens of regulation. The courts limited the government's interests and its means of achieving them in a competitive market.

While *Hobby Lobby* (and the mandate litigation more generally) had no direct effect on claims to exemption from state public accommodations laws, it gave them political purchase and doctrinal plausibility. The acceptance of for-profit corporate religious liberty in the litigation against the contraceptive mandate encouraged advocates of religious exemptions for objectors to same-sex marriage. The rush of legislatures to adopt state religious freedom restoration acts or marriage-specific religious exemptions was no coincidence. By 2014, marriage equality seemed inevitable. If *United States v. Windsor*¹³ signaled the decline of marriage inequality, *Obergefell v. Hodges*¹⁴ was widely—and correctly, as it turned out—predicted to be its death.

Focusing on public accommodations, Part II explores the significance of the moralized marketplace for gays. Section A briefly describes religiously motivated refusals of businesses to serve same-sex couples and the recent legislative action that they have spurred. Section B contends that businesses' claims to religious exemption from antidiscrimination law depend on reducing societal and individual interests in nondiscrimination to market access. With the market as the baseline, alternative vendors both negate the reason for regulation and serve as a means less restrictive of objecting businesses' religious freedom.

Part III critiques the reduction of antidiscrimination law to mere market access. It demonstrates that antidiscrimination law has far broader aims, which would be thwarted by the (explicitly or potentially) expansive religious

12. Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

13. 133 S. Ct. 2675 (2013).

14. 135 S. Ct. 2584 (2015).

exemptions now under consideration. A competitive market cannot ensure antidiscrimination law's goals of addressing social stigma, constructing equal citizenship, and creating an inclusive society.

Part IV counsels against marriage triumphalism. With same-sex marriage bans now unconstitutional, one cannot assume societal change will continue apace, even as legal impediments to equality, in the form of religious exemptions, are erected. Contrary to predictions that objections will be rare and the effects on gay rights minimal, the moralized marketplace could instead entrench a regime of unequal treatment for gays.

I. *HOBBY LOBBY'S* CONSTRUCTION OF THE MORALIZED MARKETPLACE

Before *Hobby Lobby* was decided, scores of for-profit businesses filed suit against the Affordable Care Act's requirement that employer-based health insurance plans cover contraception for employees. The challengers relied primarily on the federal Religious Freedom Restoration Act (RFRA).¹⁵ RFRA establishes that, even with regard to a law of general applicability, the federal "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹⁶ Relying on RFRA, these for-profit businesses contended that the contraceptive mandate impermissibly burdened their free exercise of religion by requiring them to provide coverage for healthcare that they believe to be immoral.

Just as other employers—typically religious non-profit organizations—had failed to win exemptions from antidiscrimination and insurance regulations,¹⁷ these plaintiffs should have been expected to lose. Yet, they

15. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (1993).

16. *Id.*

17. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-92 (1990) (denying religiously-based exemption from payment of sales taxes); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (denying religiously-based exemption from minimum wage and recordkeeping under the Fair Labor Standards Act); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (temple's withholding of employment related taxes); *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1208, 1211 (6th Cir. 1990) (worker's compensation insurance); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) ("While . . . religious institutions may base relevant hiring decisions upon religious preferences, "religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex."); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004) (holding that state contraceptive mandate withstood both the rational basis and strict scrutiny constitutional tests); *Koolau*

began to prevail. Courts across the country held that for-profit corporations were entitled to the free exercise of religion under RFRA (and occasionally the First Amendment as well).¹⁸ Many then granted the challengers exemptions from the contraceptive mandate,¹⁹ rewriting religious liberty doctrine as they did so.

As this Part argues, the contraceptive mandate litigation (and its culmination in *Burwell v. Hobby Lobby*) made two substantial moves of particular relevance to the social and legal debates over same-sex marriage exemptions. First, the corporation became an actor with religious and moral commitments deserving of respect. Second, the market became the baseline against which to measure the benefits and burdens of regulation. Against this baseline, an ideal of private ordering and limited vision of government goals disfavors the regulation of religious objectors in commerce.

A. Moralizing the For-Profit Entity

In the contraceptive litigation, the corporation became moralized. The plaintiffs argued that religious exercise is not “confined to the Sabbath or Sunday morning church services” but “extends throughout the week” and into “the business world.”²⁰ On this account, individuals should be able to use the corporate form to advance their religion and pursue profit in the commercial

Baptist Church v. Dep't of Labor & Indus. Rel., 718 P.2d 267 (Haw. 1986) (unemployment insurance); Baltimore Lutheran High Sch. Ass'n, Inc. v. Employment Sec. Admin., 490 A.2d 701, 709-10 (Md. 1985) (unemployment insurance); Big Sky Colony, Inc. v. Montana Dep't of Labor & Indus., 291 P.3d 1231 (Mont. 2012) (worker's compensation insurance); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1271 (Mont. 1992) (worker's compensation laws); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (N.Y. 2006); Victory Baptist Temple, Inc. v. Indus. Comm'n of Ohio, 442 N.E.2d 819 (Ohio Ct. App. 1982) (worker's compensation laws); Salem Coll. & Acad., Inc. v. Employment Div., 695 P.2d 25 (Or. 1985) (unemployment insurance). Individual landlords and sole proprietors of businesses routinely lost claims for judicial exemptions. *United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Swanner v. Anchorage Equal Rts. Comm'n*, 874 P.2d 274, 283 (Ak. 1994).

18. See e.g., *Monaghan v. Sebelius*, 916 F. Supp. 2d 802 (E.D. Mich. 2012) (holding plaintiffs entitled to temporary injunction under RFRA and the First Amendment).

19. See e.g., *Beckwith Elec. Co., Inc. v. Sebelius*, 960 F. Supp. 2d 1328 (M.D. Fla. 2013) (granting plaintiffs an exemption; finding government violated RFRA and the First Amendment).

20. Petition for Writ of Certiorari at 24, 27, *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014) (No.13-356), 2013 WL 5291412.

sphere.²¹ As one court siding with the challengers concluded, “sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit.”²² In granting the for-profit corporation the free exercise of religion (or corporate shareholders the right to exercise religion through the corporate form), courts regarded the corporation as reflective of, rather than differentiated from, the religious beliefs “tak[ing] shape within the minds and hearts of individuals.”²³

In *Burwell v. Hobby Lobby*, the Supreme Court cemented the link between religious belief and commercial life. The Court said that “modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”²⁴ In classifying the two for-profit plaintiffs, Hobby Lobby and Conestoga Wood, as religious for-profits, the Court emphasized that both corporations adopted a religious identity through corporate policies.²⁵ Because RFRA’s use of the word “persons” had been understood to include non-profit corporations, the Court determined “persons” must equally encompass for-profit corporations.²⁶ The Court rejected the suggestion that non-profits are “special” and concluded that closely held, for-profit corporations equally “further individual religious freedom” of

21. *FAQs: Becket Fund’s Lawsuits Against HHS*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/faq/#f26> (last visited Oct. 18, 2015) (“Americans don’t forfeit their rights just because they go into business to provide for themselves and their family.”). For scholarly support of this position, see Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1414-15 (2012) (arguing that the “the reality of the corporate landscape” shows a commitment to religious and moral positions; compiling examples of corporations citing religious beliefs, albeit not to defy economic regulation); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 65 (2013) (noting “the present proliferation of religiously committed business organizations”); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 180 (2014) (“[M]oral considerations, and not just profit maximization, have played an increasingly visible and contested role in the marketplace.”).

22. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013).

23. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12–6744, 2013 WL 140110, *7 (E.D. Pa. Jan. 11, 2013) (rejecting corporate challenger’s arguments due to the differentiation of the two).

24. *Hobby Lobby*, 134 S. Ct. at 2771.

25. *Id.* at 2766 (noting that Hobby Lobby’s statement of purpose committed to “operating the company in a manner consistent with Biblical principles”). See also *id.* at 2764 (mentioning Conestoga Wood’s “Vision and Values Statements” to “ensur[e] a reasonable profit in [a] manner that reflects [the shareholders’] Christian heritage”).

26. *Id.* at 2769 (“[N]o conceivable definition of the term [‘person’ in RFRA] includes natural persons and nonprofit corporations, but not for-profit corporations.”).

individuals united in the enterprise.²⁷ For-profit businesses—long the subject of extensive regulation as part of public commercial life—became endowed with moral lives and entitled to freedom from government intervention.

The rise of corporate religious liberty called into question long-stable distinctions that constitutional and statutory law has drawn between secular for-profits and religious non-profit organizations.²⁸ In the past, courts easily dismissed the rare free exercise claim from for-profit corporations seeking to avoid legal obligations.²⁹ The Supreme Court soundly rejected exemptions for for-profit businesses from social insurance and antidiscrimination requirements.³⁰ Even where religious non-profit organizations enjoyed legislative exemptions from generally applicable law, as a rule for-profit corporations did not.³¹ In *Hobby Lobby*, however, the Court joined market freedom with religious liberty in a way that destabilizes this consensus.

While many, this author included, critiqued the notion of a for-profit corporation exercising religion, accepting a role for religion in the corporate sphere need not have led to exempting businesses from economic regulation. Religious organizations that have long had standing to assert free exercise claims routinely lost their claims for exemption from employee and consumer protective laws under the First Amendment and RFRA.³² Nor did legislatures regularly exempt commercial entities from antidiscrimination law for religious reasons.³³ Businesses could already manifest religiosity in

27. *Id.* at 2769. Justice Ginsburg’s dissent distinguished protection for religious organizations as promoting the existence of community of co-religionists and service to the community. *Id.* at 2794-96 (Ginsburg, J., dissenting).

28. *See, e.g.*, 42 U.S.C. § 2000e-1 (2010) (allowing religious organizations to “give employment preference to members of their own religion” as an accommodation to Title VII); Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789–90 (2012) (“States that currently have such [sexual orientation antidiscrimination] statutes generally have minimal religious exemptions These include exemptions for actual places of religious worship, the organizations they operate, and certain private organizations.”).

29. *See, e.g.*, EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).

30. *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam); *United States v. Lee*, 455 U.S. 252 (1982).

31. *See, e.g.*, UTAH CODE ANN. § 34A-5-106 (declaring for-profit businesses not exempt from anti-discrimination law); ARIZ. REV. STAT. ANN. § 41-1463 (granting for-profit business exemption only if religious qualification is “reasonably necessary to the normal operation of that particular business”).

32. *See, e.g.*, cases cited *supra* note 17.

33. *See* 42 U.S.C. § 2000e-1(a) (adopting circumscribed exemption for religious organizations to prefer members of their religion in initial hiring decisions, but not to

numerous ways—displaying messages, selling religious products, donating to charity, and paying their employees above the minimum wage. They were free to exceed regulatory minimums in the pursuit of moral goals.³⁴ They could not, however, demand exemptions from generally applicable law meant to protect employees and consumers in order to preserve their own corporate morality. Yet, the contraceptive mandate litigation resulted, for the first time, in for-profit corporations being exempted from commercial regulations on religious grounds.

B. Implementing a Market Baseline in Religious Liberty Doctrine

Throughout the contraceptive mandate litigation, the corporate challengers—and their supporters—mounted arguments that sound more in market libertarianism than religious liberty doctrine.³⁵ In asserting a right to religious exemption, they relied on an ideal of a purportedly unregulated market.³⁶ Challengers characterized the regulation of employment through the health insurance mandate as unjust redistribution from employer to employees.³⁷ The government, they claimed, had no compelling interest in

discriminate on the basis of race, color, religion, sex, or national origin); NeJaime, *infra* note 78, at 1192 & n.75 (explaining that public accommodations laws generally apply to all businesses serving the public, religiously affiliated or not). One exception, which will be discussed *infra* Part IV, is healthcare conscience legislation such as the Church Amendment, which states that the receipt of federal funding will not require an entity to provide any personnel or “make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(b)(2) (2000).

34. Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby* 21-22, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Zoë Robinson, Chad Flanders & Micah Schwartzman, eds. forthcoming 2015), available at <http://ssrn.com/abstract=2609585> (“Simply put, *Hobby Lobby* is about opting out. It is not about doing more than the law requires, as is usually the case with corporate social responsibility.”).

35. Sepper, *supra* note 12 (making this argument in more detail).

36. Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, SALON (Apr. 15, 2013), http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/ (quoting the CEO of Eden Foods saying, “I don’t care if the federal government is telling me to buy my employees Jack Daniel’s or birth control. What gives them the right to tell me that I have to do that?”).

37. Brief for Respondents at 59, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 546899 (arguing that “the ultimate question” is “who will pay for a third-party’s” contraceptives); *Standing Together for Religious Freedom: An Open Letter to All Americans*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/religious-liberty/upload/standing-together-for->

interfering in the employment relationship, because a functioning market would permit employees to access contraceptives. As Richard Epstein puts it, a “strong competitive market negated any compelling state interest” in the mandate.³⁸ Under this approach, the government may only regulate religious objectors where the market fails.

As Eugene Volokh explained in 1999, to grant businesses religious exemptions from economic regulation (as in the contraceptive mandate cases), courts necessarily must reject broader governmental interests in favor of market access.³⁹ In so doing, they accept a libertarian claim that refusing to provide goods and services inflicts no harm.⁴⁰ As we shall see, courts then find, as this view implies, that this reduced governmental interest is satisfied so long as people can ultimately access goods and services. From this perspective, no one has a right to be sold another’s goods, to enter into an employment contract with another person, or to rent another’s property.⁴¹ Refusal to enter into such contracts does not infringe on any rights.

In siding with the business religious objectors, courts came to incorporate this libertarian ideal of the marketplace into the federal Religious Freedom Restoration Act.⁴² Recall that, under RFRA, any regulation deemed to substantially burden religion both must further a compelling governmental interest and must be the least restrictive means of doing so.⁴³ At each of these two steps, courts siding with the challengers of the contraceptive mandate reasoned by reference to the market. They restricted the universe of compelling interests to ensuring a functioning market. They identified market providers as alternative means that were less restrictive of the religion of business objectors.

First, these courts narrowed the government’s interests to market access. They rejected the government’s stated interests in sex equality and public health as less than compelling. According to the Tenth Circuit, for example,

religious-freedom.pdf(last visited Jan. 6, 2015) (“Very simply, HHS is forcing Citizen A, against his or her moral convictions, to purchase a product for Citizen B.”).

38. Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2014 CATO SUP. CT. REV. 35, 52, 66 (arguing that provided employers did not actively impede access to contraceptives, a “strong competitive market negated any compelling state interest”).

39. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1520 (1999).

40. *Id.* at 1526.

41. *Id.*

42. Sepper, *supra* note 12 (arguing that business religious liberty exemptions replicate the commitment to private ordering that was at the heart of *Lochner v. New York*—the case symbolic of the courts’ use of freedom of contract to strike down economic regulation at the turn of the last century).

43. 42 U.S.C. §2000bb(b).

sex equality could not justify the mandate, because women remained “free” to purchase contraception themselves.⁴⁴ The D.C. Circuit similarly disallowed sex equality as a goal; the contraceptive mandate, it said, amounted to the “subsidization of a woman’s procreative practices,” which might promote “resource parity” but had little to do with equality.⁴⁵ Nor, given access to alternative methods and providers, could a “general” interest in public health be compelling.⁴⁶ Several courts criticized the mandate for promoting “greater parity in health-care costs,” a goal not of “the highest interest.”⁴⁷

Courts perceived the effects of religious exemptions on third parties as inconveniences, but not legally cognizable burdens. The Tenth Circuit noted that because their employers “do not prevent employees from using their own money to purchase” contraceptives, employees were not burdened (that is, they could still access the market).⁴⁸ A functioning market—as the contraceptive challengers and the courts saw it—burdened no one. It merely returned them to the status quo.⁴⁹ This has particular significance, we shall see, with regard to antidiscrimination law.

While the Supreme Court in *Hobby Lobby* assumed without deciding that the government had a compelling interest in “guaranteeing cost-free access” to

44. *Hobby Lobby*, 723 F.3d at 1144–45; see also Ilya Shapiro, *Mandates Make Martyrs Out of Corporate Owners*, SCOTUSBLOG (Feb. 24, 2014), <http://www.scotusblog.com/2014/02/symposium-mandates-make-martyrs-out-of-corporate-owners/> (“Without the HHS rule, women will still be free to obtain contraceptives, abortions, and whatever else isn’t illegal.”).

45. *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1222 (D.C. Cir. 2013).

46. *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

47. *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 609 (W.D. Pa. 2013); *Korte*, 735 F.3d at 686 n.21.

48. *Hobby Lobby*, 723 F.3d at 1144; see also Eugene Volokh, *3.B. Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, VOLOKH CONSPIRACY (Dec. 4, 2013), <http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/> (“The employer isn’t forbidding its employees from using certain contraceptives. It’s just not paying for them.”).

49. Volokh, *supra* note 48 (“If the employees want certain implantation-preventing contraceptives, they would have to buy them with their own funds. . . . They would thus be in essentially the same legal position.”); Marc DeGirolami, *On the Claim that Exemptions from the Contraception Mandate Violate the Establishment Clause*, CENTER FOR L. & RELIGION F. (Dec. 5, 2013), <http://clrforum.org/2013/12/05/on-the-claim-that-exemptions-from-the-contraception-mandate-violate-the-establishment-clause/> (agreeing with Volokh).

contraceptives,⁵⁰ it too narrowed the government's interest in the mandate and calibrated burdens to the market order. The government had advanced three interests in support of the mandate: sex equality, public health, and access to a comprehensive insurance system.⁵¹ The *Hobby Lobby* majority, however, rejected both public health and sex equality as “couched in very broad terms” and perhaps too general to ever be compelling.⁵² It indicated that exemptions—as it called the ACA's exclusion of small businesses and grandfathering of existing plans—might render any governmental interest less than compelling.⁵³ It further emphasized to the lower courts that they must “loo[k] beyond broadly formulated interests” and “scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.”⁵⁴

At the second step of RFRA scrutiny, a number of courts accepted the argument that a functioning market proves a way to advance governmental goals that is less restrictive of business religious exercise. In their view, alternative providers in the market could advance governmental goals without the regulation of religious objectors.⁵⁵ The Seventh Circuit, for example, determined that the government “can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; [or] it can give tax incentives to consumers of contraception” to reimburse them for the costs of contraception on the market.⁵⁶ By this logic, if another private entity might theoretically fill the gap caused by a business's denial of statutory rights, its would-be customers are not harmed.

In *Hobby Lobby*, the Supreme Court took a different tack. While it agreed that the contraceptive mandate was not the least restrictive means of furthering the governmental interest,⁵⁷ it did not go so far as to grant a complete

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

51. *Id.* at 2779.

52. *Id.*

53. *Id.* at 2780 (describing these as “features of ACA that support [the] view” that the mandate does not serve a compelling interest); *contra id.* at 2801 (Ginsburg, J., dissenting) (noting that federal law frequently applies only to larger employers and grandfathering does not exempt, but instead phases in compliance).

54. *Id.* at 2779 (quoting *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 418 (2006)).

55. Vikram David Amar & Alan E. Brownstein, *The Narrow (and Proper) Way for the Court to Rule in Hobby Lobby's Favor*, VERDICT (Apr. 11, 2014), <http://verdict.justia.com/2014/04/11/narrow-proper-way-court-rule-hobby-lobbys-favor> (concluding that conflicts with religious objectors could be avoided “if the government provided supplemental insurance coverage (or required health plan insurers to do so) to the employees of religiously-exempt organizations”).

56. *Korte*, 735 F.3d at 686.

57. *Hobby Lobby*, 134 S.Ct. at 2801.

exemption from the mandate to the for-profit challengers. The government had accommodated non-profit religious organizations, allowing them to exclude contraceptive coverage from their employee insurance plans while requiring the insurance company to offer a no-cost contraceptive-only policy directly to employees.⁵⁸ For self-insured plans, the employer's third-party administrator must purchase a separate policy and will be compensated by the government.⁵⁹ The Court decided that the government could choose to similarly accommodate for-profit objectors.⁶⁰

The Court's reliance on the non-profit accommodation, however, also depends on the existence of market actors willing to step in. Richard Epstein criticized the Court on this ground, noting that the accommodation itself transfers the burden of compliance to other private market actors, namely insurers and administrators.⁶¹ Objectors' insurance companies and third-party administrators must be willing to assume regulatory compliance without religious objection. The Court, moreover, did not foreclose alternative market providers as a less restrictive means. After its decision, many district courts continued to hold that the contraceptive mandate and the religious accommodation did not provide the least restrictive means of ensuring access to cost-free contraceptives, because market alternatives such as tax incentives exist.⁶²

Prior to the successful litigation against the ACA's contraceptive mandate, for-profit corporations—like wedding vendors—presumptively would have been excluded from the protections of most state religious freedom restoration acts. Churches, religious organizations, and individuals exercised religion; for-profit corporations did not. Similarly, commercial enterprises—whether religiously affiliated or secular—could not have expected courts to lift their duties of nondiscrimination obligations toward the public and employees.

58. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under Patient Protection and Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013). With regard to self-insured plans, a third party administrator of the plan must provide contraception coverage at no cost. *Administration Issues Final Rules on Contraception Coverage and Religious Organizations*, U.S. DEP'T OF HEALTH & HUM. SERV. (June 28, 2013), <http://www.hhs.gov/news/press/2013pres/06/20130628a.html>.

59. *Hobby Lobby*, 134 S. Ct. at 2782.

60. 78 Fed. Reg. at 8462.

61. Epstein, *supra* note 38, at 63-65.

62. See, e.g., *Louisiana Coll. v. Sebelius*, 38 F.Supp.3d 766, 789 (W.D. La. 2014) (noting as alternative that “government work with third parties to provide emergency contraception” or “providing tax deductions, refunds, or credits to employees who must purchase emergency contraceptives” on the market).

Religious exemptions for for-profit corporations, however, suggest, not just a moral, but a moralized marketplace. Whereas for-profit corporations previously could pursue moral aims above and beyond legal minimums, the moralized marketplace allows them to seek to opt out of protections of their employees and customers in the interest of corporate religion. It authorizes the refusal of goods and services to particular people based on business owners' judgments that their conduct is wrong.

In her *Hobby Lobby* dissent, Justice Ginsburg expressed concern that the majority's acceptance of corporate religious exemption implicated antidiscrimination law across the marketplace.⁶³ She warned that the contraceptive challengers "surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs."⁶⁴ She called on the majority to explain how its embrace of corporate religious exemptions would not equally apply to cases like *Elane Photography, LLC v. Willock*,⁶⁵ in which a business did not want to photograph a lesbian couple's commitment ceremony, and *Minnesota ex rel. McClure*,⁶⁶ in which a chain of for-profit health clubs would not hire LGBT people.⁶⁷

The majority, however, was unwilling to do so. It acknowledged only the compelling nature of norms against racial discrimination and rejected the possibility that its decision might shield "discrimination in hiring, for example on the basis of race."⁶⁸ It was non-committal with regard to sexual orientation and other forms of discrimination.

Hobby Lobby, of course, has immediate relevance only for the federal RFRA, which applies to federal laws and regulations. It does not affect state legal protections for gay rights in public accommodations or elsewhere. Nor does the decision bind state courts, which will be called upon to interpret state RFRA, constitutions, or marriage-specific exemptions.

Nonetheless, *Hobby Lobby* already is proving influential as a political matter.⁶⁹ Many states are now proposing new marriage-conscience laws and

63. *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

64. *Id.* at 2751 (Ginsburg, J., dissenting).

65. *Elane Photography v. Willcock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

66. *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985).

67. *Hobby Lobby*, 134 S. Ct. at 2804. .

68. *Id.* at 2783.

69. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1240 (2014) (predicting that if the contraceptive mandate challenges succeed, "libertarian opponents of public

debating the expansion or adoption of state RFRAs with *Hobby Lobby* and same-sex marriage in mind.⁷⁰ *Hobby Lobby* opens the door to religious exemptions for for-profit businesses that raise objections to serving same-sex couples. It invites arguments that invoke the libertarian premises of the moralized marketplace.

II. THE MORALIZED MARKETPLACE OF SAME-SEX MARRIAGE RELIGIOUS EXEMPTIONS

This Part considers the significance of the moralized marketplace for religious objections to same-sex marriage. Although religious refusals span wide areas of law, my focus here will be on public accommodations, which have been a flashpoint for religious objection. Section A describes businesses' religion-based resistance to serving same-sex couples and the public accommodations antidiscrimination laws that currently bind them. Section B sets out the basic argument in favor of religious exemption of businesses from public accommodations laws. In judicial and political fora, proponents of exemption for same-sex marriage objectors present market access as the sole or central societal and individual interest in antidiscrimination law. With the goals of antidiscrimination law restricted to market access, alternative vendors both negate the reason for regulation and serve as a means less restrictive of objecting businesses' religious freedom.

A. Public Accommodations' Objections to Same-Sex Coupling

Caterers, bakeries, florists, dress shops, and other commercial enterprises have refused to serve same-sex couples out of religion-based objections to same-sex marriage or coupling.⁷¹ Inns that host weddings have turned away

accommodations statutes will be well positioned to . . . contain, and indeed roll back," antidiscrimination laws).

70. See *infra* notes 84-86 and accompanying text.

71. See, e.g., John Caher, *Farm Is Fined for Refusal to Hold Same-Sex Wedding*, N.Y. L.J. (Aug. 18, 2014), <http://www.newyorklawjournal.com/id=1202667019996/Farm-Is-Fined-for-Refusal-to-Hold-SameSex-Wedding>; Katie McDonough, *Yet Another Bakery Refuses to Make Cake for Gay Wedding*, SALON (May 15, 2013), http://www.salon.com/2013/05/15/yet_another_bakery_refuses_cake_for_gay_wedding/?utm_source=feedly; Mark Meredith & Will C. Holden, *Cake Shop Says Business Booming Since Refusal to Serve Gay Couple*, FOX 31 DENVER (July 31, 2012), <http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple/>; Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says: "That's Illegal,"* ABC NEWS (Aug. 19, 2011), <http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333#.UZqtN7>

couples, citing their religious beliefs.⁷² A broader array of enterprises has sought to avoid treating same-sex marriages as valid in the delivery of goods and services for purposes of insurance, hospital visitation, medical decision-making, and more.⁷³ Retailers, car rental companies, clubs, and childcare centers might similarly withhold discounts, memberships, or privileges (such as the ability to pick up a child without the other parent's consent) due to their religious beliefs.⁷⁴

Wkrlw; *Wedding Cake Battle Brews Between Couple, Baker*, KCCINEWS 8 (Nov. 12, 2011, 9:37 AM), <http://www.kcci.com/Wedding-Cake-Battle-Brews-Between-Couple-Baker/-/9357770/7310176/-/fwbjaw/-/index.html>.

72. In November 2012, the owners of Liberty Ridge Farm cited their religious beliefs in refusing to provide their facilities for a lesbian couple's wedding ceremony. See *New York's Liberty Ridge Farm Refuses To Host Lesbian Couple's Wedding*, HUFF. POST (Oct. 18, 2012), http://www.huffingtonpost.com/2012/10/18/liberty-ridge-farm-new-york-gay-wedding-denial_n_1980435.html (denying same-sex couple rental of venue, citing religion, and saying "I think it's our right to choose who we market to, like any business."); *Baker & Linsley v. Wildflower Inn*, ACLU (Aug. 23, 2012), <https://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn> (reporting settlement reached in discrimination case against an inn refusing to serve a same-sex marriage in which the inn raised state and federal free exercise rights in defense); Rebecca Lindstrom, *Suwanee Business Refuses to Print Gay Wedding Invitation*, CHANNEL 11 ALIVE (Apr. 27, 2015), <http://www.11alive.com/story/news/local/suwanee/2015/04/24/suwanee-alphagraphics-franchise-gay-wedding/26318959/> (reporting refusal of Georgia business to print wedding invitations for a lesbian couple); *State v. Arlene's Flowers*, No. 13-2-00871-5, 2015 WL 94248 (Wash. Super. Feb. 18, 2015) (concluding that applying antidiscrimination law to florist refusing to serve same-sex wedding does not violate state or federal free exercise provisions).

73. DOUGLAS LAYCOCK, *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 195 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds. 2008) [hereinafter *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*]; Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, N.Y. TIMES (May 12, 2009), http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/?_r=0 (listing examples).

74. Many non-religion-based refusals have involved recognition of family relationships by such entities. *Monson v. Rochester Athletic Club*, 759 N.W.2d 60 (Minn. Ct. App. 2009) (regarding a lesbian couple who parented a child together and were denied a family membership at a health club); *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824 (2005) (regarding lesbian couple who were registered domestic partners and denied a family membership at a country club); John Wright, *Gay Couple Accuses Baylor-Owned Gym of 'Draconian and Bigoted Practices'*, DALLAS VOICE (Jan. 26, 2011) (reporting complaints filed against fitness center that has a stated policy of refusing to offer family memberships to same-sex couples); *Atlanta Mayor Fines Golf Club for Refusing to Obey Domestic Partners Rule*,

Beyond marriage or coupling, gays and lesbians also have confronted refusals from commercial actors and social service providers with regard to the formation of their families. For example, the country's largest adoption website prohibited a gay couple in a registered domestic partnership from posting a profile as prospective parents, based on a position that "it is in the best interests of infants to be placed for adoption with a married mother and father."⁷⁵ In *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, citing religious concerns, a medical practice refused to perform an intrauterine insemination for a lesbian⁷⁶—as is not uncommon.⁷⁷

All of these businesses are prototypical public accommodations—holding themselves open to members of the public willing to pay for their services. To the extent that their objections have surfaced in court, they have resisted, not marriage per se, but rather the application of state antidiscrimination laws to their businesses.⁷⁸ Twenty-one states and the District of Columbia now

ADVOCATE (Dec. 28, 2004), <http://www.advocate.com/news/2004/12/28/atlanta-mayor-fines-golf-club-refusing-obey-domestic-partners-rule-14688>; Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1271-73 (2006) (discussing Sandals resort and observing that "Many businesses restrict their goods and services to opposite-sex couples. These businesses range from travel groups for straight couples only, to ballroom dance studios that require men to dance with women, to photographers who refuse to take pictures of same-sex couples."),

75. *Butler v. Adoption Media*, 486 F. Supp. 2d 1022, 1057 (N.D. Cal. 2007).

76. 189 P.3d 959 (Cal. 2008).

77. Ryan E. Lawrence et al., *Obstetrician-Gynecologists' Beliefs About Assisted Reproductive Technologies*, 116 OBSTETRICS & GYNECOLOGY 127, 129 (2010) (surveying ob-gyns and finding, for example, 14% would refuse to provide assistance with reproduction if a woman has a female partner and 12.7% would also refuse to refer her or help her find another doctor).

78. Because federal public accommodations law applies only to a limited set of commercial entities and includes only "race, color, religion, or national origin," 42 U.S.C. § 2000a (West 2014), religious objections from businesses arise in the context of state public accommodation laws. *See, e.g.*, *Cervelli v. Aloha Bed & Breakfast*, No. 11-1-3103-12 ECN, 2013 WL 1614105 (Haw. Cir. Ct. Apr. 11, 2013) (granting summary judgment in favor of same-sex couple refused service at a bed and breakfast who were visiting a friend, not marrying); *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n Dec. 6, 2013), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf, *aff'd*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n May 30, 2014) (final agency order), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf (rejecting state RFRA and free exercise defenses); *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) (concluding that state RFRA could only be raised in defense to a government action, not a private

prohibit public accommodations from discriminating against consumers on the basis of sexual orientation,⁷⁹ while virtually all states (Alabama is a rare exception) prohibit discrimination on the basis of race, color, national origin, religion, and sex.⁸⁰ Although state laws differ in form and breadth, “establishments commonly covered are hotels, restaurants, transport facilities, places of entertainment, retail stores, lodgings, and state facilities.”⁸¹ A typical definition is “any establishment that provides or offers its services, facilities, accommodations, or goods to the general public.”⁸²

Through public accommodations law, the liberty of business owners to exclude is curtailed in the interest of the full and equal participation in the marketplace of all people. Where these laws apply, a health clinic cannot put up a “no gays or lesbians” sign. A dance hall must admit interracial couples. A health club cannot restrict membership to native-born citizens. A restaurant owner cannot turn away a woman because she wears a hijab.

The public-facing nature of a business, not its claim to religiosity, tends to be determinative of its nondiscrimination obligations. Thus, religious nonprofits in commerce—hospitals, insurance companies, and daycares—assume nondiscrimination obligations by virtue of being open to the public. By contrast, houses of worship, certain private clubs, and some activities of religious non-profits (such as providing religion-based services to co-religionists) may be exempted.⁸³

action, and therefore not addressing RFRA defense); *see also* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1169 (2012) (“[R]eligious objections to same-sex marriage are merely a subset of objections to sexual orientation equality.”).

79. *Non-Discrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT (MAP), http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Oct. 18, 2015) (mapping the current state of laws).

80. Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 233 (1978).

81. *Id.* at 240-41.

82. *Id.* at 242 (citing N.M. STAT. ANN. §4-33A-2 (Supp. 1975)).

83. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601(1) (West 2014) (“Place of public accommodation” shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.); CONN. GEN. STAT. ANN. § 46a-64(b)(4)(B) (West 2012) (exempting nursing homes associated with a tax-exempt religious organization from religious nondiscrimination requirements provided “the class of persons granted preference in admission is consistent with the religious mission of the nursing home.”); *see also* Chapman, Note, *supra* note 28, at 1789–90 (“States that

As state legislatures moved to pass marriage equality acts, they did not alter this basic framework. They typically authorized religious exemptions for religious organizations to refuse to provide only those “services, accommodations, advantages, facilities, goods, or privileges” relating to “the solemnization or celebration of a marriage.”⁸⁴ While a few statutes extended accommodation more broadly,⁸⁵ no state exempted for-profit businesses from duties to serve same-sex couples.⁸⁶

2014 and 2015, however, have seen renewed efforts to achieve marriage-related religious exemptions for businesses. A number of influential scholars—including Douglas Laycock, Robin Fretwell Wilson, Thomas Berg, Carl Esbeck, and Richard Garnett—have revived their proposal for “marriage conscience protection.”⁸⁷ Under this proposal, religiously affiliated

currently have such [sexual orientation antidiscrimination] statutes generally have minimal religious exemptions.”).

84. N.Y. DOM. REL. LAW § 10-b (McKinney2013); *See e.g.*, VT. STAT. ANN. tit. 9, § 4502(l) (West 2012); *but see* Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25, 51 (2015) (discussing and critiquing such exemptions).

85. *See, e.g.*, N.H. REV. STAT. ANN. § 457:37(III) (2010) (allowing religious organizations and their employees to decline to provide “services, accommodations, advantages, facilities, goods, or privileges...related to...the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals”); *see also* CT. STAT. ANN. § 46b-35b (West Supp. 2013) (ensuring that legalization of marriage for same-sex couples shall not “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.”); R.I. GEN. LAWS ANN. § 15-3-6.1(c)(2) (West 2013) (allowing refusals related to “the promotion of marriage through any social or religious programs or services, which violates the religious doctrine or teachings of religious organization, association or society.”).

86. James M. Oleske, *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 135 (2015).

87. *See, e.g.*, Letter from Douglas Laycock, Robert E. Scott Distinguished Professor of Law & Professor of Religious Studies, Univ. of Va., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ. & Marc D. Stern, to Lisa Brown, Senate Majority Leader, Wash. State Senate (Jan. 28, 2012), *available at* <http://mirrorofjustice.blogs.com/files/washington2012-me-too-brown.pdf>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Pol’y, Univ. of St. Thomas Sch. of Law, Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch. & Marc D. Stern, to Brian E. Frosh, Chairman, Md. State Sen. (Jan. 30, 2012) [hereinafter Wilson et al. Md. Ltr.], *available at* <http://mirrorofjustice.blogs.com/files/maryland->

organizations—hospitals, insurance companies, social service providers, and the like—could refuse to “provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage” and to treat any marriage as valid.⁸⁸ Individuals and secular businesses may also deny couples goods and services for weddings; employee spousal benefits; housing; and “counseling or other services that directly facilitate the perpetuation of any marriage.”⁸⁹ The term “facilitate” arguably sweeps in businesses and individuals that might be expected to acknowledge a couple’s married status or treat same-sex couples equally to opposite-sex couples at any time in their married lives. While the proposed language applies to all marriages, same-sex marriage is its inspiration.⁹⁰

Even as some legislatures (and governors) implemented or considered marriage-specific exemptions, a number of states turned to adopting state religious freedom restoration acts or amending existing RFRA to broaden their coverage.⁹¹ As a rule, these state RFRA prohibit enforcement of any law

letter-1.pdf. For my critique of this proposal, see Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703 (2014).

88. See Wilson et al. Md. Ltr., *supra* note 87, at 3 for proposed statutory text. They also propose to exempt public employees from duties, an issue that is outside the scope of this analysis.

89. See *id.* The current iteration of the proposal applies to businesses: (1) where the owner primarily performs the services; (2) that employ five or fewer employees; or (3) that own five or fewer units of housing for rent. While the current academic proposal for marriage conscience exemption applies only to small businesses, “three of the leading academic proponents of the exemption (Berg, Laycock, and Stern) have argued elsewhere that exemptions for small businesses deprive a law of neutrality and general applicability under the Constitution and trigger a presumptive requirement that large businesses receive religious exemptions.” Oleske, *supra* note 86, at 139. See also Brief of Douglas Laycock et al., as Amici Curiae in Support of Petitioners at 34, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556tsacLaycock.pdf> [hereinafter *Obergefell Brief of Laycock et al.*] (“If, for example, an anti-discrimination law exempts very small businesses – at least if that exemption reflects a purpose to respect their privacy or free them from the burden of regulation—then the Constitution requires exemptions for religious conscience subject to the compelling interest test.”).

90. Mary Anne Case, *Why “Live-And-Let-Live” is not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 492 (2015) (noting existence of “those (and there are many) with a sincere religious objection to facilitating or recognizing interfaith marriages, the remarriage of the divorced, even interracial marriages”).

91. Don Byrd, *State RFRA Bill Tracker*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Mar. 4, 2015), <http://bjconline.org/state-rfra-tracker-2015/> (tracking state

that substantially burdens religious exercise unless doing so is the least restrictive means of furthering a compelling governmental interest.⁹²

The timing of the consideration of new religious exemptions was no coincidence. First, marriage equality had come to seem inevitable. With *United States v. Windsor* setting off a flurry of judicial decisions striking down marriage bans in much of the country,⁹³ *Obergefell v. Hodge* was widely—and correctly—predicted to establish same-sex marriage as a constitutional right. Second, the rise of corporate religious liberty in the contraceptive mandate litigation seemed to portend potential success for business objectors—such as wedding vendors—that once would have been categorically ineligible to exercise religion. In the twenty-one states that have adopted state analogs of the federal RFRA, the state courts may look to federal decisions in interpreting state RFRA.⁹⁴

The embrace of a moralized marketplace throughout the contraceptive litigation finds parallels in arguments now made in legislatures and courts for exempting businesses from their duties under antidiscrimination law. While theoretically broad, recent state RFRA are specifically motivated by the legalization of same-sex marriage.⁹⁵ Many states considering or passing such legislation have no antidiscrimination law that prohibits discriminating against people because of their sexual orientation.⁹⁶ Instead, legislators are moved to preemptively safeguard businesses that refuse to serve same-sex couples from

RFRA); *Anti-LGBT Religious Refusals Legislation Across the Country*, ACLU, <https://www.aclu.org/map/anti-lgbt-religious-refusals-legislation-across-country> (last visited Oct. 17, 2015) (mapping various anti-gay rights bills).

92. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA*s, 55 S.D. L. REV. 466, 475-77 (2010) (describing the dominant form of state RFRA).

93. See *Obergefell v. Hodges*, 135 S. Ct. 2584 app. A (2015) (compiling state and federal decisions).

94. Byrd, *supra* note 91.

95. Tony Perkins, *Georgia Peaches a Fit Over Senate Bill*, PATRIOT POST (Feb. 23, 2015), <http://patriotpost.us/opinion/33349> (“Same-sex “marriage” is tying the knot – right around Christians’ freedoms. . . . In at least 10 states, conservatives are fighting back with a string of Religious Freedom Restoration Acts (RFRA).”); Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 5, 2015), http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html?_r=0 (“The L.G.B.T. movement is the main thing, the primary thing that’s going to be challenging religious liberties and the freedom to live out religious convictions,” said State Senator Joseph Silk, an Oklahoma Republican and the sponsor of a bill in that state.”).

96. Fausset & Blinder, *supra* note 95 (“[G]ay-rights groups say the bills would enshrine discrimination.”).

such laws⁹⁷—whether they will succeed in doing so, of course, depends on the courts’ future interpretations of those acts.

*B. The Libertarian Premises of Same-Sex Marriage
Religious Exemptions*

Even more so than the employment relationship, public accommodations invite the libertarian logic of the moralized marketplace.⁹⁸ Whereas employers constitute a pipeline to benefits, fair wages, and safe working conditions, the wedding vendors offer goods and services in competition with other providers. An employee has no other avenue to employer-based insurance, but a same-sex couple typically will find a venue for their ceremony, even if others refuse. Unlike employees, consumers have no relationship of dependency with the average vendor. They engage in true arms-length transactions.

In the moralized marketplace to which religious objectors aspire, the existence of a competitive market simultaneously diminishes the need for government regulation and furnishes its alternative. On this account, the governmental interest in prohibiting discrimination in public accommodations lies in ensuring market access. In doctrinal terms, the government has no compelling interest in regulating religious objectors where the market functions. Alternative providers, moreover, prove a less-restrictive means to further its compelling interest in market access than does the regulation of business.

From the perspective of business objectors (and their scholarly supporters), a competitive market inflicts no harms that justify government intervention. Denial of service may “inconvenience” previously protected groups, but does not suffice to render the government’s interest in regulation compelling.⁹⁹ As Nelson Tebbe points out, supporters of same-sex-marriage religious objections argue that exemption from antidiscrimination law simply reverts to the status quo prior to the enactment of a statute, restoring a purportedly unregulated baseline without significant harm to anyone’s

97. *Id.*

98. Bagenstos, *supra* note 69, at 1240 (predicting that if the contraceptive mandate challenges succeed, “libertarian opponents of public accommodations statutes will be well positioned to contain, and indeed roll back,” antidiscrimination laws).

99. Laycock, *supra* note 73, at 198 (describing denial of access to services and to marriage itself as “mere inconvenience”); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 872 (2014) (critiquing “sweeping claims” of compelling interests in women’s health, public health or nondiscrimination as failing to allow exemptions or statutory rights holders to suffer “any inconvenience or affront”).

interest.¹⁰⁰ Arguments for religious exemptions thus (implicitly or explicitly) adopt a common law baseline according to which businesses have a right to refuse service to anyone for any reason.¹⁰¹

Regulation, by contrast, is seen to impose weighty burdens. On this account, “[r]equiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree.”¹⁰² While gay couples may experience “disturbance, hurt, and offense,” they “can go to the next entry in the phone book or the Google result.”¹⁰³ As the argument goes, whereas the market remedies the harm of discrimination, “[t]he individual or organization held liable for discrimination . . . must either violate the tenets of her (its) faith or else exit the social service, profession, or livelihood in which she (it) has invested time, effort, and money.”¹⁰⁴

In this view, in a functioning market, gays and lesbians cannot suffer discrimination that provides a compelling basis for government action. Some law and religion scholars, for example, claim that for RFRA (and perhaps constitutional) purposes, the government has no compelling interest in applying antidiscrimination law to a “religious organization” if “a same-sex couple seeking goods or services . . . can readily obtain comparable goods or services from other providers.”¹⁰⁵ Similarly, scholars propose that objecting businesses should be exempted from duties to serve same-sex couples where the market is competitive.¹⁰⁶

Antidiscrimination protections become necessary only where the market fails. Under the scholarly marriage-specific exemption law, for example, public accommodations antidiscrimination laws would apply to religious

100. Tebbe, *supra* note 84, at 51.

101. Beginning with the current common-law rule might seem neutral, but, as Joseph Singer makes clear in his comprehensive review of public accommodations law, the common law required businesses open to the public to serve all comers up until the mid-nineteenth century. Today’s common-law rule “originated in an attempt to deny equal rights to African-Americans and has the current effect of authorizing such conduct in states that lack their own public accommodations laws.” Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1448 (1996).

102. Laycock, *supra* note 73, at 198.

103. Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL’Y 206, 229 (2010).

104. Berg, *supra* note 103, at 229.

105. Obergefell Brief of Laycock et al., *supra* note 89.

106. Letter from Robin Fretwell Wilson et al., to Paul A. Sarlo, N.J. Senate Judiciary Comm. Chairman (Dec. 4, 2009), available at <http://mirrorofjustice.blogspot.com/2009/12/samesex-unions-and-religious-freedom-cont.html>.

objectors only where the customer is “unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship.”¹⁰⁷ Nathan Oman represents this viewpoint, saying that “antidiscrimination laws are justified to insure access” where “systematic exclusion occurs”; where, however, objectors do not “meaningfully threaten access to the market,” antidiscrimination laws cannot be justified.¹⁰⁸ The government’s ability to regulate objectors becomes contingent on the existence of such pervasive discrimination that “markets will not solve the problem” and individuals will not find alternative providers.¹⁰⁹

From this narrow account of governmental interest, it follows that requiring all businesses to comply with antidiscrimination laws is no longer the least restrictive means to achieve the government’s goals. Competition for customers and contract mechanisms usually work to allow everyone to access the goods and services they need.¹¹⁰ Alternative providers meet the government’s goal of ensuring a couple gains access to a good in the market.

In the view of objecting businesses, the availability of options in the

107. *Id.* Note that the exemption is only so conditioned with regard to secular businesses. With regard to any religiously affiliated business—ranging from adoption agencies to hospitals to daycares, the proposed right to refuse is absolute such that throughout their married life, a couple could be denied adoption, social services, housing, and spousal leave and benefits.

108. Nathan Oman, *The Empirical Irony of the Conflict Between Antidiscrimination and Religious Freedom*, CENTER FOR LAW AND RELIGION FORUM (Apr. 22, 2015), <http://clrforum.org/2015/04/22/the-empirical-irony-of-the-conflict-between-anti-discrimination-and-religious-freedom/>.

109. 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) (arguing that Richard Epstein convincingly establishes that “[a]nyone who wants to extend antidiscrimination protection to a new class needs to show that the class is subject to discrimination that is so pervasive that markets will not solve the problem”). Koppelman distinguishes between public accommodations and employers, the latter of which he views as inappropriate to exempt due to the burdens imposed on their employees and the way in which they serve as a conduit for benefits and wages. Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 60–61 (2014).

110. *Id.* (“Generally, the best way to insure such participation is to create institutions that keep markets competitive and remove barriers to entry.”); Andrew T. Walker, *The Equality Act: Bad Policy that Poses Great Harms*, PUBLIC DISCOURSE (July 24, 2015), <http://www.thepublicdiscourse.com/2015/07/15381/> (opposing federal sexual orientation antidiscrimination law and arguing that “[o]ver time, decreasing profit harms the feasibility of business that persists in bad, discriminatory business practices.”).

market proves that antidiscrimination law is unnecessarily restrictive.¹¹¹ For example, having refused service to a same-sex couple, an Iowa art gallery that hosts weddings noted that over fifty other venues exist in the county and “two websites focus solely on supporting same-sex weddings in Iowa.”¹¹² In defending a florist that turned away a same-sex couple, the Alliance Defending Freedom argued that the couple had ample opportunity to seek services elsewhere because “plenty of florists are willing to provide flowers for same-sex ceremonies.”¹¹³ Call this the alternative providers for “alternative lifestyles” defense.

Scholarly proponents of business religious exemptions also advance alternative market providers as least restrictive means. Robin Fretwell Wilson predicts that with regard to retailers “the hardships are likely to be fewer” because there are many options.¹¹⁴ Thomas Berg adds, “[t]here may be multiple adoption services, or multiple wedding photographers, ready to provide such service at little or no extra cost to the clients.”¹¹⁵ More broadly still, Robert Vischer argues that, as a general rule, businesses should be able to refuse service for religious reasons when a would-be customer seeks “roughly fungible goods and services” in an adequately competitive market.¹¹⁶

To facilitate market alternatives, a few scholars endorse disclosure of religious objections. Andrew Koppelman, for example, proposes businesses provide notice of their refusal to serve same-sex weddings and thus avert “unpleasant shock” to would-be customers.¹¹⁷ Douglas Laycock also suggests disclosure as a way of minimizing search costs.¹¹⁸ In this view, disclosure

111. See Walker, *supra* note 110.

112. Verified Petition at 15, *Odgaard & Odgaard v. Iowa Civil Rights Comm’n*, No. 046451 (Iowa Dist. Ct. Oct. 7, 2013), available at <http://www.becketfund.org/wp-content/uploads/2013/10/Odgaard-Complaint.pdf>.

113. See, e.g., Kristen Waggoner & Jonathan Scruggs, *Wash. Grandmother’s Religious Freedom, Livelihood at Stake*, ALLIANCE DEFENDING FREEDOM (Dec. 18, 2014), <http://www.adfmedia.org/News/PRDetail/9465> (“Plenty of other florists are willing to provide flowers for same-sex ceremonies, yet the lawsuits against Barronelle jeopardize her business, livelihood, and personal assets. The court should stop this injustice.”).

114. Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, 12 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 12, 13 (2011).

115. Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103, 141 (2015).

116. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 28 (2010).

117. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 646–47 (2015).

118. Laycock, *supra* note 73, at 200; Laycock, *supra* note 101, at 848–851.

further allays a governmental interest in enforcing antidiscrimination laws.

The emphasis on a competitive market admits of antidiscrimination obligations that apply in some geographic areas but not others. In some places in some states or cities even with a marriage-specific exemption in place (or where a RFRA might otherwise shield the objector), the absence of willing sellers could render the government's interest compelling and the regulation of refusing religious objectors the least restrictive means to ensure market access. On this account, religious objectors would be excused from compliance with antidiscrimination law in Greenwich Village, but perhaps not in rural Alabama.¹¹⁹ Religious exemption thus is “empirically contingent,”¹²⁰ inviting analysis more familiar to antitrust than antidiscrimination law.

III. A RADICAL RESTRICTION OF ANTIDISCRIMINATION LAW

This Part first reviews the rationales behind prohibiting discrimination in the marketplace. It then argues that a religious exemption regime characterized by market ideals radically restricts the aims of prohibitions on discrimination. Such a regime rejects the long-accepted dignitary and expressive goals of antidiscrimination law in favor of a functioning market. A guarantee of access to goods and services somewhere in the market, however, cannot suffice to ensure the broader aims of antidiscrimination law to address social stigma, construct equal citizenship, and create an inclusive society.

In broad strokes, public accommodations antidiscrimination laws have material, dignitary, and expressive goals.¹²¹ In terms of material equality, they foster access to the market. By requiring public-facing businesses to serve all without regard to race, sex, or other prohibited bases, they reduce search costs for goods and services previously only selectively available to disfavored groups. The libertarian arguments in favor of religious exemption largely accept this goal.

Antidiscrimination law, however, targets more than material inequality.¹²² In reporting out the Civil Rights Act, the Senate Commerce Committee explained, “Discrimination is not simply dollars and cents, hamburgers and

119. LAYCOCK, *supra* note 73, at 200.

120. Oman, *supra* note 108.

121. Koppelman, *supra* note 117, at 627 (“Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.”).

122. Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 191–92 (2015); Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL’Y 705, 708–16 (2014).

movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.”¹²³ As Bruce Ackerman has argued, this “institutionalized humiliation” was the central harm of discrimination, and its eradication the primary aim of antidiscrimination law.¹²⁴

The Supreme Court has emphasized the dignitary harm of discrimination in both its public accommodations and its gay rights cases. In rejecting challenges to the application of race and sex antidiscrimination laws to public accommodations, the Court stated that the laws’ “fundamental object . . . was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments’”¹²⁵ and underscored the “stigmatic injury” of discrimination.¹²⁶ The Court’s focus on “dignity” in the gay rights cases similarly acknowledges the harms that inhere in the institutionalized humiliation of gays and lesbians.¹²⁷

In addition to addressing material and dignitary harms, public accommodations laws express a message about citizenship.¹²⁸ They signal

123. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

124. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 138 (2014); *see also id.* at 136 (quoting Hubert Humphrey, the sponsor of the Civil Rights Act, emphasizing “monstrous humiliations” as the “evil” of discrimination); Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways,”* 95 B.U. L. REV. 891, 901-02 (2015) (quoting Attorney General Robert F. Kennedy saying that that discrimination in public accommodations requires “negroes to suffer humiliation and deprivation that no white citizen would tolerate”).

125. *Heart of Atlanta Motel*, 379 U.S. at 250.

126. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

127. ACKERMAN, *supra* note 124, at 291 (describing *United States v. Windsor* as focused on “the evils of institutionalized humiliation in vindicating the claims of same-sex couples”); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3082 (2014) (“The closest the Supreme Court has come to embracing the anti-humiliation principle is through its use of the term “dignity.” This link should be intuitive—what, after all, is the opposite of “humiliation” but “dignity”?).

In enacting public accommodations laws to cover sexual orientation antidiscrimination, some states affirmatively invoked the importance of ensuring human dignity. Joshua Sills, Note, *What Do Cake and Contraception Have in Common: Religious Freedom Challenges to LGBT Public Accommodations Laws after Hobby Lobby*, WASH. U. L. REV. (forthcoming 2016) (citing ME. REV. STAT. ANN. tit. 5, § 4552 (West 2008); OR. REV. STAT. ANN. § 659A.003 (West 2008)).

128. Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 843-44 (2003)

commitment to the inclusion of groups that might otherwise face discrimination. As Holning Lau argues, the civil rights framework has long taken “access to public accommodations, including business establishments, as an essential component of citizenship.”¹²⁹ As such, the denial of services constitutes not merely “an ordinary civil injury” but rather an expression of an ideology of the disfavored group’s inferiority.¹³⁰

Defining discrimination as lack of market access radically constricts the aims of antidiscrimination law. Two recent cases shed light on how this conceptualization of antidiscrimination law’s goals affects courts’ consideration of business claims to exemption.¹³¹ In the first, *Arlene’s Flowers*, a florist shop in Washington State, argued that the application of antidiscrimination law to the business violated its free exercise of religion under the state constitution.¹³² It claimed that “‘combatting discrimination’ is too broad an interest to be compelling”¹³³ and constructed the government’s interest instead as market access. The shop argued that the public accommodations law was not narrowly tailored because the state could achieve this narrower goal by allowing businesses to deny goods and services to a gay person and then “simply refer that person to a non-discriminating business.”¹³⁴ The court rejected this defense, saying that the compelling nature of antidiscrimination law lies in its eradication of “stigmatizing” and “serious

(“Antidiscrimination law also serves an important expressive purpose by offering to previously excluded groups a tangible invitation of admission as full members of society.”).

129. Lau, *supra* note 74, at 1279; *see also* Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1620 (2001) (“There is a very particular and direct relationship between prohibitions on discrimination in public accommodations and the meaning of citizenship.”).

130. Hunter, *supra* note 129, at 1618-20.

131. I assume for the sake of argument that for-profit businesses come under the protection of state religious exemptions (whether RFRA, marriage-specific, or constitutional) and antidiscrimination laws substantially burden their free exercise. Some RFRA, especially the new versions under consideration, explicitly encompass for-profits. *See e.g.*, IND. CODE § 34-13-9-7(3) (2015). Already, state courts have begun to cite *Hobby Lobby* to swiftly conclude (or assume) that for-profit corporations have religious rights. *See e.g.*, *State v. Arlene’s Flowers*, No. 13-2-00871-5, 47 (Super. Ct. of Wash. Feb. 18, 2015), *available at* <http://www.adfmedia.org/files/ArlenesFlowersSJRuling.pdf>; *Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Hum. Rts. Comm’n*, No. 14-CI-04474 (Fayette Cir. Ct. Apr. 27, 2015), *available at* <https://perma.cc/75FY-Z77D>.

132. *Arlene’s Flowers*, No. 13-2-00871-5, at 48.

133. *Id.*

134. *Id.* at 50.

social and personal harms.”¹³⁵ Allowing discrimination where alternative providers exist—the court held—“would, of course, defeat the purpose of combatting discrimination, and would allow discrimination in public accommodations based on all protected classes, including race. . . .”¹³⁶

The second case, by contrast, endorsed the market baseline. A Kentucky print shop, which had refused to print shirts for a gay rights group, contended that, among other things, the antidiscrimination law represented a violation of its rights under the state RFRA.¹³⁷ The court agreed.¹³⁸ It concluded that the government had failed to show a compelling governmental interest in enforcing antidiscrimination law, because the plaintiff was able to obtain printing at another shop for the same price.¹³⁹ In so doing, this court reduced the governmental interest in nondiscrimination to market access. Due to a functioning market, antidiscrimination law seemed unnecessary.

Ensuring a competitive market, however, hardly suffices to address the material harm of discrimination, let alone its long-accepted dignitary and expressive goals. Religious refusals raise economic costs for same-sex couples, most obviously in the form of search costs. Their proponents admit as much, accepting that “inconvenience” or “hardship” short of “substantial” may result from denial of services.¹⁴⁰

Rights and responsibilities in commerce also become uncertain. Academic proponents of exemption anticipate that businesses would face different expectations from city to city and town to town based on the competitiveness of the market. Yet, it is not clear how exactly a consumer seeking services or a business raising religious objections could evaluate the competitiveness of the market – would it have to survey other businesses? What proximity would suffice? 5 miles? 10? 50? Can consumers be assumed to be able to travel? What if a specific couple cannot? What about non-fungible goods or consumer demands (a desire, for example, to be married in one’s hometown)? What role does the Internet play? While laws need not provide bright-line rules to adequately inform consumers and businesses, it is difficult to know what

135. *Id.* at 49 (quoting *Roberts*, 468 U.S. at 628).

136. *Id.* at 51 (noting that “there is no slope, much less a slippery one, where ‘race’ and ‘sexual orientation’ are in the same sentence of the statute, separated by only by [sic] three terms: ‘creed, color, national origin.’”).

137. *Hands on Originals*, Civ. No. 14-CI-04474. Although the case is complicated by a separate, viable free speech defense, the court’s analysis of the RFRA claim is independent of the speech concerns.

138. *Id.* at 14.

139. *Id.* at 15.

140. *See supra* notes 107–116 and accompanying text.

would suffice to determine whether antidiscrimination law applies.¹⁴¹

As Mary Anne Case observes, instead of promoting “live-and-let-live,” marriage-related exemptions “encourage insecurity on the part of those in need of services and hostility on the part of providers.”¹⁴² Would-be customers would face scrutiny and intrusive questioning about their personal lives that are not normally part of commercial transactions. Individuals disadvantaged because of sexual orientation would experience uncertainty and judgment which other citizens do not face. To paraphrase the Senate Commerce Committee report on the Civil Rights Act, the harm to gays and lesbians is not in dollars and cents, wedding gowns and floral bouquets, but in the frustration, humiliation, and stigma that result from being told that one is unacceptable.¹⁴³

Same-sex couples seek more than flowers and car rentals from the third parties that now raise religious objections to serving them. They want universal recognition of their equal status as married or marrying. For these couples like their opposite-sex counterparts, marriage provides the tool to third-party recognition of their relationship to one another¹⁴⁴—which exemptions effectively block. Couples need third parties to recognize their eligibility for family healthcare plans, discounted family rates, hospital visitation privileges, medical decision-making, and family housing.¹⁴⁵ Alternate providers cannot bestow that recognition. Even assuming that the numbers of businesses seeking or being granted exemptions were low, exemptions inescapably would encumber same-sex couples’ equal enjoyment of the right to marry.¹⁴⁶ As before the Court’s recognition of same-sex marriage, third-party recognition

141. Case, *supra* note 90, at 470 n.28 (raising questions regarding the circumstances under which a duty to serve would apply and concluding “the fact that every proponent of exemptions I have talked to acknowledges s/he has not developed an answer for them should give one serious pause before adopting an exemption proposal.”).

142. *Id.* at 492.

143. See *supra* note 124 and accompanying text.

144. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1777 (2005) (arguing that the central purpose of modern marriage is the recognition of that marriage by third parties); *id.* at 1783 (explaining that marriage provides a rule that reduces the need to inquire more deeply into the parties’ relationship).

145. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, as reprinted in CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 683, 686 (William B. Rubenstein, Carlos A. Ball & Jane S. Schacter eds., 3d ed. 2008) (describing how marriage forms the mechanism through which employers deliver benefits and businesses give deals).

146. See *supra* notes 73-74 (discussing many accounts of “marriage” discrimination that involve denials by third parties of equal treatment of the relationships of same-sex couples).

would no longer be automatic. Same-sex couples would still have second-class relationship status.

Allowing businesses to refuse service under RFRA or marriage-specific statutes accordingly brands same-sex couples as second-class citizens.¹⁴⁷ For example, as Nelson Tebbe explains, a same-sex couple who was denied use of the primary wedding venue in their town found their relationship with the community altered; “they stood now not simply as residents of the town, but as committed-lesbian 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).”¹⁴⁸ Public accommodation laws recognize this and guarantee access not merely to a “market niche” willing to serve one’s group, but to the market as a whole on full and equal terms with others.¹⁴⁹ As Joseph Singer argues, “[t]he question is not whether one can find a store willing to let you in and treat you with dignity. *The question is whether one has a right to enter stores without worrying about such things.*”¹⁵⁰ Religious exemptions effectively strip same-sex couples of this right, preserving a regime in which “a key component of lesbian and gay identity—same-sex relationships—is marked as inferior.”¹⁵¹

Refusals based on one’s status as gay or female or Evangelical Christian thus are not bumps in the road to another market provider. Discrimination represents a serious harm in its own right even when the good or service is ultimately provided. A black person made to sit at the back of the bus is harmed, though he arrives at his destination. A woman denied employment on the basis of sex is not made whole, though she secures a position elsewhere. A same-sex couple refused service by one bakery suffers injury, though a second bakery will serve them.

With a more comprehensive view of the goals of antidiscrimination law, it also becomes clear that a requirement that businesses disclose their religious objections to serving same-sex couples facilitates the material goals of the law at the price of the equal dignity and citizenship of gays. “No service to same-sex couples” signs reduce search costs for wedding and other marriage related

147. Lau, *supra* note 74, at 1280.

148. Tebbe, *supra* note 84, at 38-40.

149. Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 938 (2015).

150. *Id.*

151. NeJaime, *supra* note 78, at 1214 (noting “the profound connection between same-sex relationships and lesbian and gay identity”); *see also* Lau, *supra* note 74, at 1272 (arguing that “one’s sexual orientation classification is necessarily defined by whom she desires to partner with”).

services. They also would likely, as Andrew Koppelman argues, reduce or eliminate face-to-face confrontations between business owners and gay couples.¹⁵² At the same time, however, such signs exacerbate the dignitary harm to gays.¹⁵³ Even when a gay person is not looking for wedding flowers, he is confronted by signs declaring his difference and inferiority. Such signs broadcast a message to society at large that he is and should be stigmatized. Antidiscrimination laws thus tend to prohibit advertising one's intent to discriminate.¹⁵⁴ While Koppelman raises the specter of First Amendment Free Speech challenges should the government prohibit disclosure of one's objections, such prohibitions have formed part of our constitutional landscape for over half a century.¹⁵⁵ Disclosure requirements of the kind he proposes,

152. These have sometimes been terribly traumatizing for the couple and their family. In the Matter of Klein, No. 44-14 & 45-14, Findings of Fact et al. 5-9 (Comm'n of the Bureau of Labor & Ind. of the State of Or.), *available at* <http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf> (discussing case in which bakery owners repeatedly condemned lesbian couple and their family as immoral). Refusals that do not take place face-to-face can have similar effect. Terry Hillig, *Gay Couple Get Brushhoff at Inn*, ST. LOUIS POST-DISPATCH (Feb. 24, 2011), <http://business.highbeam.com/435553/article-1G1-249914664/gay-couple-get-brushhoff-inn-pair-cry-foul-after-bamp> (describing couple's experience with denials over email, including emails stating that "homosexuality is wrong and unnatural" and follow-up unsolicited emails of Bible passages).

153. John J. Donohue, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1609 (1992) (noting that "any effort to reduce the search costs . . . necessarily elevates the dignitary harm imposed on minority citizens").

154. *See, e.g.*, Fair Housing Act, 42 U.S.C. §3604(c) (2014) (defining as actionable discrimination "to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."); 5 ME. REV. STAT. § 4592 (1) (prohibiting public accommodations from advertising their services as limited by sexual orientation); OR. REV. STAT. ANN. § 659A.409 (prohibiting any communication that services will be denied to, "or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age").

155. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 808 (2001) ("The truth, however, is that antidiscrimination laws *do* centrally interfere with the ability of many people to communicate certain messages and values."). Eugene Volokh, who reads the Free Speech Clause to prohibit much regulation, believes that this prohibition is constitutional. Eugene Volokh, *Why May the Government Ban Businesses from Saying "We Won't Bake Cakes for Same-Sex Weddings"?*, VOLOKH

moreover, seem at least as likely to be resisted as unconstitutional compelled speech.

Accepting the market libertarian arguments in favor of exemptions from antidiscrimination law potentially destabilizes all antidiscrimination obligations, resulting in a marketplace segregated by moralized judgments of other citizens. The logic of the moralized market extends far beyond same-sex marriage and sexual orientation antidiscrimination law. After all, the cost to business religious exercise is identical in the context of marriage wedding vendors that refuse to serve a gay couple, the BBQ chain that denies a black person a table, and the landlady who rejects an unmarried couple.¹⁵⁶ They seek to avoid their own involvement in a wedding, the mixing of races, or out-of-wedlock sex. In each instance, antidiscrimination law applies not because of the lack of other providers,¹⁵⁷ but because acts of discrimination inflict material, dignitary, and citizenship harms. By contrast, the moralized market asks only if a competitive market exists and, if so, permits discriminatory refusals in commercial life. Religious exemptions on these terms would signify victory in what Samuel Bagenstos labels “the unrelenting libertarian assault on public accommodations law”¹⁵⁸

IV. AGAINST MARRIAGE TRIUMPHALISM

In favor of religious exemptions to sexual orientation antidiscrimination laws, some scholars suggest that gays have won.¹⁵⁹ They point to the rapid rise in popular support for same-sex marriage. They tell a story of inevitable progress toward gay rights. On this account, exemptions will be short-lived,

CONSPIRACY (Jul. 6, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/06/why-may-the-government-ban-businesses-from-saying-we-wont-bake-cakes-for-same-sex-weddings/> (“saying we “will . . . refuse[]” to provide a cake is essentially a true threat of illegal conduct. . . And it is a threat that would have much the same effect as an outright refusal to provide a cake to someone who shows up and asks for it, because it tells people that it’s futile to even ask.”).

156. *Arlene’s Flowers*, No. 13-2-00871-5, at 51 (rejecting market libertarian religious liberty arguments, noting that “there is no slope, much less a slippery one, where ‘race’ and ‘sexual orientation’ are in the same sentence of the statute, separated by only by [sic] three terms: ‘creed, color, national origin.’”).

157. Brief for Petitioners at 7-8, *Newman v. Piggie Park Enterprises, Inc*, 1967 WL 129622 (1967) (noting that even in the Deep South, restaurants and lodging existed to serve blacks but “it is scant consolation to the Negro traveler that many facilities are desegregated if the one he enters continues to discriminate.”).

158. Bagenstos, *supra* note 69, at 1205.

159. Koppelman, *supra* note 117, at 658 (“I’m a gay rights advocate. We won. Good.”).

because, as time marches on, fewer and fewer people will hold religious beliefs that deny the equality of gays and lesbians.¹⁶⁰

This Part counsels against marriage triumphalism. Gays and lesbians may have attained marriage, but they are not treated as equals in our nation. One cannot assume societal change will continue apace, even as governments erect legal impediments to equality in the form of religious exemption.

In the marriage triumphalist account, marriage equality represents the end of discrimination. But, if this were so, *Loving v. Virginia*¹⁶¹ would have ensured equality for blacks. Indeed, by the time *Loving* was decided, the vast majority of states already permitted interracial marriage by legislative action.¹⁶² If marriage were enough, blacks could have rested on their laurels, satisfied that progress marches on. Legislative exemption of religious objectors from facilitating or recognizing interracial marriages would have formed no obstacle to racial equality. Yet, as James Oleske has shown, no scholar made this argument, and no such legislation was put in place.¹⁶³

Marriage, of course, proves more central to the enactment of sexual orientation identity.¹⁶⁴ But marriage is hardly the end of the gay rights movement. In forty-nine states, a defendant on trial for murder still may present a defense based on “gay panic” to reduce charges or escape conviction.¹⁶⁵ Studies have shown that LGBT people experience pervasive discrimination across sectors.¹⁶⁶ In the workplace, wage and income gaps between LGB people and heterosexual people persist.¹⁶⁷ A systematic review of empirical studies shows “one disturbing and consistent pattern: sexual orientation-based and gender identity discrimination is a common occurrence

160. Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., to Christopher G. Donovan, Speaker of the House, Conn. 2 (Apr. 21, 2009) (“The number of people who assert their right to conscientious objection will be small in the beginning, and it will gradually decline to insignificance.”).

161. 388 U.S. 1 (1967) (striking down antiscegenation statute).

162. *Id.* at n. 5 (listing the sixteen states with antiscegenation statutes in place).

163. *See generally* Oleske, *supra* note 86.

164. NeJaime, *supra* note 78, at 1214 (noting “the profound connection between same-sex relationships and lesbian and gay identity”).

165. Jordan Blair Woods, *Testimony: California Legislature Assembly Bill AB 2501*, WILLIAMS INSTITUTE (Sept. 2014), <http://williamsinstitute.law.ucla.edu/research/transgender-issues/ab2501-testimony-2014/>.

166. Andrew R. Flores, *National Trends in Public Opinion on LGBT Rights in the United States*, WILLIAMS INSTITUTE (Nov. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/POP-natl-trends-nov-2014.pdf>.

167. M.V. Lee Badgett, Brad Sears, Holning Lau & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559, 560 (2009).

in many workplaces across the country.”¹⁶⁸

Gays continue to face discrimination, much of it legal, in the market for goods, services, and housing as well. A 2001 survey in New York State found widespread experiences of discrimination in public accommodations.¹⁶⁹ More than a quarter of respondents reported having experienced inappropriate treatment or hostility in a restaurant, store, or hotel.¹⁷⁰ Six percent had been denied service explicitly due to their sexuality.¹⁷¹ In healthcare facilities across the nation (which are often covered by public accommodations nondiscrimination laws), fifty-six percent of LGB people report some form of discrimination, harassment, or substandard care when seeking healthcare.¹⁷² In housing, “heterosexual couples were consistently favored over gay male and lesbian couples” in metropolitan areas across the United States.¹⁷³

Although marriage triumphalism presumes society inevitably will grow more accepting of people once thought to be other, enacting religious exemptions to anti-discrimination laws—even if limited to marriage—constitutes retrenchment in the face of equality. Like other legal changes,¹⁷⁴

168. *Id.* at 561.

169. *Report Released on Anti-Gay Discrimination in New York*, EMPIRE STATE PRIDE AGENDA (May 20, 2001), <http://www.prideagenda.org/news/2001-05-20-report-released-anti-gay-discrimination-new-york>.

170. Sarah McBride et al., *We the People: Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections*, CENTER FOR AMERICAN PROGRESS 16 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/LGBT-WeThePeople-report-12.10.14.pdf>.

171. *Id.* at 16.

172. *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV*, LAMBDA LEGAL 10-11 (Sept. 2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whic-report_when-health-care-isnt-caring.pdf.

173. Samantha Friedman et al., *An Estimate of Housing Discrimination Against Same-Sex Couples*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (June 2013), http://www.huduser.org/portal/Publications/pdf/Hsg_Disc_against_SameSex_Cpls_v3.pdf (empirical study finding that, in rentals advertised online, “heterosexual couples were consistently favored over gay male and lesbian couples” in metropolitan areas across the United States); *see also* Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity Proposed Rule, 76 Fed. Reg. 4194-01 (proposed Jan. 24, 2011) (concluding that “lesbian, gay, bisexual, and transgender (LGBT) individuals and families are being arbitrarily excluded from some housing opportunities.”)

174. Even the Supreme Court’s earliest cases involving gay litigants in 1958 and 1962, which dismantled statutes prohibiting gay magazines as obscenity, “contributed in important ways to the formation and strengthening of LGBT identities and communities.” Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The*

exemptions may shift societal expectations. As Laycock admits, “discrimination gets a certain legitimacy, and in the worst case, the stream of commerce might be sprinkled with public notices of discriminatory intent.”¹⁷⁵

Whereas public accommodations previously could mount no religious defense to nondiscrimination, Americans would now see them as able to do so—and not only with regard to sexual orientation. Groups disfavored by their religion, race, or sex (among other categories) also might have to settle for a market niche in lieu of full and equal participation in the market.

Supporters of exemptions frequently predict that refusals will be rare and of little effect based on the small number of known legal cases against vendors who have denied service to gays.¹⁷⁶ While predicting the incidence of

First LGBT Rights Cases Before the Supreme Court, 28 COLUM. J. GENDER & L. 229, 232 (2015). In the states and cities that adopted them, nondiscrimination statutes and ordinances likewise allowed gays to live their lives more openly and make themselves known to their neighbors, co-workers, and vendors without fear of loss of job, home, or service. Marriage equality—whether implemented through the courts or legislatures—has tended to increase support for same-sex marriage among state residents. Flores, *supra* note 166, at 6, 19 (conducting a systematic review of public opinion polls) and *id.* at 20 (“While trends appeared stable from the late 1980s to the early 2000s, opinions start to shift around 2004, and support continues to rise.”); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 211 (2013) (citing empirical evidence of rapid changes in public opinion in Massachusetts and nationally after *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

175. Laycock, *supra* note 73, at 200.

176. Berg, *supra* note 103, at 212 (opining that conflicts will be rare); Obergefell Brief of Laycock et al., *supra* note 89, at 28-29 (“These claims are typically limited in scope. The wedding vendors do not refuse to serve gays and lesbians as such. . . [religious-liberty disputes] involve a discrete and bounded set of potential claimants.”).

They often simultaneously assert, contrary to their first prediction, that exemptions are necessary to avoid widespread conflict. Obergefell Brief of Laycock et al., *supra* note 89, at 23 (while conflicts have arisen over antidiscrimination law, “[m]arriage recognition will increase the conflicts’ frequency and religious intensity.”). They warn legislators that, in the absence of exemptions, “the volume of new litigation will be immense.” Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law, Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Carl H. Esbeck, Professor of Law, Univ. of Mo. & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to John Lynch, Governor of N.H. 4 (May 1, 2009), available at <http://mirrorofjustice.blogs.com/files/letter-to-gov1.-lynch-re-h.b.-436-1.pdf>. This claim, however, cannot withstand scrutiny. Nearly half of states already prohibit sexual orientation discrimination, without excusing for-profit businesses. A

objection is no easy task,¹⁷⁷ one should hesitate to extrapolate from the number of existing legal cases.¹⁷⁸ Most people do not look for legal recourse when they experience discrimination, particularly in housing and public accommodations, the very areas of focus for gay-rights-related exemptions. Moreover, because discrimination based on sexual orientation—whether religion-based or not—remains legal in more than half of states,¹⁷⁹ lawsuits involving public accommodations are necessarily rare.

Refusal of services to same-sex couples, however, may be or become common. Approximately four in ten Americans believe that homosexual sex is not morally acceptable.¹⁸⁰ Those who oppose same-sex marriage predominately cite their religious beliefs as motivation.¹⁸¹ As should come as no surprise, social acceptance of LGB people is much lower in states that are now considering exemptions that extend into commercial life.¹⁸² Recall too that religious objectors claim to harbor no discriminatory views toward gays,

number of states have celebrated same-sex marriage for almost a decade. Yet, religious freedom seems to have survived, and conflicts do not appear to have escalated.

177. Just as the number of objectors is uncertain, so too is the likelihood that such objectors would secure exemptions under general RFRA or more-specific marriage exemptions. Proponents of religious exemptions have exacerbated this difficulty through their emphasis on market alternatives in marriage-specific proposals and RFRA alike. Any prediction is further complicated by the unprecedented willingness of the judiciary to grant religious exemptions to businesses. See cases cited *supra* note 17 (denying exemptions to religious non-profits).

178. Based on the number of charges to the EEOC, one might otherwise conclude that sex discrimination is not a serious problem in the workplace because, out of the approximately 120 million employees in the United States, only twenty-six thousand filed sex discrimination charges with the EEOC in 2014. *Enforcement & Litigation Statistics*, U.S. EQUAL EMPLOYMENT & OPPORTUNITY COMMISSION, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Jul. 1, 2015).

179. See MOVEMENT ADVANCEMENT PROJECT (MAP), *supra* note 79.

180. Robert P. Jones et al., *A Shifting Landscape: A Decade of Change in American Attitudes about Same-sex Marriage and LGBT Issues*, PUBLIC RELIGION RESEARCH INSTITUTE (Feb. 26, 2014), http://publicreligion.org/site/wp-content/uploads/2014/02/2014.LGBT_REPORT.pdf (“A slim majority (51%) of Americans say that sex between adults of the same gender is morally wrong, while more than 4-in-10 (43%) say it is morally acceptable.”).

181. Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx> (reporting forty-seven percent citing religious beliefs).

182. Amira Hasenbush et al., *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States*, WILLIAMS INSTITUTE (Dec. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-divide-Dec-2014.pdf>.

but rather find their own involvement in same-sex marriage uniquely objectionable.¹⁸³ If, however, marriage is the centerpiece of religious objection, sexual orientation antidiscrimination laws could not have offended their religious beliefs before marriage equality. Refusals to serve gays should then increase as same-sex couples gain access to marriage.

If enacted, religious exemptions may extend opposition to same-sex marriage, rather than cut it short. Gays may face a prolonged period of continued discrimination across housing, employment, and public accommodations. Exemptions may expand, rather than fall into desuetude.

As I have previously argued, the experience of medical conscience legislation should give gay rights advocates and their allies in state legislatures pause.¹⁸⁴ In the late 1960s and early 1970s, one might have contended that women's right to abortion would soon enjoy widespread toleration. Public opinion had steadily increased to favor legal abortion.¹⁸⁵ After the Court decided *Roe v. Wade*, Congress and state legislatures enacted conscience legislation that permitted healthcare providers and institutions to refuse to perform or to participate in abortion provision.¹⁸⁶ At the time, one reasonably might have predicted that religious exemptions for healthcare providers would provide a temporary safe harbor for dissenters. Educated in a system that accepted and trained them in abortion provision, doctors would eventually provide abortions as a matter of course. Most hospitals would permit them to do so.

Such assumptions would have been mistaken. Conscience legislation formed an effective tool in a rearguard action to limit a then-new constitutional

183. *Verified Petition, Odgaard & Odgaard v. Iowa Civil Rights Comm'n*, THE IOWA DISTRICT COURT FOR POLK COUNTY (Oct. 7, 2013), <http://www.becketfund.org/wp-content/uploads/2013/10/Odgaard-Complaint.pdf> (denying discrimination against gays); Wilson et al. Md. Ltr., *supra* note 87, at 15 (arguing that objection “arises not from anti-gay animus, but from a sincere religious belief in traditional marriage”); *but see* McClain, *supra* note 124, 894-95 (“Scholars defending religious liberty today often distinguish conscience-based objections to same-sex marriage as entirely different from earlier objections to interracial marriage. Nonetheless, opponents of interracial marriage resisted the label of ‘bigot’ and appealed to conscience, morality, religious teaching, and the Bible as bases for their stance.”).

184. Sepper, *supra* note 87, at 752-61.

185. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2077 (2011); Judith Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 SCIENCE 540 (1971); Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POPULATION & DEV. R. 45, 49 (1977).

186. Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1509-14 (2012) (discussing history of this legislation).

right and to implement policy more consistent with conservative religious values. Today, few providers and even fewer hospitals perform abortions. Institutional refusal in particular has contributed to a legal landscape in which nine out of ten U.S. counties lack an abortion provider.¹⁸⁷ Having been granted accommodation, objectors did not rest but rather demanded ever-wider exemptions.¹⁸⁸

Moreover, with the help of conscience legislation, anti-choice advocates claimed the mantle of religion exclusively for themselves.¹⁸⁹ Before *Roe v. Wade*, religious support of abortion rights was highly visible. Protestant clergy tended to support reform and worked to help women access abortions.¹⁹⁰ Religious faith was an accepted basis for a pro-choice position.¹⁹¹ Conscience legislation, however, sent a powerful message that religion and morality stood in tension with reproductive rights.

While one may reasonably suggest that abortion is and will remain more fraught than same-sex marriage, exemptions—if enacted—maybe particularly likely to survive with regard to gay rights. Empirical studies demonstrate that, across states, incongruence between public support and policy works to the detriment of LGBT equality.¹⁹² For example, despite long-standing majority support across states for preventing sexual orientation discrimination in employment and housing,¹⁹³ only twenty-two states have enacted such statutes.¹⁹⁴ As Steve Sanders argues, “the assumption that the political process

187. Richard Florida, *The Geography of Abortion*, CITY LAB (June 11, 2012), <http://www.citylab.com/politics/2012/06/geography-abortion/1711/>.

188. Sepper, *supra* note 87, at 741, 754.

189. *Id.* at 744.

190. Greenhouse & Siegel, *supra* note 185, at 2048; Rhonda Copelon & Sylvia A. Law, *Nearly Allied to Her Right “to Be”—Medicaid Funding for Abortion: The Story of Harris v. McRae*, in *WOMEN AND THE LAW STORIES* 207, 229–30 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (noting testimony from Protestant, Conservative and Reform Judaism, and Baptist clergy in support of legal abortion, and opposition from Southern Baptist Convention, Catholic Church, and Orthodox Judaism).

191. In a challenge to the Hyde Amendment’s prohibition on Medicaid funding for abortion, for example, the trial court held that a woman’s decision to terminate her pregnancy is a conscientious one and may be “exercised in conformity with religious belief and teaching protected by the First Amendment.” *McRae v. Califano*, 491 F. Supp. 630, 742 (E.D.N.Y. 1980).

192. Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 383 (2009).

193. *Id.* at 373.

194. *Non-Discrimination Laws: State by State Information*, ACLU, <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Oct. 19,

is responsive to evolving public attitudes and simple legislative majorities can prevail under ordinary lawmaking” has not held for same-sex marriage.¹⁹⁵ Instead, social scientists conclude that “[p]owerful conservative religious interest groups. . . strongly affect gay rights policy at the expense of majoritarian congruence.”¹⁹⁶

Already, the debate sets up a collision between religion and same-sex marriage as though opposing same-sex marriage were the sole religious position. Proponents of exemptions from sexual orientation antidiscrimination laws frequently claim that those who resist them are hostile to religious accommodation or even to religion itself.¹⁹⁷ Religious commitments, however, can motivate those who support equality for same-sex couples. “Even among religiously affiliated Americans, supporters [of same-sex marriage] today actually outnumber opponents” (47 to 45%).¹⁹⁸ To say that “[d]isaffiliation

2015); *Statewide Employment Laws and Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (last visited Oct. 19, 2015) (select issue “Statewide Employment Law & Policies”); *Statewide Housing Laws and Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (last visited Oct. 19, 2015) (select issue “Statewide Housing Law & Policies”).

195. Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. 12, 15 (2014).

196. Lax & Phillips, *supra* note 192, at 383.

197. Koppelman, *supra* note 117, at 629 (“Resistance to religious accommodation has its source in the political left, much of which, largely as consequence of disputes over sexual ethics, regards religion as a malign force in the world.”); Laycock, *supra* note 99, at 862 (asserting that “many Americans are becoming hostile to religious liberty” and “that hostility is disproportionately on the left”); Art Moore, *‘Gay’-Rights Advocates Back Indiana Law*, WND (Apr. 1, 2015), <http://www.wnd.com/2015/04/gay-rights-advocates-back-indiana-law/> (quoting Paul Kengor, professor at Grove City College and a visiting fellow at the Hoover Institution at Stanford University: “This is what happens to a country and culture that has lost respect for religion, for religious values, for religious freedom and for religious believers” and “where secular people angrily steamroll the religious rights and beliefs of people they disagree with”); Stephen Prothero, *Indiana Needs to Balance Gay, Religious Rights: Column*, USA TODAY (Mar. 30, 2015), <http://www.usatoday.com/story/opinion/2015/03/29/indiana-religious-freedom-prothero/70632870/> (claiming, with regard to religious liberty, “there is so little support for the liberties of U.S. citizens, especially among liberals who should be their staunchest defenders”); Peter Steinfeld, *Any Liberals for Religious Freedom?*, COMMONWEAL (Mar. 31, 2015), <https://www.commonwealmagazine.org/blog/any-liberals-religious-freedom> (querying whether any liberals are willing to speak up for religious freedom).

198. Robert P. Jones, *Attitudes on Same-sex Marriage by Religious Affiliation and Denominational Family*, PUB. RELIGION RES. INST. (Apr. 22, 2015), <http://public>

with religion has become a cultural marker for solidarity with gay people”¹⁹⁹ ignores that the vast majority of Buddhists (84%), Jews (77%), white mainline Protestants (62%), and Catholics (60%) express such solidarity as well.²⁰⁰ For many people, their faith compels them to oppose religious exemptions from antidiscrimination law.²⁰¹

As with reproductive rights, religious exemptions potentially offer a tool to continue to shape policy—if not constitutional law—to the preferences of powerful conservative interest groups. Opponents of same-sex marriage have indicated their support for such a strategy. Ryan T. Anderson of the Heritage Foundation, for example, argues that, like the pro-life movement, “pro-marriage” forces can use religious exemptions to ensure that they both can “operate [] businesses and charities in accordance with [their] beliefs” and can continue to receive government funding and contracts.²⁰² “Pro-marriage

religion.org/2015/04/attitudes-on-same-sex-marriage-by-religious-affiliation-and-denominational-family/.

199. Koppelman, *supra* note 117, at 656. To be sure, the vast majority (77%) of religiously unaffiliated support same-sex marriage. Jones, *supra* note 180.

200. Jones, *supra* note 180.

201. See, e.g., Antonia Blumberg, *These Religious Groups Want Nothing To Do With Indiana’s New Law*, HUFFINGTON POST (Apr. 1, 2015), http://www.huffingtonpost.com/2015/04/01/religious-groups-protest-rfra_n_6986002.html (compiling statements from religious groups opposing Indiana’s new RFRA); Gabriel Greenberg, *A Religious Case Against Louisiana’s Religious Freedom Bill: Rabbi Gabriel Greenberg*, TIMES-PICAYUNE (Apr. 24, 2015), http://www.nola.com/opinions/index.ssf/2015/04/religious_freedom_louisiana.html (“As an orthodox Jewish man and a rabbi, I find [Louisiana Governor Bobby] Jindal’s pursuit of this [‘Marriage and Conscience Act’] bill’s passage to be sacrilegious and offensive.”); Paul C. McClasson, *Featured letter: A Christian pastor’s strong opposition to RFRA*, TRIBUNE STAR (Mar. 31, 2015), http://www.tribstar.com/opinion/letters_to_the_editor/featured-letter-a-christian-pastor-s-strong-opposition-to-rfra/article_0ffa080-40ff-5339-b8b3-f17845f03e17.html (“I write to oppose the RFRA; in fact to argue that whatever ‘religious freedom’ it purports to restore, it is most emphatically not the joyous freedom of the Christian gospel.”). That is not to say that those who oppose these exemptions disagree with all religious accommodation. James M. Oleske, Jr., *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75, 87 (2015) (showing that many liberals “—including liberal organizations, professors, and politicians—largely continue to support religious exemptions for individuals, while opposing the extension of such exemptions to commercial businesses”).

202. Ryan T. Anderson, *Will Marriage Dissidents Be Treated As Bigots Or Pro-Lifers?*, FEDERALIST (July 14, 2015), <http://thefederalist.com/2015/07/14/will-marriage-dissidents-treated-bigots-pro-lifers/> (“Everything the pro-life movement did needs to be done again, now on this new frontier of marriage.”); see also John Breen, *CLS Panel: Obergefell and Future Challenges to Religious Liberty*, MIRROR OF

forces” must seek to ensure that, like medical providers, businesses need not deliver services to which they object, Anderson says.²⁰³ While most states have no sexual orientation antidiscrimination law, the enactment of RFRAs (or other exemptions that apply generally to marriage) predicts a future in which antidiscrimination laws exist and could apply to objectors to same-sex marriage. Widespread support for sexual orientation antidiscrimination laws across states suggests that the day will come when LGBT people have legal protection against discrimination. With religious exemptions in place, however, today’s legal refusal of services, benefits, or housing could become tomorrow’s acceptable and exempted objection.

CONCLUSION

With the Supreme Court’s recognition of same-sex marriage, the moralized market provides a potential counterweight for religious objectors to gay rights. Justice Kennedy’s observation in *Obergefell* bears remembering:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.²⁰⁴

To be sure, religious exemptions from antidiscrimination laws do not bar same-sex couples from the institution of marriage. Nevertheless, they deny such couples the same legal treatment as opposite-sex couples. The dignity and equal citizenship of gays and lesbians have no place in a religious liberty

JUSTICE (July 6, 2015), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2015/07/cls-panel-obergefell-and-future-challenges-to-religious-liberty.html> (nothing the “[r]ousing the same kind of interest in overturning *Obergefell* that the pro-life movement has succeeded in generating in overturning *Roe* will be difficult” in part because religious exemptions have not been enacted to allow wedding vendors to refuse service even though “same-sex couples could have simply turned to other vendors”).

203. Anderson, *supra* note 202.

204. *Obergefell*, 135 S. Ct. at 2602.

jurisprudence characterized by market ideals. The moralized marketplace instead envisions a market segregated by businesses' moral judgments of their customers to the detriment of not only gays and lesbians but other marginalized groups as well.