Religious Exemptions, Marriage Equality, and the Establishment of Religion

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ABSTRACT

The advent of nationwide marriage equality has sparked a robust debate over the extent of religious liberties and the limits of civil rights protections. As public opinion regarding LGBT individuals and the families they form has evolved, religious beliefs that once served as the basis for law and policy have been increasingly marginalized. Various efforts have been made to protect religious objectors who continue to believe that marriage is only between one man and one woman. For example, all of the states that had enacted marriage equality legislation included exceptions for clergy and religious organizations to ensure that they would not be required to perform or participate in marriage ceremonies contrary to their sincerely held religious beliefs. Other states, such as Arkansas and Indiana, enacted broad Religious Freedom Restoration Acts (RFRAs) once marriage equality became a foregone conclusion. Most recently, state legislatures and Congress have begun to consider religious marriage exemptions that provide a blanket exception for private and governmental actors who object to marriage equality on religious grounds. This essay provides a critical examination of this new generation of religious exemptions. It argues that they are not consistent with our tradition of religious liberty or civil rights protections. Instead, religious marriage exemptions raise important questions concerning the role of religious conviction in public life and the nature of civil rights protections that are currently obscured under the banner of “conflicting rights.”

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INTRODUCTION

The advent of nationwide marriage equality has sparked a robust debate over the extent of religious liberties and the limits of civil rights protections.¹ As public opinion regarding LGBT individuals and the families they form has evolved, religious beliefs that once served as the basis for law and policy have been increasingly marginalized.² Various efforts have been made to protect religious objectors who continue to believe that marriage is only between one man and one woman.³ For example, all of the states that enacted marriage equality legislation included exceptions for clergy and religious organizations to ensure that they would not be required to perform or participate in marriage ceremonies contrary to their sincerely held religious beliefs.⁴ Other states, such as Arkansas and Indiana, enacted broad Religious Restoration Acts (RFRAs) once it became clear that nation-wide marriage equality was a foregone conclusion.⁵ Most recently, state legislatures and Congress have begun to consider religious marriage exemptions that provide a blanket exception for private and governmental actors who object to marriage equality on religious grounds.⁶ This essay provides a critical examination of this new generation of religious exemptions. It argues that they are not consistent with our tradition of religious liberty or civil rights protections. Instead, they raise important questions concerning the role of religious conviction in public life and the nature of civil rights protections that are currently obscured under the banner of “conflicting rights.”⁷

By the time the U.S. Supreme Court affirmed a fundamental right to same-sex marriage in *Obergefell v. Hodges* in June 2015,⁸ religious marriage exemptions were either pending or had

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¹ Obergefell v. Hodges, 576 U.S. ___, 135 S.Ct. 2584 (2015) (“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family s

² The Tangled Web of Conflicting Rights

³ See also Emma Green, How Will the U.S. Supreme Court’s Same-Sex-Marriage Decision Affect Religious Liberty?, ATLANTIC, June 25, 2015, http://www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986/ (asking what *Obergefell* “means for the shrinking number—but still substantial portion—of Americans who oppose gay marriage, particularly on religious grounds?”).


⁶ See e.g., 13 DEL. C. §106(e) (2015) (providing no “clergyperson” or “minister of any religion” may be penalized or fined for failing to perform a marriage).


been enacted in eleven state legislatures and the U.S. Congress. Religious marriage exemptions are designed to hold harmless individuals who violate the law by refusing to recognize or otherwise facilitate a same-sex marriage due to religious or moral objections. At the federal level, the proposed First Amendment Defense Act (FADA) would prohibit the federal government from taking any “discriminatory action” against a person on the basis of “a religious belief or moral conviction” that marriage is solely the “union of one man and one woman.” In many instances, this sort of legislation is merely prophylactic or expressive in nature because LGBT individuals are not universally protected by anti-discrimination laws.

9 The First Amendment Freedom Act (FADA) was introduced in the U.S. House and Senate ten days in advance of the Obergefell decision. The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. (2015). FADA provides that the federal government can take no action against individuals who act “in accordance with a religious or moral belief that marriage is . . . between one man and one woman.” Id. Some of the state level marriage exemptions followed the federal model, whereas others were more limited in scope. Alabama General Session SB 377 (2015) (ending state issuance of marriage licenses); Arkansas HB 1879 (2015) (authorizing denial of service for “private businesses, religious organizations, and individuals authorized to perform marriages”); Louisiana Marriage and Conscience Act of 2015, H.B. 707 (2015) (substantially similar to FADA), Mich. Comp. Laws § 722.124e, (2015) (limited to child services and adoption), Missouri HB 1077, SB 577 (2015) (no taxpayer funds for same-sex marriage and employees who issue marriage licenses to same-sex couples subject to termination), Minnesota Freedom of Conscience Act, SF 2158, 89th Leg. (2015-2016) (authorizing denial of service by religious entities and private persons), N.C. Gen. Stat. § 51-5.5 (2015) (establishing recusal mechanism for county clerks and magistrates); Oklahoma HB 1125 (2015) (eliminating state issuance of marriage licenses) and Oklahoma SB 788 (2015) (allowing government officials and clergy to refuse to officiate); South Carolina HB 3022 (2015) (no taxpayer funds for same-sex marriage and employees who issue marriage licenses to same-sex couple subject to termination) and South Carolina H. 3150 (substantially similar to FADA); Texas Family Code § 2.601 (authorizing religious organizations to refuse service) and H.B. 2977 (2015) (no state funds for same-sex marriage licenses and no employee may issue same-sex marriage licenses); and Utah Code § 63G 20-101 et seq. (2015) (authorizing denial of service by religious organizations and clergy) and Utah Code § 17 20-4 (2015) (requiring county to clerk to establish policies to ensure a willing designee is available to solemnize marriages).

10 For example, the North Carolina same-sex marriage recusal law provides that “Every magistrate shall have the right to recuse from performing all marriages under this Chapter base on sincerely held religious beliefs.” N.C. Gen. Stat. § 51-5.5 (2015). Without the recusal provision, a magistrate who refused to perform a marriage could be criminally liable for the willful failure to perform an official duty. N.C. Gen. Stat. § 14-230(a).

11 The First Amendment Defense Act, H.R. 2802, S. 1598, Sec. 3(a), 114th Cong. (2015). FADA provides: Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

scope of the legislation varies, a religious marriage exemption could cover a county clerk who did not want to issue a marriage license or a caterer who did not want to provide food for a wedding reception or a hotel owner who did not want to reserve a room for a honeymoon couple. Unlike a RFRA, religious marriage exemptions do not require that the aggrieved party establish that the government substantially burdened her Free Exercise rights nor do they allow the government to show that the burden is justified by a compelling state interest.

Proponents of these exemptions have argued that they are a necessary measure to preserve religious liberties. They have reframed the debate over marriage equality as a question of “competing rights,” pitting free exercise rights against LGBT rights. Asserting that two wrongs don’t make a right, the proponents argue that marriage equality should not come at the expense of sincerely held religious beliefs. When rights conflict, the argument goes, accommodation is required in a pluralistic society that values both religious liberties and equality. This argument resonates strongly among religious liberty proponents, and it has also gained the support among a growing number of scholars who also support LGBT rights.

many individuals will live in municipalities with protections. Id. See also Douglas Nejamie and Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L. JOUR. 2516, 2576-78 (2015) (discussing the social meaning of denial of service for same-sex couples and the wider community).


David Bossie, Religious Liberty is a Sacred Right, BREITBART, Aug. 24, 2015, http://www.breitbart.com/big-government/2015/08/14/religious-liberty-is-a-sacred-right/ (arguing that “religious liberties are under attack”).

Ryan T. Anderson and Leslie Ford, Protecting Religious Liberty in the State Marriage Debate, HERITAGE FOUND., Apr. 10, 2014, http://www.heritage.org/research/reports/2014/04/protecting-religious-liberty-in-the-state-marriage-debate (arguing that “[s]tate laws that create special privileges based on sexual orientation and gender identity are being used to trump fundamental civil liberties such as freedom of speech and the free exercise of religion”).

Id (arguing that individuals with religious objection to same-sex marriage “are facing a new wave of government coercion and discrimination”).

Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. ILL. L. REV. 840, 877 (2014) (“We could still create a society in which both sides can live with their own values, if we care enough about liberty to protect it for both sides”).

By contrast, Andrew Koppleman, Gay Rights, Religious Accommodations, and the Purpose of Antidiscrimination Law, 88 S. CALIF. L. REV. 619, 620-21 (2015) (stating “I have been a gay rights advocate for more than twenty-five years. Here in this Article, with my first time, I make common cause with my longtime adversaries.”).
Many LGBT rights advocates, however, maintain that religious marriage exemptions could render Obergefell a hollow victory, if widely adopted. Individuals and entities would only be bound to respect the hard-fought right to marry to the extent marriage equality was congruent with their “religious belief or moral conviction.” Advances in LGBT rights would then move forward only among those members of society who were not opposed to them, giving a new meaning to the phrase “consent of the governed.” Far from providing a “great compromise” to end the Culture War over marriage equality, the religious marriage exemptions would enshrine anti-LGBT bias in the guise of state-protected religious liberty.

The reframing of the debate over marriage equality as one of “conflicting rights” signals a new chapter in the ongoing struggle for LGBT rights; a struggle that for the past fifty years has challenged the overlapping and reinforcing religious, scientific, and legal disabilities imposed on LGBT individuals. In language that is deceptively evenhanded, the conflicting rights paradigm purports to balance two sets of rights. It recommends limiting LGBT rights in order to safeguard religious liberty and thereby prevent a veritable power shift where religious objectors become the victims of victorious same-sex couples. Religious marriage exemptions are designed to make sure that LGBT rights end where a religious objection begins.

These exemptions actually represent a radical expansion of our understanding of religious liberty. They insulate religious objectors from the increased legal and social acceptance of LGBT individuals and their families. They also signal that there is something different about LGBT rights that merits caution. The blanket exemption provided under these laws extends state...
protection beyond questions of individual belief and conscience to cover public acts that in other contexts would clearly be recognized as discriminatory regardless of their religious motivation. As a matter of policy, it may very well be that more states and Congress will decide to expand religious liberties in this way and, by so doing, circumscribe the nature of LGBT rights. However, such expansion is not inevitable as suggested by the rhetoric of “conflicting rights.” Religious marriage exemptions are not based on our tradition of religious liberty or civil rights protections. To the contrary, they raise significant Establishment Clause concerns and should be the subject of robust debate that is not curtailed by misplaced appeals to pluralism and tradition.

Part I of the Essay examines the “conflicting rights” debate and the rebranding of anti-LGBT bias as a form of state-protected religious liberty. It makes the case that the religious rights asserted by religious marriage exemptions represent a significant departure from our traditional understanding of Free Exercise rights. Part II explores FADA and the various state-level religious marriage exemptions within the context of civil rights laws. It notes that religious exemptions were not included in the foundational civil rights acts of the 1960s or the ban on antimiscegenation laws despite the existence of a well developed “theology of segregation” and widely held religious objections to interracial relationships. Part III turns to the Establishment Clause and revisits the two key policy issues presented by religious marriage exemptions – the expansion of religious liberty and the nature of LGBT rights. It concludes that religious marriage exemptions are fatally flawed due to both their inherent breadth and their narrow focus. In terms of their breadth, First Amendment neutrality principles make it impossible to place meaningful restrictions on what constitute a “religious belief or moral conviction.” The proliferation of such broadly construed laws suggest a future where, to quote Justice Scalia, “each conscience is a law unto itself.” At the same time, the function of the exemptions is to carve out an exception for a discrete belief and a particular religious view. As fewer and fewer religious denominations persist in their condemnation of LGBT individuals and their families, these narrowly drawn exceptions will risk not only the establishment of a waning orthodoxy, but also the establishment of religion in violation of the clear commands of the First Amendment.

I. CONFLICTING RIGHTS AND RELIGIOUS LIBERTIES

The conflicting rights paradigm starts with the proposition that LGBT rights are necessarily at odds with religious liberties. As Douglas Laycock explains: “The rise of one set of liberties threatens the decline of another, older set of liberties.” In the case of marriage

29 For example, if a business owner in a jurisdiction with a non-discrimination law refused to provide goods or services to a same-sex couple, the business owner would be subject to a claim of discrimination. Laycock argues that the claim of “discrimination” is too strong. Id. at 850. He writes: Discrimination is a powerful charge [that] still retains some of the moral imperative associated with the civil rights movement of the 1960s, when the discrimination at issue was utterly indefensible by any measure.” Id.
30 U.S. Const. amend. 1 (Free Exercise Clause).
31 U.S. Const. amend. 1 (Establishment Clause).
33 The First Amendment Defense Act, H.R. 2802, S. 1598, Sec. 3(a) 114th Cong. (2015).
35 Laycock, supra note 20, at 840. He continues, “I believe that we can protect liberty and equality for both sides of this conflict if we have the will to do so.” Id.
equality, the LGBT rights at issue were clearly articulated in Obergefell as the fundamental right to marry “inherent in the liberty of the person” guaranteed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although the religious liberty rights are said to be reflected in the Free Exercise Clause and our nation’s strong tradition of respecting religious freedom, the exemptions are not consistent with this tradition nor are they currently protected under First Amendment jurisprudence. They extend far beyond the traditional protections afforded members of the clergy and religious organizations. They even exceed the expanded vision of religious liberty articulated under the federal and state-level RFRAs.

This section argues that the conflicting rights paradigm is not simply trying to mediate a dispute between existing rights. Far from the détente suggested by it name, the conflicting rights frame represents an attempt to claim a much broader role for religious belief and moral conviction in public life. While individuals have always enjoyed the absolute right to freedom of conscience, conscience-based objections to laws of general applicability have not been without costs to the religious objectors. Religious marriage exemptions, on the other hand, attempt to insulate objectors from these costs and shift them to third parties, principally same-sex couples.

A. Framing the Debate

The debate over marriage equality in the United States has been long and costly. The rhetoric on both sides has been heated. For LGBT individuals, the right to marry and define their families is highly personal, but it has also been highly politicized. Amid all the vitriol, framing the question of marriage equality from a conflicting rights perspective strikes a conciliatory tone. It represents a positive retrenchment on the part of the traditional values movement because it concedes that same-sex couples have rights, specifically the fundamental

37 Laycock, supra note 20, at 840 (asserting that “[r]eligious liberty is one of America’s great contributions to the world”).
40 Laycock takes issue with drawing a clear line between belief and action. Laycock, supra note 20, at 876. He objects to the proposition that “If an individual provides any goods or services, on however personal a basis, on however small a scale, he has crossed over to the other side’s turf in the same-sex marriage debate and forfeited his right to exercise his religion.” Id.
42 Marriage equality and LGBT rights have been a major player in the so-called “Culture Wars.” See generally ANDREW HARTMAN, THE HISTORY OF THE CULTURE WARS: A WAR FOR THE SOUL OF AMERICA (2015)
right to marry.\textsuperscript{44} It also appeals to widely shared values of fairness and equality.\textsuperscript{45} Now that marriage equality is here to stay, the argument goes, it is important to make sure that we do not harm or demonize religious objectors. We should carve out space for them to act in accordance with their beliefs, and we should not demean or disparage their beliefs by calling them bigots.\textsuperscript{46} Borrowing a page from the LGBT rights movement, the proponents of religious marriage exemptions highlight stories of everyday people who have been harmed by marriage equality,\textsuperscript{47} such as the 70-year old florist who was fined when she refused to provide floral arrangements for a same-sex wedding or the county clerk jailed for her beliefs.\textsuperscript{48} Under a conflicting rights paradigm, the state should not require individuals and entities opposed to marriage equality on religious grounds to facilitate or condone same-sex marriage, which arguably includes providing any goods or services related to a same-sex marriage.\textsuperscript{49} As discussed in Part III. A, this exception could be interpreted broadly to include not just weddings, but also existing same-sex marriages or even individuals who might be pre-disposed to seek a same-sex partner in marriage.

The Obergefell decision prompted outrage on the part of opponents to marriage equality. Some of the harshest and most immediate criticisms were directed toward the U.S. Supreme Court and its perceived activist stance. Many of the candidates for the Republican Presidential nomination advocated creative ways to circumvent or block the Court’s decision.\textsuperscript{50} Governor Scott Walker called for an amendment to the U.S. Constitution “to reaffirm the ability of the states to continue to define marriage.”\textsuperscript{51} Senator Ted Cruz floated the idea that the members of the Supreme Court should be elected and term limited.\textsuperscript{52} He held public hearings that he titled “With Prejudice: Supreme Court Activism and Possible Solutions.”\textsuperscript{53} Governor Bobby Jindal

\textsuperscript{44} Laycock argues that “The first step for the religious side would be to focus on protecting its own liberty, and to give up on regulating other people’s liberty. . . In practical terms, that would mean giving up the fight against same-sex marriage now, instead of waiting until the fight becomes hopeless.” Laycock, supra note 20, at 878.

\textsuperscript{45} Mary Anne Case refers to this line of argument as the “Live and Let Live Argument.” 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. (forthcoming 2015). See also Laycock, supra note 20, at 879 (noting “There is no apparent prospect of either side agreeing to live and let live”).

\textsuperscript{46} Laycock notes that “The issues involved in these religious liberty disputes are very different from Jim Crow, but the broad label “discrimination” makes no distinctions.” Id. at 869.

\textsuperscript{47} Adam B. Lerner, Conservatives Regroup, POLITICO, July 12, 2015, http://www.politico.com/story/2015/07/conservatives-regroup-after-gay-marriage-defeat-119984.html (reporting that conservatives are “employing tactics refined by the same-sex marriage movement that recently defeated them”).


\textsuperscript{49} Nelanie and Siegel, supra note 12, at 2544-52 (discussing complicity-based conscience claims).


called for the dissolution of the Court, stating “The Supreme Court is completely out of control, making laws on their own . . . [i]f we want to save some money, let’s just get rid of the court.”  

Former Arkansas Governor, Mike Huckabee issued a statement saying that he “will not acquiesce to an imperial court any more than our Founders acquiesced to an imperial British monarch,” and instead promised to “resist and reject judicial tyranny, not retreat.” He later referenced Martin Luther King’s Letter From Birmingham Jail and called for massive civil disobedience in response to Obergefell.

In addition to the criticism of the Court, there was a strong call to respect religious freedom. For example, President Obama’s statement on the Obergefell decision included the following caution:

I know that Americans of goodwill continue to hold a wide range of views on this issue. Opposition in some cases has been based on sincere and deeply held beliefs. All of us who welcome today’s news should be mindful of that fact; recognize different viewpoints; revere our deep commitment to religious freedom.

According to the conflicting rights paradigm, the appropriate way to respect our deep commitment to religious freedom is to carve out exemptions for religious objectors and remove any legal barriers that would require them to respect or otherwise facilitate a same-sex marriage. Religious marriage exemptions are designed to provide such a carve out by offering protection from a host of laws, including non-discrimination laws and the requirement that a public official perform the duties of his office.

Concerns about the rights of religious objectors were expressed in both the majority and the dissenting opinions in Obergefell. Toward the end of his majority opinion, Justice Kennedy acknowledged that some religions and individuals hold a “sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” He affirmed that the First Amendment protects “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” In his dissent, the Chief Justice charged that Justice Kennedy’s assurances were lacking. He noted that although “[t]he majority graciously suggests that religious believers may continue to “advocate” and “teach” their views of marriage,” the

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59 Id. at 2607.
60 Id.
First Amendment actually guarantees “the freedom to ‘exercise’ religion.” Justice Thomas echoed this concern in his dissent when he warned that the Court’s ruling could have “potentially ruinous consequences for religious liberty.”

Justice Alito’s dissent most closely reflected a conflicting rights perspective. It stressed how quickly the tables can turn and a newly recognized right can be used to “vilify Americans who are unwilling to assent to the new orthodoxy.” While making the case for the protection of “rights of conscience,” Justice Alito concedes “the harsh treatment of gays and lesbians in the past,” but warns that “the Nation will experience bitter and lasting wounds” if Americans with “traditional ideas” are marginalized. Under his view, protection is necessary to ensure that a new class of Americans are not victimized. Not persuaded by Justice Kennedy’s nod to religious freedom, Justice Alito warns “that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”

B. The Religion Clauses and Religious Liberty

Advocates of religious marriage exemptions largely base their claims on free exercise rights and, in the words of President Obama, “our deep commitment to religious freedom.” Although the Religion Clauses of the U.S. Constitution guarantee wide berth to clergy and religious organizations, they do not extend the same degree of protection to individual objectors who are not exempt from generally applicable laws. Accordingly, the conflicting rights paradigm actually argues for an expansion of the current level of protection afforded free exercise rights by demanding accommodation not only for anti-LGBT religious beliefs and teachings, but also for anti-LGBT actions that are motivated by religious conviction.

The Free Exercise Clause of the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].” It is applicable to the states through the Due Process Clause of the Fourteenth Amendment, and it remains to be seen whether corporate entities enjoy free exercise rights. In the case of individuals, the courts have drawn a

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62 Obergefell, at 2639 (Roberts, C.J., dissenting).
63 Id. at 2642 (Alito, J. dissenting).
64 Id. at 2643 (Alito, J. dissenting).
65 Id. at 2642-43 (Alito, J. dissenting).
68 U.S. Const. amend. I.
69 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In addition, every state constitution also protects free exercise.
70 Burwell v. Hobby, 573 U.S. ____ , 134 S.Ct. 2751(2014) (declining to reach the question presented by one of the two consolidated cases as to whether corporate entities had free exercise rights under the First Amendment).
longstanding distinction between actions and belief.\footnote{Thomas Jefferson, 1802 Letter to Danbury Church, available at http://www.heritage.org/initiatives/first-principles/primary-sources/jefferson-s-letter-to-the-danbury-baptists (last accessed SEPT. 5, 2015) ("the legislative powers of the government reach actions only, and not opinions"). See also 1786 Virginia Statute of Religious Freedom ("that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order")} Whereas freedom of belief is said to be absolute, religiously motivated actions (or inaction) are subject to secular regulation.\footnote{Emp’t Div. v. Smith, 494 U.S. 872, 879 (1990).} In some cases, religiously motivated action (or inaction) may also constitute speech that is entitled to additional protection under the Free Speech Clause of the First Amendment.\footnote{Religious speech is thus subject to greater protection under the First Amendment than religiously motivated actions. See Rosenberger v. University of Virginia, 515 U.S. 819 (1995).}

Members of the clergy and religious organizations are afforded greater protections under the Establishment Clause that provides “Congress shall make no law respecting an establishment of religion.”\footnote{U.S. Const. amend. I.} Working in tandem with the Free Exercise Clause, the Establishment Clause guarantees the right of religious organizations to manage their internal affairs.\footnote{See generally Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S.Ct. 692 (2012) (affirming the “ministerial exception”).} The “ministerial exception,” for example, grants religious organizations broad discretion to favor co-religionists in hiring and other considerations without regard to anti-discrimination laws.\footnote{Id.} The Establishment Clause also assures that a member of the clergy would never be required to perform a same-sex marriage or any marriage that was contrary to his or her beliefs. As explained in Part II. A, all of the states that enacted same-sex marriage legislation provided an express exception for clergy and religious organizations, even though it was not necessary given the scope of the Religion Clauses.\footnote{For example, the marriage equality law for the District of Columbia was titled the “Religious Freedom and Civil Marriage Equality Amendment Act of 2009.” D.C. Code § 46-406 (2015)(clarifying that clergy shall not “be required to solemnize or celebrate any marriage”).} The current spate of religious marriage exemptions covers not only clergy or religious organizations, but also religiously motivated individuals who are not protected under existing First Amendment jurisprudence.\footnote{See e.g. See e.g., The First Amendment Defense Act, H.R. 2802, S. 1598, 114th Cong. (2015).}

The first case the U.S. Supreme Court heard under the Free Exercise Clause was Reynolds v. United States in 1878.\footnote{Reynolds v. United States, 98 U.S. 145 (1878).} The case involved a member of the Church of Latter Day Saints, George Reynolds, who appealed his conviction under the Morrill Anti-Bigamy Act on the grounds that it violated Free Exercise Clause because bigamy was his religious duty.\footnote{Id. at 153.} The unanimous Court rejected his defense by drawing a clear distinction between beliefs and acts.\footnote{Id. at 164 (concluding that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order”).} The Court ruled, “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”\footnote{Id. at 166.} To hold otherwise, the Court reasoned “would be to make the professed doctrines of religious belief superior to the law

\footnote{Id. at 166.}
of the land, and, in effect, to permit every citizen to become a law unto himself.” As a result, “[g]overnment could exist only in name under such circumstances."83

In 1990 the Court reaffirmed the central premise of Reynolds in Employment Division v. Smith.85 Writing for the majority in Smith, Justice Scalia rejected the argument that the government needed to show a “compelling government interest” in Free Exercise Claims.86 The plaintiffs in Smith, Alfred Smith and Galen Black, were members of the Native American Church.87 They were fired from their jobs at a drug rehabilitation center after they ingested peyote as part of a religious ceremony, which was a crime under state law.88 When they applied for state unemployment benefits, their applications were denied because they had been fired for “misconduct.”89 The Court held that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”90 Under Smith, a law of general applicability only has to satisfy a rational basis inquiry.91 The Court confirmed the ruling the following year in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah where it held that a law of general applicability only had to meet the rational basis standard even where “the law has the incidental effect burdening a particular religious practice.”92 The government is only required to show a compelling state interest when the law targets a particular religion or religious practice.93

The decision in Smith repudiated the compelling interest standard enunciated by the Court in the 1963 decision Sherbert v. Verner.94 Under what had become known as the Sherbert Test, a government action violated the Free Exercise Clause if 1) it burdened an individual’s exercise of religion, and 2) the government failed to show that the action was narrowly tailored to further a compelling state interest.95 The plaintiff in Sherbert was a Seventh Day Adventist, Adell Sherbert, whose faith prohibited work on Saturday.96 She was fired from her job at a textile mill for refusing to work Saturdays.97 Like the plaintiffs in Smith, her application for unemployment benefits was denied because the state asserted that she had been fired for “good cause.”98

83 Id. at 167
84 Id. See contra Roman 2:14 discussing individuals who act as a "law unto themselves" in a more positive light
86 Id. at 886 (applying the standard in the religion context creates a “constitutional anomaly”)
87 Id. at 874.
88 Id.
89 Id.
90 Emp’t Div. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted);
91 Id. at 891.
92 Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) 546 (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).
93 Id. at 531–32 (“A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”).
95 Id. at 406.
96 Id. at 399.
97 Id.
98 Id.
When Sherbert was decided, the ruling was consistent with a trend to increase the level of scrutiny for claims involving members of a suspect class. It was also consistent with the standards applied in Free Speech cases. Smith made a compelling argument that the heightened level of scrutiny was not appropriate in the context of the Religion Clauses. Justice Scalia explained:

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race or before the government may regulate the content of speech is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields – equality of treatment, and an unrestricted flow of contending speech – are constitutional norms; what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly. (citations omitted)

C. The Federal RFRA and the State Level “Mini” RFRA

Although Smith held that the Free Exercise Cause did not mandate what Justice Scalia referred to as a “nondiscriminatory religious practice exemption,” he was clear that religious accommodations could be secured through the political process. Three years later, Congress enacted the Religious Restoration and Freedom Act of 1993 (RFRA), which legislatively reinstated the Sherbert Test. RFRA mandates the use of strict scrutiny whenever a governmental action “substantially burdens religious exercise.” A governmental action that is found to place a substantial burden on an individual’s exercise of religion is then prohibited unless the government can show that the action is the least restrictive means of furthering a compelling state interest.” RFRA originally applied to both state and federal governmental action, but it was declared unconstitutional as applied to the states in the 1997 U.S. Supreme Court decision of City of Boerne v. Flores. Since that time, twenty-one states have passed their own “mini-

100 Id. at 890 (“to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts”).
101 The Religious Freedom and Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)), invalidated in part by City of Boerne v. Flores, 521 U.S. 507 (1997). RFRA passed both houses of Congress with overwhelming bi-partisan support. The vote in favor of the bill was unanimous in the House and 97-3 in the Senate. It also had the support of progressive organizations such as the American Civil Liberties Union (ACLU) because RFRA was perceived to be a way to protect minority religions, such as the Native American Church that was involved in the Smith opinion. In the wake of the post-Obergefell push for broader religious exemption, the ACLU has withdrawn its support.
102 RFRA recites that its purpose is: “to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1)(2015). In Smith, Justice Scalia said that imposing a higher standard was not something that should be “discerned by the courts,” but rather that “accommodation” should be left “to the political process.” Emp’t Div. v. Smith, 494 U.S. 872, 890 (1990).
RFRA’s.” In 2006, the Court affirmed that RFRA continues to apply to federal action in *Gonzalez v. O Centre Espirita Beneficente Uniao do Vegetal.*

The Court revisited constitutes a “substantial burden” for purposes of RFRA in *Burwell v. Hobby Lobby* in 2014. In *Hobby Lobby*, two closely held for-profit corporations, Hobby Lobby and Conestoga Wood Specialties, challenged the contraceptive mandate of the Affordable Care Act (ACA) on the grounds that it substantially burdened the religious exercise rights of the owners of the corporations. The ACA contraceptive mandate requires employers to include insurance coverage for certain methods of birth control for their employers and provides significant monetary penalties if they refused to provide such coverage. The owners argued that complying with the mandate would violate their sincerely held religious belief that that life begins at conception and that the ACA forced them to choose between incurring significant penalties or violating their religious beliefs. As a preliminary matter, the Court determined that certain for-profit corporations were entitled to RFRA protections. It then held that the ACA contraceptive mandate violated RFRA because it substantially burdened the plaintiffs’ religious exercise and was not narrowly tailored to further a compelling governmental interest. After *Hobby Lobby*, many states introduced legislation to broaden their existing RFRA or to enact a RFRA that would provide as much protection, or more, than the federal statute.

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109 Id. Patient Protection and Affordable Care Act of 2010 (ACA), 124 Stat. 119.

110 The ACA requires employer health plans to provide “preventive care and screenings” for women without “any cost sharing requirements.” 42 U. S. C. §300gg–13(a)(4). Regulations promulgated by the Health Resources and Services Administration (HRSA), a component of the U.S. Department of Health and Human Services (HHS) specified that preventative care included all FDA approved contraceptives HHS, but also provided an exception for certain religious organizations. 45 CFR §147.131(b). The combined law and regulatory scheme is referred to as the “contraceptive mandate.” Employers who fail to satisfy the contraceptive mandate and subject to penalties. Failure to provide coverage 26 U.S.C. §§4980D(a)–(b).


112 Id. at 2769.

113 Id. at 2785.

Proposals were introduced to remove the requirement that the burden on religious exercise must be “substantial,” providing instead that any burden on religious exercise will trigger strict scrutiny.\textsuperscript{115} Other bills specifically included for-profit and non-profit organizations.\textsuperscript{116} Much of the RFRA activity occurred while \textit{Obergefell} was pending before the Court, leading many commentators to suggest that it was motivated by the increasing awareness that marriage equality was inevitable.\textsuperscript{117}

Shortly before the Court issued its decision in \textit{Obergefell}, both Indiana and Arkansas enacted RFRA legislation amid considerable controversy regarding the impact such laws could have on LGBT individuals.\textsuperscript{118} In March 2015, Indiana enacted an expanded RFRA that immediately drew the ire of LGBT rights advocates and corporate leaders who denounced the law as being designed to provide a cover for anti-LGBT discrimination.\textsuperscript{119} Facing increasing pressure from economic interests, the Indiana legislature amended the law to clarify that its purpose was not to discriminate on the basis of sexual orientation or gender identity.\textsuperscript{120} At the same time, an expanded RFRA was also pending in Arkansas.\textsuperscript{121} The original version of the Arkansas bill would have required the state to show not just that it furthered a compelling state interest, but that it was “essential” to achieving a compelling state interest.\textsuperscript{122} Walmart and other corporations doing business in Arkansas came out against the bill.\textsuperscript{123} In response, the Governor of Arkansas asked the legislature to revise the bill to mirror the federal RFRA.\textsuperscript{124} The Governor then signed the revised bill into law in April 2015.\textsuperscript{125}

In both Indiana and Arkansas, the controversy surrounding the RFRA centered on protecting LGBT individuals from discrimination.\textsuperscript{126} However, neither piece of legislation mentioned LGBT individuals or marriage.\textsuperscript{127} By design, RFRAs are broad statutes that apply to all religious exercise. They are indifferent as to whether the exercise is by a member of the Native American Church or a mainline Protestant denomination. They protect the free exercise of religious belief against substantial government interference, but also balance free exercise

\textsuperscript{115} For example, a proposed amendment to the Texas state constitution deletes the requirement that the burden must be “substantial” and requires the government to show that the state action is the “least restrictive means” of furthering a “compelling state interest.” Texas H.J.R. Sec. 6(b)(1),(2) (2015).
\textsuperscript{116} The new Indiana RFRA specifically includes “a partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity[.]” Indiana SB 101 Sec. 7 (3) (2015).
\textsuperscript{118} Friedman, \textit{supra} note 5.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Friedman, \textit{supra} note 5.
\textsuperscript{127} As amended, the Indiana statute provides that the law does not authorize the denial of goods or services on account of sexual orientation or gender identity nor does it provide a defense to a claim of discrimination. Indiana SB 50 Sec. 0.7(1),(2) (2015).
interests against the importance of the offending governmental action. As discussed in greater
detail in the next section, religious marriage exemptions have none of these qualities. They
target a particular religious belief, namely the religious belief that the marriage is a union
between one man and one woman. They then conclusively presume that this belief takes priority
over any government law or action advancing or protecting same-sex marriage, without any need
to establish a substantial burden or opportunity to justify that burden by showing a compelling
state interest.

II. RELIGIOUS MARRIAGE EXEMPTIONS AND CIVIL RIGHTS PROTECTIONS

Prior to Obergefell, a number of states and the District of Columbia legalized same-sex
marriage through legislation. In each jurisdiction, the authorizing legislation also contained a
religious exemption for clergy and religious organizations. As explained in Part I. B, such
express exemptions for clergy and religious organizations are arguably not necessary because
they duplicate protections already available under the Religion Clauses of the First Amendment.
The new generation of religious marriage exemption laws extends far beyond these narrow carve
outs for clergy or religious organizations, providing instead a blanket exception for individuals
who oppose marriage equality due to their religious belief or moral conviction. Exemptions of
this sort are not mandated by the Religion Clauses nor do they employ the type of balancing test
used by both the federal and state RFRAs. Under a traditional Free Exercise analysis, when an
individual enters a particular profession or engages in a commercial activity, he chooses to be
subject to the secular rules governing that profession or activity. Any legal requirements that
are at odds with his faith are not considered to burden his free exercise of religion because his
religion does not require him to pursue the profession or activity.

This section examines FADA and the state-level religious marriage exemptions. It makes
that case that these exemptions are not only inconsistent with our traditional understanding of
religious liberty as discussed in Part I. B, but they also represent a clear departure from our
approach to civil rights. For example, religious exemptions were not used in connection with the
Civil Rights Act of 1964, the Fair Housing Act of 1968, or the ban on anti-miscegenation
laws, despite strong religious-based objections to integration and interracial marriage.
Although any comparison between the civil rights movement and the LGBT rights movement

128 Connecticut (2009); Delaware (2013); District of Columbia (2009); Hawaii (2013); Illinois (2014);
Maryland (2013); Minnesota (2013); New Hampshire (2010); New York (2011); Rhode Island (2013);
129 For example, the marriage equality law for the District of Columbia was titled the “Religious Freedom and Civil
required to solemnize or celebrate any marriage”).
activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not
to be superimposed on the statutory schemes which are binding on others in that activity.”)
132 See Laycock, supra note 20, at 873 (“Driving religious minorities out of their chosen occupation or profession is
said not to be a burden on religion, because their religions do not require them to be a wedding planner, or a
marriage counselor, or an obstetrician.”).
must be carefully drawn, it does raise the question as to why should LGBT rights be treated differently?136

A. First Amendment Defense Act (FADA)

FADA was introduced in both the U.S. House and Senate ten days before the U.S. Supreme Court announced its decision in Obergefell.137 Since its introduction, FADA has been endorsed by numerous conservative organizations, including the Catholic Council on Bishops, the Family Research Council, and the Heritage Foundation.138 It is a federal level religious marriage exemption that prohibits the federal government from taking any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.139

“Discriminatory action” is defined broadly and covers the areas of taxation, federal contracts, licensing and accreditation, employment, and federal benefits.140 Consistent with the Court’s ruling in Hobby Lobby,141 FADA defines “person” to include both for-profit and non-profit entities.142 It also covers persons “regardless of religious affiliation or lack thereof.”143

FADA holds religious objectors harmless from a potentially wide range of federal sanctions, but it has been most closely associated with the concern that religious educational institutions could lose their federal tax exemption if they discriminate against same-sex couples or LGBT individuals more generally.144 The basis for this concern is the 1983 U.S. Supreme

136 See Louise Melling, Religious Refusals To Public Accommodations Laws: Four Reasons To Say No, 38 HARV. JOUR. L. & GEN. 177, 185 (2015) (arguing that religious exemption suggest “that the interest in ending discrimination based on sexual orientation and gender identity is different and less important than the interest in ending race discrimination.”).
139 The First Amendment Defense Act, H.R. 2802, S. 1598, Sec. 3(a),114th Cong. (2015).
140 Id. Sec. 3(b).
143 Id.
Court decision, *Bob Jones University v. United States*. In an 8 to 1 opinion, the Court held that the Free Exercise Clause did not prohibit the Internal Revenue Service (IRS) from revoking the tax exemption of an educational institution with religiously motivated racially discriminatory policies. The specter of *Bob Jones* was raised by Justice Alito at Oral Argument in *Obergefell*, prompting the following exchange between the Justice and the Solicitor General, Donald Verrilli:

**JUSTICE ALITO:** Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?

**GENERAL VERRILLI:** You know, I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue. I don’t deny that. I don’t deny that, Justice Alito. It is it is going to be an issue.

The exchange alarmed many religious leaders, whose fears were not assuaged by Chief Justice Roberts’ dissent in *Obergefell* where he warned that

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. . . There is little doubt that these and similar questions will soon be before this Court.

In the week following the *Obergefell* opinion, a coalition of fifteen state attorneys general wrote to House and Senate leaders to express their collective concern that the IRS “may deny tax exemption to religious organizations” and urged Congress to “take action now to preclude the IRS from targeting religious organizations.”

*At issue in Bob Jones was an IRS policy, first announced in 1970, that it could “no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination.” The impetus for the 1970 policy change was the number of racially restricted private schools known as “segregation academies” that were founded to avoid the desegregation mandate of *Brown v. Board of Education*. A 1971 Revenue Ruling formalized the IRS policy by declaring that “a [private] school not having a racially nondiscriminatory policy as to students*

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146 Id.
147 Tr. of Oral Arg. on Question 1, at 36–38, Obergefell (2015).
is not ‘charitable’ within the common law concepts reflected in sections 170 and 501(c)(3) of the Code.” As a result of the Revenue Ruling, a school with racially discriminatory policies would no longer be entitled to receive tax-deductible contributions or be exempt from federal income tax on its income related to its exempt purpose.

The Bob Jones decision involved two consolidated cases where education institutions were challenging the authority of the IRS to revoke their tax exemption under the new policy. In the first case, the IRS revoked the tax exemption of Bob Jones University (the University) on account of its ban on interracial dating. In the second case, the IRS revoked the tax exemption of Goldsborough Christian School, an elementary and secondary school that was founded in 1962 with a racially discriminatory admissions policy. The Goldsboro School considered “[c]ultural or biological mixing of the races . . . as a violation of God’s command.”

The rationale behind the University’s ban on interracial dating was a bit more complicated, but shared the same Biblical roots. Founded in 1927, the University initially did not admit African Americans at all because of its religious objection to interracial relationships. In 1970 the IRS notified the University that it intended to challenge its tax exemption under the newly announced policy regarding racial discrimination. The following year, the University began to admit married African Americans, provided they were not in an interracial marriage. In 1975 the University began to admit African Americans regardless of marital status, but adopted a disciplinary rule that prohibited interracial dating. These changes in University policy were not sufficient to satisfy the IRS, which officially revoked the University’s tax exemption in 1976, effective December 1, 1970.

The Court upheld the authority of the IRS to make the policy change because it was consistent with the statutory scheme that “an institution seeking tax-exempt status must serve a...
public purpose and not be contrary to established public policy.” The Court held that “Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . which substantially outweighs whatever burden denial of tax benefits places on [the University's] exercise of their religious beliefs.” In order to avoid Establishment concerns, the Court limited its holding to “religious schools—not ... churches or other purely religious institutions.” The Court also found that the sponsors of the University “genuinely believe that the Bible forbids interracial dating and marriage,” but rejected the University’s claim that it was exempt from the IRS nondiscrimination policy under the Free Exercise Clause. The Court affirmed the revocation, and the University did not lift its ban on interracial dating until 2000 when the continued ban became an issue during the Republican Presidential Primary season.

One goal of FADA is to prevent the IRS from making a similar policy determination with respect to marriage equality. Given that Obergefell recognized a fundamental right to marriage for same-sex couples, the concern is that the IRS will revoke the tax exemption of religious educational institutions on the grounds that their policies regarding same-sex marriage violate newly articulated public policy. At a 2015 hearing before the Senate Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, the Commissioner of the IRS, John Koskinen, explained that the IRS had no plans to revisit the tax exemption of religious educational organizations. Referring to Obergefell, he said, we see no basis for changing our examination criteria as a result of this Supreme Court case. Despite these assurances, many opponents of marriage equality remain adamantly convinced that the federal government will punish individuals who continue to believe that marriage is only between one man and one woman.

B. State-Level Religious Marriage Exemptions

On the state level, religious marriage exemptions come in a variety of forms, including executive action, legislation, and proposed constitutional amendments. In 2015, seven states adopted religious marriage exemptions, and exemptions remain pending in at least [will fill in

163 Id. at 586.
164 Id. at 604.
165 Id. at 604 fn 29.
166 Id. at 580.
167 Id. at 603-04. The Court noted that “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.” Id.
169 Cary, supra note 144.
171 Id.
closer to publication date] more states.\textsuperscript{174} As of September, 2015, the states with religious marriage exemptions in effect are: Kansas, Louisiana, Michigan, North Carolina, Oklahoma, Texas, and Utah.\textsuperscript{175} Each one of these states already had a state-level RFRA.\textsuperscript{176} The state-level religious marriage exemptions differ in scope from a RFRA because they all provide a blanket exemption for a belief that marriage is only between a man and a woman and that belief automatically trumps general laws. As noted earlier, these religious marriage exemptions do not only to apply to governmental actions that substantially burden free exercise rights.\textsuperscript{177} There is also no opportunity for the state to show that the governmental action in question is narrowly tailored to further a compelling state interest, such as eradicating discrimination.\textsuperscript{178}

Some of the state-level exemptions follow the model provided by FADA\textsuperscript{179} whereas others are more expansive and cover government officials.\textsuperscript{180} Virginia has proposed an amendment to its state constitution to protect individuals with “religious or moral convictions” regarding “same-sex marriage or homosexual conduct.”\textsuperscript{181} Both South Carolina and Texas have bills pending that would prohibit the use of taxpayer money to “license or support” same-sex marriages.\textsuperscript{182} Three states, Alabama, Oklahoma, and Utah, are currently considering a “nuclear

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\textsuperscript{174} For example, Bill pending in South Carolina - government officials http://rfraperils.com/south-carolinaBill pending in Wyoming


\textsuperscript{176} See supra note 106 (listing states with RFRA).

\textsuperscript{177} See supra text accompanying notes 101-127 (discussing RFRA). Without the showing of a substantial burden or even a burden, religious belief functions as a trump against all government action. For a discussion of “trumps” see Amy J. Sepinwall Conscience and Complicity: Assessing Pleas for Religious Exemptions after Hobby Lobby, 82 U. CHI. L. REV. _____, fn12 (forthcoming 2015)) (noting that “Invocations of religion, that is, threaten to function as trumps”).


\textsuperscript{179} See e.g. Louisiana Marriage and Conscience Act, H.B. 707 (2015).


\textsuperscript{181} Virginia H.B. 1414 (2015) available at http://lis.virginia.gov/cgi-bin/lpg604.exe?151+sum+HB1414 (last accessed Sept. 6, 2015) (providing exemption where “such condition would violate the religious or moral convictions of such person with respect to same-sex marriage or homosexual behavior.”).

option” that would get the state out of issuing marriage licenses completely – for same-sex couples and different sex couples.\textsuperscript{183}

Immediately following Obergefell, a number of governors, attorneys general, and judges in non-recognition states denounced the opinion and sought ways to limit its effect. Governor Sam Brownback of Kansas issued executive order 15-05, Preservation and Protection of Religious Freedom\textsuperscript{184} that prohibits the state from taking any discriminatory action against a member of the clergy or a religious organization, including those providing social services, on the basis of a “religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman.”\textsuperscript{185} The Attorney General of Texas issued an opinion stating that “county clerks, justices of the peace, and judges may refuse to issue same-sex marriage licenses or conduct same-sex marriage if doing so would violate their sincerely held religious beliefs.”\textsuperscript{186} The Supreme Court of Alabama issued an order designed to stay the issuance of marriage licenses to same-sex couples for twenty-five days.\textsuperscript{187}

Governor Bobby Jindal, who is also seeking the Republican nomination for President, acted in advance of the Obergefell ruling to preserve religious liberty in Louisiana. In May 2015, Jindal issued an Executive Order BJ 15-8, known as the Marriage & Conscience Executive Order.\textsuperscript{188} He issued the Order when the Louisiana Marriage and Conscience Act, modeled after FADA, died in committee.\textsuperscript{189} In a New York Times op-ed piece, Jindal acknowledged that members of the clergy were already protected under the First Amendment, but argued that further action was necessary to “ensure that musicians, caterers, photographers and others [are] immune from government coercion on deeply held religious convictions.”\textsuperscript{190}

Some of the state-level religious marriage exemptions have specifically targeted

\begin{itemize}
  \item[183] Both Alabama and Oklahoma have bills that have advanced in their legislatures. Alabama General Session SB 377 (2015) (ending state issuance of marriage licenses); Oklahoma HB 1125 (2015) (eliminating state issuance of marriage licenses). Legislators in Utah have expressed interest in introducing similar legislation in the next legislative cycle. Ben Winslow, Lawmaker Has Bill Drafted To Do Away With Marriages In Utah, Fox13 (Salt Lake City) June 26, 2015, \url{http://fox13now.com/2015/06/26/lawmaker-has-bill-drafted-to-do-away-with-marriages-in-utah/}.
  \item[185] Id.
  \item[188] Louisiana Marriage & Conscience Executive Order, BJ 15-8, available at \url{www.doa.la.gov/osr/other/bj15-8.htm} (last accessed Sept. 6, 2015)(providing exemptions substantially the same as FADA, but does not include “moral conviction”).
\end{itemize}
government officials who object to same-sex marriage on religious or moral grounds. Government officials who refuse to discharge their duties may be subject to internal censure and criminal sanctions depending upon state law. For example, in North Carolina a magistrate or recorder of deeds who refuses to issue or record a marriage license could be charged with “willfully failing to discharge duties,” which is a Class 1 misdemeanor. In June 2015, the North Carolina legislature amended the law, over the governor’s veto, to provide a recusal mechanism for magistrates and recorder of deeds who refused to issue or record a marriage license “based upon any sincerely held religious objection.” It is estimated that fourteen officials have exercised the recusal option.

In Utah, the religious marriage exemption covers religious leaders, religious organizations, and government officials with objections based on “religious or deeply held beliefs about marriage, family, and sexuality.” The exemption provides that county clerks must solemnize marriage only if they are “willing.” County clerks who are not “willing” are authorized to “delegate or deputize another person to perform the function of solemnizing a marriage.” Under both the North Carolina law and the Utah law, an official who refuses to participate in a marriage of a same-sex couple will be relieved of performing all marriages. The official will not be permitted to pick and choose among couples.

For some states, it seems that the option of allowing government officials to opt out of solemnizing marriages might just be the first step to getting the state to opt out of the marriage business entirely. In Oklahoma, a bill passed the state House by a vote of 67 to 24 in March 2015 that would eliminate state involvement in the issuance of marriage licenses. The sponsor of the bill explained that the bill’s goal was to “leave marriage in the hands of the clergy.” Under the bill, couples could either get a marriage certificate from an authorized member of the

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195 Utah Code § 17 20-4 (2015) (requiring county to clerk to establish policies to ensure a willing designee is available to solemnize marriages).
196 Id.
197 This provision removes prior requirement that the delegate be an employee of the office. Id.
199 Id.
200 As noted above, Utah is one of the three states that are currently considering proposals that would abolish the role of the state in civil marriage. Colby Frazer, Change has Come, SALT LAKE CITY WEEKLY, July 1, 2015, http://www.cityweekly.net/utah/change-has-come/Content?oid=2883207.
201 Oklahoma HB 1125 (2015).
clergy or take an affidavit of common-law marriage to a notary.\textsuperscript{203} The county clerks would then record the documents, which would serve as evidence of marriage.\textsuperscript{204} A similar bill pending in Alabama would also abolish state-issued marriage licenses, however, it does not rely on the involvement of clergy.\textsuperscript{205} Under the Alabama bill, couples would file a “marriage contract” with the local probate court and “no civil or religious ceremony [would be] required to be married.”\textsuperscript{206}

The proposals to end civil marriage have found support in a broader libertarian movement to privatize marriage.\textsuperscript{207} However, they also invite an uncomfortable comparison to the reactions of southern municipalities in the 1960s that closed their public pools rather than desegregate\textsuperscript{208} or the Virginia school districts that closed all the public schools rather than comply with \textit{Brown v. Board of Education}.

Surely, Alabama would not be trying to get out of the marriage business if \textit{Obergefell} had not mandated nationwide marriage equality. The next section discusses the religious objections to desegregation and interracial marriage and suggests parallels to the present day religious objection to marriage equality.

\textbf{C. Religious Exemptions and Civil Rights Protections}

The religious marriage exemptions represent not only a departure from the traditional scope of Free Exercise protections, they are also an anomaly in the context of civil rights protections. The Civil Rights Act of 1964 and other civil rights era protections did not contain religious exemptions nor were religious carve outs enacted in response to the end of antimiscegenation laws. The proponents of religious marriage exemptions have countered that marriage equality is different because many people harbor religious objections to same-sex marriage and homosexuality.\textsuperscript{210} They argue that these objections are not the product of bigotry, but rather the natural extension of their sincerely held religious beliefs.\textsuperscript{211} This line of argument ignores the fact that there was a well-articulated theology of segregation under which

\begin{itemize}
  \item \textsuperscript{203} Oklahoma HB 1125 (2015).
  \item \textsuperscript{204} Id.
  \item \textsuperscript{206} Alabama General Session SB 377 Section 1(a). The Bill provides: “Effective July 1, 2015, the only requirement to be married in this state shall be for parties who are otherwise legally authorized to be married to enter into a contract of marriage as provided herein[.]” Id.
  \item \textsuperscript{207} See Laura Meyers, \textit{Bill to End Marriage Licenses Passed in Alabama Senate}, L\textsc{ibertarian} R\textsc{epublic}, June 5, 2015, http://thelibertarianrepublic.com/bill-to-end-marriage-licenses-passed-in-alabama-senate/
  \item \textsuperscript{208} Palmer v. Thompson, 403 U.S. 217 (1971) (holding closure of municipal swimming pools in Jackson, Mississippi in order to avoid desegregation did not violate the 14th Amendment). \textit{See also} J\textsc{eff} W\textsc{iltse}, CONTESTED WATERS: A S\textsc{ocial} H\textsc{istory} OF S\textsc{wimming} POOLS IN AMERICA 154-80 (2007) (examining struggle over the desegregation of public swimming pools).
  \item \textsuperscript{209} KRISTEN GREEN, SOMETHING MUST BE DONE ABOUT PRINCE EDWARD COUNTY: A FAMILY, A TOWN, A CIVIL RIGHTS BATTLE (2015) (describing when Prince Edward County Virginia closed its public schools for five years from 1959 to 1964).
  \item \textsuperscript{211} Id. (arguing that “religion, unlike racism, is constitutionally protected”).
\end{itemize}
desegregation violated a divine plan that the races should remain separate for all time.\textsuperscript{212} According to this view, marriage was only between one man and one woman of the same race. For example, when Senator Robert Byrd (D-WVA) led the filibuster against the Civil Rights Act of 1964, he quoted the Bible to support segregation in public accommodations.\textsuperscript{213} He said: “In Leviticus, chapter 19, verse 19, we find the words: ‘Ye shall keep my statutes. Thou shalt not let thy cattle gender with a diverse kind: thou shalt not sow they field with mingled seed.’ God’s statutes, therefore, recognize the natural order of the separateness of things.”\textsuperscript{214} Congress repeatedly chose not to include religious exemptions in civil rights laws, despite the prevalence of deeply held religious beliefs against racial mixing.\textsuperscript{215} The original version of Title VII of the Civil Rights Act of 1964 that was passed by the House, H.R. 7152, contained a broad exemption for religious employers, providing that “[t]his title shall not apply ... to a religious corporation, association, or society.”\textsuperscript{216} The Senate narrowed the exemption to allow religious organizations to exercise a hiring preference for co-religionists in certain circumstances, but they were otherwise subject to the general requirement of nondiscrimination.\textsuperscript{217} In 1972 Congress again considered and rejected legislation that would have provided a blanket exemption for religious organizations.\textsuperscript{218} Title II, dealing with public accommodations, contains no exemptions for religious organizations.\textsuperscript{219} It exempts from the definition of “public accommodation” private clubs or establishments that are “not in fact open to the public.”\textsuperscript{220} In addition, it provides what has been referred to as the “Mrs. Murphy exception” for small owner-occupied lodging facilities.\textsuperscript{221} A similar exception was included in the Fair Housing Act of 1968.\textsuperscript{222} The “Mrs. Murphy exceptions” have been justified on a number of grounds, including: respect for associational freedoms, privacy concerns, and enforcement issues.\textsuperscript{223} They have not been justified as a means to protect religiously motivated discrimination.


\textsuperscript{215} Dailey, supra note 212 (explaining “theology of segregation).


\textsuperscript{218} Section 702 of Title VII, 42 U.S.C. 2000e-1.


\textsuperscript{220} 42 U.S.C. § 2000a(e)

\textsuperscript{221} The statute exempts “an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.” 42 U.S.C. § 3603(b)(1).

\textsuperscript{222} 42 U.S.C. § 3603(b)(2).

\textsuperscript{223} Robin Fretwell Wilson, \textit{Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-sex Marriage and LGBT Rights}, 95 BOSTON UNIV. L. REV. 951, 974-75 (discussing the Mrs. Murphy exception).
In 1968 the U.S. Supreme Court rejected a Free Exercise claim raised in defense of a violation of Title II as “patently frivolous.” In *Newman v. Piggie Park Enterprises, Inc.*, the owner of a chain of BBQ restaurants in South Carolina, Maurice Bessinger, refused to serve African Americans at his restaurants because of “his sacred religious beliefs” regarding the separation of the races. Bessinger, who was a devout Southern Baptist and the President of the National Association National for the Preservation of White People, claimed that the public accommodations provisions of the Civil Rights Act of 1964 violated his First Amendment Free Exercise rights. The District Court had also rejected his Free Exercise claim out of hand, stating that the court “refuses to lend credence or support to his position.” In addition to his religiously based views on segregation, Bessinger defended slavery in South Carolina on the grounds that it was “Biblical slavery,” which he argued was a more benign form of slavery. In 2000, Bessinger was again in news when it came to light that he was selling pro-slavery tracts at his restaurants. The publication that attracted the most attention was written by a Baptist minister and titled *Biblical View of Slavery*. It argued against the inherent evil of slavery because it was permitted in the Bible.

A year before the *Piggie Park* case, the Court decided *Loving v. Virginia* which struck down Virginia’s Act to Preserve Racial Integrity that criminalized interracial marriages. When the trial judge sentenced Mr. and Mrs. Loving, he wrote that Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.

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   Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. 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.
   *Id.*
229 Firestone, *supra* note 226. Major supermarket chains stopped carrying Bessinger’s BBQ sauce as a result of the negative publicity. *Id.*
230 *Id.*
231 *Id.*
233 *Id.* at 3. For an extended discussion of the religious objections to interracial marriage see FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW* (2013).
The Court found that the Virginia law violated the Equal Protection Clause of the 14th Amendment and further recognized a fundamental right to marriage under the Due Process Clause of the Fourteenth Amendment. It did not address the religious justifications for anti-miscegenation laws, despite widespread public disapproval on expressly religious grounds.\footnote{For example, in 1963 former President Truman explained his disapproval for interracial marriage, saying “the Lord created it that way.” Mike Tolson, \textit{In Resistance To Same-Sex Marriage, Echoes Of 1967}, HOUST. CHRON., July 5, 2015, \url{http://www.houstonchronicle.com/local/gray-matters/article/In-resistance-to-same-sex-marriage-echoes-of-1967-6365105.php}.} Shortly after the decision, only twenty percent of the American people approved of inter-racial marriage in 1968.\footnote{Frank Newport, \textit{In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958}, GALLUP, July 25, 2013, \url{http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx}.} It would take twenty-nine years before public opinion polls indicated that a majority of Americans approved of interracial marriage.\footnote{Id.} The racial policies at Bob Jones University discussed in Part II. A, reflect these religious beliefs regarding interracial marriage.

The sincerely held religious beliefs that justified segregation and opposed interracial relationships are no longer accepted by mainstream religions.\footnote{Far outside of the mainstream, the Christian Identity movement continues to believe the separation of the races and white supremacy. \textit{Christian Identity Movement, Religious Tolerance, available at \url{http://www.religioustolerance.org/cr_ident.htm} (last accessed Sept. 6, 2015).} } The Resolution acknowledged that “Southern Baptists [had] opposed[ ] legitimate initiatives to secure the civil rights of African-Americans.”\footnote{Resolution On Racial Reconciliation On The 150th Anniversary Of The Southern Baptist Convention, Southern Baptist Convention (1995), \url{http://www.sbc.net/resolutions/899/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention}. See also Gustav Niebuhr, \textit{Baptist Group Votes to Repent Stand on Slaves}, N.Y. TIMES, June 21, 1995, \url{http://www.nytimes.com/1995/06/21/us/baptist-group-votes-to-repent-stand-on-slaves.html}. } It also apologized for “condoning and/or perpetuating individual and systemic racism in our lifetime.”\footnote{Resolution On Racial Reconciliation On The 150th Anniversary Of The Southern Baptist Convention, Southern Baptist Convention (1995), \url{http://www.sbc.net/resolutions/899/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention}.} Bob Jones University issued an apology for its racial policies in 2008.\footnote{Id.} Whether the religiously based views on marriage will similarly be displaced remains to be seen, but many mainline Protestant denominations, as well as most branches Judaism, have embraced marriage equality.\footnote{Id.}

Kennedy’s opinion for its need “to sully those on the other side of the debate.” To be clear, Justice Kennedy did not call religious objectors bigots or homophobes. He did not mention the individuals opposed to marriage equality at all. Rather, the Chief Justice takes Justice Kennedy to task for saying that “‘the necessary consequence’ of laws codifying the traditional definition of marriage is to ‘demea[n] or stigmatiz[e]’ same-sex couples.” The Chief Justice warns that “[t]hese apparent assaults on the character of fairminded people will have an effect, in society and in court.” Time will tell.

III. RELIGIOUS MARRIAGE EXEMPTIONS AND THE ESTABLISHMENT CLAUSE

As explained in Part I, the seemingly modest request for accommodation posed by the religious marriage exemptions underestimates the scope and nature of the religious liberties asserted. The blanket exception for public religiously motivated acts is not required under the First Amendment nor is it consistent with the balancing approach employed by RFRAs. Far from being consistent with our history of religious freedom, they represent a radical rethinking of the role of religious conviction in public life. In some ways, an apt analogy might be the American with Disabilities Act (ADA) where physical barriers were removed and reasonable accommodations mandated in order to ensure full participation in public life for persons with disabilities. The ADA imposed the costs of these remedial measures on third parties because of the importance of the policy issues at stake. Here, religious objectors also want barriers removed and accommodations made in order to allow them to participate fully in public life without violating their beliefs. In this case, the costs of safeguarding their beliefs would be shouldered by same-sex couples who experience both economic and dignitary harm.

It is entirely possible that Congress and some states might decide that, as a matter of public policy, it is important to protect religious liberty at the expense of LGBT rights. In fact, a

245 Id.
246 Id.
247 See NeJaime and Siegel, supra note 13, at 2588 (“Asserted in this spirit, the claim for accommodation is not simply an act of withdrawal . . . [a]ccommodation of these claims may undermine, rather than advance, pluralistic values”).
249 See e.g Robert P. O’Quinn, The Americans With Disabilities Act: Time for Amendments, Cato Policy Analysis No. 158, Aug. 9, 1991 (arguing that “the ADA is confiscatory in nature and represents another congressional attempt to force American business to act as a social welfare and income redistribution agency”).
250 Eugene Scott and Jeremy Diamond, Mike Huckabee to visit Kentucky Clerk Kim Davis in Jail, CNN, Sept.4, 2015, http://www.cnbc.com/2015/09/03/politics/2016-kim-davis-presidential-candidates-responses/ (quoting Governor Jindal: “I don't think anyone should have to choose between following their conscience and religious beliefs and giving up their job and facing financial sanctions”).
251 NeJaime and Siegel, supra note 12, at 2566-79 (examining economic and dignitary harms). The constitutional concerns are comcompanied when one considers . . . that the brunt of the proposed exemptions will fall almost exclusively on individual members of historically disadvantaged groups, notably gay men, lesbians and other women, creating equal protection problems.”); Reva at 2588 - In addition to basic questions of fairness, specific constitutional norms may be implicated when one citizen is asked to bear the costs of another's religious exercise. Granting an accommodation may not rise to the level of an independent constitutional violation, yet it may still be in deep tension with important constitutional values.
number of states have already decided to tip the scale in favor of religious liberty.\textsuperscript{252} Scholars and commentators have catalogued many reasons why this decision does not represent a good policy choice: LGBT rights deserve equal respect with other civil rights,\textsuperscript{253} the exemptions are based on a form of complicity not recognized in our religious liberty jurisprudence,\textsuperscript{254} they produce significant third party harm,\textsuperscript{255} they signal second class equality,\textsuperscript{256} they reinscribe social stigma and homophobia,\textsuperscript{257} they stunt consensus building and hinder pluralism.\textsuperscript{258} This section focuses instead on the constraints of the Establishment Clause.\textsuperscript{259} It concludes that religious marriage exemptions are fatally flawed because they are at once too broad and too narrow. First Amendment neutrality principles require an expansive view of what constitutes a religious belief or moral conviction, presenting a slippery slope that leaves plenty of cover for animus and discrimination. Moreover, the narrow carve out provided by these laws risks establishing a religion by targeting for special treatment a belief held by a specific subset of religious denominations. Far from simply being a poor policy choice, religious marriage exemptions violate the First Amendment.

\textbf{A. The Slippery Slope of Religious Belief.}

In order to avoid establishing a religion, courts have been reluctant to define what constitutes a religion or to evaluate individual religious beliefs.\textsuperscript{260} Generally, a court will only inquire as to whether the religious belief is sincerely held, not whether it is true or false.\textsuperscript{261} Religion is defined in the most abstract terms as a system of belief that deals with ultimate concerns, such as fundamental questions regarding human existence and what makes life worth living.\textsuperscript{262} As a result, the religious marriage exemptions have the potential to be applied very broadly and could serve as an attractive pretext for anti-LGBT discrimination and bigotry.\textsuperscript{263} Moreover, there is no reason to think that this type of blanket religious exception will be confined to the marriage context. Similar types of exemptions already exist in the reproductive health arena and there is nothing to stop this sort of carve out from being introduced in a host of other areas. This section examines the application of the religious marriage exemptions both in

\textsuperscript{252} See supra note 175 (listing states with religious marriage exemption in place).
\textsuperscript{253} Melling, supra note 136, at 185 (“Requests to discriminate that are rooted in religion should be rejected today, just as they were fifty years ago.”).
\textsuperscript{254} NeJaime and Siegel, supra note 12, at 2544-52 (discussing complicity-based conscience claims).
\textsuperscript{255} Id. (“Accommodation of complicity-based conscience claims may impose material burdens on third parties by deterring or obstructing access to goods and services.”).
\textsuperscript{256} Melling, supra note 136, at 185 (“Enshrining pockets of discrimination against LGBT people in our laws, where the law has not done so elsewhere, will create a second-class version of equality.”).
\textsuperscript{257} NeJaime and Siegel, supra note 12, at 2578 (“The claim’s reiteration by a mass movement amplifies its power to demean.”).
\textsuperscript{258} Id. at 2553 (“For these reasons, accommodating religious exemption claims may not settle conflict [but] provide a way to continue conflict over community-wide norms in a new form.”).
\textsuperscript{259} U.S. Const. amend. I.
\textsuperscript{260} The Establishment Clause applies to the states through the 14th Amendment. Everson v. Board of Education, 330 U.S. 1 (1947).
\textsuperscript{261} United States v. Ballard, 322 U.S. 78 (1944) (holding the jury could only consider whether religious beliefs were sincerely held, not whether they were true).
\textsuperscript{262} Malnak v. Yogi, 592 F.2d 197, 208-10 (1979) (3d Cir. 1979) (Adams, J., concurring).
terms of the individuals who could invoke them and the behavior they could protect. It also discusses the potential proliferation of blanket religious exemption in other settings.

1. Religious objectors

There is no question that religious beliefs that teach disapproval and even animus towards LGBT individuals and their families enjoy absolute protection under the Free Exercise Clause. However, when religious beliefs translate into public action they traditionally step over the line and become subject to state regulation. For example, a county clerk who refuses to issue a marriage license to a same-sex couple could face internal discipline or criminal charges for the failure to discharge her official duties or a federal lawsuit for deprivation of civil rights.

Religious marriage exemption laws would protect the clerk from such actions provided the refusal was based on his religious belief that marriage is between one man and one woman. A court would not be permitted to inquire as to whether the belief was central to the clerk’s religion or whether it was a valid interpretation of his particular creed. It could not judge the plausibility of the religious claim. The belief could represent an entirely idiosyncratic interpretation that was not supported by the doctrine of his denomination or by any denomination. The belief also could be based on a deeply held secular moral code, which is why many of the religious marriage exemptions expressly include “moral conviction” as a protected category in addition to religious belief.

For LGBT advocates, the addition of “moral conviction” to some of the religious marriage exemptions signals an effort to protect everyone who is opposed to marriage equality. Moral disapproval has long served as the basis of the legal disabilities imposed on LGBT

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264 Cantwell v. Connecticut, 310 U. S. 296, 303-04 (1940) (“Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”).

265 Reynolds v. United States, 98 U.S. 145 (1878). In Reynolds, the Court quoted Memorial and Remonstrance: “that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.” Id. at 163. It then concluded: “In these two sentences is found the true distinction between what properly belongs to the church and what to the State.” Id.

266 See supra text accompanying notes 196-99 (discussing North Carolina recusal law for county officials).

267 John Mura And Richard Pérez-Peña, Marriage Licenses Issued in Kentucky County, but Debates Continue, N.Y. TIMES, Sept. 4, 2015, http://www.nytimes.com/2015/09/05/us/kim-davis-same-sex-marriage.html (discussing Kim Davis, the county clerk of Rowan County Kentucky, who refused to issue marriage licenses to same-sex couples).

268 Emp’t Div. v. Smith, 494 U.S. 872, 889 (1990) (“Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’”); United States v. Lee, 455 U.S. at 263 n. 2 (Stevens, J., concurring) (1982) (“As we reaffirmed only last Term, [i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretation of those creeds.”).

269 Emp’t Div. v. Smith, 494 U.S. 872, 888 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”).

270 Thomas v. Review. Bd., 450 U.S. 707 (1981) (hold that “religious belief need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”).

271 Everson v. Bd. of Educ. of Ewing Twp., 330 U. S. 1, 18 (1947) (the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”); United States v. Seeger, 380 U.S. 165 (1965) (non-religious objections can play the same role in an individual’s life as religious convictions.).

Religious Marriage Exemptions

individuals. If the religious marriage exemptions safeguard individuals with moral objections, as well as religious objections, then it is difficult to see who would not be protected. Returning to the county clerk, assume that instead of harboring a religiously informed objection, the clerk is an unrepentant bigot with a strong hatred for LGBT individuals. His refusal to issue marriage licenses would be based on his strong and sincere “moral conviction” that marriage should be between one man and one woman. Under a religious marriage exemption, there would be no meaningful distinction between the bigoted clerk and the devout clerk. The religious marriage exemptions would trump internal state employment rules, criminal laws, and federal civil rights protections. Of course, there is also no difference between the two from the perspective of the same-sex couples who are denied a marriage license. The actions of the clerks have the same effect, regardless of their motivation.

2. Provision of goods and services.

The examples that are used to illustrate instances where religious marriage exemptions are needed to protect religious objectors typically invoke various aspects of the wedding industry or the wedding itself: florists, photographers, caterers, county clerks. However, the potential for the denial of service is much broader and the laws could be used to refuse to recognize a same-sex marriage in any setting. Accordingly, their reach extends far beyond the consumer economy and the actual issuance of marriage licenses.

For example, a public school teacher could refuse to meet with the same-sex parents of one of her students during a parent-teacher conference. The teacher could justify her refusal by saying that meeting with the parents would require her to recognize a same-sex marriage contrary to her religious beliefs or moral convictions. An employer could refuse to provide spousal benefits to same-sex spouses. An insurance agent could refuse to sell insurance to same-sex married couples. A hospital administrator could deny visitation to same-sex spouses. Likewise, a doctor or nurse could refuse to talk to a patient’s same-sex spouse because to do so would recognize the marriage. Funeral homes could refuse to provide services for individuals who were in same-sex marriages. Cemeteries could refuse to bury same-sex spouses. Even the artisans who inscribe grave markers could refuse to provide services because they would have to use words that acknowledged the marriage, such as “loving wife” or “loving husband.” Getting back to they florists, they also could refuse to make a traditional funeral spray using the word “husband” or “wife” lest they recognize a same-sex marriage.

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274 It is hard to see other motivations, but perhaps individuals could adhere to the discredited scientific views of homosexuality that maintained that homosexuality was a sociopathic disorder. See generally RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: PSYCHIATRY AND THE POLITICS OF DIAGNOSIS (1987).
3. Unmarried gay men and lesbians

The religious marriage exemptions apply to entities as well as individuals.\(^{276}\) One of the primary goals of FADA is to ensure that tax-exempt charitable organizations, specifically educational institutions, do not lose their federal tax exemptions on account of their religiously motivated policies regarding marriage.\(^{277}\) These policies could refuse admission, housing, or other benefits coverage for students in same-sex marriages. They could also result in discriminatory hiring practices and benefits for employees. However, the logic that was exposed in the Bob Jones case suggests that these policies could be much broader in scope.\(^{278}\) As discussed in Part II. A, the University initially refused to admit any African Americans because of the potential that their admission would lead to interracial marriages within the student body.\(^{279}\) In the case of marriage, a similar rationale could lead educational institutions to refuse admission to single gay men and lesbians. At a minimum, institutions could impose a ban on same-sex dating. To be clear, there are already numerous tax-exempt educational institutions that have such conduct bans in place.\(^{280}\) FADA would ensure that these taxpayer-subsidized institutions would not lose their federal tax exemption despite the evolution of public policy regarding marriage equality. Beyond questions of tax-exemption, however, it is also possible to see how policies regarding a particular type of relationship could end up targeting individuals who might be in such relationships or might want to be in such relationships. In the general service economy, a same-sex couple out on a first date raises the specter of a same-sex marriage just as surely as a trip to the jewelry store to look at engagement rings.

4. Potential for proliferation to other areas

Given that religious marriage exemptions represent a rethinking of the role of religious conviction in public life, there is no reason to believe that the strategy of securing a blanket exception for public acts motivated by religious beliefs would be limited to the issue of marriage. Conservative or traditional religious views have been marginalized due to evolving legal and social views in a number of areas, including reproductive health, sex education, divorce, premarital sex, gender roles, and gender identity. So-called “conscience clauses” have already become widespread in the context of reproductive health.\(^{281}\) It would be possible to draft religious exemptions that provide a carve out for matters of sexuality and gender more generally and thereby consolidate these types of concerns. The Utah non-discrimination laws already contains a broad carve out for “convictions about marriage, family, or sexuality.”\(^{282}\)

Beyond the context of “marriage, family, or sexuality,” the possibilities for religious exemption are endless, provided the proponents of the exemption can gather sufficient political support. A recent article in the Washington Post, noted that individuals in the South who helped

\(^{277}\) See supra text accompanying notes 150 - 72 (discussing tax exemptions).
\(^{278}\) Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
\(^{279}\) See supra text accompanying notes 154-68 (discussing fact of Bob Jones).
\(^{280}\) Cary, supra note 144 (“Policies exist in the student handbooks of numerous … universities and colleges that mark homosexual activity as a disciplinary offense, along with other sexual actions.”).
\(^{281}\) See Laycock, supra note 20, at 846-48, 851-63 (discussing abortion and contraception); NeJaime and Siegel, supra note 12, at 2533-42 (discussing health care refusals).
people procure marijuana for medical purposes report that they are doing “the Lord’s work.”283 Pacifists object to their tax dollars being used to wage war.284 Some conservative Christians object to mandatory vaccination for the human papillomavirus (HPV),285 and at least one more recently formed religion, the Congregation of Universal Wisdom, objects to all vaccinations.286 There are also religious objections to union dues, child labor laws, global warming, evolution, and cloning.287 When the scope is opened to include moral objections, then the possibilities are limitless because there are innumerable government regulations that individuals object to on moral grounds, including gun control, environmental standards, taxes, and other public safety measures.

In Reynolds, the Supreme Court acknowledged just how precipitous this slippery slope could be when it rhetorically asked “Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”288 Justice Scalia later reiterated this concern in Smith:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind – ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment’s protection of religious liberty does not require this.289 (citations omitted)

284 United States v. Lee, 455 U.S. 252, 260 (1982) (rejecting a religious objection to paying social security taxes). The Court reasoned: “If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.” Id. It concluded: “The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.” Id.
Both Reynolds and Smith involved the scope of the Free Exercise protections guaranteed under the First Amendment. The Court has been quite clear that the First Amendment does not mandate religious exemptions to generally applicable laws. Religious marriage exemptions are an attempt to expand Free Exercise protections through legislation. As described in the next section, however, such efforts are necessarily constrained by the Establishment Clause.

B. Establishment of Religion

The Religion Clauses of the First Amendment provide two distinct sets of protections that sometimes overlap and sometimes are in tension—freedom of religion (i.e., the protections for free exercise) and freedom from religion (i.e., the protections from the establishment of a religion). There are instances where a government action may violate both free exercise and establishment. For example, mandatory prayer in public schools would violate both a student’s right to free exercise his or her religious beliefs, as well as the student’s right to be free from the government’s institution of religion. There are also instances where efforts to protect free exercise can go too far and result in the establishment of a religion. For example, laws designed to protect Christian Science parents from child abuse and neglect laws when they refuse medical treatment for children have been held to constitute an establishment of religion because they were narrowly tailored to mirror tenets of a specific faith. Religious marriage exemptions also go too far. Although the exemptions purport to protect free exercise interests, their narrow focus on a single belief regarding the nature of marriage constitutes an establishment of religion in violation of the First Amendment.

The U.S. Supreme Court announced a three-part test for determining what constitutes an establishment of religion in Lemon v. Kurtzman that was based on a synthesis of its prior rulings. The Lemon Test provides that a government action will not constitute an establishment of religion provided it 1) has a secular purpose, 2) does not favor or hinder religion, and 3) does not result in an “excessive government entanglement with religion.” The Court has continued to apply the Lemon Test despite criticism from a number of Justices. Most notably, Justice O’Connor advanced an “endorsement” test and Justice Kennedy has advocated a “coercion” test as possible alternatives. As discussed below, religious marriage exemptions constitute an establishment of religion regardless of the standard used.

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292 See e.g. State v. Miskimens, 22 Ohio Misc.2d 43, 43-46, (Ohio Ct. Com. Pl. 1984) (holding law “hopelessly involved” the state in religious beliefs and served no “legitimate purpose.”). Id. at 45.
294 Id. (citing Board of Education v. Allen, 392 U.S. 236, 243 (1968))
295 Id. at 613 (quoting Walz v. Tax Commission of the City of New York 397 U.S. 664, 674 (1970))
296 McCready County v. ACLU of Kentucky, 545 U.S. 844 (2005).
297 See infra text accompanying notes 338-51(discussing the tests). There is also a line of cases that also involve speech issues that adopt a “neutrality” test. See e.g. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).
1. Religion and marriage equality

Religious marriage exemptions are a response to marriage equality and the growing acceptance of LGBT individuals. Not that long ago, a broad public consensus condemned LGBT individuals and their families.298 During this period, religious beliefs and moral convictions often served as the basis for laws that imposed numerous disabilities on LGBT individuals.299 Homosexuality was both criminalized and classified as a severe sociopathic illness and gender variance was strictly policed.300 Homosexuals were disqualified from most employment and the military.301 They were considered unfit parents.302 And needless to say, they were not permitted to marry.303

As recently as 1996, Biblical condemnation of homosexuality figured prominently in the Congressional debate over the Defense of Marriage Act (DOMA).304 One Senator who used religious arguments to explain his support for DOMA was Senator Byrd, whose religious arguments in favor segregation were discussed in Part II. C.305 On the floor of the Senate, Senator Byrd held up his family’s King James Bible and read from Genesis and the Gospel of St. Mark to make his point in favor of DOMA.306 After he finished reading from the Bible, he warned: “Woe betide that society . . . that fails to honor that heritage and begins to blur that

299 Id. at 571 (“The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family”).
300 The classification of homosexuality as a severe sociopathic personality disorder was used to justify a wide range of legal and social disabilities, as was its continued criminalization. See generally WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 62 (1999) (describing history of criminal sanctions imposed on homosexuality). See generally RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987) (describing history of controversy relating to declassification of homosexuality and its deletion from the Diagnostic and Statistical Manual III).
301 ESKRIGE, supra note 26, at 57-98 (discussing 1946-1961).
302 BAYER, supra 1, at 15-40 (discussing homosexuality from abomination to disease).
305 See supra text accompanying notes 213-14 (describing Senator Byrd’s filibuster)

First chapter of Genesis, 27th and 28th verses: “So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth…”

And when God used the word “multiply,” he wasn’t talking about multiplying your stocks, bonds, your bank accounts or your cattle on a thousand hills or your race horses or your acreages of land. He was talking about procreation, multiplying, populating the earth. And after the flood, when the only humans who were left on the globe were Noah and his wife and his sons and their wives, the Bible says in chapter 9 of Genesis: “And God blessed Noah and his sons, and said unto them, Be fruitful and multiply and replenish the earth.” Christians also look at the Gospel of Saint Mark, chapter 10, which states:

But from the beginning of the creation God made them male and female. For this cause shall a man leave his father and mother, and cleave to his wife. And they twain shall become one flesh: so then they are no more twain, but one flesh.

What therefore God hath joined together, let not man put asunder.
tradition which was laid down by the Creator.”

The Senator ended his statement with the story of Belshazzar and the omen of the writing on the wall. According to the story, Daniel was the only man in the kingdom who could read the writing that foretold of Belshazzar’s demise at the hands of Darius the Median. The Senator quoted Daniel’s interpretation of the writing: “God hath numbered thy kingdom and finished it. Thou art weighed in the balances and found wanting. Thy kingdom is divided and given to the Medes and Persians.” Senator Bryd concluded: “The time is now . . . Let us defend the oldest institution, the institution of marriage between male and female, as set forth in the Holy Bible. Else we, too, will be weighed in the balances and found wanting.” Senator Jesse Helms was a little more succinct when he invoked Biblical authority. He simply said: “God created Adam and Eve – not Adam and Steve.”

Less than twenty years later, the Supreme Court had not only overturned DOMA, but had mandated marriage equality nationwide. By the time the Court ruled in Obergefell, a majority of the American public approved of same-sex marriage, which was far cry from the mere twenty percent of the population who approved of interracial marriage after Loving v. Virginia. Moreover, the majority of the mainline Protestant denominations, as well as most branches of Judaism and the Unitarian Universalists have all embraced same-sex marriage and LGBT individuals. Prohibitions against same-sex marriage remain in the teachings of the Catholic Church and among Evangelical Protestants, but such views no longer enjoy universal acceptance across American faiths. Moreover, such views also no longer hold the force of law. The majority opinion in Lawrence v. Texas was clear that even “profound and deep convictions accepted as ethical and moral principles” could not be “enforced on the whole society.”

As anti-LGBT and anti-marriage religious views have become increasingly marginalized, anti-LGBT organizations have lobbied for religious marriage exemptions in an attempt to insulate religious objectors from the changing laws. The religious marriage exemptions carve out a blanket exception for individuals who hold the religious belief that marriage is only between one man and one woman. The exemption empowers religious objectors to ignore all laws that are not consistent with their beliefs regarding marriage and holds them harmless for the resulting costs incurred by third parties. In short, religion marriage exemptions provide

307 Id. at S10,110.
308 Id. at S10,110.
309 Id.
310 Id. at S10,111.
311 Id.
316 See NeJaime and Siegel, supra note 12, at 2588 (“[T]he brunt of the proposed exemptions will fall almost exclusively on individual members of historically disadvantaged groups, notably gay men, lesbians and other
special treatment and absolution from the law for a particular religious viewpoint. They are similar to the spiritual healing exemption to the Delaware abuse and neglect law considered by the Delaware Supreme Court in Newmark v. Williams.\textsuperscript{317} The court noted that the exception was “enacted as a result of a Christian Science lobbying effort” and “mirrors the Christian Science belief.”\textsuperscript{318} Although the court did not reach the question of the constitutionality of the spiritual healing exemption, it concluded that “any statute passed as the result of the efforts of one religious group to benefit that one particular group . . . bears a strong presumption against its validity as a direct violation of the Establishment Clause.”\textsuperscript{319}

2. The Lemon Test

Religious marriage exemptions violate both the first and second prong of the Lemon Test. They fail to serve a secular purpose, and they also advance a particular religion while arguably hindering other religions or belief systems. The first prong of the Lemon Test requires a governmental action to have a secular purpose.\textsuperscript{320} The Court has invalidated government action under the purpose prong in a variety of settings, including the teaching of creationism, the display of the Ten Commandments, a moment of silence, and prayer at a high school football game.\textsuperscript{321} The absence of a secular purpose may be shown by an attempt to promote religion in general.\textsuperscript{322} In Wallace v. Jaffree, the Court struck down an Alabama law that set aside one minute at the beginning of each school day for meditation or voluntary prayer finding that the law’s “purpose was to endorse religion [and] the enactment of the statute was not motivated by any clearly secular purpose.”\textsuperscript{323}

The purpose prong can also be violated where the government action advances a particular religious belief, which is clearly the case with the religious marriage exemptions.\textsuperscript{324} In Stone v. Graham, the Court invalidated a Kentucky law that required the posting of the Ten Commandments in public school classrooms.\textsuperscript{325} The Court rejected the “avowed” secular purpose of the statute and ruled that the Ten Commandments were “undeniably a sacred text in the Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can

\footnotesize{318} Id. at 1112 fn 7. See also David Margolick, In Child Deaths, a Test for Christian Science, N.Y. TIMES, Aug. 6, 1990 http://www.nytimes.com/1990/08/06/us/in-child-deaths-a-test-for-christian-science.html (lobbying by Christian Science Church in forty states).
\footnotesize{319} Newmark v. Williams, 588 A.2d 1108, 1112 (DE 1991).
\footnotesize{322} Wallace v. Jaffree, supra, at 52-53 (Establishment Clause protects individual freedom of conscience “to select any religious faith or none at all”).
\footnotesize{323} Id. (“The State's endorsement of prayer activities at the beginning of each schoolday is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.”).
\footnotesize{324} Edwards v. Aguillard, 482 U.S. 578 (1987) (creationism). Epperson v. Arkansas 393 U.S. 97 (1968) predated Lemon. The Court ruled that “Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.” Id, at 103.
blind us to that fact."\(^{326}\) In *Epperson v. Arkansas*, a case that pre-dated *Lemon*, the Court struck down an Arkansas law that prohibited the teaching of evolution.\(^{327}\) The Court held that the law violated the Establishment Clause because it “selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.”\(^{328}\)

In the case of religious marriage exemptions, the stated purpose is to protect religious liberty. As established in Part I. B, however, the exemptions actually seek to expand religious liberties by protecting a particular religious view of marriage and insulating religious objectors from laws of general applicability. The avowed secular purpose of the exemptions is to further diversity and pluralism. For example, Section 2 of FADA recites: “Laws that protect the free exercise of religious beliefs and moral convictions about marriage will encourage private citizens and institutions to demonstrate tolerance for those beliefs and convictions and therefore contribute to a more respectful, diverse, and peaceful society.”\(^{329}\) The Court faced a similar situation in *Edwards v. Aguillard*, where it invalidated the Louisiana “Creationism Act” that required schools to teach creationism if they also taught evolution.\(^{330}\) The stated purpose of the Act was to promote “academic freedom” and further “a basic concept of fairness.”\(^{331}\) The Court rejected the stated rationales for the Act and held that “the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint.”\(^{332}\) To reach its determination, the Court reviewed the legislative history surrounding the adoption of the Act noting that “we need not be blind in this case to the legislature’s preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution.”\(^{333}\)

In the absence of a secular purpose, a governmental action will surely violate the second prong of the Lemon Test that requires that action can neither advance nor hinder religion. Once the Court in *Epperson* ruled that “[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind,”\(^{334}\) it was not necessary to address whether the Act also advanced a particular religious belief. With respect to the religious marriage exemptions, it remains clear that the effect of the exemptions is to further a particular religious belief even if the courts were to accept the stated secular purpose. In *Estate of Thorton v. Caldor*, the Court invalidated a Connecticut law that required employers to give employees that day off on their Sabbath without exception.\(^{335}\) Writing for the majority, Chief Justice Burger wrote that the law “arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath” and “imposes on

\(^{326}\) *Id.* at 41.

\(^{327}\) *Epperson v. Arkansas* 393 U.S. 97 (1968).

\(^{328}\) *Id.* at 103.


\(^{331}\) *Id.* at 586.

\(^{332}\) *Id.* at 593.

\(^{333}\) *Id.* at 590.

\(^{334}\) *Id.* at 591. The Court ruled that the “primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.” *Id.* at 594.

employers an absolute duty to conform their business practices to the particular religious practices of the employee. The majority held that the law had “a primary effect that impermissibly advances a particular religious practice.” It is easy to see the parallels between the Sabbath law and the religious marriage exemptions.

3. The endorsement test and the coercion test

Although the Lemon Test has been subject to sustained criticism, the Court has declined to overrule it. The more conservative Justices would prefer an analysis that looks to “our Nation’s history” to determine what constitutes an establishment of religion. Both Justice O’Connor and Justice Kennedy developed alternative tests that did not fully displace the Lemon Test – Justice O’Connor’s endorsement test and Justice Kennedy’s coercion test. Under either test, religious marriage exemptions constitute an Establishment of Religion. Arguably, the religious marriage exemptions would also fail under a “history and traditions” test because they provide a type of blanket exception from general laws that is not “deeply rooted in our Nation’s history or traditions.”

Justice O’Connor’s endorsement test asks whether an “objective observer” would conclude that the government action in question conveyed a message of “endorsement of a particular religious belief, to the detriment of those who did not share it.” The endorsement test collapses the first two prongs of the Lemon Test and then evaluates the effect of the government action from the perspective of an objective observer. Religious marriage exemptions obviously have an impermissible effect under the endorsement test because they send the unmistakable message that the government is endorsing and providing special treatment for a particular religious belief, namely that marriage is only between one man and one woman. In Lynch v. Donnelly, Justice O’Connor explained the impact of government endorsement of a particular religion or religious belief as follows: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying

336 Id., at 709.
337 Id.
338 Lee v. Weisman, 505 U.S. 577, 587 (1992) (declining to revisit Lemon Test). As noted earlier, in addition to the endorsement test and the coercion test, the Court has employed a neutrality test in cases involving government aid and access to public institutions that requires equal treatment for religious viewpoints and interests. Rosenberger. The neutrality test is not necessarily applicable to the religious marriage exemptions because they do not deny access or aid on account of religion. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).
339 For example, in Van Orden v. Perry, Chief Justice Rehnquist upheld the display of a Ten Commandments monument on state property and noted that Lemon was “not useful” to the Court’s analysis. Van Orden v. Perry, 545 U.S. 677 (2005). He stated that “instead our analysis is driven by the nature of the monument and our Nation’s history.” Id. Justice Scalia is another frequent critic of the Lemon Test who prefers to look to our nation’s history and tradition. See also Lamb’s Chapel v. Center Moriches Union Free School District 508 U.S. 384, 398 (Scalia, J. concurring in judgment) (stating Lemon Test not appropriate standard).
342 In Estate of Thorton, 472 U.S. 703, 711 (1985)(O’Connor, J., concurring)
message to adherents that they are insiders, favored members of the political community.”

By their very design, religious marriage exemptions convey a message of exclusion to individuals who do not share the belief that marriage is only between one man and one woman.

Justice Kennedy has used a coercion test to establish the minimum level of protection that the Constitution guarantees from establishment of a state religion. In *Lee v. Weisman*, the Court invalidated prayers at a high school graduation using the coercion test. Writing for the majority, Justice Kennedy recognized that efforts to devise a religious accommodation may sometimes go too far: “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. For purposes of the test, Justice Kennedy uses an expansive concept of coercion and places considerable importance on “the potential for divisiveness.” In *Lee*, Justice Kennedy said that it was not necessary to apply the Lemon Test because “It is beyond dispute that, at a minimum, the “government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.'” With respect to religious marriage exemptions, the state has empowered individuals to ignore laws of general applicability and impose costs on third parties without consequence. The potential for divisiveness is high, as well as the potential for the type of “subtle coercion” that concerned the Court in *Lee*.

In certain areas of the country, it is not farfetched to believe that their might be pressure placed on certain service providers or government officials to deny service to same-sex couples in order to conform with the state-sponsored religious belief. Perhaps more to the point, as Justice Kennedy declared in *Lee* that “It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.” Of course, that is exactly the effect of religious marriage exemptions on the nonadherents. Same-sex couples must forfeit rights and benefits otherwise guaranteed to them under a host of federal, state, and local laws in order to resist conformance to the state-sponsored religious belief that marriage is only between one man and one woman.

344 *Id.* 688.
347 *Id.* at 587.
348 In *Lee v. Weisman*, Justice Kennedy recognized that “subtle coercive pressures” could lead the student to “the fact or appearance of participation.” *Id.* 593 (“The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.”). In *Allegheny v. ACLU*, Justice Kennedy disagreed with the majority’s holding that a seasonal religious display on state property violated the Establishment Clause, noting that “no one was compelled to observe or participate,” but he also acknowledged that sometimes a purely passive display could constitute an establishment of religion because “coercion need not be a direct tax in aid of religion or a test oath.” *County of Allegheny v. ACLU*, 492 U.S. 573, 661, 664 (1989) (Kennedy, J., concurring).
349 *Id.* 587.
351 *Id.* at
IV. CONCLUSION

The advent of nation-wide marriage equality has led to the call for increased religious exemptions to protect the sincerely held religious belief that marriage is only between one man and one woman. The exemptions differ in scope, but they all aim to provide a blanket exemption for a specific religious belief. Under the logic of conflicting rights, these exemptions are necessary to balance two sets of equally important rights that are inexorably in conflict—free exercise of religion and marriage equality. The language of conflicting rights, however, obscures the nature of the free exercise rights asserted. Far from being based on our tradition of religious liberties, the type of interests that religious marriage exemptions are designed to protect represent an expansive view of religious liberties that is not recognized under our existing First Amendment case law and does not incorporate the balancing approach employed by RFRAs. Religious marriage exemptions assert a much broader role for religious conviction in public life where certain beliefs can function as trumps and hold objectors harmless from laws of general applicability. In their attempt to bolster and protect a waning orthodoxy, they simply have gone too far. Their blanket exemptions and narrow focus on a single belief regarding the nature of marriage constitute an establishment of religion in violation of the First Amendment.